Arlington Electric, Inc. *and* International Brotherhood of Electrical Workers, Local Union 728, AFL–CIO. Case 12–CA–17156

October 24, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On July 16, 1997, Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

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

1. The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the Act when admitted Supervisor Jack Briggs asked David Svetlick whether he was the person mentioned in a union flyer and how he could be working a nonunion job as a union member. Through its questioning, the Respondent acknowledged that it was aware of Svetlick's union activity and implied that he should not be working for the Respondent. Thus, we find that a reasonable employee would find the questioning coercive.[3]

2. The judge additionally found that the Respondent violated Section 8(a)(1) of the Act by threatening Svetlick with discharge because he engaged in concerted, protected activity.[4] The judge found that Jorge Medina made the threat by telling Svetlick that he would probably be fired for distributing a flyer, and that Medina was a supervisor because he had the authority to assign employees work and responsibly direct them in the interest of the Employer using independent judgment. The Respondent excepts to the judge's finding of a violation, asserting that Medina was not a supervisor within the meaning of Section 2(11) of the Act at the time he made the statement. We find merit to this exception.

On the project in question, Medina spent nearly all of his time working as an electrician along with about five or six other employees. When Statutory Supervisor Briggs was offsite or occupied with other work,[5] Medina assigned work to employees, did layouts and inspected work, and accompanied the inspector during inspections. However, it is undisputed that Medina assigned work to employees pursuant to plans and schedules developed by Briggs, who determined the sequence of work. When contractors or employees did not show up, certain work could not be performed and Medina had to reassign employees to work they could perform. It is undisputed that Medina had no authority to hire, fire, discipline, or evaluate employees or require overtime work.

Section 2(11) of the Act defines a "supervisor" as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise is not of a merely routine or clerical nature, but requires the use of independent judgment.

"The possession of even one of those attributes is enough to convey supervisory status, provided the authority is exercised with independent judgment, not in a merely routine or clerical manner." *Union Square Theatre Management*, 326 NLRB 70, 71 (1998); *Pepsi-Cola Co.*, 327 NLRB 1062 (1999).

Here, we find that Medina's assignment of work to other employees, pursuant to plans and schedules developed by Briggs, fails to establish that he is a statutory

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

The judge inadvertently stated at sec. II,A of his decision that David Svetlick was hired on about December 30, 1994, rather than, as the evidence reflects and we find, on about November 30, 1994.

[2] We have modified the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997).

[3] See, e.g., *TRW-United Greenfield Division v. NLRB*, 637 F.2d 410, 418 (5th Cir. 1981) ("[a]lthough an employee has openly declared his support for the union, the employer is not thereby free to probe directly or indirectly into his reason for supporting the union" and "it makes no difference that actual coercion was not achieved in the particular instance"); and *NLRB v. Camco, Inc.*, 340 F.2d 803, 807 (5th Cir. 1965) ("[q]uestioning is much more likely to have a coercive effect if the purpose of the interrogation is not explained and if there are no assurances against retaliation"). See also *M. J. Mechanical Services*, 324 NLRB 812, 812–813 (1997) (questioning interviewees whether they were afraid of being caught by the union for working at a non-union contractor found unlawful).

[4] Sec. 8(a)(1) provides that it is unlawful for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Sec. 7 provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

[5] Briggs was offsite for about half of the time in Svetlick's last 2 weeks of employment.

supervisor. See, e.g., *Lab Glass Corp*., 296 NLRB 348, 352–353 (1989). Moreover, his direction of employees does not demonstrate the exercise of independent judgment, but rather involves routine decisions typical of leadmen who have been consistently found by the Board not to be statutory supervisors. See, e.g., *S.D.I. Operating Partners, L.P.,* 321 NLRB 111, 111 (1996), and cases cited therein. See also *Chrome Deposit Corp.*, 323 NLRB 961, 964 (1997) (crew leaders merely possessed "the kind of routine, decision-making authority typical of non-supervisor leadmen" and therefore were not supervisors). Medina provided direction and guidance to other employees based on his experience and craft skill and pursuant to Briggs' project plans rather than as a result of any managerial discretion. Similarly, Medina's inspection of work is an example of the application of his technical competence and experience rather than the exercise of supervisory authority. See, e.g., *Hogan Mfg.,* 305 NLRB 806, 807 (1991). Accordingly, and contrary to the finding of the judge, we dismiss the allegation that the Respondent violated Section 8(a)(1) through Medina's statement to Svetlick.

