

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

D.C. SCAFFOLD, INC.

and

Cases 1-CA-41294
1-RC-21685

NEW ENGLAND REGIONAL COUNCIL OF
CARPENTERS, a/w UNITED BROTHERHOOD
OF CARPENTERS & JOINERS OF AMERICA,
AFL-CIO

A. Susan Lawson, Esq., for the General Counsel.
Carol Chandler, Esq. and *Macon P. Magee, Esq.*
(Stoneman, Chandler & Miller, LLP), of Boston,
Massachusetts, for the Respondent.
Aaron D. Krakow, Esq. (Krakow & Souris, LLC),
of Boston, Massachusetts, for the Charging Party.

DECISION

Statement of the Case

JOSEPH GONTRAM, Administrative Law Judge. This case was tried in Boston, Massachusetts, on February 4 and 5, 2004. The charge in Case 1-CA-41294 was filed on October 3, 2003, and was amended on December 4, 2003. The complaint was issued on December 19, 2003.¹ D.C. Scaffold, Inc. (Respondent) filed an answer to the complaint on December 30 in which it admitted jurisdiction, its employer status under the National Labor Relations Act (the Act), and the labor organization status under the Act of New England Regional Council of Carpenters, a/w United Brotherhood of Carpenters & Joiners of America, AFL-CIO (the Union). The Respondent denied committing any unfair labor practices. A notice of hearing on challenges and Order consolidating Cases 1-RC-21685 and 1-CA-41294 was issued on January 7, 2004. The issues are as follows:

1. Did the Respondent violate Section 8(a)(1) of the Act by its actions and statements to its employees on October 2, 2003?

2. Did the Respondent violate Section 8(a)(3) and (1) of the Act by discharging six employees on October 2, 2003?

3. If the Respondent unlawfully discharged six employees on October 2, did it make valid offers of reinstatement on October 3? If so, did the employees reject such offers?

4. Were the six discharged employees, and/or five of the six employees who were hired

¹ All dates are in 2003 unless otherwise indicated.

shortly after the discharges, entitled to vote in the election on October 30?

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

Findings of Fact

I. Jurisdiction

The Respondent, a corporation with an office and a place of business in East Bridgewater, Massachusetts, is engaged in the installation, erection, and removal of scaffolding material in Massachusetts and throughout the New England area. During the 12-month period preceding the filing of the instant complaint, the Respondent leased scaffolding valued in excess of \$50,000 from other enterprises that are directly engaged in interstate commerce. The 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 Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

John DeGrenier is the owner of the Respondent. Jason Lewis, who the Respondent admits is a supervisor and an agent within the meaning of Section 2(11) and (13) of the Act, is a salesman and estimator for the Respondent. During the period involved in this case, the Respondent had 10 employees, including DeGrenier's wife. John McCann and Richard Guevremont were working foremen for the Respondent, and John Emmert, Stanley Moore, Jon Olinger, and Thomas O'Day were workers. Emmert started working for the Respondent in early 2001; Olinger, McCann and Moore started in approximately 1997; and Guevremont started working for the Respondent in June 2003. When Guevremont was hired, he told DeGrenier that he was a union member and he did not want to lose his union benefits by being out of the Union too long. DeGrenier said that he would consider becoming a union company, but not at that particular time. The normal workweek of the Respondent is Monday through Friday, 7 a.m. to 3:30 p.m. On occasion, there was Saturday work, but no employee was required to work on a Saturday.

B. Union activity

In mid-September 2003, John O'Connor, an organizer for the Union, met with the Respondent's workers at a jobsite in Plymouth, Massachusetts, and discussed the Union with them.² After O'Connor left, Guevremont called Lewis who was upset at the news that a union organizer had visited the jobsite. Lewis asked Guevremont why he had not simply told O'Connor to leave. Guevremont replied that he wanted to protect his union standings.

On September 25 at a parking lot in Dorchester, DeGrenier held a meeting with all of the workers. He stated he was upset that some workers were leaving jobsites early in the day and that not enough of the workers were volunteering for weekend work. He told the workers to discuss the matter with their families and to decide "where [they] wanted to go with the

² All cities and jobsites are in Massachusetts unless otherwise indicated.

company.” (Tr. 25, 258.)³ After this meeting, the workers first decided to talk with the Union. Olinger contacted O’Connor and a meeting was arranged for September 29 at the union hall. Emmert, McCann, Moore, O’Day, and Olinger attended this meeting. On October 1, these five employees returned to the union hall and signed union authorization cards and a petition for recognition. Guevremont signed a union authorization card and the petition the next morning, although he was already a member of the Union. There is no evidence that the cards or the petition were ever presented to the Respondent.

C. Events of October 2

On Thursday, October 2, at 7 a.m., O’Connor met with the Respondent’s employees at their jobsite in Winchester. Present were Emmert, Guevremont, McCann, Moore, and O’Day. Olinger had not yet arrived at the jobsite because he was picking up materials for the job. The employees selected Emmert to call DeGrenier and advise him of their decision to be represented by a union. Emmert used his cell phone to call DeGrenier. Emmert told DeGrenier that six employees wanted to speak to him, they had considered his instruction that they should decide where they wanted to go with the company, and they had decided to go union. Emmert told DeGrenier that the workers would not work until DeGrenier talked to a union representative. DeGrenier asked Emmert if he was speaking for all the employees at the site, and Emmert replied that he was.⁴

DeGrenier’s reaction was immediate, antagonistic, threatening, and crude. He told Emmert that “You guys want to f—ing go union? You can’t even do non-f—ing union jobs. How the f— do you think you can do union jobs? Tell those f—ing guys if they don’t want to f—ing work, to f—ing go home.” (Tr. 26, 50, 261.) DeGrenier told Emmert that if the workers wanted to talk to him, they should call him. Emmert replied that they would not talk to DeGrenier individually, but as a group. DeGrenier repeated that if the workers did not want to work, they should pack up, leave the job, and go home. After the telephone call ended, Emmert told the workers what DeGrenier said.

Less than a minute after this conversation, DeGrenier called Guevremont on his cell phone. DeGrenier was aware that Guevremont had been a member of the union before he started working for the Respondent. DeGrenier told Guevremont, “Richie, I can’t f—ing believe you did this to me,” implying that Guevremont was the employee responsible for initiating the union activity among the workers. (Tr. 59.) Guevremont denied that he had initiated the union activity. DeGrenier told Guevremont that if the employees were not going to work, they should “pack up their shit and get off the job and he would come and get all the stuff [viz., cell phones, credit cards, and trucks],” and that they should go home. (Tr. 59, 220.) Guevremont, Olinger, and McCann had been issued company trucks, cell phones, and credit cards by the Respondent.

In spite of DeGrenier’s instruction that the employees should leave the jobsite and go

³ References to the transcript of the hearing are designated as Tr.

⁴ All facts found here are based on the record as a whole and on my observation of the witnesses. The credibility resolutions have been made from a review of the entire testimonial record and exhibits with due regard for logic and probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404 (1962). As to those witnesses testifying in contradiction of the findings, their testimony has been discredited, either as having been in conflict with the testimony of reliable witnesses, or because it was incredible and unworthy of belief, or as more fully explained in the text.

home, and in spite of Emmert's initial statement to DeGrenier that the employees wanted him to speak to a union representative before returning to work, the employees decided that they would not refuse to work. Accordingly, they agreed to finish the job and to wait for Olinger to deliver materials.

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DeGrenier next called Olinger who was enroute to Winchester with materials for the job. DeGrenier told Olinger that Emmert had called and had asked DeGrenier to speak to a union representative. DeGrenier asked Olinger if he was involved in this. Olinger told him yes, "I'm the sixth guy." DeGrenier responded, "F— you guys. If you think I'm going union, you're f—ing crazy."⁵ DeGrenier repeated to Olinger that if the employees did not want to work, they should go home. Olinger attempted to reply to these statements, but DeGrenier cut him off. DeGrenier blamed Guevremont for starting the union activity amongst the workers, for "filling [their] heads with 'crap.'" Olinger replied that he, not Guevremont, had initiated the contacts with the Union. (Tr. 87-88.) DeGrenier then said that he would never go union, he hates unions, and he would rather shut his doors than go union.

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DeGrenier testified that during these conversations he did not mention unions or the employees' decision to go union. (Tr. 352.) This testimony is not credible. DeGrenier acknowledges that Emmert told him the employees had decided to go union and would not work until he talked to a union representative. DeGrenier also admits that he was "pretty mad" when he talked to Guevremont. DeGrenier would reasonably and probably have responded to Emmert's, Guevremont's, and Olinger's statements by saying something about the Union or the employees' union activity. Moreover, throughout his testimony, DeGrenier's demeanor evoked a person who was opinionated and who had firm antiunion opinions. It is likely that these feelings would have surfaced after being told that his workers had decided to go union and would not work until DeGrenier talked to a union representative.

