**M. J. Electric, Inc. *and* John P. Ricketson.** Case 30–CA–11736

July 23, 1993

## DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On March 4, 1993, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, M. J. Electric, Inc., Iron Mountain, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent's request for oral argument is denied because the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

[2] The Respondent excepts to the judge's recommended remedy of reinstatement and backpay for unlawfully laid-off employees John Ricketson and David Denson on the ground that the issues relating to reinstatement and backpay have not been fully litigated and that further hearing is necessary. We find that the issues raised by the Respondent's exceptions are best left to compliance. The Respondent will be permitted at the compliance stage of this proceeding to submit evidence on the question or whether Ricketson or Denson would have been transferred or reassigned to other jobsites if it were not for the unlawful discrimination against them. See *Dean General Contractors*, 285 NLRB 573 (1987).

*Rocky L. Coe, Esq.*, for the General Counsel.
*Mark W. Schneider, Esq.* and *Tracy Wessell, Esq.*, of Minneapolis, Minnesota, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case as heard at Wausau, Wisconsin, on November 19 and 20, 1992. The charge was filed on April 17, 1992, by John P. Ricketson, an individual. The complaint, which issued on May 18, 1992, alleges that M. J. Electric, Inc. (the Company or Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act as amended. The gravamen of the complaint is that the Company allegedly threatened employees Ricketson and David Denson with layoff, and laid them off, because of their union activity in filing and pursuing internal union charges against another employee. The Company's answer denies the commission of the alleged unfair labor practices. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally and to file briefs. General Counsel and Respondent each filed a brief.

On the entire record in this case[1] and from my observation of the demeanor of the witnesses, and having considered the arguments and briefs of the parties, I make the following

### FINDINGS OF FACT

#### I. THE BUSINESS OF RESPONDENT

The Company, a corporation with an office and place of business in Iron Mountain, Michigan, is engaged in business as a commercial and industrial electrical contractor. In the operation of its business, the Company annually performs services valued in excess of $50,000 in States other than Michigan. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Electrical Workers, Local No. 388, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *Background: The Company's Operations, Supervisory Hierarchy, and Alleged Animus*

The Company is a large-scale electrical contractor, and specializes in electrical work for the paper mill industry. Consolidated Paper Company is a major customer. Since January 1990 Robert Biallas has been company vice president for field operations, and in overall charge of those operations. He reports directly to Company President David Brule. The Company's project managers (and superintendents on small projects) report to Biallas. On large projects, the project manager is assisted by superintendents, each of whom is responsible for an area of work. The superintendents lay out work, direct day-to-day operations, and work closely with field personnel. Below the superintendents are foremen, each of whom supervises a crew of journeymen and apprentices, usually numbering from 5 to 12, with an average of 8. The events which gave rise to this proceeding occurred in connection with the Consolidated Paper No. 16 paper machine project in Wisconsin Rapids, Wisconsin. The project ran from about February 18, 1991 to mid-July 1992. At its peak the Company had about 100 employees on the job, organized into some 50 work crews. Oscar J. Boldt Company was general contractor over the electrical work. The Company is signatory to collective-bargaining agreements with IBEW and the Union. The Company obtains its employees through the Union's hiring hall, but has the contractual right to reject referred personnel. Many of the employees, and most on large jobs like No. 16 paper machine, are travelers, members of IBEW locals from throughout the United States. It is undisputed that the Company is not contractually obligated to consider seniority in layoffs, and that the Company does not have any practice of laying off employees by inverse order of seniority.

[1] The record should reflect that at p. 114, LL. 9–10 of the transcript, Risberg testified he was business manager.

Leonard Bal was project manager on the No. 16 paper machine job. Bal, like Biallas, is a member of an IBEW local. Bal, by his own testimony, was principally responsible for selection of Ricketson and Denison for layoff on November 20, 1991. Bal testified that he never threatened any employee with layoff for not withdrawing a grievance. Vice President Biallas testified in sum that the Company has rehired employees who filed unfair labor practice charges or grievances against it. General Counsel presented testimony to show that Bal has in fact made such threats. In early 1990 electricians David Hoover and Ronald McEachen were working on a company project for Consolidated Paper (No. 34 paper machine) in Stevens Point, Wisconsin. They had been referred through the Union. The Company commenced a project for another paper mill firm in Tomahawk, Wisconsin. Hoover, McEachen, and other employees wanted to transfer to the Tomahawk job. Project Manager Bal told Union Business Manager Peter Risberg that transfers would not be allowed. Hoover, McEachen, and another employee then tried to get around Bal's refusal. They quit their jobs, re-registered at the union hall, and were referred to the Tomahawk job. Bal refused to accept the referrals. He told the employees that under a company-union agreement, employees who quit a company project were ineligible for rehire for 90 days. Hoover and McEachen subsequently returned to work at the Stevens Point project. Risberg and Bal testified in sum that Risberg persuaded the Company to take them back, although it was not obligated to do so. Hoover testified in sum as follows: After quitting he filed a grievance with the Union against the Company over its refusal to allow transfer to Tomahawk. The grievance was still on file and being processed when he returned to Stevens Point. About April 12 Bal told him that if he did not withdraw the grievance he would be laid off and not work again for the Company. Hoover spoke to Risberg, who indicated that the grievance had little chance of success. Hoover withdrew the grievance, but wrote a letter for the Union's file, describing the alleged threat. Hoover retained a copy of the letter (presented in evidence) but did not have a copy of the grievance. He later worked for the Company on another job. McEachen testified in sum as follows: After returning to Stevens Point he filed a grievance over the Company's refusal to allow transfer to Tomahawk. About April 1 Bal told him that if he did not drop the grievance he would be terminated. The Union advised McEachen that the grievance had little chance of success. Because of Bal's threat, McEachen withdrew the grievance. He subsequently worked again for the Company in 1990. He did not have a copy of the grievance. Bal testified that he did not threaten the employees with layoff, and they did not file any grievance. He further testified that Hoover may have worked subsequently for the Company, but Consolidated Paper caught McEachen stealing and would not permit his rehire. Business Manager Risberg, who was presented as a witness by both General Counsel and the Company, testified that he did not recall whether Hoover and McEachen filed grievances, or that he filed a statement from the employees, although the Union's file might contain such documents. Neither General Counsel nor the Company requested production of the Union's file concerning the matter. Hoover and McEachen are both local union members living in Wisconsin, and at the time of the present hearing were employed by other electrical contractors in Wisconsin.