3. The judge found that the Respondent violated Section 8(a)(3) and (1) by discharging Svetlick for the circulation of two flyers. In this regard, the judge found that Svetlick's circulation of both flyers constituted protected, concerted activity. We agree with the judge's finding, for the reasons stated by him, that Svetlick's circulation of the second flyer constituted protected, concerted activity. The second flyer urged hospital patrons and employees not to use the hospital because the Employer (a subcontractor of the hospital) did not provide paid family health care. See, e.g., *Furr's Cafeteria*, 292 NLRB 749 fn. 1 (1989) (circulation of flyers requesting boycott of cafeteria for whom the employer was performing work is protected activity). See also *Emarco, Inc*., 284 NLRB 832, 833 (1987) (employees may communicate with third parties "in circumstances where the communication is related to an ongoing labor dispute and when the communication is not so disloyal, reckless, or maliciously untrue to lose the Act's protection"). We also reject the Respondent's assertion that a consumer boycott is permitted only during "labor disputes," which occur only when the employees first raise their concerns with the employer, because "[t]he language of Section 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made." *NLRB v. Washington Aluminum Co*., 370 U.S. 9, 13–14 (1962).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Arlington Electric, Inc., Stuart, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees concerning their union or other protected, concerted activities.

(b) Discouraging membership in the International Brotherhood of Electrical Workers, Local Union 728, AFL–CIO, by discharging employees because of their union or other protected concerted activity, or by discriminating against them in any other manner with respect to their wages, hours, or other terms and conditions of employment.

(c) 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.

(a) Within 14 days from the date of this Order, offer David Svetlick full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make David Svetlick whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

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

(d) Preserve and, within 14 days of a 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 under the terms of this Order.

(e) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the no-

[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."

tices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 14, 1994.

(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.

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.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate you about your union or other concerted protected activities.

WE WILL NOT discourage membership in the Union by discharging you because of your union or protected activity, or by discriminating against you in any other manner with respect to your wages, hours, or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under the Act.

WE WILL, within 14 days from the date of the Board's Order, offer David Svetlick full reinstatement to his former position or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make David Svetlick whole for any loss of earnings and other benefits resulting from his discharge, less any net earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the discharge of David Svetlick and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

ARLINGTON ELECTRIC, INC.

Arturo Ross, Esq., for the General Counsel.

William R. Radford, Esq. (Morgan, Lewis & Bockius), of Miami, Florida, for the Respondent.

David Svetlick, International Brotherhood of Electrical Workers, Local Union 728, AFL–CIO, of Fort Lauderdale, Florida, for the Charging Party.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge was filed on May 24, 1995, by the International Brotherhood of Electrical Workers, Local Union 728, AFL–CIO (the Union). Complaint issued on May 15, 1996, and alleges that Arlington Electric, Inc. (Respondent or the Company) interrogated employees concerning their union activities and sympathies, and threatened them with discharge because they assisted the Union in violation of Section 8(a)(1) of the National Labor Relations Act. The complaint further alleges that Respondent discharged employee David Svetlick on December 21, 1994, because he assisted the Union and engaged in other concerted activities for mutual aid and protection, thus violating Section 8(a)(3) and (1) of the Act.

A hearing on these matters was held before me in Miami, Florida, on January 21 and 22, 1997. Thereafter the General Counsel and Respondent filed briefs. Based on the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The pleadings establish that Respondent is a Florida corporation with an office and place of business in Stuart, Florida, where it is engaged as a subcontractor in the building and construction industry performing electrical systems installation work. During calendar year 1995, Respondent purchased and received at its Florida facilities goods valued in excess of $50,000 from points located outside the State of Florida. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

II. ALLEGED UNFAIR LABOR PRACTICES

A. Svetlick's Employment and Union Activities

David Svetlick was a paid union organizer during the period he worked for Respondent. Answering an advertisement, he applied for work at Respondent's jobsite in Hollywood, Florida, where the Company was doing the electrical work in the construction of a separate rehabilitation building which was part of the Pembroke Pines Hospital complex. Svetlick was hired on about November 30, 1994. He did not wear any union insignia at the time he was hired, and did not list any prior employment with employers who had used union employees. Svetlick was discharged about 3 weeks after being hired.

There were about five or six employees on the project during Svetlick's period of employment. During his first week on the job, two of them complained that their wages were not high enough. Svetlick suggested that they form an employee "association" and "demand more money." Svetlick volunteered to head the organization and obtain wage increases.

During Svetlick's first week of employment, Respondent offered a $50 "finder's fee" for any employee who could get new employees for the project. Svetlick caused another union organizer to get three applicants at Respondent's jobsite. Two of them used Svetlick's name as a reference, and were hired.

At the beginning of Svetlick's second week of employment, he was having lunch with two carpenters who were wearing T-shirts with the name of their own carpenters' union. Electricians were present, and Svetlick asked the carpenters questions about their union and benefits.

