NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Lackawanna Electrical Construction, Inc. *and* International Brotherhood of Electrical Workers, Local Union No. 81, AFL–CIO. Cases 4–CA–29391 and 4–CA–29877

April 24, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND BARTLETT

On December 21, 2001, Administrative Law Judge George Alemán issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering 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 briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] as modified, and to adopt the recommended Order[3] as modified.

1. We agree with the judge that the Respondent did not rely on the existence of any "disabling conflict" created by the paid union organizer status of two union applicants as a basis for refusing to hire them. See *Aztech Electric Co.*, 335 NLRB No. 25 at slip op. 5 (2001), and *Sunland Construction Co.*, 309 NLRB 1224 (1992). We therefore find no error in the judge's failure to grant the Respondent's request to reopen the hearing to present additional evidence with respect to this matter.

2. The judge thoroughly analyzed the complaint's refusal-to-hire allegations, but he did not separately analyze the refusal to consider allegations. However, the record fully supports the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to consider for hire six union applicants because: (1) the Respondent excluded them from the hiring process; (2) antiunion animus contributed to its decision not to consider the applicants; and (3) the Respondent has failed to show it would not have considered the applicants even in the absence of their union activity or affiliation. *FES (A Division of Thermo Power)*, 331 NLRB No. 20 (2000), slip op. at 7. Consistent with this analysis, the judge's Conclusion of Law 4 should have stated that the Respondent violated the Act by refusing to hire *and* refusing to consider for hire the six applicants (rather than *or* refusing to consider them).

ORDER

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

1. Substitute the following for paragraph 2(d).

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

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

Dated, Washington, D.C. April 24, 2002

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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.

[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.

For the foregoing reasons, we affirm the judge's resolution of a conflict in testimony by crediting union official Richard Schraeder and discrediting Respondent's president Michael Castellano about the details of their conversation in late March 2000. We find no need to rely on the judge's speculation that Schraeder would not likely have applied for work, or permitted other union members to apply, if he had made the statements attributed to him by Castellano. We also find no need to rely on the judge's alternative analysis for finding a refusal-to-hire violation even if he had credited Castellano.

[2] No exceptions were filed to the judge's findings of several 8(a)(1) violations or to the 8(a)(3) and (1) unlawful wage increase violation.

[3] We shall modify the remedial recordkeeping provision in the recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (2001). We shall also substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001).

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT interrogate job applicants about their Union membership or sympathies.

WE WILL NOT unlawfully poll our employees to determine if they wish to be represented by the Union.

WE WILL NOT promise to increase wages if employees vote against a Union in an election, and WE WILL NOT grant employees wage increases in order to discourage their support for the Union.

WE WILL NOT refuse to hire and WE WILL NOT refuse to consider for hire job applicants because of their membership in, support for or affiliation with the Union.

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

WE WILL, within 14 days of the date of the Board's Order, offer Richard Schraeder, Paul Casparro, Martin Cecci, Gerald Trygar, Patrick Hartman, and Thomas Burns instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

WE WILL make Richard Schraeder, Paul Casparro, Martin Cecci, Gerald Trygar, Patrick Hartman, and Thomas Burns whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, with interest.

WE WILL, within 14 days of the date of the Board's Order, remove from our files any reference to the unlawful refusals to hire and refusal to consider for hire Richard Schraeder, Paul Casparro, Martin Cecci, Gerald Trygar, Patrick Hartman, and Thomas Burns and, within 3 days thereafter, notify them in writing that the refusal to hire and refusal to consider for hire will not be used against them in any way.

LACKAWANNA ELECTRICAL CONSTRUCTION, INC.

Donna D. Brown, Esq., for the General Counsel.
David Guadioso, Esq., for the Charging Party.
Thomas Davies, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

GEORGE ALEMÁN, Administrative Law Judge. Pursuant to unfair labor practice charges filed by International Brotherhood of Electrical Workers, Local Union No. 81, AFL–CIO (herein the Union or Local 81) on May 8, and October 20, 2000, the Regional Director for Region 4 of the National Labor Relations Board (the Board) issued separate complaints which were subsequently consolidated for hearing on February 27, 2001, alleging that Lackawanna Electrical Construction, Inc. (the Respondent) had violated Section 8(a)(3) and (1) of the Act.[1]

The complaint alleges that the Respondent unlawfully interrogated applicants for employment regarding their union sympathies, unlawfully promised to, and did in fact, increase their wages to discourage them from supporting the Union, unlawfully polled employees about their union sympathies, and unlawfully failed and refused to consider and hire job applicants Richard Schraeder,[2] Paul Casparro, Martin Cecci, Gerald Trygar, Patrick Hartman, and Thomas Burns because of their membership in the Union.[3] In timely-filed answers to the complaints, the Respondent denies having engaged in any unlawful conduct.

A hearing in this matter was held in Scranton, Pennsylvania on August 1, 2001, during which all parties were afforded a full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to submit briefs. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Pennsylvania corporation with an office and place of business in Taylor, PA, is engaged in the business of performing commercial and electrical services. During the past year, the Respondent, in the course and conduct of its business operations, purchased and received at its above place of business goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Factual Background

Michael Castellano is Respondent's president and project manager and has sole responsibility for the hiring of employees. As of the date of the hearing, the Respondent had a complement of about 20 employees. The record reflects that some-

[1] All dates hereinafter are in 2000, unless otherwise indicated.

[2] The General Counsel's motion to correct the record, at transcript p. 50, to reflect that Schraeder's first name is "Richard," and not "Victor," is granted.

[3] Just prior to the start of the hearing, the parties entered into an informal settlement agreement regarding Case 4–CA–29391, which I have approved, resolving allegations that the Respondent unlawfully interrogated an employee regarding his union activities, and thereafter unlawfully discharged employee Shawn Benzeleski and unlawfully laid off employee John Quirk because they applied for membership in the Union. Accordingly, the only matters before me for consideration are those involving the allegations in Case 4–CA–29877.