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DeGrenier's demeanor showed a person who held fast to his opinions, the most prominent of which, for purposes of this case, was his dislike of unions. This overarching bias, demonstrated by and consistent with his demeanor and his antiunion statements to his employees, substantially undermines his credibility. Accordingly, in those admittedly few instances in which DeGrenier's testimony is in conflict with the testimony of the employees, I have generally credited the testimony of the employees. Moreover, the credibility of the employees' testimony is enhanced by the general consistency in the employees' descriptions of what occurred during and after the union activity.

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The low opinion DeGrenier has for unions, as reflected in the statements to his employees on October 2, is consistent with antiunion statements he has made in the past. Olinger testified, credibly, that DeGrenier hates unions because in every union job the Respondent has ever been involved with, DeGrenier talks about how he cannot stand unions. Also, when DeGrenier's brother's company became unionized in the spring of 2003, DeGrenier told Olinger that he would "never go union." (Tr. 89.)

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Olinger drove to the Winchester jobsite, and the employees continued working until the materials were exhausted. While the employees were still at the Winchester site, DeGrenier

⁵ (Tr. 87.) DeGrenier admits that he made the statement, but he misreads the portion of the transcript that contains his statement. DeGrenier said, "if you think I'm going union, you're f—ing crazy." He did not say, "if you think I am union, you are f—ing crazy." See Respondent's Br., p. 6. The difference could be significant because the former, actual statement contains a direct threat whereas the threat in the latter statement is, at most, implied.

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called McCann. The telephone call was made at approximately 12 noon. DeGrenier had already driven to McCann's house in order to pick up McCann's company truck, but discovered that the truck was not there. DeGrenier asked McCann where he was, and McCann responded that he and the other workers were still at the Winchester jobsite. McCann asked DeGrenier what should be done with the extra equipment that was still at the jobsite, demonstrating that the employees were still working and would continue to work. DeGrenier became irate. He told McCann, "I f—ing told you guys to go home. You guys might as well go collect [unemployment benefits] because you'll never work for D.C. Scaffold again." (Tr. 222.) McCann told the employees what DeGrenier said. They then left the jobsite.

The conversation between DeGrenier and McCann, who was the foreman on the job, shows that although Emmert had initially told DeGrenier that the workers had decided to go union and would not work until DeGrenier talked to a union representative, the workers' position on working had changed after DeGrenier's vehement reaction to that news. The workers still wanted DeGrenier to talk to a union representative, but they were willing to work, and had continued to work after Emmert's conversation with DeGrenier. Thus, the only outstanding request of the employees during McCann's telephone conversation with DeGrenier was that the employees wanted to go union and wanted DeGrenier talk to a union representative. DeGrenier's reaction was to discharge the six employees and tell them that they would never work for the Respondent again.

DeGrenier went with Jason Lewis and Ray McLaughlin, a worker who had not engaged in union activity, to the residences of McCann, Olinger, and Guevremont, and retrieved the company's trucks, cell phones, and credit cards. DeGrenier told Lewis that he had discharged the six workers. While at Olinger's residence, DeGrenier and Olinger had further discussions. DeGrenier asked Olinger how the employees could "ambush him" like they did. He said, "I'm not going union. If you think I'm going union you're crazy." DeGrenier said that the company was finished, and the employees had kicked him in the mud. Olinger tried to explain that the employees just wanted DeGrenier to sit down and talk with the union representative. DeGrenier told Olinger, "F— that. I'm not going union. I'm not talking to anyone." (Tr. 92, 93.) DeGrenier continued to believe that Guevremont had initiated the union activity with the employees, but Olinger told him that he (Olinger) had initiated the contacts with the Union, not Guevremont. At Guevremont's residence, DeGrenier repeated his belief that Guevremont had started it, and although Guevremont denied it, DeGrenier was not convinced. DeGrenier told Guevremont that he would try to get to the bottom of it, i.e., who had started the union activity among the employees. (Tr. 61.)

D. Events of October 3–5

On October 3, the Union filed an unfair labor practice charge against the Respondent because of DeGrenier's alleged unlawful discharge of the six workers. DeGrenier learned in the morning of October 3 that the charge had been filed. On the same day, DeGrenier sought legal counsel. DeGrenier went to the attorney's office with Lewis, and from the attorney's office, DeGrenier telephoned Guevremont, Emmert, and Olinger in an alleged attempt to offer them reinstatement. He reached Guevremont at about 5 p.m. and asked if he was interested in working the next day, a Saturday. DeGrenier knew that Guevremont did not work on Saturdays. Nevertheless, Guevremont told DeGrenier he would think about it. DeGrenier reached Emmert at about 6 p.m., and asked if he wanted to work the next day saying, "I have work for you Saturday . . . do you want to work, yes or no?" (Tr. 29.) Emmert told DeGrenier that he was not going back to work until he talked to a union representative. DeGrenier said "okay," and hung up.

DeGrenier also telephoned Olinger on October 3 and asked him if he wanted to work the next day. Olinger questioned the sincerity of DeGrenier's offer in light of DeGrenier's actions the day before, and DeGrenier laughed saying, "No, I didn't fire you. I was just laying everyone off because I'm going down to one crew." (Tr. 94.) A crew consisted of three workers. Olinger said he could not work Saturday, and DeGrenier asked, "what about Monday?" Olinger responded that he could not. Olinger again doubted DeGrenier's sincerity in making the offer. Moreover, DeGrenier's claim that the workers had not been discharged and that they had simply been laid off because the Respondent was going down to one crew was inconsistent with DeGrenier's vehement and decisive reaction to the news that the employees had decided to go union. In addition, Olinger had previously told DeGrenier that he could not work on Monday because of a doctor's appointment. For all of these reasons, Olinger reasonably doubted the sincerity of DeGrenier's purported offer of work.

To the extent that the above recounting of the telephone conversations between DeGrenier and the employees differs from the testimony of DeGrenier, I have credited the testimony of the employees, with one qualification. I have based this credibility determination on the demeanor of the witnesses, as well as the following. Lewis was present for the telephone calls made by DeGrenier, and the Respondent called Lewis as a witness. However, the Respondent did not ask Lewis about what he heard DeGrenier say during those conversations. Indeed, at one point, the Respondent specifically directed Lewis away from telling what he heard DeGrenier say during the conversations. (Tr. 146.) (Such testimony would not have been barred by the hearsay rule because it could have been offered solely to prove that DeGrenier made the statements, not to prove the truth of the statements.) Emmert, Guevremont, and Olinger testified before Lewis testified, and they described their conversations with DeGrenier on October 3. If these descriptions were inaccurate, Lewis would likely have been asked, at least, what he heard DeGrenier say during the conversations. Moreover, the credibility of DeGrenier's statement that the workers were not fired, but rather were laid off because he was going down to one crew, is belied by Lewis's testimony concerning the large number of jobs that were pending, and by DeGrenier's hostile, confrontational, and antiunion statements to the discharged workers on October 2.

The qualification in assessing credibility regarding what was said during the various telephone conversations concerns Guevremont. Guevremont provided an affidavit to the Board during its investigation of this case in which he stated that he had reported to Blackstone Street on October 6 with the other employees. This statement was false. Guevremont credibly testified at the hearing that his reason for making this false statement was his fear of being deprived of a remedy for his discharge. However, this fear does not excuse his false statement. Therefore, in any instance in which Guevremont's testimony conflicts with DeGrenier's testimony regarding the substance of their conversation, and in the absence of other corroborating evidence, I have credited the testimony of DeGrenier. Under the circumstances of this case, no other corrective action or sanction is warranted. See *Brother Industries*, 314 NLRB 1218 (1994) (where the judge credited the testimony of two witnesses who made false statements in Board affidavits and found that other sanctions would not reasonably effectuate the purposes and policies of the Act.).

DeGrenier did not state during his telephone discussions with Emmert, Guevremont, and Olinger that they were being offered "reinstatement" to their jobs. DeGrenier simply said that he had some work on a particular day, Saturday or Monday. Nor did DeGrenier offer to return the workers' trucks, cell phones, or credit cards that they had been required to relinquish upon their discharge. A truck was especially important to Guevremont who used the truck to get to and from the jobsites. Indeed, DeGrenier's offer of the use of a company truck was an important reason in Guevremont's decision to accept employment with the Respondent the previous June.

On the same day, October 3, that he made these telephone calls, DeGrenier sent letters to all six of the workers. The letters were sent by overnight mail. DeGrenier sent the following letter to Emmert:

5 On Friday afternoon, I called you at your home and offered to return you to your job with D.C. Scaffold. I asked you if you would return on Saturday, October 4th or Monday, October 6th, 2003. You told me that you would not return to work until I spoke to the "Union Rep."