The next day Svetlick asked a temporary employee whether he would be interested in joining the Union.

B. Svetlick's Conversations with Jorge Medina—Medina's Alleged Supervisory Status

1. Svetlick's conversations with Medina

During the latter part of his second week of employment, Svetlick talked about the benefits of unions with Jorge Medina, an alleged supervisor. At the beginning of his third week of employment, Svetlick began wearing union insignia—a T-shirt, cap, and pencil clip. Medina asked him if he was in the Union, and Svetlick replied that he was. Svetlick and Medina talked more about the Union, and Svetlick explained the benefits. Svetlick discussed the initiation fee, testing, and had an "in depth" discussion about health insurance. Svetlick explained the family insurance provided by the Union, the payment for drugs and medicines, the co-pay, and other provisions. According to Svetlick, Medina said that he had insurance covering himself with the Company, but that family insurance was too expensive. Medina testified, corroborated Svetlick's testimony on this issue, and said that the union insurance sounded "good."1

Svetlick also discussed the Union's journeyman scale with Medina. The latter said that he was making more with Respondent, but that he was not interested in traveling extensively for work. If the Company did not get more work in Dade or Broward counties after the current job ended, he would be interested in getting a union-sponsored job closer to home. Medina acknowledged that Svetlick never said that Medina would have to leave Respondent's employment in order to join the Union.

2. Medina's alleged supervisory status

a. Summary of the evidence

Medina was formerly the supervisor for Respondent at a job constructing a parking garage for the University of Miami. His pay was $16 hourly. In midsummer 1994, he started working at Respondent's Pembroke Pines job at the same pay rate.

Jack Briggs was the admitted supervisor of the Pembroke Pines job. Medina described himself as a "leadman" at that job.

The General Counsel elicited evidence to establish that Medina performed supervisory functions at Pembroke Pines. Thus, Svetlick testified that Briggs was absent from the jobsite 40 to 50 percent of the time, and that Medina filled in for him on those occasions. According to Svetlick, Briggs was absent half the time in the morning when Svetlick arrived. Medina assigned work to employees, did layouts and pre-inspections, and accompanied the inspector during inspections. In the morning, he opened the "gang-box," took out equipment, and told employees which projects to work. On occasion he reassigned employees to different jobs. He did this with respect to all the employees on the jobsite. Svetlick averred that Medina did this on occasions when Briggs was present on the jobsite. Svetlick regarded Medina as his supervisor.

Michael O'Melia testified that Briggs was absent about 20 percent of the time, and that there were days when he did not show up at all. Medina gave the work assignments, including "redo or repair" of work O'Melia had done, or work another employee had done. These activities took place when Briggs was on the jobsite and busy in another area, or attending a meeting. Briggs was frequently at meetings, according to O'Melia. There was never a week when he did not get orders from Medina.

On direct examination, Medina testified that he directed employees to perform and correct work, but only pursuant to Briggs' instructions made according to a plan. Medina still instructed employees to lay out work on his own. However, on cross-examination Medina was shown Respondent's timesheets, and agreed that they demonstrate that Briggs was away from the Pembroke Pines job 16 out of 40 hours during Svetlick's second week of employment, and 23 out of 40 hours during Svetlick's third and last week of employment.2 On those occasions, according to Medina, he assigned employees their jobs and directed their activities. He had to make certain that only employees qualified to do the work were in fact sent to these jobs.

Medina was asked on redirect examination whether Briggs determined the sequence of work. He replied, "Like I said before, sometimes other contractors are not ready in one area, and you have to make a judgment call." On recross-examination, Medina agreed that Briggs' plans could not provide for every eventuality. "There's some unforeseen things where two guys don't show up and you've got to do something else."

Supervisor Jack Briggs testified that he was supervising two jobs at the same time—the Pembroke Pines job and another at the Hollywood Memorial East Hospital. They were about 20 to 25 miles apart. He contended that he spent only 10 hours weekly at the Hollywood Memorial East job during December 1994. Asked who assigned work to employees during these 10 hours, Briggs replied that the employees merely did what he had already assigned to them to do. Asked who disciplined the employees during these absences, Briggs replied, "Nobody." Briggs agreed that Medina inspected the work with a blueprint to make certain that the employees had performed the work satisfactorily. Medina could also order employees to redo or repair work. Asked whether Medina was not in fact directing employees' work during these times, Briggs replied, "No, he was a licensed journeyman."

b. Factual and legal conclusions

Respondent's records and the testimony of Svetlick and O'Melia establish that Briggs was absent from the Pembroke Pines job for significant periods of time during the last 2 of Svetlick's 3 weeks of employment, more than half of the last week. On those occasions, according to Medina himself, he assigned employees to jobs, making sure that only qualified employees were sent to specific jobs. Although Respondent attempted to establish that Medina only followed a "plan" given to him by Briggs, Medina testified that, when contractors or employees did not show up, he had to make a "judgment call." This is consistent with Svetlick's and O'Melia's testimony that Medina reassigned work. In addition, he ordered repair work. Medina inspected work with a blueprint, and made certain that work had been performed satisfactorily.