The complaint was amended at the hearing, over the Respondent's objection, to include Burns as a named discriminatee.

time in mid-March, the Respondent was retained by Scartelli General Contracting Inc., a general contractor, to do some electrical work at a church, St. Anne's Basilica Station of the Cross. According to Castellano, on March 22, he received a call from Scartelli informing him that the priest and other members of the Church board had received threats that the jobsite might be picketed by the Union. Castellano claims he offered to take on some Union workers in order to avoid any problems, and that Scartelli agreed with his suggestion. Castellano testified that following his talk with Scartelli, he phoned Union president and alleged discriminatee Schraeder to discuss his proposal and offered to hire "a couple (two) of your electricians and place them on the job." Schraeder, according to Castellano, grumbled and told him he could not "hire individuals who were members of the local," e.g., Local 81, unless Castellano agreed to become a signatory contractor, e.g., enter into an agreement with the Union (Tr. 16). Castellano purportedly responded that he had heard of other contractors who had made similar arrangements with the Union without becoming a signatory contractor (Tr. 106). Castellano testified that at the time he had enough work to hire two electricians but, because the job was a complicated one, he could not say for sure how long they would be needed, that it could be anywhere from two weeks to a month. He further admitted that he was not overly concerned about the qualifications of the workers the Union might be willing to send him, and that they could be either apprentices or journeymen electricians (Tr. 119).

Schraeder admits conversing with Castellano in late March regarding the St. Anne's jobsite, but denies that Castellano offered to hire two electricians. Rather, Schraeder's recollection is that Castellano agreed to hire one Union apprentice only, and that when he asked Castellano to hire a journeyman, the latter declined and insisted he would only take an apprentice. Schraeder claims he told Castellano that decisions regarding apprentices were made not by him but by the Union's Joint Apprenticeship Training Committee (JATC). He further told Castellano he did not believe there were any apprentices available at the time and that, even if one were available, he did not think the JATC would authorize the apprentice to work at the jobsite (Tr. 54). Schraeder expressly denied telling Castellano during that conversation that he could not hire any journeymen electricians. Castellano, for his part, specifically denied that he asked Schraeder for only one apprentice or that the latter told him he had to go through the JATC to obtain the apprentice.

I credit Schraeder's version of this conversation. His testimony in this regard was corroborated by notes he prepared of the conversation soon after its occurrence (GCX-8). The notes reflect that Castellano indeed told Schraeder he was "willing to put a man on as an apprentice" and that the latter replied, "we won't do that." The notes further reflect that Schraeder told Castellano that even if he, Schraeder agreed, the "signatory contractors on the committee would never agree."

The Respondent sought, through a "March 22" calendar page from Castellano's appointment book (RX-9), to corroborate Castellano's claim that he requested two electricians, not apprentices, during his March 22, conversation with Schraeder. RX-9, however, is of no help to Respondent in this regard. Thus, RX-9 contains only a notation showing that Castellano planned to call Schraeder on March 22 to discuss the subject of "Residential Electrician."[4] It does not, however, contain any notes of what the two may actually have discussed during their March 22, conversation. By Castellano's own admission, the notation was only a reminder to him to call Schraeder which he recorded in his calendar either the night before or on the morning of March 22, before the actual conversation took place. Nor, in any event, is there anything in the notation itself to indicate that Castellano intended to ask Schraeder to provide him with two electricians.

Thus, I reject Castellano's assertion that he asked Schraeder to provide him with two electricians. I find instead that Castellano, as testified by Schraeder, requested that Schraeder provide him with an apprentice, and that Schraeder declined to do so because he did not believe the JATC would allow it. I also find that Schraeder never told Castellano that the Union would not permit him to hire two Local 81 member electricians unless he became signatory to a union contract.

On May 2, Schraeder began a campaign to organize Respondent's employees. His efforts in this regard included visits to Respondent's jobsites to speak with employees, passing out his business cards to employees and explaining his reasons for being there, and making himself available to anyone interested in speaking with him about becoming union electricians.

On May 10, Schraeder and alleged discriminatee Casparro applied for work with Respondent. The parties stipulated that alleged discriminatees Cecci, Trygar, and Hartman submitted their job applications on May 11 (Tr. 6).[5] Alleged discriminatee Burns applied for work on June 2. The record reflects, and Castellano so testified, that from May 10, onward, the Respondent was engaged in hiring electricians. Thus, Castellano testified that since May 10, the Respondent had hired between seven and ten electricians (Tr. 21). A list of individuals hired by Respondent since May 10, received into evidence as GCX-4, confirms that the Respondent hired at least seven individuals during a four month period between June 26 and October 10.[6] Thus, while there is no disputing that the Respondent was hiring after May 10, there is no indication in the record to show that the Respondent ever advertised for workers during this hiring period, or what type of experience or training the Respondent was looking for in prospective job applicants.

As to the six alleged discriminatees, the record shows, and the Respondent does not deny, that all had prior experience and/or were trained as electricians. Thus, Schraeder's job ap-

[4] Castellano defined a "residential electrician" as being less educated than a journeyman electrician, and having a wage scale similar to that paid to apprentices (Tr. 127).

[5] Trygar's job application, it should be noted, is dated April 11 (GCX-3e). Notwithstanding the date on the application, the Respondent nevertheless stipulated that Trygar, along with Cecci and Hartman, applied for work on May 11. The Respondent offered no explanation for why it was willing to stipulate to May 11, as Trygar's application date when the application shows an April 11, date, nor does it contend, on brief, that it erred in entering into such a stipulation with respect to Trygar. Accordingly, pursuant to that stipulation, I find that Trygar did in fact apply for work May 11, along with Cecci and Hartman, and not on April 11, as shown on his application.

[6] It appears that GCX-4, which was prepared by the Respondent and turned over to the General Counsel in response to a subpoena, is incomplete as it does not include the name of employee Mark Hozlock, who was hired as an electrician by Respondent on July 15, 2001. (Tr. 78). The omission of Hozlock's name from the list, whether deliberate or through inadvertence, raises the question of whether the names of other employees may have been left off the list.

plication shows he had four years training in the IBEW-NECA JATC, and at least two years of actual employment as an electrician. Casparro likewise spent four years in the JATC program and worked as an electrician for approximately nine years. Hartman went through a 5-year JATC program and, as of the application date, had worked 10 months as an electrician. Cecci also spent four years in a JATC program, and had been employed as an electrician with three different electrical contractors. Trygar's application reflects employment as an electrician with different firms for a period of fourteen months prior to applying for work with Respondent. Burns' application shows he spent 5 years in a JATC program, and had 13 years of employment as a journeyman electrician with Local 81.