I credit Hoover and McEachen. As indicated, Bal testified that the Company would not rehire McEachen. However, Hoover, who also lives and works in the Company's area of operations, remains available for employment by the Company. He has no interest in the present case, and no reason to testify falsely against the Company. His testimony is entitled to special weight. This hearing was conducted under a rule of sequestration, and Hoover and McEachen substantially corroborated each other's testimony. I do not agree with the Company's argument (Br. 16) that if Bal were discriminatorily motivated, it would make no sense to rehire Hoover at Stevens Point. Bal may have assumed that after returning to Stevens Point, Hoover would withdraw his grievance. However he did not do so. In crediting the testimony of Hoover and McEachen concerning Bal's threat, I do not rely on Hoover's purported copy of a letter or file memo to the Union. As General Counsel never called for production of the original, I am not inclined to attach any evidentiary significance to the purported copy. As both General Counsel and the Company could have, but did not, call for production of the Union's pertinent file, I have not drawn any adverse inference against either for their failure to do so. Rather, my determination is based on the credibility of the employees' testimony. I find that the incident may properly be considered as background evidence of company policy and animus toward employees who file charges which challenge the Company's personnel practices. The question is not, as argued by the Company (Br. 12), one concerning Leonard Bal's character. Rather, as indicated, the question concerns company policy and alleged animus toward employee union activity. Therefore the threats to Hoover and McEachen are evidentiary with respect to the present alleged unfair labor practices. See *NLRB v. My Store, Inc*., 345 F.2d 494, 497–498 (7th Cir. 1965), cert. denied 382 U.S. 927.

### B. *The Alleged Threat and the Layoff of Ricketson and Denson*

John Ricketson, a journeyman inside wireman since 1966, and member of the Gainesville, Florida IBEW local, first worked for the Company in 1990 at its Champion project in Iron Mountain, Michigan. He left to take a job near home, but the job did not materialize. He returned and was referred by the Union to the Company's Stevens Point project, where he worked from August 8 to early October 1990. Ricketson worked in a crew of 8 to 10 under Foreman Dean Miller. Superintendent Roger Hunt asked Ricketson and two other crewmembers whether they wanted to transfer to the Consolidated Paper wet lap mill project in Wisconsin Rapids. The other crewmembers were laid off. Ricketson testified that Hunt told the three he was offering the transfer because they did a good job. Miller testified that Ricketson was offered a transfer because he was one of the best workers. (Hunt, not now employed by the Company, was not called as a witness). Ricketson worked at Wisconsin Rapids until laid off on November 30, 1990. He was not one of the last laid off, but the project was near completion. On May 8, 1991, the Union referred Ricketson to the No. 16 paper machine project in Wisconsin Rapids, where he worked until laid off on November 21.[2] He occasionally served as acting foreman. Ricketson did not receive any disciplinary warnings

[2] All dates hereafter are in 1991 unless otherwise indicated.

prior to that job. David Denson, also a journeyman inside wireman, is a member of the Houston, Texas IBEW local. He was referred by the Union to the No. 16 paper machine project on June 18, and worked there until laid off on November 21. Ricketson and Denson began working in foreman Dennis Dorski's crew, but Ricketson, in June, and Denson at a later time, transferred into Dean Miller's crew (which was their preference). Miller's crew worked under area Superintendent Errol Steen.