I credit the uncontradicted testimony of Svetlick and O'Melia that Medina performed these functions when Briggs was present on the jobsite, but was occupied with other work or meetings.

Section 2(11) of the Act defines a supervisor as

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Court of Appeals for the Fifth Circuit has stated: "The functions of a supervisor listed in the statute are disjunctive; the Board need not show that an employee performed all or several of the functions to support a finding of supervisory status." *NLRB v. Dadco Fashions, Inc.*, 632 F.2d 493 (5th Cir. 1980), enfg. 243 NLRB 1193 (1979).3

I conclude that Medina had authority to assign employees to work and responsibility to direct them in the interest of the employer. He was required to use independent judgment in determining whether a particular employee had the qualifications to do a particular job. He checked their work, and ordered repair work when necessary. When contractors or employees did not show up, had to make a "judgment call" in work assignment. The Board has held on similar facts that these responsibilities establish supervisory status.4 At least two circuit courts of appeal have sustained the Board's finding of supervisory status where responsible direction of work constituted a key factor in the Board's conclusions.5

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[1] The Company's personnel manual provides that an employee may request information regarding the cost of insurance. GC Exh. 6, sec. 7.5.

[2] Jt. Exh. 1.

[3] See also *NLRB v. Brown Speciality Co.*, 436 F.2d 372, 375 (7th Cir. 1971), enfg. 174 NLRB 519 (1969), 180 NLRB 969 (1970).

[4] *Lab Glass Corp.*, 296 NLRB 348 (1989); *F. Mullins Construction*, 273 NLRB 1016 (1984); and *Debber Electric*, 313 NLRB 1094 (1994).

[5] *NLRB v. Dadco Fashions, Inc.*, supra; and *Justak Bros. & Co. v. NLRB,* 664 F.2d 1074 (7th Cir. 1981), enfg. 253 NLRB 1054 (1981).

I conclude on this authority that Medina was a supervisor within the meaning of the Act.[6]

C. Svetlick's Distribution of the First Flyer and Briggs' Interrogation

1. Summary of the evidence

Early in his third week of employment, Svetlick distributed a flyer reading:

ATTENTION

Electricians

IBEW LU 728 is in Need of your Services for Employment with our Union Contractors

$15.60 per Hour Plus Benefit Package

Call: John Ranken or David Svetlick

Organizers (305) 525–3106

All Inquiries Will Be Kept Confidential[7]

Svetlick testified that his object in distributing the flyer was to show the employees that union wages were obtainable to get them interested, and to approach the Company about becoming a union contractor. He distributed copies in the employee gangbox and other areas where the employees kept tools. Svetlick testified that Supervisor Briggs asked him whether he was the David Svetlick mentioned in the flyer, and Svetlick replied that he was. Briggs further asked how Svetlick, a union member, could be working a nonunion job. Svetlick replied that it was his duty to organize employees.

Supervisor Briggs testified that he saw a copy of the flyer in the employee gangbox. He removed it, and faxed a copy to Respondent's president, James Williams. Briggs denied speaking to Svetlick about this flyer. Briggs saw other copies elsewhere on the jobsite, which he did not remove.

Respondent's president, James Williams, testified that Briggs called and informed him about the flyer. Williams instructed Briggs to fax him a copy, and the latter did so. Williams then called Briggs and instructed him to "take no action regarding the flyer or any activities of Mr. Svetlick on the job."

2. Factual and legal conclusions

As described hereinafter, Briggs admitted talking to Svetlick about another flyer Svetlick distributed near the hospital. Briggs' conversation with Respondent's president, Williams, indicates that there was no doubt that the "David Svetlick" mentioned in the first flyer was the individual employed by Respondent. This is consistent with Svetlick's testimony that Briggs asked him whether he was the person mentioned in the flyer. Svetlick had a more truthful demeanor than Briggs, and I credit his testimony that Briggs asked him whether he was the same person, and how he could be working a nonunion job, as a union member.

In an early statement of the principles to be applied in such cases, the Board stated:

> In our view, the test is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act. The fact that employees gave false answers when questioned, although relevant, is not controlling. The Respondent communicated its purpose in questioning the employees—a purpose which was legitimate in nature—to the employees and assured them that no reprisal would take place. Moreover, the questioning occurred in a background free of employer hostility to union organization. These circumstances convince us that the Respondent's interrogation did not reasonably lead the employees to believe that economic reprisal might be visited upon them by Respondent. [*Blue Flash Express*, 109 NLRB 591, 593 (1954).]