There is no question, given their prior March conversation, that Castellano knew who Schraeder was when he received the latter's application. Schraeder's application, in any event, identified him as a Union organizer. Castellano testified that on receipt of Schraeder's application, he became "very puzzled" and "very shocked" that Schraeder would be applying for work with his Company because he purportedly had been led to believe by Schraeder that Union members would not be allowed to work for Respondent. However, he admittedly made no effort to contact Schraeder to seek an explanation. As to Casparro's application, Castellano testified that he did not contact the latter for the same reason he did not contact Schraeder, e.g., because "he was employed by the local union . . . and I was told that I could not hire a union electrician" (Tr. 13). Unlike Schraeder's application, however, Casparro's application does not expressly identify him as a member, organizer, or officer of Local 81.[7] Rather, it reveals only that Casparro went through a four year IBEW-JATC program, and that his more recent employment was as a "training electrician" with the "Scranton JATC" (GCX-3b).

Like Casparro's application, Hartman's and Cecci's applications do not reveal whether or not they were Local 81 members. Their applications show only that both participated in an IBEW apprenticeship program, and list Flanagan as a personal reference. Castellano, however, testified that he "probably would not have called them due to again they are listed as participating and working with the local [union], and I was told [by Schraeder] that I cannot employ local union electricians" (Tr. 15). There is, however, nothing in their applications to show that Hartman or Cecci were in fact "working" with Local 81, as claimed by Castellano.[8]

Castellano does not deny receiving Trygar's application, and admits not having contacted Trygar but could not recall why he did not do so (Tr. 14). Trygar's application likewise does not reveal whether or not he was a member of Local 81 (GCX-3e). In fact, the only item on his application linking him to Local 81 is his listing of Union business manager, Jack Flanagan, as a personal reference.

Castellano was not questioned about Burns' application, or as to his reason for not hiring Burns. Burns' application likewise does not specifically identify him as a Local 81 member, but does show that he participated in a five-year IBEW apprenticeship program, was most recently employed as a journeyman electrician with Local 81, and lists Schraeder, Flanagan, and Union treasurer, Gino Arcuri, as personal references (GCX-3f).

Thus, while the job applications of alleged discriminatees Casparro, Hartman, Cecci, Trygar, and Burns do not specifically identify them as Local 81, members, the fact that said alleged discriminatees participated in an IBEW-sponsored apprenticeship program and that they listed Local 81 officers as personal references would reasonably have led Castellano to believe that the alleged discriminatees were affiliated, if not with Local 81, with some other labor organization, or that they were, at a minimum, union supporters.

John Quirk worked for Respondent from May 1999 to May 2000. He testified that on May 2, as he was having lunch at a jobsite, Schraeder showed up, identified himself, and passed out business cards. Two days later, Castellano approached him and asked if he had spoken with Schraeder. When Quirk replied that he had, Castellano asked Quirk what he planned to do, if he intended to go with the Union. Although Quirk testified he believed Castellano was asking if he, Quirk, intended to leave his employment with Respondent and go to work for a union contractor, nothing in his testimony suggests that Castellano explained what he meant by his inquiry. Indeed, the subsequent action taken by Castellano suggests that Castellano may very well have been asking Quirk if he intended to support the Union. Thus, when Quirk told Castellano he was undecided on what to do, Castellano him told him to pick up his tools and go home. Quirk did as instructed, but instead of going home went to the Union hall to speak with Schraeder. Quirk's above account was not denied by Castellano and is therefore accepted as true. Clearly, Castellano's summary and immediate dismissal of Quirk was intended to show his dissatisfaction with Quirk's demonstrated ambivalence towards the Union, and conveyed the message that Castellano opposed the Union and expected his employees to feel the same way.

Sean Benzeleski, a named discriminatee in Case 4–CA–29391, worked for Respondent until terminated on May 4. Benzeleski testified that on May 2, Schraeder visited the jobsite he was working on and spoke with him. Two days later, on May 4, Benzeleski claims Castellano approached him and fellow co-worker, Chris Kellaher, and in a very agitated tone asked if they had signed anything with the Union. Benzeleski and Kellaher denied having done so. Castellano then commented that if they had signed something for the Union, he would sue them. Benzeleski claims that Castellano then asked Kellaher if he had signed anything for the Union, and when the latter answered he had not, Castellano told Kellaher that if he was even thinking about signing with the Union, he, Castellano, would not need him anymore (Tr. 94). When he again asked Benzeleski the same question, the latter replied that he had indeed filled out an application for the Union but had not heard anything yet. Castellano purportedly then told Benzeleski to pick up his tools as he was fired. As he began walking out after picking up his tools, Castellano allegedly told Benzeleski that if the Union wanted a war, he would give it a war, and that he intended to seek an injunction to keep Schraeder off Respondent's jobsites. (Tr. 93-94) As with Quirk's above account,

[7] A letter sent by Schraeder to Castellano on June 23, identifies Casparro as Vice-President of the Union on the document's letterhead (RX-5). Thus, while Castellano would have known of Casparro's position as an officer of the Union on June 23, there is no evidence to suggest that he was aware of Casparro's position with the Union when the latter applied for work on May 10.

[8] It should be noted that Castellano did not claim that he had refused to hire or to consider hiring Hartman and Cecci because they were members of Local 81, but rather stated that he denied them employment because they purportedly were "participating and working" with the Union.

Castellano was not asked to confirm or deny Benzeleski's testimony. Accordingly, I credit Benzeleski.

Raymond Mason worked for Respondent during two separate time periods, the most recent being from September 1999 until August 2000, at which time he voluntarily quit his position as project manager. He testified to having a conversation with Castellano in May in Respondent's office during which Castellano asked him if he had ever been approached by the Union or any union representative. Mason truthfully responded that he had not. Castellano, he recalls, then mentioned that several employees who were working at a Redner's Supermarket jobsite, including Benzeleski and Quirk, had been approached and that he let them go because they had been speaking to Schraeder on company time. Mason admits that in late August or early September, he told Schraeder about his conversation with Castellano. At the time of the hearing, Mason was working for a union contractor and had applied to become a member of the Union. (Tr. 100-101). I credit Mason's testimony as Castellano was not questioned about, and consequently did not deny, having such a conversation with Mason.