Ricketson first met Sam Clark, then a journeyman electrician, in August. The Company subsequently promoted Clark to foreman. William Nagy (now a project manager) was his area superintendent. Ricketson testified that beginning in August, he observed Clark working off the clock. Ricketson complained to the union steward. Ricketson and Denson testified in sum that in mid-October they and other employees observed Clark working before the 7:30 a.m. starting time and after the 4 p.m. quitting time. They protested to Clark. Ricketson prepared and filed with the Union an internal union charge, dated November 4 alleging that member Clark violated the IBEW constitution and the Union's contract by ''working below scale'' (i.e., without pay) at 7:13 a.m. and 4:03 p.m. on October 13 (a Sunday). Denson and another employee (Steve Fenton) signed the charge as witnesses. The Union mailed a copy of the charge to Clark (received by him on November 12), together with notice of hearing by the Union's trial board, scheduled for November 19 at 8 p.m. The Union did not give notice to or request the Company to state its position. Nevertheless Clark presented a letter to the Union from Project Manager Bal. Bal enclosed time reports for the week ending October 13, indicating that no employees worked on October 13. However Bal also asserted that to his knowledge, Clark did not violate the local contract or the IBEW constitution and bylaws. At the union hearing Ricketson admitted that he misdated the violations, asserting that the violations actually took place on October 15. The trial board found Clark not guilty of the charges. Normally the charged party receives notice of the decision within 2 or 3 days following the hearing.

As indicated, Ricketson and Denson were laid off on November 21. On December 4 Ricketson refiled his charge, this time alleging that the violations occurred on Tuesday, October 15. The Union granted one request by Clark for a delay, and scheduled the hearing for January 14, 1992. On January 17, 1992, the trial board issued its decision, finding Clark guilty ''by his own admission'' only of working after quitting time. The board fined Clark $125, but suspended $100 of the fine, conditioned on no further similar violations for 1 year. Meanwhile in mid-December, the Union again referred Ricketson to the No. 16 paper machine project, the Company having called for about 17 additional personnel, Ricketson reported on December 16, but Project Manager Bal, invoking the Company's contractual right, refused to accept him. Ricketson testified, but Bal denied, that Bal said that anyone in the November 21 layoff would not be hired. Bal testified that he rejected four referred employees, and rejected Ricketson because he was recently laid off and had a work rule violation in his file.

Denson testified in sum as follows: On the evening of November 20 he and Steve Fenton went to the Body Shop bar, a strip joint in Wisconsin Rapids. Bal was there, drinking, when they arrived. Denson heard rumors of a layoff, and was concerned about whether he should sign a new lease for his trailer. About 10 p.m. he asked Bal whether he would be in the layoff the next day. They talked about the charges against Clark. Bal said if they dropped the charges they would not be in the layoff. Denson replied: ''That dog won't hunt.'' Bal commented that the first chance he got, Dean Miller was gone too, but he gave no explanation. In his investigatory affidavit, Denson stated that he did not comment when Bal referred to dropping the charges. Denson further testified in sum as follows: The following morning he told Ricketson about his conversation with Bal. Ricketson said he would not withdraw the charges. That afternoon Superintendent Steen told them they were being laid off. Ricketson asked if it was about the charges. Steen said, ''You know why.'' Ricketson insisted he wanted to hear it from Steen, whereupon Steen admitted it was because of the charges. In his affidavit, Denson stated that ''Steen just repeated that we knew why.'' Denson testified that after the layoff he left town without signing the Union's out-of-work list, going to find a job in Tennessee. In fact, Denson signed the book on November 22. Ricketson testified in sum as follows: Denson told him about the conversation in the Body Shop bar. Ricketson said he would not drop the charges. About 11:30 a.m. Foreman Miller told Ricketson he was in the layoff, and that Steen said it was because of the charges. About 1:30 p.m. Steen told Ricketson, in the presence of Denson and two other employees, ''I guess you know'' about the layoff. Ricketson said he wanted to hear it from Steen, whereupon Steen answered: ''You know it is about the charges against Clark.'' Ricketson insisted he was not dropping the charges. Steen said the Company would have the charges postponed as long as possible to where Ricketson wouldn't be around. Ricketson replied that they couldn't starve him out. After his layoff Ricketson signed the union book and as indicated, was again referred to the Company. In January 1992, Dean Miller was demoted from foreman and eventually was laid off about 2 weeks before the project was completed (after his entire former crew was laid off). He testified as a General Counsel witness. Miller testified that on the morning of November 21, Steen told him that Ricketson and Denson were being laid off because of the charges against Clark. Miller further testified that Steen added that Bal told him that Miller would have been laid off if he had not been a local wireman and foreman, because of his involvement as a witness in the trial board hearing.

Project Manager Bal testified in sum as follows: In mid-November Superintendent Nagy told him that charges were filed against Sam Clark, that Clark was being harassed, and received anonymous phone calls and threats of property damage. Nagy did not know who filed the charges or harassed Clark. Bal spoke to Union Steward Don Schmude and to Clark, who refused to give details. However Clark told him that the charges ''were originally filed on a Sunday,'' and he asked Bal for a letter to the trial board verifying that no company employees worked on that Sunday. Therefore as indicated, Bal gave Clark the letter. At the time Ricketson and Denson were laid off, Bal did not know who filed the charges against Clark. On the evening of November 20 Bal worked until about 7:30 or 7:45, and then went to the Body Shop bar with Nagy and two other supervisors. Bal was seated next to Nagy at the bar. Denson came over to Bal. He