10 I wish you luck in the future.

DeGrenier sent the following letter to Olinger:

15 On Friday afternoon, I called you at your home and offered to return you to your job with D.C. Scaffold. I asked you if you would return to work on Saturday, October 4th or on Monday, October 6, 2003. You asked me if I were out of my mind and told me you would not return to work.

20 I wish you the best of luck in the future.

DeGrenier sent the following letter to Guevremont, McCann, Moore, and O'Day:

25 This is to inform you that I am offering you reinstatement to your position at D.C. Scaffold. Please report to 46 Blackstone Street, Cambridge, Massachusetts at 7:00 a.m. on Monday, October 6, 2003.

30 Directions were not provided, and the letter failed to give any description of the work site or whom the workers were supposed to meet at the work site or what the job entailed. After the employees received these letters, all except Guevremont (who, without the company truck, was unable to get to the Cambridge site) conferred with the Union and decided to report to the job set forth in the letter at 46 Blackstone Street, Cambridge on Monday, October 6, at 7 a.m.

35 Despite these apparent attempts to rehire the six discharged workers, DeGrenier placed an advertisement for replacement scaffold workers in two newspapers on the same day he made the telephone calls and sent the overnight letters. Indeed, the advertisement was placed before DeGrenier made the apparent attempts to rehire the workers. Nevertheless, in spite of his alleged attempt to rehire the workers, DeGrenier did not cancel the newspaper advertisement, which sought workers to replace the very workers he supposedly was attempting to rehire.

40 On Sunday, October 5, Guevremont telephoned DeGrenier about the letter he had received. Guevremont asked DeGrenier whether he would provide a company truck to Guevremont as he had done previously. Guevremont reminded DeGrenier that he needed the truck to get to and from the jobsite. DeGrenier replied that the truck was in the shop. The Respondent owns seven trucks, and when Guevremont asked if another truck could be provided, DeGrenier replied that every truck was in the shop. This obvious falsehood⁶ provoked

50 ⁶ DeGrenier acknowledged at the hearing that Guevremont's truck was the only truck he brought to the repair shop. Of course, DeGrenier must have appreciated by the time of the hearing the patent falsehood of his statement to Guevremont, especially since he knew he was going to testify at the hearing that he and another worker drove two of the Respondent's trucks

Continued

a heated exchange and they hung up on each other.

In assessing the credibility of DeGrenier's statement that all of the Respondent's trucks were in the shop, the following matters were considered in addition to DeGrenier's demeanor.

5 First and foremost, the extreme unlikelihood that all seven of the Respondent's trucks would suddenly and all at once require repairs or maintenance work. Second, the equally extreme unlikelihood that, even if all seven trucks needed maintenance work, they would all be placed out of service at the same time. Also, the Respondent presented no objective or independent evidence that any of the trucks had mechanical problems or were in the shop. Indeed, 10 DeGrenier and Lewis had picked up three of the trucks on October 2 from Guevremont, McCann, and Olinger and drove the trucks back to the Respondent's place of business. Moreover, at least three of the Respondent's trucks were used for the Cambridge job on October 6. Indeed, the Respondent would not be able to operate without having trucks for its use because the Respondent used the trucks to pick up and deliver the scaffolding materials for 15 its jobs. DeGrenier knew that Guevremont needed a truck to get to work sites. In spite of this, or possibly because of it, DeGrenier disingenuously told Guevremont that a truck could not be provided to Guevremont because all of the trucks were in the shop. Guevremont did not have transportation to work on October 6, and he did not report to the Cambridge work site.⁷

20 *E. Events of October 6*

Blackstone Street in Cambridge is approximately one, rather long block in length. It is bounded on either side by River Street and Western Avenue. On October 6, 2003, the only construction activity in the block was at a building in approximately the middle of the block. 25 There was no construction activity at 46 Blackstone Street. Generally, the Respondent's jobs are at construction sites. The building at 46 Blackstone Street is at the corner of Blackstone Street and Western Avenue, but the entrance to the building is not on Blackstone Street. There are few address markers on the buildings on Blackstone Street and there was no address marker on 46 Blackstone Street on October 6. However, on the building adjacent to the parking lot in front of and next to 46 Blackstone, there were address markers of "24" and "26," 30 consecutively in the direction of Western Avenue. The parking lot in front of 46 Blackstone Street is gated, and on October 6 the gates were closed. Adding to the confusion of addresses on the block, the building opposite the construction site in the middle of the block lists its address on Blackstone Street as 840 Memorial Drive.

35 McCann, O'Day, and Olinger went together to the Cambridge site. They arrived at approximately 6:30 a.m. They were unable to locate the address of 46 Blackstone Street, and after once driving the length of Blackstone Street, they saw a union organizer, Vincent Scalisi, at the construction site in the middle of the block. They parked in the parking area of this

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to the Cambridge work site on October 6. DeGrenier claimed to have a receipt for the repairs to Guevremont's truck, but he failed to produce the receipt at the hearing. Thus, DeGrenier's testimony that he took even one truck, Guevremont's, into the shop for repairs is not credible.

45 ⁷ Guevremont provided an affidavit to the Board in its investigation of the charges in this case. Guevremont falsely stated in that affidavit that he had gone to the Cambridge work site on October 6. At the hearing, Guevremont acknowledged that he made this false statement because he was fearful he might have forfeited benefits if he admitted not reporting to the Cambridge work site. This explanation for his false statement does not excuse the fact that Guevremont testified falsely in order to protect benefits for which he might be eligible. I conclude 50 that Guevremont's testimony should not be accepted except to the extent that other witnesses or other evidence in the case corroborates it.

construction site and waited with Scalisi on the sidewalk at the construction site. After a short period, Scalisi and McCann approached two elevator workers at the site and asked them if scaffolding was going to be erected. The elevator workers responded that they did not know.

5 Shortly before 7 a.m., Moore and Emmert arrived together. Entering Blackstone Street from Western Avenue, they also were unable to locate 46 Blackstone Street. They spotted McCann on the sidewalk and parked their vehicle in the same parking lot next to the construction site. The five workers, McCann, O'Day, Olinger, Moore, and Emmert, together with Scalisi, waited on the sidewalk and scanned the entire block looking for the Respondent's trucks or DeGrenier or anyone else from the company who could point them to the location of the work site. Moore walked the length of Blackstone Street trying to find, without avail, number 46 or the site where the job was supposedly scheduled. After a period of time, they began discussing the possibility that DeGrenier had not been serious about his offer of work and had sent them on a "wild goose chase."

15 Lewis knew where 46 Blackstone Street was located because he had been there when he estimated the job about a month before October 6. Lewis arrived at approximately 7 a.m. He parked his truck across Blackstone Street from the building. This was a truck Lewis had used for years and the workers were familiar with it. After about 10-15 minutes, Lewis left in his truck and went to a coffee shop. When Lewis returned, he parked in the same location across from 46 Blackstone Street. Lewis did not see the workers who were standing on the sidewalk in the middle of the street, and the workers did not see Lewis who was parked at the end of the street.

25 As the workers waited, they became increasingly angry at what they became convinced was a wild goose chase. Scalisi was concerned about the rising level of tension and anger of the men. The workers believed that DeGrenier had gotten back at them for their decision to go union, that there was no work to be done on Blackstone Street, and that no one from the company would be coming to meet them. Accordingly, the workers left at approximately 7:30-7:45 a.m.

30 DeGrenier arrived at approximately 7:45-8:00 a.m. He arrived with two trucks, which were loaded with the scaffolding materials, and three workers, Ray McLaughlin, Roger Russell, and Sal Smarra. DeGrenier could see Lewis' truck and parked near it. DeGrenier, with Lewis and the 3 workers, entered the property through the gated parking lot, spoke to the guard who was stationed inside a trailer on the lot, and received permission to begin the scaffolding work. When Lewis estimated the Blackstone Street job, he estimated that the job would be completed in 2 days. In fact, it was completed in 2 days despite the fact that none of the workers to whom DeGrenier had sent letters on October 3, and whom DeGrenier was supposedly expecting to be meeting that morning and working on the job, actually worked on the job. There is no evidence that the Respondent expended any extra effort, money, or materials to complete the job in a timely manner.

45 In the past, whenever materials or supplies for a job were late in arriving, DeGrenier or Lewis would telephone the employees to advise them of the situation and the expected time the materials would arrive. The employees were paid for their waiting time. DeGrenier was unable to call the employees on October 6 because he had taken their cell phones from them on October 2 and had not returned them. Also, there is no evidence that he wanted to call them, intended to call them, or otherwise tried to get in touch with them on October 6. Similarly, the employees were unable to call DeGrenier or Lewis on October 6 because they did not have cell phones. Scalisi did have a cell phone, but there is no evidence that the employees with him knew this. Moreover, just as with DeGrenier, there is no evidence that the employees wanted to call DeGrenier, intended to call him, or otherwise tried to get in touch with him on October 6. On

October 6, the relationship between DeGrenier and the employees was strained and mistrustful, primarily due to DeGrenier's heated, confrontational, and antiunion reaction to the employees' decision to go union.