Mark Hozlock was hired by Respondent on July 15, 2001. He testified that Schraeder had mentioned to him that the Respondent was hiring and that when he called the Company, he was told that no hiring was being done at the time but to send in his resume anyway. Hozlock did so and a week later received a call from Respondent's secretary asking him to come in for an interview. He recalls that during his interview with Castellano, the latter questioned him about his prior employment and other employment-related matters. Castellano, he claims, then asked if he was familiar with the Union, and when Hozlock replied that he was, asked Hozlock what his choice would be, e.g., for or against the Union.[9] Hozlock responded that he could take it or leave it. Hozlock quit after only one week of employment when Castellano refused his request for a $3.00 raise. Hozlock recalls Castellano telling him that he could not give him the raise without first discussing it with his business partner, but that he told Castellano that he couldn't wait, that he was interested in bettering himself and felt he had enough experience to warrant the raise, and that he was going out on an economic strike. Hozlock claims that he knew of the "economic strike" concept from having heard it in different conversations, and recalled speaking with Schraeder around the time he quit who "kind of mentioned that [an economic strike] would be a good way to leave without causing any problems." (Tr. 87).

In late August, Castellano and Schraeder had discussions about entering into some contractual agreement. At a meeting held August 28, Schraeder presented and asked Castellano to sign a "Letter of Assent" agreeing to be bound to a multiemployer contract the Union had with the National Electrical Contractors Association (N.E.C.A.), and an "Agreement for Voluntary Recognition."(See, RX-7).[10] Although Castellano signed neither agreement, the following day, August 29, Castellano, as made clear by a tape recorded message left on Schraeder's answering machine (see GCX-7), phoned Schraeder and asked him to come to his office later that day so that he, Castellano, could sign the Letter of Assent. In his recorded message, Castellano also informed Schraeder that he wanted "to have a vote" even though he was "definitely going in," e.g., signing the contract, because he wanted "to just give the guys a good feeling that, you know, I'm giving them the opportunity." Castellano went on to say that he was sure "most of them are going to vote towards it anyhow, and the other ones won't be a problem to talk to and bring in."

Castellano's testimony regarding the intent of his August 29, message to Schraeder was confusing. Thus, while not denying having told Schraeder in his August 29, phone message that he would sign a contract later that afternoon, Castellano at the hearing claimed that he had not yet made up his mind and "went back and forth" on the issue. He explained, for example, that at the time he called Schraeder, "I felt more than likely I would sign," because "at that particular point, I felt that was the way it was going to go." As to the election, Castellano explained that "I felt more that we were going to sign after our men took a vote." (Tr. 114, 115)

The record reflects that at the end of the workday on August 31, Castellano called the employees together and announced he was holding an election. His testimony on why he decided to hold an election was somewhat confusing. Thus, he claims he told employees at this meeting that the purpose of the election was to see if they wanted the company "to be non-union or a union shop" (Tr. 25).[11] He subsequently added that no one particular thing prompted him to hold an election, and that he simply "wanted to see how the company felt and the way [employees] wanted to go." He further testified, however, that he decided to hold the election after hearing employees at one of the jobsites commenting about the Union and asking "why don't we just take a vote at our next meeting?"[12] Yet, during examination by Respondent's counsel, Castellano claimed that he told employees just prior to the election that the election was being held because he was considering becoming a union signatory contractor but wanted to get the employees' opinion first on whether or not they desired union representation. (Tr. 26-27; 109) Finally, in his August 29, recorded message to Schraeder, Castellano stated that he was holding the election to make his employees feel good about his decision to enter into a contract with the Union.

Castellano claims that he invited Schraeder to meet with his employees prior to the election so they could hear what the

[9] While not specifically asked to refute Hozlock's testimony, Castellano did generally deny ever asking job applicants how they felt about the Union (Tr. 23). I credit Hozlock over Castellano and find that Castellano did ask Hozlock how he felt about the Union during his job interview. Castellano, as noted, was generally not a very credible witness both from his poor demeanor on the witness stand and from inconsistencies found elsewhere in his testimony. Castellano, as noted, never denied questioning employees Quirk, Benzeleski, and Mason about their Union sympathies or activities. I have no doubt that just as Castellano had no qualms about questioning his employees regarding their Union activities, he would have no difficulty in questioning a job applicant, such as Hozlock, about his union sympathies.

[10] The agreement for voluntary recognition, in part, stated that "[t]he Union claims, and the Employer acknowledges and agrees, that a majority of its employees has authorized the Union to represent them in collective bargaining."

[11] The marked ballots were received into evidence as Respondent's Exhibit 8 (RX-8).

[12] Castellano explained that he holds meetings with employees once or twice a month.

Union had to offer, and that the meeting was held on August 31.[13] He further claims to have told Schraeder about wanting to conduct an election, but did not know if he told Schraeder when the election was to be held (Tr. 43). Schraeder admits learning on August 29, that an election was to be held, but denies meeting with employees on August 31. Rather, he testified that while he had been scheduled to meet with employees on August 31, Castellano's secretary called him prior thereto to cancel the meeting because the employees would not be able to get away from the jobsite. GCX-7 corroborates Schraeder's testimony in this regard. In a discussion with Castellano, the latter, according to Schraeder, told him he could have his meeting with employees on September 6. Schraeder did in fact meet with employees on September 6. Schraeder recalled that just prior to the meeting, he asked Castellano if he (Castellano) had to be present, and Castellano said yes, that he wanted to be there (Tr. 63). Castellano denies that Schraeder asked him to leave, and instead claims that he offered to leave but his employees said it was not necessary for him to do so. Schraeder denies that Castellano ever asked employees during that meeting if they cared whether he remained or not.

I credit Schraeder over Castellano regarding the above events. From a demeanor standpoint, Schraeder was more convincing and, in my view, testified in an honest and forthright manner. Castellano, on the other hand, was not a very believable witness both from a demeanor standpoint, and from inconsistencies in his testimony. Castellano, as noted, was plain wrong in asserting that Schraeder met with employees on August 31, for the tape recorded message left by his secretary on Schraeder's answering machine contradicted him on this point, and, as further noted, supported Schraeder's claim that he met with employees after the August 31, vote, and not before. Accordingly, I credit Schraeder over Castellano and accept his version of events over Castellano's where they conflict.