wanted to know if he was included in the pending layoff. Bal knew that Denson had been added to the layoff list. Bal said that affected employees would get 2 hours' notice, as provided in the contract. Denson talked about his problems, including his trailer lease, and kept asking about the layoff. Bal repeated his answer. Denson became angry. He questioned Bal's qualifications as a supervisor, and asserted that Bal discriminated against good union employees. Nothing was said about the charges against Clark; and Bal did not make the statement attributed to him by Denson. Nagy remained seated next to Bal during this conversation. Another employee approached Nagy. They argued about the fact that Nagy was not a union member. Nagy summoned the bar manager and they escorted the employee to the door. Nagy testified in sum as follows: In mid-November, prior to the layoff, Clark told him that he didn't know if he could continue on as foreman. Clark complained that internal union charges were filed against him for starting early and quitting late, he was getting pressure, and ''things were happening to him.'' Later he said he was getting phone calls at home. Clark refused to say who filed the charges. Nagy asked him to remain as foreman, and reported the conversation to Bal. As of November 20 Nagy did not know who was involved in the charges. That evening Nagy and Bal arrived at the Body Shop bar before 6 p.m., and remained about 4 hours. Denson came in about 1 or 2 hours after they arrived. He went over to them, and asked Bal if he was going to be laid off the next day, explaining his personal problems. Bal said that if there was a layoff the employees would get their 2 hours' notice. Denson persisted and Bal repeated his answer. Nagy did not hear Bal threaten Denson concerning the layoff. However Nagy went to the bathroom, and thereafter went to the other end of the bar, but Bal and Denson were still talking. Nagy remained in the bar about one-half hour after Denson left. Superintendent Steen, who was involved in the layoff decisions, testified in sum as follows: He did not know as of November 21 that internal union charges had been filed against Clark, but he heard rumors about such a charge, possibly before the layoffs. About 1 or 1:30 p.m. on November 21 he told Foreman Miller and the affected employees in his area, including Ricketson and Denson, about the layoffs. He did not give advance notice to Miller. He did not recall if the employees said anything. Steen in his testimony did not deny making the statements attributed to him by Ricketson, Denson, and Miller.

I find incredible the testimony of Bal, Steen, and Nagy that as of November 20 they did not know who filed the charge against Clark. (Clark, who was not employed by the Company at the time of this hearing, was not called as a witness.) If Clark did not want the Company to know who filed the charge, then it would make no sense for him to complain to higher supervision about the charge, particularly when he accompanied this complaint with additional assertions of harassment, coupled with assertion that as a consequence he might not be able to continue as foreman. It is evident from Nagy's testimony that Clark expected the Company to do something about the alleged harassment. It is also evident from the testimony of Bal and Nagy, that Clark informed them of the substance of the charge. As indicated, Bal did not simply provide Clark with timesheets for October 13. Rather, he prepared a letter for the trial board in which he asserted that to his knowledge, Clark did not violate the local contract or the IBEW constitution and bylaws. It is unlikely that Bal would do so, particularly (as he did) in his official capacity as company project manager, without having seen the charge and consequently knowing whereof he spoke. As indicated, Steen in his testimony did not deny the testimony of Ricketson, Denson, and Miller that he told them Ricketson and Denson were selected for layoff because of the charge. There are credibility problems on both sides with respect to statements allegedly made by Bal and Steen on November 20 and 21. As indicated, Denson's testimony was inconsistent in several respects with his investigatory affidavit. I am not inclined to dismiss these inconsistencies on the ground that his affidavit was taken telephonically. Denson had an opportunity to read and correct his affidavit before signing it. On the other side, Nagy contradicted Bal's testimony that Nagy was present throughout his conversation with Denson. Nagy indicated that he did not overhear most of their conversation. Bal and Nagy also differed as to when they arrived at the Body Shop bar. Nagy's testimony indicates that Bal had been drinking for some time before Denson arrived, and consequently might be more inclined to talk freely. I have no comparable reservations with Ricketson's testimony, except insofar as it conflicts with Denson's affidavit. Ricketson in his affidavit did not refer to his asserted conversation with Foreman Miller on the morning of November 21. However, he did refer to rumors on the job that he and Denson would be laid off because of the charge against Clark. As Miller had no authority in selecting employees for layoff, Ricketson could have been referring to Miller's statement. However, in resolving these questions of credibility, I find particularly critical and significant the Company's assertions concerning its professed reasons for selecting Ricketson and Denson for layoff. As will be discussed, the company witnesses' testimony in this regard demonstrates an overall lack of credibility with respect to the ultimate merits of this case. In particular, key elements of the Company's assertions are contradicted by its own professed records.