The Board distinguished its decision in *Blue Flash* from a contrary holding, in which the interrogation took place a week before a Board election, and the employer failed to give the employees any legitimate reason for the interrogation or assurances against reprisal (id.).

The Board reiterated this standard in *Rossmore House*, 269 NLRB 1176 (1984), where it rejected a per se approach to interrogation of open union adherents and concluded that the test was whether, under all of the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by the Act (id. at 1177). The Board stated some of the factors to be considered:

> Some factors which may be considered in analyzing interrogations are: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner, and (4) the place and method of interrogation. See *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). These other relevant factors are not to be mechanically applied in each case. Rather, they represent some areas of inquiry that may be applied in applying the *Blue Flash* test of whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. [Id., 269 NLRB at 1178 fn. 20.]

The Board has concluded that interrogation of a known union adherent's union sympathies was coercive. *Baptist Medical System*, 288 NLRB 882 (1988). In *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), the Board applied the same test to interrogation of employees who were not open union adherents. The Court of Appeals for the Fifth Circuit recently affirmed a Board finding of coercive interrogation because of the employer's promulgation of an illegal rule, and a history of attempting to engage in the same practice in the past. *NLRB v. Brookshire Grocery Co.*, 919 F.2d 359 (5th Cir. 1990), enfd. in part 294 NLRB 462 (1989).[8]

The Board has recently considered a case with similarities to the case at bar. In *Stoody Co.*, 320 NLRB 18 (1995), there was no apparent purpose for the questions, nor were any assurances given that the employee did not have to answer or that his job was not endangered. The violations in *Stoody* consisted only of transgressions of Section 8(a)(1), whereas here the Respondent discharged Svetlick.[9]

I conclude that the circumstances in this case were at least as coercive as they were in *Stoody*, and that Respondent, by Briggs' questions, violated Section 8(a)(1).

D. The Hospital Flyer and Medina's Alleged Threat

1. Summary of the evidence

On December 19 and 20, Svetlick and another union organizer distributed a flyer during the lunch hour. The organizer, John Ranken, had applied for employment with Respondent. The flyer read:

PLEASE DO NOT
USE
THIS HOSPITAL

ARLINGTON ELECTRIC
My Employer Has No Paid Health Care for My Family.

Thank You.
Arlington Electric Employees.[10]

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[6] The General Counsel argues that Medina's wage rate of $16, equal to the supervisory rate he received at his prior job with Respondent, and the fact that Svetlick considered Medina to be his supervisor, constitute secondary indicia of supervisory status. I consider the facts and authority recited above to be sufficient without relying on these additional arguments.

[7] GC Exh. 4.

[8] Citing *Bourne*, supra, the court listed eight factors to be considered in determining whether interrogation has been coercive: (1) the history of the employer's attitude toward its employees; (2) the nature of the information sought or related; (3) the rank of the questioner in the employer's hierarchy; (4) the place and manner of the conversation; (5) the truthfulness of the employee's response: (6) whether the employer had a valid purpose in obtaining the information sought; (7) whether a valid purpose, if existent, was communicated to the employee that no reprisals would be forthcoming. Although some of these factors were not satisfied, the court in *NLRB v. Brookshire Grocery*, supra, agreed with the Board that the interrogation had been coercive.

[9] See also *Cumberland Farms*, 307 NLRB 1479 (1992).

[10] GC Exh. 5.

As indicated, the rehabilitation building was separate from the Hospital. The latter had separate entrances, a sidewalk, and separate parking areas. In the beginning, the employees parked near the construction site, but later parked in the hospital parking lot nearest the construction site.

Svetlick and the other organizer positioned themselves on a sidewalk about midway between the hospital entrance and an employee entrance, and distributed copies to hospital patrons and employees. They also placed copies of the leaflet on the automobiles of patrons.

Svetlick testified that Supervisor Briggs asked him whether he knew about the leaflet, and Svetlick replied that he distributed it. Briggs asked how Svetlick could distribute such lies. Svetlick replied that they were not lies and that Briggs had to read the flyer again. It merely stated that Respondent did not provide paid health insurance for an employee's family. Svetlick derived this information from a document setting forth Respondent's "Personnel Policies." This document states that health and accident insurance benefits were available to employees, and that they could request information concerning the cost of insurance.11 In addition, Medina told Svetlick that he obtained for his family insurance elsewhere, because the cost of the Company's insurance was too high. Briggs agreed that he spoke to Svetlick about the hospital flyer.