On August 31,[14] the Respondent conducted its election which resulted in a vote against unionization. Namlick, who worked for Respondent from 1999 to January 2001, testified that when he and other employees returned to the shop at the end of that day from an out-of-town job, Castellano met with them and told them an election was about to be held to decide whether or not employees wished to be represented by the Union. Contrary to Castellano's claim that he advised employees they did not have to vote if they did not want to, Namlick testified that Castellano never gave any such instruction. I credit Namlick over Castellano and find that employees were not told they were free not to vote.

Namlick further claims that during that meeting and before the actual voting got under way, Castellano announced they would all be getting raises comparable or close to union scale. Namlick claims that Castellano stated that "he was going to give us all raises if we didn't go union because if we did go union we would have gotten them anyway." Although Namlick understood Castellano's comments to mean that employees would be receiving raises regardless of how the vote turned out, his further claim in his testimony, that "we all got raises if we were to stay non-union," suggests his belief that Castellano was granting them the increase in the hope that employees would reciprocate the favor by voting not to unionize. (Tr. 72, 73). During the actual balloting, Castellano, according to Namlick, stood about fifteen feet from the voting site. Namlick recalled that after marking their ballots, each employee folded the ballot in different ways and placed it in the ballot box.[15]

Castellano admitted being able to see employees at the voting site but claims he was approximately 45–60 feet from where employees actually voted and could not see how employees marked or folded their ballots (Tr. 108–109). He further denied telling employees prior to the election that they would be receiving wage increases if they stayed non-union, but admits that approximately two-thirds of his employee complement did in fact receive "significant" wage increases ranging from $1.00 to $4.00 an hour two weeks after the election. Castellano's explanation for the wage increases was contradictory and confusing. Thus, while he initially testified that about one-third of his workforce was up for a raise around the date of the election (Tr. 25–26), he subsequently stated that a majority of his employees were due raises immediately following the election, and that only one-third were eligible for raises prior to the election (Tr. 29). When asked if it was Company policy to grant employees performance raises once a year, Castellano testified that that was "usually the minimum," then added that "there is not an exact one year period," and finally stated that the timing of the raises was based solely on his discretion (Tr. 29). Castellano further testified that he had given out raises "anywhere from two months to six months" before the mid-September increases, and explained that he gives out raises often because he doesn't "want to lose" good employees. As to the raises given to employees after the election, Castellano at first suggested that they "could have been promised weeks . . . or a month" prior to their being granted. However, when asked if he recalled promising to give two-thirds of his employees wage increases in the above-specified amounts by September 18, when the raises took effect, Castellano stated he had not done so.

I credit Namlick over Castellano and find that Castellano did tell employees just prior to the election that they were going to receive raises comparable or close to union scale if they voted not to go union.[16] The Union, as noted, lost the election, and

[13] Castellano's claim, that he invited Schraeder to meet with his employees (Tr. 28), conflicts with his prior assertion that Schraeder had asked for the meeting (Tr. 24-25).

[14] There is some confusion in the record as to whether the election was held on August 31, or September 1. Schraeder testified that to his knowledge, and based on reports he received from employees, the election was conducted on August 31. Leonard Namlick, a former employee, likewise testified that the election was held August 31, claiming that he recalls the date because he was celebrating a birthday that day. The ballots themselves, however, are dated September 1 (See RX-8). Castellano testified, with a bit of uncertainty, that he believed the election was held on September 1, because, according to his recollection, August 31, was when Schraeder purportedly met with his employees. Castellano, however, was wrong about Schraeder meeting with employees on August 31, for Schraeder, as noted, credibly testified that that meeting was canceled, a claim corroborated by the message left by Castellano's secretary on Schraeder's answering machine. I credit Schraeder and Namlick and find that Castellano conducted the election on August 31. While the ballots are dated September 1, I find it more likely than not that the ballots were prepared in advance of that date in anticipation that the election would be held on September 1, but that, for reasons unknown, the election was moved up one day to August 31. This might very well explain why Schraeder's meeting with employees scheduled for August 31, was suddenly called off.

[15] A review of RX-8 corroborates Namlick's claim that employees folded their ballots in different ways.

[16] The Respondent, it should be noted, has apparently accepted Namlick's claim in this regard over Castellano's denial that he discussed wages with employees prior to the election for, on brief, the Respon-

some two weeks later, on or about September 18, the Respondent granted what Castellano admits were "significant" wage increases to two-thirds of its employees. There is no evidence to show that the granting of these wage increases on September 18, was in keeping with some Company policy or pattern, or consistent with an established past practice, or that employees were expecting, or had been told, at any time prior to the time Castellano made his above remark, that they would be receiving such increases. Castellano, in fact, testified that the timing and amounts of such increases were matters left up to his own discretion.

B. Discussion

1. The Section 8(A)(1) Allegations

a. Interrogation

The General Counsel contends, and I agree, that the Respondent unlawfully interrogated Hozlock during his job interview when Castellano asked Hozlock how he felt about the Union. The standard for determining whether an interrogation is coercive is "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176 (1984); also, *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). The Board, however, has also held that the questioning of a job applicant regarding his union preference during the course of a job interview is inherently coercive and unlawful even when the applicant is hired. *Electro-Tec, Inc.*, 310 NLRB 131, 134 (1993); see, also, *Merit Contracting, Inc.*, 333 NLRB No. 64, slip op. at 15 (2001) and *Challenge-Cook Bros.*, 288 NLRB 387, 397 (1988). The Board reasons that under the "totality of circumstances" test, a job applicant questioned about his union sympathies during the job interview "may understandably fear that any answer he might give to questions about union sentiments may well affect his job prospects." *Smith and Johnson Construction Company*, 324 NLRB 970, 980 (1997); *Active Transportation*, 296 NLRB 431, fn. 3 (1989); *Challenge-Cook Bros.*, supra. The Respondent has produced no evidence, other than Castellano's rejected general denial that job applicants were questioned about their union sympathies, to show that it had some legitimate reason for asking Hozlock how he felt about the Union. Accordingly, I find that Castellano's interrogation of Hozlock was coercive and violated Section 8(a)(1) of the Act, as alleged.