5 In setting forth what occurred at the Cambridge work site in the morning of October 6, I have generally credited the testimony of all the persons who were there, including the General Counsel's five witnesses as well as the Respondent's two witnesses. Their testimony is not necessarily inconsistent, and it is certainly possible that everything occurred as both sides testified and as found herein, but simply failed to see each other that morning. In short, I find the
10 testimony of these witnesses in describing the events of that morning to be credible.

After being advised of the possibility that both the Respondent and the workers were present at the work site on October 6, but had not seen each other, and in order to resolve any confusion that may have occurred on October 6, the Union faxed a letter to the Respondent on
15 October 10 stating that the six workers wished to be reinstated. However, the Respondent had started hiring replacement workers on Saturday, October 4, and had hired other workers during the week of October 6. Moreover, DeGrenier considered the employees' failure to appear at the Cambridge site on October, or at least his belief that they had not appeared, to constitute a rejection of his reinstatement offer on October 4. Accordingly, the Respondent declined to
20 reinstate the six employees.

F. Replacement workers/Voter eligibility

DeGrenier hired the following workers after he discharged the above-named six
25 employees: (1) Leo DeGrenier, (2) William Sims, (3) Robert Young, (4) Paul Ruginski, and (5) Gary Russell.⁸ These replacement workers voted in the election on October 30, and their eligibility was challenged by the Union.

Leo DeGrenier was not working at the time he was hired, October 4, and he was not a
30 trained or certified scaffolder. Before working for his brother, he was a truck driver earning \$14.75 an hour. His wage during the time he worked for his brother was \$10 per hour. DeGrenier told Leo that he was only needed temporarily—for 2 months—in order to get DeGrenier through the crisis caused by the loss of the other employees.

35 William Sims has been DeGrenier's friend since high school. For 24 years, he has been employed full time by State Street Bank as a systems analyst, and he continues to be so employed. His annual salary at State Street Bank is \$60,000. He and DeGrenier claim that he completed an application to work as a scaffolder for the Respondent on October 8. Sims remembers that date because it is his wedding anniversary. During his first 15 years at the
40 bank, Sims worked a 3-day week. For an unknown length of time during a 15-year period, Sims worked part-time for another scaffolding company. For the past 9 years, Sims has worked a 5-day week, with a day off every other week. Sims represented on his employment application with the Respondent that he worked at the State Street Bank in his "spare time". He did not sign this application. He claims that he was hired at the rate of \$13 per hour. He claims that he
45 intended to work at nights and on weekends, and that he intended to work full time and permanently for the Respondent. In fact, he worked for 2 months, and has not worked for the Respondent since the end of November 2003. At the time Sims was hired, the Respondent only had one pending evening job.

50 ⁸ The Respondent also hired Dale Beausoleil. Mr. Beausoleil continues to be employed by the Respondent and his ballot was not challenged.

5 Robert Young has also been DeGrenier's friend since high school. He also has a full time job—as a telephone solicitor from which he earns \$50,000 per year. He claims that he intended to work full time during afternoons and evenings. As noted above, during this period, the Respondent only had one job requiring evening work. Young had never before worked as a scaffolder. Young worked for the Respondent for 2 months, and has not worked for the Respondent since the end of November 2003.

10 Paul Ruginski is a friend and business partner of Lewis. Unlike Leo DeGrenier, Sims, and Young, Ruginski has worked in the scaffolding business for many years. He had worked as a scaffolder up to 1993 when he sustained serious injuries from a fall. He did not work again as a scaffolder after that injury until the Respondent hired him in October 2003. He claims that he intended to perform supervisory work for the Respondent. However, his wage with the Respondent was \$10 per hour, the starting rate of pay for a scaffolder. Moreover, Ruginski had
15 worked for the Respondent in October 2002 as a management consultant during which he earned \$25 per hour. Prior to that position, Ruginski worked in a management position for another scaffolding company at a yearly salary of \$40,000. Like all of the alleged replacements hired by the Respondent in October, Ruginski worked for 2 months, and has not worked for the Respondent since the end of November 2003.

20 The Respondent hired Gary Russell on or about October 8. He was fired before the end of November because he failed to come into work for 2 days in a row. DeGrenier fired Russell on the second day he failed to show up. Russell did not testify at the hearing, and the Respondent failed to produce any evidence regarding Russell's qualifications, the
25 circumstances of his being hired, or how his hiring can be distinguished from the circumstances surrounding the hiring of the individuals described above.

30 The Union filed a petition on October 6. An election was held on October 30. Each of the six discharged employees voted, and their eligibility to vote was challenged because their names were not included on the list of eligible voters submitted by the Respondent. The Union challenged the ballots of the five replacement employees detailed above. The eleven challenged ballots were sufficient to affect the results of the election. The challenged ballots raise some of the same issues set forth in the unfair labor practice complaint. Accordingly, the cases were consolidated.

35 III. Analysis

A. Case 1-CA-41294

40 1. Interrogations

45 The test for determining whether an unlawful interrogation has occurred is whether, under all the circumstances, the alleged interrogation reasonably tends to restrain, coerce, or interfere with employees in the exercise of rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub nom. Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In making this determination, all of the surrounding circumstances must be considered. Either the words themselves or the context in which they are used must suggest an element of coercion or interference. *Id.* Relevant circumstances include (1) the background, (2) the nature of the information sought, (3) the identity of the questioner, (4) the place and method
50 of the interrogation, and (5) the truthfulness of the reply. *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Additional factors include whether the employee was given assurances that there would be no reprisals, whether a valid purpose for the question(s) was communicated to the

employee, and whether the employee is an open union adherent. *Performance Friction Corp.*, 335 NLRB 1117 (2001); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). These factors should not be applied mechanically, and the analysis does not require strict evaluation of each factor. *Medcare Associates, Inc.*, 330 NLRB 935 (2000).

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The General Counsel contends that DeGrenier unlawfully interrogated Emmert when he asked if Emmert was speaking for all the employees. Although DeGrenier asked his question amidst strident and coarse invectives, the question simply sought a repetition of the information that Emmert had already provided to DeGrenier, as if DeGrenier could not believe that Emmert was speaking for all six employees. Emmert had started the conversation by telling DeGrenier that he was speaking for the employees. Under these circumstances, I reject the contention that DeGrenier's question to Emmert constituted unlawful interrogation under the Act.

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Shortly after his conversation with Emmert, and during an expletive-filled diatribe, DeGrenier asked Olinger if he was involved in the union activity. Olinger replied that he was involved, that he was the sixth guy. DeGrenier's question, a direct attempt to uncover the union sympathies of an employee, was made in the context of heated, antiunion statements by the owner of the company. No assurances were given to Olinger nor did DeGrenier offer any valid purpose for the question. Moreover, the coerciveness of the questioning is highlighted by, although not dependent on, DeGrenier's apparent intent or desire to possibly take retaliatory action. This intent is demonstrated by DeGrenier's accusation that Guevremont had started the union activity by "filling [the employees'] heads with 'crap.'" Why should it matter to DeGrenier who started the union activity, unless he planned some retaliation? DeGrenier's interrogation of Olinger, in which he attempted to uncover Olinger's union sympathies, reasonably tends to restrain, coerce, and interfere with the exercise of rights guaranteed by the Act. *Parts Depot, Inc.*, 332 NLRB 670, 674 (2000) (a supervisor's "remarks, delivered in an angry and elevated tone, contained an implied threat of unspecified reprisals. An interrogation of an open and active union supporter, coupled with such a threat, is coercive and a violation of Section 8(a)(1)."). Accordingly, DeGrenier's interrogation of Olinger violated Section 8(a)(1) of the Act.

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DeGrenier's interest in uncovering who started the union activity continued during his conversation with Guevremont. DeGrenier knew that Guevremont was a member of the Union, and he assumed that Guevremont had planted the seeds of organizing among the employees. Accordingly, DeGrenier told Guevremont, "Richie, I can't f—ing believe you did this to me." Implied or indirect questioning by an employer may constitute interrogation in violation of the Act. *Ready Mix, Inc.*, 337 NLRB 1189 (2002). DeGrenier's statement to Guevremont was designed to elicit from Guevremont an affirmation or denial of his role in initiating the union activity. *NLRB v. McCullough Environmental Services*, 5 F.3d 923, 929 (5th Cir. 1993). DeGrenier's statement to Guevremont "begs a reply," and Guevremont did reply by insisting that he had not initiated this activity. See *Continental Bus System*, 229 NLRB 1262, 1264–65 (1977). Under all of the circumstances, DeGrenier's statement to Guevremont constitutes an unlawful interrogation in violation of Section 8(a)(1) of the Act.