Vice President Biallas testified in sum as follows: In September Consolidated Paper requested the Company to reduce its jobsite work force by 10 percent. The request was precipitated by Consolidated Paper's complaints about employee work rule violations and insufficient productivity. Biallas was concerned because the Company could not cut its work force and still meet the construction schedule. (In fact, the job was completed about 3 months after the scheduled completion date.) Biallas agreed to the reduction in force, but in fact the Company did not lay off any employees. On November 19 or 20 General Contractor Boldt informed Biallas that Consolidated again requested a 10-percent reduction in the work force, and to ''try to weed out the worst non-productive job rule offenders.'' This time the Company promptly complied, and on November 21 laid off 31 day-shift and 3 night-shift employees. Project Manager Bal conducted the layoff. In selecting employees for layoff, the Company considered ''violation of jobsite rules, our least productive workers, absenteeism, tardiness, safety violators, and hardship cases if requested.'' Generally the Company tried to keep better employees. After the layoff Bal and Steen told him that Ricketson and Denson had poor attitudes, but this was not a reason why they were selected for layoff. Biallas understood, but did not personally know, that both employees abused work rules. Denson was selected for layoff

in part because of poor productivity, and presumably because of an incident in early July involving damage to a wire cable. After the incident Biallas instructed Bal to demote Dean Miller from foreman and lay off all of the employees involved with the cable ''when the layoffs apply.''

Project Manager Bal testified in sum as follows: He followed the Company's usual procedure for layoffs. He provided area superintendents with the names of employees having work rule or safety violations. He checked with union steward Schmude to determine if there were any employees with hardship problems who wished to volunteer for layoff. The superintendents would return to Bal with their recommendations. They tried to spread the layoffs as evenly as possible throughout the different areas. In selecting employees for layoff he considered ''productivity, warnings, safety violations, absenteeism, accident reports'' and hardship (volunteer) cases. He selected Ricketson because of work rule violations, abuse of morning coffeebreak, his involvement with the cable pull, and Superintendent Steen's opinion of Ricketson's performance. He selected Denson because of a work rule violation in his file, Bal believed he was loafing on the job, and he was involved in the termination end of the cable pull. However, Bal conceded that Denson was not in Miller's crew at the time of the cable pull, and he had no documentation as to who or what crew worked on termination of the damaged wire cable. In a statement to the Board's Regional Office, Bal stated that he laid off Ricketson and Denson ''based on poor work performance, attitude and work rule violations.'' Bal testified that by ''poor attitudes,'' he meant lack of cooperation in regard to following work rules. He testified that Superintendent Steen told him that Steen repeatedly warned Ricketson and Denson to improve their productivity and not abuse break times. Bal had no documentation of the alleged warnings. Bal testified that production by Miller's crew was below average. However he also testified that overall production on the project was poor. In support of Bal's testimony, the Company presented in evidence two weekly productivity reports for the Miller crew in November, purporting to show that their productivity was substantially below industry and company standards. However the Company did not proffer such records for other crews. Consequently, for purposes of this case, the reports have no evidentiary value, particularly in light of Bal's testimony that overall project production was poor. Bal also testified that in mid-December he called for about 17 more employees because the Company was able to persuade the owner that it needed more personnel in order to meet the project schedule.

Then Superintendent Steen testified that Bal decided who would be laid off, and placed Ricketson and Denson on the list because they had work rule violations. Steen further testified that he made recommendations. However, he did not claim that he recommended Ricketson or Denson for layoff, or gave either an unfavorable evaluation, except insofar as he followed Bal's instruction to put employees with recorded warnings on the list. Bal conceded that he recommended Ricketson or Denson for layoff, or gave either an unfavorable evaluation, except insofar as he followed Bal's instruction to put employees with recorded warnings on the list. Bal conceded that he recommended Ricketson to Miller as an acting foreman, and had no problem with Ricketson when he served as acting foreman. Steen denied that he gave repeated warnings to Ricketson and Denson. He testified that he talked to Miller and other foremen, and to crews as a whole about productivity, the cable pull and work times, ''because the owner was always pushing, pushing, pushing,'' and that these discussions continued after the layoff. At no time prior to November 21 did he direct Miller to take any action against Ricketson or Denson, and Miller never complained to him about their performance.

The Company presented in evidence an organizational chart purporting to show the makeup and other information concerning the Company's project work force as of November 21. The chart indicates a near total lack of correlation between recorded disciplinary warnings and employees selected for layoff. The chart indicates that 28 employees were laid off that day, and that 30 employees had recorded warnings. Only three of the laid-off employees (Ricketson, Denson, and one other) had recorded warnings. Four employees in Miller's crew (Ricketson, Denson, Deutsch, and Engel) and Miller himself, had indicated recorded warning letters. The Company's witnesses offered no explanation as to why Ricketson and Denson rather than Deutsch and Engel were laid off. Steen testified that he asked that some employees slated for layoff be kept on, but he did not indicate that he expressed any preferences among Miller's crew. The Company in its brief (p. 20) suggests that the choice had something to do with the fact that Ricketson and Denson ''were from out of the area.'' However Deutsch and Engel were also travelers (Deutsch from Texas and Engel from Michigan), and the Company's witnesses indicated that Bal did not take this factor into consideration. The Company also offered conflicting explanations as to why only two of the five personnel in Miller's crew with purported written warnings were selected for layoff. The Company argues on one hand (Br. 20) that ''Dean Miller's crew, which had a record of low productivity, was most likely to be a target of the 11/21/91 layoffs.'' But the Company also argues (Br. 19) that ''those ultimately laid off were spread evenly throughout the crews,'' and ''Bal did not want to lay five out of nine individuals off of one work crew because such action would impact productivity and continuity more than M. J. Electric could tolerate.'' However Biallas testified that it was company practice in reductions in force to disperse crews, laying off some but transferring the better employees. Indeed the Company did just this when it transferred Ricketson in 1990.