b. The promise of wage increases

The General Counsel further contends that the promise of a wage increase to employees just prior to the Respondent's August 31, election was unlawful. I agree. It is well settled that an employer's promising of increased wages or benefits in order to dissuade employees from supporting a union is violative of Section 8(a)(1) of the Act. *McCarty Processors*, 292 NLRB 359, 364 (1989); *Churchill Supermarkets*, 285 NLRB 138 (1987). It is patently clear from Namlick's credited testimony that the Respondent did just that when, just prior to holding the August 31, election, Castellano told employees they would be getting a wage increase if they voted against the Union. Given its timing just prior to the unlawful election called by Castellano, the latter's promise to employees of a wage increase was on its face intended, and would reasonably have been understood by employees to be, solely for the purpose of dissuading employees from supporting the Union. Castellano's remark was therefore coercive and a violation of Section 8(a)(1). *L. H. & J. Coal Company, Inc.*, 228 NLRB 1091, 1094–1095 (1977). That Namlick may have understood Castellano to mean that employees would receive the wage increase regardless of how they voted does not negate such a finding, for the Board applies an "objective," not a "subjective," standard in determining whether an employer's conduct can reasonably be said to have interfered with the free exercise of employee rights. *C.P. Associates, Inc.*, 336 NLRB No. 12 (slip op. at fn. 2) (2001); *Westwood Health Care Center*, 330 NLRB No.141 (slip op. at 6, fn. 17) (2000). Thus, under the "objective" test, the Board, in making that assessment, does not take into account either the motive of the employer or the actual impact of the conduct on the employee. *Westwood*, supra. Accordingly, the Respondent's claim that Castellano's statement was not unlawful because Namlick may not have been coerced by it is rejected.

c. The August 31, Poll

The General Counsel also contends, and I agree, that the election held among employees by Respondent on August 31, was unlawful. The Board has held that, absent unusual circumstances, the polling of employees by an employer will violate Section 8(a)(1) unless the following safeguards are observed: (1) the purpose of the poll is to determine the truth of a union's claim of majority, (2) this purpose is communicated to the employees, (3) assurances against reprisal are given, (4) the employees are polled by secret ballot, and (5) the employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere. *Struksnes Construction Co.*, Inc., 165 NLRB 1062, 1063 (1967); See also, *Allegheny Ludlum Corporation*, 333 NLRB No. 109, slip op. at 4 (2001), citing *Struksnes*, supra. The burden of establishing that all the *Struksnes* safeguards were complied with is on the Respondent. *Heck's, Inc.*, 174 NLRB 951 (1969). A failure to comply with just one of the *Struksnes* requirements is sufficient to render the election unlawful. *American National Insurance Company*, 281 NLRB 713 (1986); *Ravenswood Electronics Corporation*, 232 NLRB 609, 615 (1977). The Respondent, I find, has not met that burden here.

First, Castellano's own confusing and contradictory testimony, and the August 29, tape recorded message he left on Schraeder's answering machine, make patently clear that Castellano did not conduct the August 31, election for the purpose of testing any claim of majority status made by the Union.[17] For example, Castellano, as noted, testified that no one particular thing prompted him to conduct the election, that he simply "wanted to see how the company felt and the way they [employees] wanted to go." Yet, elsewhere in his testimony, Castellano claimed that he decided to hold an election after "probably two or three [employees] came up and said we

dent relies on Namlick's version to support its argument that the post-election wage increases were lawful. (RB:4, 10).

[17] The General Counsel's assertion that the Union never claimed to represent a majority of Respondent's employees is not entirely accurate, for the "Agreement for Voluntary Recognition" which Schraeder presented to Castellano for signature together with the "Letter of Assent" contains the following language: "The Union claims, and the Employer acknowledges and agrees, that a majority of its employees has authorized the Union to represent them in collective bargaining." Such language, I find, constitutes a sufficient claim of majority status under *Struksnes*.

should just have a vote." However, he subsequently backed off this latter explanation by stating that he could not "honestly say that's why or what made me do it," and that he "just felt that it was the only way that I could really, without overstepping my bounds or wanting to put pressure on them, just let them take an anonymous vote." He lastly claimed to have told employees that he was holding the election because he was considering becoming a signatory contractor with the Union but first wanted to get the employees' opinion on whether they wished to have union representation. Finally, in his August 29, tape-recorded message, Castellano, as noted, told Schraeder that while he intended to enter into an agreement with the Union, he nevertheless wanted to hold an election so that employees would "feel good" about his decision. As evident from the above undisputed facts, at no time did Castellano ever claim that the election was conducted because of doubts he may have had that the Union enjoyed majority support among his employees. In fact, the statements he left on Schraeder's answering machine on August 29, suggests quite the contrary, for they show that Castellano believed the Union had majority support and that the election he wanted to have was intended as a mere formality to make employees feel good, not as a test of the Union's majority status. Consequently, the August 31, poll fails to satisfy the first *Struksnes* criteria since the Respondent has neither alleged nor shown that its purpose was to test the Union's claim of majority support.[18]

The election falls short of satisfying the *Struksnes* requirements in other respects. There is, for example, no evidence that Castellano provided employees with assurances against reprisals. Further, as credibly testified by Hamlick, employees were never told that they were free to refrain from voting. The failure to provide employees with such assurances or to advise them that they were free not to vote could reasonably have led employees to believe that voting was mandatory, and that their failure to do so would be noticed by, and possibly bring repercussions from, Castellano who, as noted, had positioned himself some fifteen feet from the polling place and could observe who voted, and who did not. In this regard, Castellano's observation of employees as they took turns voting denied employees of the privacy required to satisfy the *Struksnes* "secret ballot" criteria. See, *Eagle Comtronics, Inc.*, 263 NLRB 515, 522 (1982).

Finally, the election was not conducted in an atmosphere free of unfair labor practices or coercion for just prior to the actual balloting, Castellano, as found infra, unlawfully and in violation of Section 8(a)(1), promised employees a wage increase if they voted against the Union. The above facts, and in particular Respondent's promise to give employees a wage increase if they voted against the Union, leads me to believe that Castellano's intent in holding the election was to undermine, not test, the Union's claim of majority support. As recently pointed out in *Public Service Company of Oklahoma (PSO)*, 334 NLRB No. 68 (2001), "an employer may not initiate a poll of employee sentiments in an attempt to create - as opposed to confirm - a good faith doubt of the union's continuing majority support among employees." Whatever may have motivated Castellano to conduct an election, it is patently clear that the election did not satisfy the *Struksnes* standards, rendering it unlawful and in violation of Section 8(a)(1).