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2. Threats

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(a) Threat to discharge employees

On October 2, DeGrenier—after learning that the employees had continued working at the jobsite until their materials were exhausted and were ready to continue working—told McCann that the employees should go home and that they would never work for D.C. Scaffold again. The Respondent claims that DeGrenier ordered the employees to leave the job and go home because of their refusal to work until DeGrenier spoke to a union representative. Although

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5 this may have been true when DeGrenier spoke to Emmert and Guevremont at 7 a.m., it was no longer true when he spoke to McCann at noon. DeGrenier told McCann that he was discharging the six employees, including McCann, after DeGrenier learned that the employees had abandoned their original position and that they would no longer work until DeGrenier spoke to a union representative. DeGrenier's threat to discharge the employees was followed by a second, coercive threat that they would never work for the Respondent again.

10 An employer whose conduct reasonably tends to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights violates Section 8(a)(1). *Alliance Steel Products*, 340 NLRB No. 65 (2003). DeGrenier's threat to fire the employees because of their union activity, as well as his threat that those employees would never again work for the Respondent because of that union activity, is conduct that coerces, threatens, and interferes with employees in the exercise of their Section 7 rights. Accordingly, the Respondent has violated Section 8(a)(1).

15 (b) *Threat to shut down its business*

20 DeGrenier told Olinger on October 2 that he would never go union, he hates unions, and he would rather shut his doors than go union. An employer who threatens to shut down its business rather than deal with the union violates Section 8(a)(1). Indeed, such threats are "hallmark" violations and are highly coercive. *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001). The Respondent violated Section 8(a)(1) by threatening to close its business rather than deal with the union.

25 3. Blaming a specific employee for other employees' support for the union

30 The complaint charges, in paragraph 7(b)(iv), that the Respondent violated Section 8(a)(1) by blaming a specific employee for other employees' support for the Union. This allegation apparently refers to DeGrenier's belief and accusation that Guevremont had started the union activity whereas Olinger had actually made the initial contact with the Union. However, in its posthearing Brief, the General Counsel seems to shift its theory of the alleged violation, and argues that the words used by DeGrenier in blaming Guevremont ("Richie, I can't f—ing believe you did this to me,") equate union activity with disloyalty. The General Counsel then makes the easier argument (easier than the argument presented by the charge alleged in paragraph 7(b)(iv) of the complaint), that employer statements equating union activity with disloyalty are unlawful. *HarperCollins San Francisco v. NLRB*, 79 F.3d 1324 (2d Cir. 1996); *Sea Breeze Health Care Center*, 331 NLRB 1131 (2000).

40 The General Counsel is correct that, in general, statements equating union activity with disloyalty are unlawful under Section 8(a)(1). Moreover, the statement made by DeGrenier to Guevremont, and especially considering the circumstances in which the statement was made, appears to violate Section 8(a)(1). (DeGrenier also made other statements to his employees equating union activity with disloyalty, such as his statement to Olinger that he had been "ambushed" by the employees, and several times asking how Guevremont could have done this to him.) However, the Respondent was not charged with making a statement that equated union activity with disloyalty. The Respondent was charged with blaming a specific employee for other employees' support for the union.

50 The Respondent has defended DeGrenier's statement on the basis of the charge in the complaint. For example, the Respondent argues in its posthearing brief (R. Br. 15) that "DeGrenier's mere belief that Guevremont was responsible for the union organizing is not a violation of Section 8(a)(1)." This argument, like the General Counsel's argument, appears to be

correct. However, the Respondent's argument addresses the charge set forth in the complaint, whereas the General Counsel's argument does not. The Respondent has not asserted any prejudice because of the variance, but this is likely due to the fact that the General Counsel did not propound his alternative theory until the filing of his posthearing brief.

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"Failure to clearly define the issues and advise an employer charged with a violation of the law of the specific complaint he must meet and provide a full hearing upon the issue presented is, of course, to deny procedural due process of law." *J.C. Penny & Co. v. NLRB*, 384 F.2d 479, 483 (10th Cir. 1967). Nevertheless, a variance between the charges alleged in the complaint and the charges alleged or found after hearing will not defeat a Board determination when the issue was fully litigated. *Rea Trucking Co. v. NLRB*, 439 F.2d 1065 (9th Cir. 1971). Indeed, "a material issue which has been fairly tried by the parties should be decided by the Board regardless of whether it has been specifically pleaded." *American Boiler Manufacturers Assn. v. NLRB*, 366 F.2d 815, 821 (8th Cir. 1966).

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In the present case, the Respondent did defend against all statements made by DeGrenier to his employees after they told him of their desire to be represented by the Union. However, since the Respondent was not advised of the reason why the statement was unlawful, viz., that the statement equated union activity with disloyalty, the Respondent was not given the opportunity to explain the relevant circumstances surrounding that statement, much less address such matters in its posthearing brief. As noted above, all of the circumstances in which an employer's statement is made are relevant in determining whether the statement is unlawful. An employer should be given the opportunity to explain not only whether the statement was made, but the full context in which it was made, for it is often this context that determines whether a statement was coercive, and therefore, unlawful.

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A violation of Section 8(a)(1) does not depend on the employer's motivation or on the subjective reaction of the employees or on whether the coercion succeeded or failed. *American Freightways Co.*, 124 NLRB 146, 147 (1959). Accordingly, the context that the Respondent should have been given the opportunity to explain does not include DeGrenier's motivation for making the statement or the employees' response to the statement. Nevertheless, there may be other relevant facts to a proper consideration of DeGrenier's statement, under the theory that it equated union activity with disloyalty, which the Respondent was not given the opportunity to explain. The failure of the complaint to allege why the statement was unlawful deprived the Respondent of the opportunity to address or present such relevant facts.

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For the foregoing reasons, I conclude that the issue of whether the Respondent made an unlawful statement equating union activity with disloyalty has not been fully litigated. Accordingly, I will recommend that the allegations in paragraph 7(b)(iv) of the complaint be dismissed.

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4. Discharges

(a) *Wright Line* analysis.

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Under the test set forth in *Wright Line*, the General Counsel has the burden of proving by a preponderance of the evidence that antiunion animus was a substantial or motivating factor in the employer's discharge of the employees. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). To meet this burden, the General Counsel must establish four elements. First, the existence of activity protected by the Act. Second, that the Respondent was aware of such activity. Third, that the alleged discriminatee suffered an

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adverse employment action. Fourth, a motivational link, or nexus, between the employee's protected activity and the adverse employment action. *American Gardens Management Co.*, 338 NLRB No. 76 (2002).

5 If the General Counsel satisfies his initial burden under *Wright Line*, the burden then shifts to the employer, in the nature of an affirmative defense, to demonstrate that the same action would have taken place even in the absence of the protected conduct. In meeting this burden, the employer cannot simply state a legitimate reason for the action taken, but rather must persuade by a preponderance of the evidence that it would have taken the same action in
10 the absence of the protected activity. *T & J Trucking Co.*, 316 NLRB 771 (1995). Nevertheless, the employer's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merrilat Industries*, 307 NLRB 1301, 1303 (1992). The ultimate burden of proving discrimination always remains with the General Counsel. *Wright Line*, supra.

15 With respect to the first two elements, union activity is not disputed and is shown by the employees convening at the union hall on September 29 and October 1, as well as their signatures on the union authorization cards. Moreover, the Respondent knew of the employees' union activity because Emmert told DeGrenier at 7 a.m. on October 2 that the employees
20 wanted to be represented by a union.

The Respondent disputes the third element by arguing that it did not discharge the employees, and that it sent the employees home on October 2 because they refused to work unless DeGrenier first talked to a union representative. The facts do not support these
25 contentions. When DeGrenier sent the employees home during his telephone conversation with McCann, DeGrenier had already learned that the employees had given up their demand that he speak to a union representative before they returned to work. Indeed, DeGrenier learned that the employees had continued to work, had completed their work at the Winchester site, and were ready and willing to continue working. Accordingly, when DeGrenier sent the employees
30 home, he did not do so in response to their statement that they would not work until he talked to a union representative.

When DeGrenier sent the employees home on October 2, he said, "You'll never work for D.C. Scaffold again." Under the commonly accepted meaning of these words, and especially
35 considering the context in which they were uttered, DeGrenier discharged the six employees. Moreover, after he had discharged the employees, DeGrenier met with Lewis in order to retrieve the company's trucks from Olinger, Guevremont, and McCann. DeGrenier told Lewis that he had discharged the six employees. DeGrenier also told Lewis about his decision to reinstate the discharged workers. On October 3, DeGrenier telephoned Emmert, Guevremont, and Olinger to
40 offer them reinstatement. On October 4, DeGrenier sent letters to Guevremont, McCann, Moore, and O'Day to offer them reinstatement. Of course, reinstatement would not have been necessary if the workers had not been previously discharged.