The company witnesses' testimony indicates that the purported written warnings to Ricketson and Denson related to a single incident on September 19, the Company knew that Denson was not guilty of any infraction, Ricketson and other crewmembers committed no infraction or at most a technical and insignificant infraction, the alleged warnings, if given at all, were handed out indiscriminately in order to appease the general contractor, and the Company at the time attached no significance to the entire episode. Keith Zimmerman was General Contractor Boldt's project manager. His responsibilities included supervision of the Company's performance. Zimmerman, who was presented as a company witness, testified with regard to the incident in sum as follows: He was checking around the MCC coder area when he saw what appeared to be suspicious activity. Two employees were working on a ladder, but others were starting their morning break, although it was only 9:20 and break time began at 9:30. He may have said: ''You're cutting it a little close, fellows.'' He

wrote down the hardhat numbers of four to six company employees, and employees of other contractors, on a clipboard he carried with him. He also carried a walkie-talkie. The foremen came in. Zimmerman told him he would report the numbers. Zimmerman gave the sheet with numbers to Biallas, saying he should do something about it. Biallas said he would take care of it. Biallas testified in sum as follows: At about 9:25 a.m. Zimmerman told him that Foreman Miller and his crew were abusing the morning coffeebreak. Zimmerman gave him a list of hardhat numbers, and told him to take care of it. Biallas said he would. He told Bal to write up Miller and each of his crew for abusing the morning break. Bal subsequently returned, reporting that there was more than one crew of electricians, and he wanted to identify the employees observed by Zimmerman. Biallas gave Zimmerman's list to Biallas. Thereafter some crewmembers were given written warnings. The Company presented in evidence a written warning to Ricketson, signed by Bal and acknowledged by union steward Schmude, but not Ricketson, and a written warning to Denson, signed by Bal and acknowledged by both Schmude and Denson. Bal testified in sum as follows: About 9:30 a.m. Biallas told him that Zimmerman observed Miller and his crew taking an early break, and to issue warning letters to Miller and his whole crew. Bal summoned Foreman Miller, who admitted that the accusation was true. Bal told him that this could cause problems for the Company. Bal wrote out the warnings, and summoned Steen and Schmude. Some crewmembers denied being in the area. Bal said he would go back, and if Biallas and Zimmerman lacked proof, he would not write warning letters. Bal asked Biallas if Zimmerman had hard hat numbers. Biallas gave him a list of numbers. Bal tore up the warnings for those not on the list, and issued warnings to those on the list. He gave a warning letter to Ricketson, but did not recall what he said. Steen testified in sum as follows: On September 19 Bal told him he had warning letters for certain named employees, and that Boldt got their numbers. Steen accompanied Bal, and with steward Schmude present, issued the warnings. He could not recall what was said when the warnings were issued. Steen did not, in his testimony, indicate that Bal brought warnings more than one time. No witness identified the employees whose hardhat numbers were on the purported list, and the list was not presented in evidence.

Then Foreman Miller testified in sum as follows: His crew was working when Zimmerman came into the area. Denson and Engel were out on the lift, and Ricketson and three other employees were in the area. Zimmerman did not write down any numbers. Later Bal told him he had to write up the whole crew. Miller said he did not think the employees abused time. He told Bal the employees were 30 seconds early, which was not true, and that they were in a work area. Bal said he had to write up somebody, because Zimmerman told him. He brought warnings which he gave to employees, including Denson. Bal told Miller that if the men were good he would tear up the warnings in a couple of days. Miller believed the warnings were not warranted. Ricketson testified in sum as follows: Zimmerman came into the area about 9:29 a.m. Ricketson, Miller and four other employes were present. Denson was outside on a lift. Zimmerman looked around and said: ''You're cutting it a little green, ain't you fellows?'' But they were working. Zimmerman was carrying a radio, but did not have a clipboard. Later steward Schmude brought for his signature, a warning letter for abusing the morning break. Ricketson said he would not sign until he talked to Bal. He went to Bal, but before he had a chance to speak, Bal stuck the warning letters under his arm and said, ''Forget it.'' Ricketson understood that the warnings were not outstanding. Denson testified in sum as follows: He was working on the scissor lift with Engel, and was not present when Zimmerman came into the area. He heard about the incident when he took his break. Later Miller and Schmude came around with the warning letters. Miller told him: ''It's no big deal. Just go ahead and sign it. Everybody in the crew is going to get one.'' Therefore Denson signed his warning.

I find that Denson and Engel were in fact at work on the lift when Zimmerman entered the area. As indicated, Miller, Ricketson and Denson all so testified, and Zimmerman testified that two employees were working on a ladder. If Denson believed that he was being selected for a recorded disciplinary warning, then it is probable that he would have filed a grievance. However, neither he nor any other employee filed a grievance. I also find significant, Steen's testimony which indicates that Bal came around only once with warnings. I find that when Zimmerman checked the area, he saw what appeared to be employees beginning their morning break shortly before 9:30 a.m. He did not record any numbers, but simply went to Bal and demanded that Miller and his crew be disciplined. In order to appease Zimmerman, Bal wrote out disciplinary warnings for the entire crew. When Bal realized that it would be impossible to determine which if any employees took any early break, he assured Miller that the matter would be forgotten. I find that the Company never recorded the warnings, Ricketson and Denson had no disciplinary warnings in their personnel records, and in this regard the organizational chart presented in evidence is false.