Svetlick testified that, after this conversation, Briggs "stormed out of there rather mad." Medina was present and, according to Svetlick, said that Svetlick "wouldn't be long for the job." Svetlick asked the reason for this statement, and Medina replied that the Company would probably fire him.

Medina confirmed that Briggs was "hot and bothered" about the hospital flyer. He rolled it up into a ball and threw it across the room, then came back to retrieve it. On direct examination Medina denied that he ever told Svetlick that he might be fired for distributing the leaflet, but did tell him that he did not know what might happen if Svetlick continued the distribution. On cross-examination, Medina conceded that it was possible that he told the General Counsel that he said Svetlick might be fired for distributing the hospital leaflets.

2. Factual and legal conclusions

Medina corroborated Svetlick as to Briggs' "hot and bothered" response to the hospital flyer. Medina's denial that he told Svetlick he might be fired for distribution of the hospital flyer is vitiated by his admission on cross-examination that he might have done so. I credit Svetlick's testimony that Medina told him that Svetlick would probably be fired for distribution of the hospital flyer. Even if Medina's version is accepted—that he did not know what might happen if the flyer distribution continued—this constituted a veiled threat that such distribution would cause Svetlick's discharge.

The Board has concluded that a supervisor's telling an employee that he would not be laid off as long as he stopped talking about the union was coercive. The fact that the relationship between the supervisor and employee was cordial (as in the case at bar) did not justify a contrary finding. The supervisor's statement constituted a message from the supervisor's management that the employee would be laid off if he did not stop talking about the union. *J. T. Slocomb Co.*, 314 NLRB 231 (1994).

Respondent argues that Medina did not evince any displeasure in Svetlick's activities, and had himself evidenced some interest in the Union. Accordingly, Respondent argues, such a remark is not attributable to the employer.12 As *Slocomb*, supra, points out, a statement of this nature to an employee constitutes a message from management. It is well settled that statements from supervisors are attributable to management. *NLRB v. Ace Comb Co.*, 342 F.2d 841, 844 (8th Cir. 1965); and *Jays Foods, Inc. v. NLRB*, 573 F.2d 438, 445 (7th Cir. 1978).

Respondent also argues that Svetlick was a "paid Salt," and, as such, is not entitled to the "same umbrella of protection afforded other employees."13 This argument is flatly contrary to the Supreme Court's holding in *NLRB v. Town & Country Electric,* 516 U.S. 85 (1995).

For these reasons, I conclude that Respondent, by Supervisor Medina's statement to Svetlick, unlawfully threatened him in violation of Section 8(a)(1) of the Act.

[11] GC Exh. 6, sec. 7.3–7.5.
[12] R. Br. at 24.
[13] R. Br. at 24.

E. Svetlick's Discharge

1. Summary of the evidence

As indicated, Svetlick was discharged on December 21. The decision was made by Respondent's president James Williams. He testified that he knew that Svetlick was a union organizer engaged in union organizing activities. However, Williams contended, this had nothing to do with his decision to terminate Svetlick. Rather, it was Svetlick's distribution of the flyers. The first one, notifying employees that the Union was in need of their services with union contractors at $15.60 hourly plus a benefit package signified to Williams that he had an employee "in (his) henhouse stealing (his) chickens." If any employee had signed up with the Union, Williams would have fired Svetlick.

With respect to the hospital flyer, Respondent elicited testimony from Williams that a representative of the general contractor told Williams that he would be removed from the job if distribution of the flyer continued. The testimony was elicited not for the truth of the assertion, but to explain Williams' conduct. This asserted fact, and Svetlick's extending his activities to the hospital, away from the jobsite, led Williams to conclude that Svetlick was "disloyal." Svetlick testified that a supervisor of the general contractor told him that distribution of the hospital flyer was "not a smart thing to do."

Williams prepared a notice of termination. The explanation section reads: "We have considered all the facts and circumstances involving your employment and have made a decision to terminate you."14 He went to the jobsite and gave the notice to Svetlick, who refused to sign it because the explanation was "too vague."

Williams also gave Svetlick a check for $100 as his finder's fee for the two employees Svetlick brought to the Company. Williams and Svetlick had an amiable conversation, and Svetlick said that he would have the Union's business agent get in touch with Williams. The business agent did so, and Williams had lunch with him. The business agent gave Williams a proposed contract, which he considered but did not execute.