45 Despite DeGrenier's present position that he did not discharge the employees, his sworn testimony in response to McCann's application for state unemployment compensation benefits contradicts this argument. On January 29, 2004, DeGrenier testified before the Hearing Officer of the Massachusetts Division and Training as follows (GC Exh. 26):

50 Hearing Officer: Did you discharge Mr. McCann from his job?
DeGrenier: Yes, I did.
Hearing Officer: And that was on October 2nd?
DeGrenier: Yes.

Hearing Officer: Over the telephone?
DeGrenier: Yes.

5 Thus, DeGrenier has acknowledged, under oath, that he discharged McCann during the telephone call on October 2. Moreover, DeGrenier made no distinction between McCann and any other employee when he said, “I f—ing told you guys to go home. You guys might as well go collect [unemployment benefits] because you’ll never work for D.C. Scaffold again.” DeGrenier was not a credible witness, and his present position that he did not discharge the employees further detracts from his credibility. See also *Canova Moving & Storage Co.*, 227
10 NLRB 1834, 1842 (1977) (“Respondents [sic] insistent mischaracterization of Phillips’ discharge as a quit disclosed a perceived need to disguise the reality of the situation to avoid guilt.”).

15 The Respondent argues that DeGrenier’s testimony in the Massachusetts unemployment compensation proceeding should not be admitted in the present proceeding. In support of this contention, the Respondent cites the provision of the Massachusetts statute in which information secured in an unemployment compensation proceeding is deemed to be confidential. Mass. Gen. L. ch. 151A, § 46. However, this statute permits disclosure “as
20 otherwise required or authorized by law.” Thus, testimony given by a party in a hearing before the Massachusetts Division and Training is admissible in a proceeding before the Board when such testimony is otherwise admissible pursuant to the Federal Rules of Evidence. *Filene’s Basement Store*, 299 NLRB 183 (1990). DeGrenier testified in the present proceeding, and he testified about similar matters in the state hearing on McCann’s application for unemployment benefits. Accordingly, DeGrenier’s testimony in the Massachusetts proceeding is admissible in the present proceeding as a prior inconsistent statement and as an admission. Fed. R. Evid.
25 613 and 801(d)(2).

30 The Respondent also cites the NLRB Division of Judges Bench Book, § 8-440, as authority for its contention that the Board follows state laws and will exclude evidence deemed confidential by various states. This argument is unpersuasive. First, the Bench Book is not authoritative. Indeed, the Bench Book specifically provides that, “[n]or should it be cited as binding precedent.” (Bench Book, p. 1.) Second, the holding in the single case cited in § 8-440 of the Bench Book, *Canova v. NLRB*, 708 F.2d 1498 (9th Cir. 1983), regarding use in Board proceedings of confidential state unemployment records, does not support the Respondent’s
35 contention, and would be of questionable authority if it did. The *Canova* court upheld the Board’s discretionary authority to revoke a party’s subpoena for confidential state employment records. The court noted that the subpoenaed material was of “small probative value and that *Canova* was not significantly prejudiced by the revocation [of the subpoena].” *Id.* at 1502. However, the court recognized that “the Board must comply as far as is practicable with the rules of evidence applicable in federal courts.” *Id.* at 1502. Presently, Federal Rule of Evidence
40 501 provides, inter alia, that in federal question cases, the privilege of a person or government “shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” Rule 501 has not been interpreted to adopt and apply state, unemployment compensation, confidentiality privileges in federal question proceedings.
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50 The Respondent cites no authority, other than referring to the Bench Book and the *Canova* case cited therein, upholding the confidentiality or privilege of state unemployment compensation records in the face of relevant inquiries in Board proceedings. Indeed, the authority is to the contrary. “[W]e start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional.” *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quoting 8 J. Wigmore, Evidence § 2192, p. 64 (3d ed. 1940)). With few exceptions, federal courts have generally

declined to grant requests for new privileges. In *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), the Supreme Court noted that a privilege must be strictly construed, and should not be applied unless it “promotes sufficiently important interests to outweigh the need for probative evidence.” citing *Trammel v. U. S.*, 445 U.S. 40, 51 (1980). The confidentiality provision of the Massachusetts unemployment compensation law does not meet this standard in a proceeding under the National Labor Relations Act such as the present case. See also *EEOC v. Illinois Dept. of Employment Security*, 995 F.2d 106, 108 (7th Cir. 1993) (where the court discounted the state’s interest in confidentiality, and noted that persons who testify in state unemployment proceedings and “who know that third parties will not examine the evidence have less to fear from telling lies—for the truth is less likely to emerge.”). The Seventh Circuit also noted that, “An unemployment-insurance privilege is no more compelling than an academic-deliberation privilege [the subject of *University of Pennsylvania v. EEOC*, supra] or a reporters’-source privilege (the subject of *Branzburg [v. Hayes]*, 408 U.S. 665 (1972)); indeed, it is less so.”

Moreover, in *Yuker Construction Co.*, 335 NLRB 1072 (2001), in a ruling left undisturbed by the Board, the Administrative Law Judge held that materials subpoenaed by the Board from the Michigan Unemployment Agency, which were protected from disclosure by Michigan’s statute, were not privileged and were admissible.⁹ The judge concluded that “the better rule is that, where state privilege law conflicts with the enforcement of a federal statute and the privilege is not otherwise consonant with federal evidentiary law, state privilege law is not controlling.” *Id.* at 1082. Consistent with *Yuker Construction Co.*, and in accord with the authorities cited above, I conclude that the tape and accompanying transcript of DeGrenier’s testimony before the Massachusetts Division and Training (GC Exh. 26) are admissible.

For all of the foregoing reasons, including DeGrenier’s statements when he discharged the employees, DeGrenier’s admissions to Lewis, and his testimony before the Hearing Officer for the Massachusetts Division and Training, the Respondent discharged its six employees, Emmert, Olinger, Guevremont, McCann, Moore, and O’Day, on October 2.

Despite the Respondent’s position that evidence relating to the Massachusetts unemployment compensation proceeding should be excluded, the Respondent’s counsel sent a letter dated April 14, 2004 to the present Administrative Law Judge, in which counsel advised of his understanding that the Massachusetts Board of Review had upheld the denial of unemployment benefits to McCann.¹⁰ No date is given for this supposed action by the state agency. First, counsel’s “understanding,” which is apparently something less than knowledge, is incompetent and insufficient (for example, this information was not presented in an affidavit by a person with knowledge, rather than counsel) to establish the fact he seeks to interject in the record in this case. Second, the record in this case was closed at the termination of the hearing, except for the presentation by the parties of an agreed transcript of the relevant portion of

⁹ See also *Trinidad Logistics Co.*, 2002 WL 1466281 (NLRB Div. of Judges 2002), in which Chief Administrative Law Judge Robert Giannasi denied the state of California’s motion to revoke a subpoena to produce criminal history records of the alleged discriminatee in the pending unfair labor practice proceeding. Chief Judge Giannasi noted that the state privilege is secondary to the Board subpoena, and that *Canova*, to the extent it was applicable, was of questionable authority.

¹⁰ The letter was ostensibly sent to correct a statement in counsel’s posthearing brief that a phrase in the Massachusetts statute upon which the Board relied in its decision in *Filene’s Basement Store*, supra, had been deleted. In fact, this phrase had not been deleted. Accordingly, counsel’s letter was appropriate. What was not appropriate, as discussed infra, was the reference to alleged events outside the record in this case.

DeGrenier's testimony. And, in submitting his letter, counsel did not request that the record be reopened in order to receive the information. The General Counsel and the Union have opposed the submission by Respondent's counsel insofar as it attempts to include in the record this additional information. For the foregoing reasons, I approve the positions taken by the General
5 Counsel and the Union, and I have not considered any of the matters set forth in the second paragraph of counsel's April 14 letter.

As described above, the Union responded to the Respondent's April 14 letter, and opposed the attempt by counsel for the Respondent to interject additional information into the
10 record of this case. However, taking advantage of the opportunity for one-upmanship, the Union presented additional information in its letter, which information concerned McCann's application for unemployment compensation benefits. Like the information submitted by the Respondent, this information was outside the record in this case, and the Union has not requested that the record be reopened. Like the information contained in the Respondent's letter, I have not
15 considered any of the matters set forth in the second paragraph of the Union's letter, dated April 21.

The Respondent also disputes the fourth element of the General Counsel's initial burden, viz., whether there is a motivational link, or nexus, between the employees' union
20 activity and the adverse employment action. Antiunion animus may be found from direct as well as indirect or circumstantial evidence. All of the circumstances in the case should be considered in making this determination. Among the circumstantial factors that the Board has found to support an inference of animus are suspicious timing and abruptness of the termination. E.g., *Medic One, Inc.*, 331 NLRB 464, 475 (2000).