[18] While, as pointed out by the Respondent on brief (RB:9), the election occurred within a day or so of the Union's claim of majority support, it does not necessarily follow that the purpose of the election was to test that claim. As noted, Castellano in his testimony never cited the Union's claim of majority status as a reason for holding the election. Nor, is there anything in Castellano's testimony to indicate that he informed employees about the Union's claim of majority support, or that he explained to employees that he had decided to conduct an election to test that claim, as is required under the second *Struksnes* criteria.

The Section 8(A)(3) Allegations

a. The refusal to hire or to consider for hire allegation

The complaint, as noted, alleges that the Respondent unlawfully refused to hire or to consider for hire alleged discriminatees Schraeder, Casparro, Cecci, Trygar, Hartman, and Burns because of their membership in the Union. In *FES (A Division of Thermo Power)*, 331 NLRB No. 20 (2000), the Board held that in order to establish a discriminatory refusal to hire, the General Counsel, consistent with the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), must first show that (1) the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. If the General Counsel makes such a showing, the burden shifts to the respondent to show that it would not have hired the applicants, or considered them for hire, even in the absence of their union activity or affiliation. *FES*, supra, slip op. at 4.

Here, the facts, as previously discussed, clearly show, and the Respondent does not contend otherwise, that all six alleged discriminatees submitted applications at a time when the Respondent was adding electricians to its workforce. The facts, as noted, further show, and the Respondent again does not dispute, that all six applicants had the necessary training and experience relevant to positions for which the Respondent was hiring. Nor does the Respondent contend that it was unaware that the alleged discriminatees were somehow connected to the Union or to some other labor organization. There is, in any event, sufficient evidence from which such knowledge can reasonably be imputed to the Respondent.

As to Schraeder, the Respondent, as noted, clearly knew of his Union affiliation by virtue of Castellano's March conversation with Schraeder. Castellano's admission that he did not hire Casparro for the same reason he did not hire Schraeder, because Respondent was purportedly not permitted to hire Local 81 electricians, establishes that Respondent knew that Casparro was somehow affiliated with the Union. Castellano's further admission, that he would not have hired alleged discriminatees Hartman and Cecci because their applications purportedly showed they were "participating and working" with Local 81, makes clear that the Respondent knew Hartman and Cecci were supporters of, or affiliated with, the Union.

Although no similar admissions were made by Castellano to show that he knew that Trygar and Burns were union supporters, Castellano, as noted, did admit that he did not hire or consider hiring any job applicant whose application suggested membership in the Union. As noted, neither Trygar's nor

Burns' application expressly identified them as Local 81 members. However, their applications, as further noted, did contain information which would have reasonably led Castellano to believe that Trygar and Burns might somehow be involved with the Union. Trygar, for example, listed Flanagan as a personal reference, and Burns served five years in an IBEW apprenticeship program, was employed by Local 81 as a journeyman electrician, and listed Flanagan, Schraeder, and Union treasurer Arcuri as personal references. The Respondent does not contend, nor is there anything in Castellano's testimony to indicate, that Trygar's or Burns' applications were not reviewed by Castellano. Given these facts, I am convinced that Castellano did review Trygar's and Burns' applications and that, in doing so, assumed from the above-described information found in their applications that they were, at a minimum, supporters if not members of Local 81.

Finally, I am convinced that the Respondent's decision not to hire any of the six alleged discriminatees was motivated by antiunion animus. Evidence of Respondent's animus and hostility towards the Union and its supporters is readily apparent from its decision, one week before receiving most of the alleged discriminatees' job applications, to summarily dismiss employee Quirk because the latter was noncommittal when asked by Castellano what he intended to do about the Union, from Castellano's further questioning of employees Kellaher and Benzeleski on whether they had signed up with the Union, from Castellano's threat to sue them if they signed anything, from his threat to discharge Kellaher if he even thought about signing up with the Union, from Castellano's discharge of Benzeleski because the latter admitted he had applied for membership in the Union, and from his comments to Benzeleski that Respondent would give the Union a war if it wanted one. While none of these incidents were alleged in this case to be violations of the Act, they nevertheless reveal, clearly and unambiguously, the extent of Respondent's hostility and animus towards the Union, and the lengths to which it would go to avoid becoming unionized. See, *Kanawha Stone Company, Inc.*, 334 NLRB No. 28 (2001).[19] Respondent's antiunion animus is also evident from the unlawful poll it took of its employees on August 31, from its unlawful promise to give employees a wage increase if they voted against the Union, and from its subsequent unlawful grant of such an increase to employees two weeks after the election, all of which, as noted, were found to be violations of the Act.

The Respondent, however, contends that its refusal to hire, or to consider for hire, the six alleged discriminatees was prompted not by antiunion animus, but rather by Schraeder's alleged insistence during the latter's March conversation with Castellano that the Respondent could not hire any union applicants for employment unless it had a signed contract with the Union. The Respondent's claim in this regard is without merit for, as found above, Castellano's version of his conversation with Schraeder was not credible. Rather, as further found, Schraeder never told Castellano that he was prohibited from hiring union members either on the St. Anne's Basilica job, or on other projects, without a union contract. Nor do I find it likely that Schraeder would have applied, or permitted other union members to apply, for work with Respondent if he indeed had told Castellano, as claimed by the latter, that union members were prohibited from working for Respondent without a contract.

The Respondent, in any event, would not prevail even if I were to believe Castellano's claim of being told by Schraeder that he could not hire union members without first entering into an agreement with the Union, for while the job applications of these five discriminatees show that each went through the Union's apprenticeship program and may have been acquainted with union officials, they do not, as previously noted, specifically identify the discriminatees as members of the Union. While Castellano could reasonably suspect from their involvement in the JATC program and their listing of union officers as personal references that the applicants were somehow involved or connected with the Union, he would not be able to tell from those facts alone that the applicants were in fact union members. There is, in this regard, no record evidence to show that membership in the Union was a prerequisite for participation in JATC or, if so, whether following completion of the program these applicants retained their membership status.[20] Likewise, the fact that the applicants may have known or been acquaintances of Schraeder or Flanagan does not establish that they were union members. Thus, even if Castellano was told by Schraeder that he could not hire union members without a contract, Castellano would not have been justified in refusing to hire or to give hiring consideration to Casparro, Cecci, Trygar, Hartman, and Burns as he could not have known from a mere perusal of their applications if these five discriminatees were union members prohibited from employment under Schraeder's alleged hiring ban.