No employee was disciplined in connection with the damaged wire cable incident. Nevertheless as indicated, Bal testified that he selected Ricketson and Denson for layoff in part because of their alleged involvement in the incident. The Company's records do not indicate who worked on the wire when it was damaged. They simply indicate that Foreman Bob Lowe's crew repulled the cable about 2 months after the incident, and Foreman Miller initialed records to that effect. Vice President Biallas testified in sum as follows: In July Miller's crew was assigned to pull six high voltage cables. About September 1 Consolidated Paper tested the cables and found them defective. The Company's investigation determined that a cable was crushed when it was pulled in. The employees should have reported the problem. Instead they continued to pull and damage all the cables. The machine for pulling met industry standards. Biallas supervised the repulling, using the same equipment, and the cables tested satisfactorily. Biallas did not know whether another crew worked on the defective cable, did not investigate to find out, and did not know whether Denson worked on the cable terminal. Biallas and Project Manager Bal testified that the damage cost the Company about $50,000, and the Company presented records to that effect. Bal testified that Miller's crew was responsible for laying the damaged cable. He conceded that Denson was not then in Miller's crew, but nevertheless testified, without explanation, that Denson was involved in terminating the cable. Ricketson testified in sum as follows: In mid-August he learned that in early July, a high voltage cable allegedly was not pulled properly and con-

sequently broke down. Ricketson's crew worked on the cable, but another contractor (Van Ert Electric) also worked on the cable. The day shift began installing the cable and the night shift terminated the cable. Ricketson's crew did the best they could in pulling the cable with what Ricketson considered to be barely adequate equipment. The multiple cables were above ground, and any problems would be visible. Ricketson did not see any cable wrinkle. Moreover, wrinkling does not necessarily harm a cable. Foreman Miller substantially corroborated Ricketson's testimony. Miller testified that the Company (including his crew) and Van Ert, and two shifts worked on the cable, his crew did not have adequate equipment, and consequently they made their own rigging. Miller further testified that in mid-August he learned there was a problem when Consolidated Paper tested the wire, the cause of the problem was not determined, and the cable was repulled by another crew. Denson testified that he was not with the crew when the damage allegedly occurred.

If, as indicated by Biallas, the employees' principal fault was in failing to report damage to one cable, then it is probable that the Company would have taken action against the responsible crew foreman, and probably demoted the foreman, upon determining the cause of the problem. However, the Company took no disciplinary action against Miller or any of his crew. Indeed Bal admitted that Steve Traxinger, who may have been acting as foreman at the time of the damage, was subsequently promoted to foreman of a wire pulling crew. It is also evident that the Company had no reason to believe that Denson had anything to do with installation of the cable. If he did, then by the ostensible reasoning of Biallas and Bal, the crew on which he was then working (Dorski's crew), including Dorski himself, should also have been selected for layoff on November 21. However, only one member of Dorski's crew was laid off on that date. It would make no sense to single out Denson and Ricketson for layoff in whole or part because of the incident. No evidence was presented that would indicate that members of Miller's crew, other than Ricketson and Denson, were laid off ahead of employees in other crews performing comparable work. Indeed Bal admitted in his testimony that he did not know which individuals in Miller's crew as of November 21, were also in his crew in July. Therefore I find that the Company did not hold Miller or his crew responsible for the damage, and I do not credit Biallas' testimony that he told Bal to lay off all the employees involved with the defective cables.

I am not persuaded that the Company's decision to conduct a layoff on November 21 was discriminatorily motivated, although the circumstances are at least suspicious. The testimony of Biallas and Bal indicates that the Company ignored the owner's directive to reduce its work force in September, yet against its better judgement swiftly complied with the owner's directive of November 20, laying off 34 employees, and less than 4 weeks later, called the union hall for 17 employees. However, I find that the Company's professed reasons for selecting Ricketson and Denson for layoff were demonstrably false and pretextural. Ricketson was a highly regarded employee who the Company considered qualified to serve as a foreman. Denson had a satisfactory work record. Neither employee had a recorded disciplinary warning. Ricketson testified that he was never given a warning about his productivity or work attitude, and his testimony was corroborated by Miller and Steen. As indicated, the Company offered no explanation as to why Ricketson and Denson were laid off while Deutsch and Engel were retained. Bal's lack of credibility with respect to his alleged reasons for laying off Ricketson and Denson, confirmed in part by the Company's own professed records and Steen's testimony, demonstrates an overall lack of credibility with respect to the subject matter of this proceeding.