DeGrenier's statements to Olinger in the afternoon of October 2, while DeGrenier was retrieving his truck at Olinger's residence, constitute direct evidence of his antiunion animus. (I have discounted DeGrenier's statements to Emmert, Guevremont, and Olinger in the morning of
30 October 2 because these were made when DeGrenier believed that the employees would not work until he talked to the union representative.) DeGrenier told Olinger, "I'm not going union. If you think I'm going union you're crazy." When Olinger said that the employees simply wanted him to talk to the union representative, DeGrenier responded, "F— that. I'm not going union. I'm not talking to anyone." The coarseness of DeGrenier's discourse when referring to union
35 matters does not determine his antiunion animus, which is apparent without regard to the saltiness of his language, but it does indicate the resolve with which DeGrenier holds his antiunion opinions. In short, DeGrenier's statements constitute direct evidence of antiunion animus.

Moreover, DeGrenier's antiunion animus that he displayed on October 2 is consistent
40 with the antiunion animus he has exhibited in the past. He has often stated that he cannot stand unions. On many union jobs (every union job according to Olinger), DeGrenier talks about how he does not like unions. Upon learning that his brother's company had become unionized in 2003, DeGrenier stated that he would never go union. These statements, although not independently charged herein, are admissible to shed light on DeGrenier's motive. *American
45 Packaging Corp.*, 311 NLRB 482 fn. 1 (1993).

The direct evidence of the Respondent's motivation is corroborated by the timing and abruptness of DeGrenier's discharge of the six workers. When DeGrenier learned from
50 McCann, at about noon on October 2, that the employees were still at the Winchester jobsite, he asked what the employees were still doing there. DeGrenier made no attempt to discuss the matter with McCann nor did he respond to McCann's question of what should be done with the extra equipment at the Winchester jobsite. Rather, DeGrenier told them to go home and they

would never work for him again. This abruptness is consistent with DeGrenier's demeanor as a forceful and opinionated person, as well as his resolute antiunion sentiment.

5 The Respondent has not presented evidence, and does not maintain, that the same action would have taken place even in the absence of the protected conduct. Rather, the Respondent's argument is grounded on its factual contention that it did not discharge the six workers. This argument has been addressed and rejected in the factual findings set forth herein. Alternatively, the Respondent argues that it discharged the workers because of their refusal to work until DeGrenier spoke to a union representative. This factual contention has also been
10 addressed and rejected. In considering all of the evidence in this record, the Respondent has failed to demonstrate that it would have taken the same action of discharging its employees in the absence of their protected activity. Accordingly, the Respondent violated Section 8(a)(3) and (1) of the Act when it discharged its six employees, Emmert, Guevremont, Olinger, McCann, Moore, and O'Day.

15 (b) *Reinstatement*

20 The Respondent further contends that it offered reinstatement to all six discharged employees. These reinstatement offers were made by telephone (on October 3 to Emmert, Olinger, and Guevremont) and by letter (on October 4 to Guevremont, McCann, Moore, and O'Day). Whether the Respondent made valid offers of reinstatement to the workers, and if so, whether such reinstatement offers ended any further obligation by the Respondent arising from its unlawful discharge of the workers must now be addressed, for these matters relate to what remedy, if any, is appropriate. Cf. *Tel Data Corp.*, 315 NLRB 364 (1994), *enfd.* in part 90 F.3d 1195 (6th Cir. 1996) (where the question of reinstatement turned on evidence, properly admitted
25 in the unfair labor practice proceeding, that the discriminatee had engaged in misconduct for which he would have been discharged). The Respondent's reinstatement offers to the workers were made under varying circumstances. Accordingly, the different offers will be considered separately.

30 1. John Emmert

35 A reinstatement offer must be specific, unequivocal, and unconditional in order to satisfy a Respondent's remedial obligation. *Holo-Krome Co.*, 302 NLRB 452, 454 (1991). "For a reinstatement offer to be valid, it must have sufficient specificity to apprise the discriminatee that the employer is offering unconditional and full reinstatement to the employee's former or a substantially equivalent position." *Cassis Management Corp.*, 336 NLRB 961, 969 (2001). The Respondent's offer of employment to Emmert did not satisfy these minimal conditions of a reinstatement offer. DeGrenier did not offer to reinstate Emmert to his former position, but rather
40 offered a single day's work, a day that neither the Respondent nor Emmert normally worked.

45 Moreover, an inquiry into whether the employee is interested in working is not a valid reinstatement offer. E.g., *L'Ermitage Hotel*, 293 NLRB 924 (1989); *Flatiron Materials Co.*, 250 NLRB 554 (1980). In *Flatiron Materials Co.*, the Respondent's president told the discriminatee, by telephone, that a position was available, and inquired whether or not he wanted to return to work. The discriminatee replied that he did not.¹¹ The Board noted that, "where the subject of

50 ¹¹ Similar to the present case, the president of Flatiron Materials Co. followed up this conversation with a letter that was more specific than the verbal offer. The Board stated that, "the context in which the offer was made is as clear as the offer is vague," and concluded that the offer was not tendered in good faith. The Respondent's actions in the present case are

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returning to work is put as a question, as was done in the instant proceeding, and not as an offer, such is a mere inquiry concerning a discriminatee's interest in returning to work and does not constitute an unconditional offer of reinstatement." Likewise, DeGrenier's inquiry of Emmert as to whether he wanted to work on Saturday is not a valid offer of reinstatement.

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If a Respondent's offer of reinstatement is invalid, it is not necessary to consider the discriminatee's reply to the invalid offer. *Consolidated Freightways*, 290 NLRB 771 (1988). Emmert's reply that he wanted to speak, or he wanted DeGrenier to speak, to a union representative does not change the invalidity of the offer in the first instance. The employment offer to Emmert was not a valid offer of reinstatement and did not toll the Respondent's backpay liability.

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2. Jon Olinger

Like DeGrenier's invalid offer to Emmert, DeGrenier's offer of work on Saturday and/or Monday was not sufficiently specific to apprise Olinger that the Respondent was offering unconditional and full reinstatement to Olinger's former or a substantially equivalent position. Moreover, and again similar to DeGrenier's invalid offer to Emmert, the "offer" to Olinger was simply an inquiry; he asked Olinger if he wanted to work, but he did not tell Olinger that he was being reinstated to his job. Accordingly, the offer was not a valid offer of reinstatement, and it is not necessary to consider Olinger's response to DeGrenier's inquiry. DeGrenier did not validly offer to reinstate Olinger. Accordingly, his action did not toll the Respondent's backpay liability.

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3. Richard Guevremont

DeGrenier's attempt to offer Guevremont reinstatement on October 3 during their telephone conversation suffers from the same defects as his offers to Emmert and Olinger. The "offer" was made via an inquiry (DeGrenier asked Guevremont if he was interested in working the next day), and the offer was not for reinstatement, but to do one job.

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Moreover, a valid reinstatement offer must offer full reinstatement to the employee's former or a substantially equivalent position. The Respondent "must make a good faith . . . effort calculated to remedy the wrong which it initially committed." *Reeves Rubber*, 252 NLRB 134 fn. 2 (1980). In Guevremont's position before he was unlawfully discharged, the Respondent allowed him the use of a company truck, which Guevremont needed in order to travel to the various work sites. However, on October 3, DeGrenier did not offer to reassign a company truck to Guevremont. Indeed, after Guevremont requested the use of a truck, DeGrenier specifically refused to give him a company truck by telling Guevremont a blatant falsehood that every one of the Respondent's trucks was in the shop being repaired. Thus, the reinstatement offer to Guevremont on October 3 was not valid because it did not offer full reinstatement, and because it was not made in a good faith effort to remedy the wrong the Respondent had committed.

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4. Richard Guevremont, John McCann, Stanley Moore, and Thomas O'Day

It is the Respondent's burden to establish that it made a valid offer of reinstatement to the discriminatees. *Adsco Mfg. Corp.*, 322 NLRB 217 (1996). The Respondent failed to satisfy this burden with respect to its October 4 letters of reinstatement to Guevremont, McCann,

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comparable to the Respondent's action in Flatiron Materials, and call into question DeGrenier's good faith. However, in light of the legal insufficiency of the Respondent's offer of reinstatement, there is no need to address the question of good faith in DeGrenier's "offer" to Emmert.

Moore, and O'Day, especially when those letters are considered in the light of subsequent events. The letters failed to give any description of the work-site or whom the workers were to meet at the work site or what the job entailed. As a result of this lack of information and specificity, the workers were unable to locate the jobsite on October 6, despite making a good faith effort to comply with the reinstatement offer. The workers appeared at the appointed time. However, because the Respondent failed to give any particulars concerning the job, they appeared at the correct street, but the wrong location. It was the Respondent's obligation to give the workers sufficient information to enable them to accept the offer of reinstatement. The Respondent failed to provide sufficient information, and whether this was done innocently or in bad faith is irrelevant in determining the validity of the reinstatement offer. The Respondent has failed to satisfy its burden of establishing that it made a valid offer of reinstatement.