2. Legal conclusions

Section 7 of the Act gives employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Respondent argues that Svetlick was not engaged in such concerted activities. The Company contends that Svetlick's distribution of the flyers was undertaken without the prior approval of any of the employees, that they expressed no dissatisfaction with the Company's health care benefits, and that the flyers were not part of any effort to initiate group action.15

These arguments are not supported by the record. Two employees complained to Svetlick that their wages were not high enough; he suggested an employee "association to demand more money," and asked a temporary employee whether the latter would be interested in joining the Union. Even Medina, a supervisor, complained about the high cost of insurance. Svetlick was assisted in his distribution of the hospital flyer by an applicant for employment.

The Board stated in *Myers II*:16

> [W]e intend that *Myers I* be read as fully embracing the view of concertedness exemplified by the *Mushroom Transportation* line of cases. We reiterate, our definition of concerted activity in *Myers I* encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.

In *Myers I* we noted with approval *Root Carlin, Inc.*, 92 NLRB 1313, 1314 (1951), a decision antedating *Myers I* by 33 years, in which the Board recognized that:

> Manifestly, the guarantees of Section 7 of the Act extend to concerted activity which in its inception involves only a speaker and a listener, for such activity is an indispensable preliminary step to employee self-organization.

[14] GC Exh. 7.
[15] R. Br. at 27.
[16] *Myers Industries*, 281 NLRB 882, 887 (1986) (*Myers II*), enfd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

More recently, in *Vought Corp.*, 273 NLRB 1290, 1294 (1984), enfd. 788 F.2d 1378 (8th Cir. 1986), the Board noted with approval the Third Circuit's comments in *Mushroom Transportation*, supra, that:

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducting or preparing for group action in the interest of the employees.

There can be no doubt that Svetlick's discussion with two employees to form an employee association to "demand more money," his solicitation of a temporary employee to join the Union, and his distribution of the first flyer to show employees that union wages were obtainable and thus to prepare for the approach to management, establish that he was engaged in protected, concerted activity under the *Myers II* definition set forth above. I so find.

Respondent next argues that the distribution of the flyers did not relate to any ongoing labor dispute, because neither Svetlick nor any employee had lodged any complaint with management regarding health care or other term or condition of employment. Under this peculiar reasoning, no organizational effort would be protected unless a prior demand had been made on management. Indeed, Respondent explicitly argues: "The cases applying the 'ongoing labor dispute' requirement to employee communications presuppose the existence of a dispute between the employee and his or her employer *prior* to the allegedly protected communication," citing *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980). In the latter case, the Board in fact held to the contrary.

> [I]t is not the Board's function to appraise the potential effectiveness of the tactics utilized by employees in their disputes with management. At what point the employees determine that third-party assistance will be of more benefit than private talks with their employer is a tactical decision. Thus, if the communication is related to the dispute, the employee sending the communication is equally protected whether such a step is taken early on in the dispute, or at a later date after all internal avenues have been exhausted.

[248 NLRB at 231.] Respondent's argument is without merit.

Respondent next argues that the first flyer was an unlawful attempt to induce Respondent's employees to leave the Company, to "strip" it of employees. This argument requires consideration of various authorities. Employees who engage in certain activity even though concerted but designed to injure their employer's business have been found to be without the protection of the Act. *NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard Broadcasting)*, 346 U.S. 464 (1953), affg. 94 NLRB 1507 (1951). An employer may lawfully impose discipline for concerted employee activity which is disruptive or impairs maintenance of discipline. *NLRB v. Blue Bell*, 219 F.2d 796, 798 (5th Cir. 1955). Conduct which is considered "disloyal" to an employer may also justify discipline. *Jefferson Standard*, supra. However, not every form of concerted activity loses the protection of the Act merely because it might ultimately have a detrimental effect on an employer. Strike activity itself may have such an effect. The ultimate issue is whether the conduct was necessary and legitimate to employee ends. *Jefferson Standard*, supra.

In *Boeing Airplane Co.*, 110 NLRB 147, (1954), enf. denied 238 F.2d 188 (9th Cir. 1956), the Board considered a Manpower Availability Conference designed to enhance the union's bargaining position with Boeing. The Board held that the activity of the employee involved and the union presented only a conditional threat to the company, and was not a direct attack on the company's business unrelated to a term or condition of employment. Accordingly, the conduct was protected, and the employee's discharge was unlawful. Two Board members dissented. The Court of Appeals for the Ninth Circuit denied enforcement because the employee was acting as a licensed and bonded employment agent attempting to secure outside positions for Boeing's engineers, and refused to give up this position.

In another case, a former employee, while employed by a third party, attempted to induce the employer's employees to leave the employer and work for union contractors. The employer then barred the former employee from its premises while in the employ of a third party, and the Board concluded that the employer did not violate the Act. *Clinton Corn Processing Co.*, 194 NLRB 184 (1971). In *Hoover Co. v. NLRB*, 191 F.2d 380 (6th Cir. 1951), the court refused to enforce the Board's Order reinstating two members of the union's executive committee who failed to disassociate themselves from a national boycott of the employer's products.