Returning to the events of November 20 and 21, I find with respect to the conversation in the Body Shop bar, Bal initially refused to tell Denson whether he would be laid off. However when Nagy left them alone, Bal let his hair down, and told Denson that if he and Ricketson dropped the charges against Clark they would not be included in the layoff. As of November 20 and 21, so far as Bal knew, the charges were still pending. Clark knew, and probably told Bal, that Ricketson told the trial board that the charges were incorrect only in that Ricketson gave the wrong date. Therefore Clark and Bal could and probably did reasonably assume that the charges would remain pending or that Ricketson would file new or amended charges. I further find, as indicated in Denson's affidavit, that he did not give Bal an answer. As the charges were filed by Ricketson, Denson would not likely commit himself without first consulting with Ricketson. The next day, Bal having failed to receive a satisfactory answer, Steen told Miller (as testified by Miller) that Ricketson and Denson were being laid off because of the charges against Clark. I find as Denson indicated in his affidavit, that Steen simply told Ricketson and Denson that they knew why they were being laid off. It is unlikely that Steen would express the real reason in the presence of witnesses.

I find that the Company threatened to lay off Ricketson and Denson unless they dropped the charges against Clark, and laid off Ricketson and Denson because of their activities in filing and witnessing the charges, and their failure to withdraw the charges. Ricketson engaged in union and protected concerted activities. *Tracy Towing Line*, 166 NLRB 81, 82 (1967), enfd. sub nom. *NLRB v. Maritime Union Local 333*, 417 F. 2d 965 (2d Cir. 1969); see also *London Chop House*, 264 NLRB 638, 639 (1982); *Terpening Trucking Co*., 271 NLRB 96, 102 (1984). Therefore the Company violated Section 8(a)(1) and (3) of the Act.[3]

## Conclusions of Law

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

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

3. By discriminatorily terminating John Ricketson and David Denson, thereby discouraging membership in the Union, the Company has violated and is violating Section 8(a)(3) of the Act.

4. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7

[3] On the basis of the threat by Bal and statement of Steen to Miller, and the false and pretextural reasons advanced by the Company for the layoffs, General Counsel presented a prima facie case that the Company terminated Ricketson and Denson because of their protected union and concerted activity. As the Company's explanation for selecting them for layoff was not credible, it follows that the Company failed to meet its burden of establishing that it would have terminated them in the absence of such activity.

of the Act, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

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

## THE REMEDY

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

The evidence indicates that the Company engages in numerous projects, some of large scale, and has repeatedly employed traveler electricians, including Ricketson, for its Wisconsin projects. The evidence also indicates that the Company sometimes transfers its better employees rather than lay them off, as it did in 1990 with Ricketson. In these circumstances, I agree with General Counsel that a conventional order of reinstatement with backpay is warranted, notwithstanding that the No. 16 paper machine project was completed in July 1992. I find without merit, the Company's argument (Br. 25) that backpay should be tolled for Denson because he did not register with the Union after his layoff. In fact, as indicated, he signed the out-of-work list on November 22. Even if he did not, the Company's discriminatory refusal to accept referral of Ricketson on December 16, indicates that registering would have been futile. Denson acted promptly to mitigate damages by proceeding to a job in Tennessee.

Having found that the Company discriminatorily terminated Ricketson and Denson, it will be recommended that the Company be ordered to offer them immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings and benefits that they may have suffered from the time of their discharge to the date of the Company's offer of reinstatement. I shall further recommend that the Company be ordered to expunge from its records any reference to their unlawful terminations, to give each of them written notice of such expunction, and to inform them that its unlawful conduct will not be used as a basis for further personnel actions against them. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4] It will also be recommended that the Company be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of backpay and reimbursement due. I do not agree with General Counsel's request (Br. 36) that notices should be sent to all employees currently on the Company's payroll and on its payroll as of November 21, 1991. Such a requirement would be unduly burdensome. However I shall recommend that the Company be ordered to post appropriate notices at its Iron Mountain facility and each of its jobsite locations.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

## ORDER

The Respondent, M. J. Electric, Inc., Iron Mountain, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating or otherwise discriminating against employees because they file internal union charges, give evidence in support of such charges, or otherwise engage in protected union or concerted activities for mutual aid and or protection.

(b) Threatening employees with layoff or other reprisal for engaging in such protected activity, or telling them that they or other employees will be terminated because of such activity.

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

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

(a) Offer John Ricketson and David Denson immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for losses they suffered by reason of the discrimination against them as set forth in the remedy section of this decision.

(b) Expunge from its files any reference to the terminations of John Ricketson and David Denson, and notify each of them in writing that this has been done and that evidence of their unlawful termination will not be used as a basis for future personnel actions against them.

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

(d) Post at its Iron Mountain, Michigan place of business and at each of its jobsites, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

[4] Under *New Horizons*, interest on and after January 1, 1987, is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[5] 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.

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

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

## APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT terminate or otherwise discriminate against employees because they file internal union charges, or otherwise engage in protected union or concerted activities for mutual aid and protection.

WE WILL NOT threaten employees with layoff or other reprisal for engaging in such protected activity, or tell them that they or other employees will be terminated because of such activity.

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

WE WILL offer John Ricketson and David Denson immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for losses they suffered by reason of the discrimination against them, with interest.

WE WILL expunge from our files any reference to the terminations of John Ricketson and David Denson, and notify them in writing that this has been done and that evidence of their unlawful termination will not be used as a basis for future personnel actions against them.

M. J. ELECTRIC, INC.