Alternatively, if it is assumed that the October 4 letters did validly offer reinstatement, I conclude that the employees accepted the offer of reinstatement. They appeared at the appointed time and at the location, the only construction site on Blackstone Street, which appeared proper. DeGrenier could have provided more information to the workers regarding the type of job, the location of the job, and persons to contact should there be any confusion, but he did not do so. The Respondent could also have returned the cell phones to the workers, which would have enabled them to call DeGrenier, or DeGrenier to call them, to confirm the location of the jobsite. The consequences of DeGrenier's failure to provide sufficient information to the workers should not be placed on the workers who attempted to comply with the directions in the letter. Moreover, the frustration of the workers in the morning of October 6, after it appeared to them that DeGrenier had sent them on a wild goose chase, was at least partially a result of DeGrenier's virulent remarks on October 2 regarding their desire to be represented by the Union. Finally, the Union faxed a letter to the Respondent on October 10 stating that the six workers wished to be reinstated. Under all the circumstances, including the abrupt discharge of the employees, DeGrenier's virulent antiunion statements, and the apparent confusion on October 6, the Union's response on behalf of the employees was made within a reasonable time after October 4. See *Esterline Electronics Corp.*, 290 NLRB 834 (1988). Thus, whether or not the October 4 letters to the workers are considered valid reinstatement offers, the letters did not toll the Respondent's reinstatement and backpay liability.

B. Case 1-RC-21685

The Regional Director for Region 1 consolidated the foregoing unfair labor practice case with the case arising from the challenge to certain ballots in the election held on October 30, 2003. The Union challenged the ballots cast by Leo DeGrenier, Sims, Young, Ruginski, and Russell. The Board agent challenged the ballots of Emmert, Guevremont, Olinger, McCann, Moore, and O'Day on the ground that their names did not appear on the list of eligible voters furnished by D.C. Scaffold. The challenged ballots are sufficient in number to affect the results of the election.

1. Discharged workers

Emmert, Guevremont, Olinger, McCann, Moore, and O'Day would have been on the payroll and eligible to vote in the October 30 election but for their unlawful terminations on October 2. Employees who have been unlawfully discharged are eligible to vote. *Romal Iron Works Corp.*, 285 NLRB 1178 (1987). Emmert, Guevremont, Olinger, McCann, Moore, and O'Day were unlawfully discharged on October 2 in violation of Section 8(a)(3) and (1) of the Act. Accordingly, they were eligible to vote and the challenges to their ballots are overruled.

2. Alleged Replacement workers

5 “It is established Board policy that a temporary employee is ineligible to be included in the bargaining unit.” *Pen Mar Packaging Corp.*, 261 NLRB 874 (1982). An eligible employee must be within the proposed bargaining unit on the eligibility date as well as the date of the election. *Plymouth Towing Co.*, 178 NLRB 651 (1969). The evidence in this case demonstrates that Leo DeGrenier, Sims, Young, Ruginski, and Russell were not hired by D.C. Scaffold to replace the terminated employees, but to temporarily pose as employees of D.C. Scaffold so that they could vote in the election, reject the Union, and then return to their respective real jobs. 10 Leo DeGrenier acknowledged that his brother told him that he was only being hired as a temporary employee. And Leo’s testimony was the only candid testimony on this point among the remaining alleged replacement workers who testified at the hearing.

15 All of the alleged replacements were discharged by the end of November. Thus, they worked for D.C. Scaffold for approximately 2 months, 1 month before the election and 1 month after the election. D.C. Scaffold argues that the replacements were discharged due to lack of work in the winter, but this contention is rejected. The winter of 2003 was the first time D.C. Scaffold laid off workers in the winter. Olinger worked for D.C. Scaffold for approximately 7 years, and had never been laid off; the same for McCann, a 7-year employee; the same for 20 Moore, a 4–5 year employee; and the same for the other workers. Accordingly, the discharges of Leo DeGrenier, Sims, Young, Ruginski, and Russell within 1 month after the election were more than coincidental. These discharges support the conclusion that Leo DeGrenier, Sims, Young, Ruginski, and Russell were hired as temporary workers.

25 Moreover, even without Leo’s acknowledgement that he had been hired as a temporary employee, the circumstances of DeGrenier’s hiring of his friends and family as replacement workers demonstrate just as clearly the disingenuousness of his actions and his intention to hire these individuals as temporary employees. These friends and brother of DeGrenier, alternatively or jointly, (1) were unskilled in scaffolding work, (2) had full-time jobs, which they continued to 30 maintain, while they allegedly accepted full time employment with D.C. Scaffold, (3) were earning substantially more money prior to accepting employment with D.C. Scaffold, and (4) were all discharged within 2 months of being hired. It is not necessary to belabor the point. The testimony of DeGrenier’s friends was as credible as DeGrenier’s testimony on this issue, which is to say, not at all. Leo DeGrenier, Sims, Young, Ruginski, and Russell were hired as 35 temporary workers, and they did not share a community of interests with the proposed bargaining unit employees. Accordingly, they were not eligible to vote in the election, and the challenges to their ballots are sustained.

40 Alternatively, if D.C. Scaffold’s factual contention were accepted, viz., that the replacement workers were hired as permanent employees, the result would not change. Replacements for employees who have been unlawfully discharged in violation of the Act are ineligible to vote. *Romal Iron Works Corp*, supra. If Leo DeGrenier, Sims, Young, Ruginski, and Russell were hired as permanent employees, then they were hired to replace the six workers who were unlawfully discharged on October 2. Accordingly, Leo DeGrenier, Sims, Young, 45 Ruginski, and Russell were not eligible to vote in the election, and the challenges to their ballots are sustained.

Conclusions of Law

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

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

3. The Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating its employees, by unlawfully threatening to discharge its employees, and by unlawfully threatening to shut down its business rather than deal with the Union.

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4. The Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully discharging John Emmert, Richard Guevremont, Jon Olinger, John McCann, Stanley Moore, and Thomas O'Day.

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5. The foregoing violations constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

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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.

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The Respondent having discriminatorily discharged John Emmert, Richard Guevremont, Jon Olinger, John McCann, Stanley Moore, and Thomas O'Day, 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).

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

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ORDER

The Respondent, D.C. Scaffold, Inc., East Bridgewater, Massachusetts, its officers, agents, and representatives, shall

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1. Cease and desist from

(a) Unlawfully interrogating its employees about their union activities or in any other manner interrogating its employees in violation of the Act.

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(b) Unlawfully threatening to discharge its employees because of protected, union activities by the employees.

¹² 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.

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(c) Unlawfully threatening to shut down its business rather than deal with the Union.

5 (d) Discharging or otherwise discriminating against any employee for supporting the New England Regional Council of Carpenters, a/w United Brotherhood of Carpenters & Joiners of America, AFL-CIO (the Union) or any other union.

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

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

15 (a) Within 14 days from the date of this Order, offer John Emmert, Richard Guevremont, Jon Olinger, John McCann, Stanley Moore, and Thomas O'Day 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.

20 (b) Make John Emmert, Richard Guevremont, Jon Olinger, John McCann, Stanley Moore, and Thomas O'Day 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.

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

30 (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.

35 (e) Within 14 days after service by the Region, post at its facility in East Bridgewater, Massachusetts copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 1, 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
40 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
45 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 October 2, 2003.

50 ¹³ 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."

(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.

5 IT IS FURTHER RECOMMENDED that the challenges to the ballots of John Emmert, Richard Guevremont, Jon Olinger, John McCann, Stanley Moore, and Thomas O'Day be overruled, and the challenges to the ballots of Leo DeGrenier, William Sims, Robert Young, Paul Ruginski, and Roger Russell be sustained.

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

Dated, Washington, D.C. May 19, 2004

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Joseph Gontram
Administrative Law Judge

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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 a 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

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

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the New England Regional Council of Carpenters, a/w United Brotherhood of Carpenters & Joiners of America, AFL-CIO (the Union) or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threatening to discharge our employees because of protected, union activities by the employees.

WE WILL NOT threaten to shut down our business rather than deal with the Union.

WE WILL NOT Discharge or otherwise discriminate against any employee for supporting the Union or any other union.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer John Emmert, Richard Guevremont, Jon Olinger, John McCann, Stanley Moore, and Thomas O'Day 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 John Emmert, Richard Guevremont, Jon Olinger, John McCann, Stanley Moore, and Thomas O'Day 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 of John Emmert, Richard Guevremont, Jon Olinger, John McCann, Stanley Moore, and Thomas O'Day, and WE WILL, within 3 days thereafter, notify

each of them in writing that this has been done and that the discharges will not be used against them in any way.

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D. C. Scaffold, Inc.

(Employer)

Dated _____

By _____

(Representative)

(Title)

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The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

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10 Causeway Street, Room 601, Boston, MA 02222-1072
(617) 565-6700, Hours: 8:30 a.m. to 5:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

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THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (617) 565-6701.

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