In *Technicolor Services*, 276 NLRB 383 (1985), the employer was facing competition for renewal of its contract with the U.S. Air Force. A union steward distributed applications for employment with one of the employer's competitors, and was discharged. The administrative law judge concluded with Board approval that the Union's interest was in continued employment of its members, not the displacement of the employer. As evidence of this conclusion, it was noted that the union agreed to early reopening of bargaining agreement negotiations which, if successful, would enhance the employer's chances of obtaining renewal of its contract. The union promised to withhold submission of the applications until the result of the contract bidding became known.[17]

Respondent argues that *Technicolor Services* is inapplicable to this case because Svetlick knew that the Pembroke Pines job was scheduled to continue for some time, and, accordingly, he could not have been interested only in maintaining employment for the employees. He was, as the employer's president contended engaged in "stripping" the employer's employees from their positions.[18] The General Counsel argues that Svetlick was simply informing employees of their other opportunities, and was not inducing them to leave Respondent.[19]

The validity of Respondent's premise to this argument—the predictability of continued employment in the construction industry—is questionable. In any event, Svetlick was attempting to induce the employees to seek higher wages and better working conditions, not merely maintenance of employment. He testified that his object was to get the employees interested in greater benefits so that they could then ask for them from the employer. He did not go as far as the steward in *Technicolor Services*, i.e., distribute employment applications for a competitor directly to employees. Rather, his message was conveyed by way of a leaflet. In a case where the employer discharged an employee in part because she solicited employees to work for a competitor, the Board held that the discharge violated the Act. *QIC Corp.*, 212 NLRB 63, 69 (1974).

Respondent's position that Svetlick was trying to "strip" it of its employees is contradicted by the fact that Svetlick actually brought two new employees to the Company; Company President Williams gave Svetlick his $100 bonus for doing so. I conclude that Svetlick was not trying to "strip" Respondent of its employees.

Respondent adds a last argument: the hospital flyer was a "boycott," and an employee's support of a "boycott" violates the Act unless it is related to an ongoing labor dispute, and does not disparage the employer's product.[20] The hospital flyer related to an ongoing labor dispute for the reasons given above. It did not disparage Respondent's "product"—the installation of electrical systems. In fact, it said nothing whatever about the "product," but merely claimed truthfully that Respondent had no paid health care for the employees' families. The record shows that all Svetlick and Ranken did was distribute the leaflets. They were thus engaged in handbilling, and were protected by the publicity proviso to Section 8(b)(4) of the Act. *Milk Drivers & Dairy Employees Local 537*, 132 NLRB 901 (1961); and *Great Western Broadcasting Corp. v. NLRB*, 356 F.2d 434 (9th Cir. 1966).

Respondent's animus against Svetlick's organizational activities is established by Medina's statement to Svetlick that Respondent would probably fire him because of his distribution of the hospital flyer, and Supervisor Briggs' unlawful interrogation of Svetlick. The General Counsel has thus established a prima facie case that it was Svetlick's organizational activities which

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[17] *Clinton Corn Processing*, supra, was distinguished.
[18] R. Br. at 26.
[19] GC Br. at 15.
[20] R. Br. at 28.

were responsible for his discharge.[21] Respondent's asserted reasons for discharging Svetlick are not justifiable, for the reasons given above. Accordingly, I conclude that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Svetlick on December 21, 1994.

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

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

2. The Union, International Brotherhood of Electrical Workers, Local Union 728, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the National Labor Relations Act by interrogating employees concerning their union activities, and by threatening them with discharge because they assisted the Union.

4. Respondent violated Section 8(a)(3) and (1) of the Act discharging employee David Svetlick on December 21, 1994, because of his union and other protected, concerted activities.

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

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent unlawfully discharged David Svetlick on December 21, 1994, I shall recommend that Respondent be required to offer him immediate reinstatement to his former position, dismissing if necessary any employee hired to fill the position, and to make him whole for any loss of earnings he may have suffered by reason of Respondent's unlawful conduct, by him paying him a sum of money equal to the amount he would have earned from the date of his unlawful discharge to the date of an offer of reinstatement, less net interim earnings during such period, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[22]

I shall also recommend that Respondent be required to remove from its files all references to its discharge of David Svetlick, and to inform him in writing that this has been done, and that his discharge will not be used as the basis of any future discipline of him.

[Recommended Order omitted from publication.]

[21] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); and *Manno Electric*, 321 NLRB 278 fn. 12 (1996).

[22] Under *New Horizons*, interest 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. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 281 NLRB 651 (1977).