However, Castellano, as previously found, was not a credible witness, and his claim that Schraeder prohibited him from hiring union members is rejected. I find instead that the Respondent's refusal to hire or to consider hiring Schraeder, Casparro, Cecci, Trygar, Hartman, and Burns was motivated not by any restriction imposed on it by the Union, but rather by its own demonstrated animosity towards the Union and its supporters. Having failed to present any credible evidence to rebut the General Counsel's prima facie case, the Respondent's refusal to hire the six named discriminatees, or to consider them for hire, is therefore found to have violated Section 8(a)(3) and (1) of the Act.[21]

[19] In *Kanawha*, the Board upheld the judge's reliance on conduct that did not independently violate the Act to support a finding of animus. The Board, citing *Meritor Automotive, Inc.*, 328 NLRB 813 (1999), stated that "conduct that exhibits animus but that is not independently alleged or found to violate the Act may nevertheless be used to shed light on the motive for other conduct that is alleged to be unlawful."

[20] There may be any number of reasons, including a failure to pay dues or to otherwise remain in good standing with the Union, or a relocation outside the Union's jurisdiction, why a union member might lose or relinquish his or her union membership.

[21] The Respondent's claim that Schraeder and Casparro were not bona fide job applicants under *Sunland Construction Co.*, 309 NLRB 1224 (1992), is without merit, and its reliance on *Sunland* misplaced. In *Sunland*, the Board found that an employer had a substantial and legitimate business justification for refusing to hire, during the course of a strike, a paid union organizer as a strike replacement because the goal of the Union and its agent, the paid union organizer, during the strike of persuading employees not to work was inimical to, and in conflict with, the employer's goal of resisting the strike by continuing production. Thus, the Board in *Sunland* held that the employer had shown the existence of "disabling conflict" between it and the union during the course of an economic strike justifying its refusal to hire the paid union organizer during as a strike replacement. See, *Aztech Electric Co.*, 335 NLRB No. 25 (slip op. at 5) (August 27, 2001). Here, unlike in *Sunland*, the Respondent's refusal to hire Schraeder or Cas-

b. The September wage increases

The complaint alleges, and I agree, that the wage increases unlawfully promised to employee just prior to Respondent's unlawful August 31, election, and granted some two weeks later, also violated Section 8(a)(3) and (1) of the Act. The mid-September wage increases, as noted, were not part of any company policy or pattern, nor consistent with any established past practice. Further, there is no credible evidence to show that, except for the unlawful promise made to employees to grant them a wage increase if they voted against the Union, the Respondent had planned to give employees raises in mid-September. The only evidence in this regard is Castellano's dubious and conflicting claim that because he probably had "a third" of his company that was "up for raises" around the time of the election, "we decided that it's better for me just to go through and give our raises incrementally." (Tr. 25) He never explained when that decision was made, or why he granted wages to two-thirds of his employees when presumably only one-third were eligible to receive them. Castellano, as noted, further admits that those employees who were given raises beginning in mid-September were never told beforehand that they would be receiving them. Indeed, the only notification given of future raises was, as noted, Castellano's general unlawful announcement to all employees just prior to the election that they could expect wage increases if they voted against the Union. By carrying through with its unlawful announcement and increasing employee wages shortly thereafter, the Respondent, I find, was not only rewarding employees for voting against the Union, but also conveying the message that they could expect better treatment without the Union. For the above-stated reasons, I find that the mid-September wage increases were unlawfully motivated and intended to discourage employee support for the Union and, therefore, violated Section 8(a)(3) and (1) of the Act. See, *Parts Depot, Inc.*, 332 NLRB No. 64 (slip op. at 33-34) (2000); *Dealers Manufacturing Company*, 320 NLRB 947, 949 (1999); *DTR Industries, Inc.*, 311 NLRB 833, 835 (1993); *Aircraft Plating Company, Inc.*, 213 NLRB 664, 673 (1974).

CONCLUSIONS OF LAW

1. The Respondent 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. The Respondent violated Section 8(a)(1) of the Act by interrogating employee applicant Mark Hozlock about his union sympathies, by unlawfully polling employees on August 31, 2000, and by promising employees wage increases if they voted against the Union.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire or to consider for hire applicants Richard Schraeder, Paul Casparro, Martin Cecci, Gerald Trygar, Patrick Hartman, and Thomas Burns because of their affiliation with the Union, and by granting employees wage increases in order to discourage support for the Union.

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

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[22]

To remedy its discriminatory refusal to hire job applicants Schraeder, Casparro, Cecci, Trygar, Hartman, and Burns, the Respondent shall be ordered to, within 14 days from the date of the Order, offer them employment to the positions for which they would have been hired but for its unlawful conduct. Further, the Respondent will be required to make Schraeder, Casparro, Cecci, Trygar, Hartman, and Burns whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent will also be required to, within 14 days from the date of the Order, remove from its files any reference to its unlawful refusal to hire or to consider for hire Schraeder, Casparro, Cecci, Trygar, Hartman, and Burns, and to, within 3 days thereafter, notify them in writing that it has done so and that the actions taken against them will not be used against them in any way. Finally, the Respondent will be ordered to post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Lackawanna Electrical Construction, Inc., Taylor, PA, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating job applicants about their union support or activities.

(b) Unlawfully polling its employees to determine their union sympathies.

(c) Promising, and thereafter granting, employees wage increases in order to dissuade them from supporting the Union.

(d) Refusing to hire or to consider for hire applicants for employment because of their membership in, or support for, the Union.

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

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

(a) Within 14 days from the date of this Order, offer Richard Schraeder, Paul Casparro, Martin Cecci, Gerald Trygar, Patrick Hartman, and Thomas Burns instatement to the positions for

parro did not occur during a strike situation. More importantly, Castellano never cited the existence of a "disabling conflict" as a reason for not hiring Schraeder or Casparro. Rather, his sole defense was that Schraeder had told him he was not permitted to hire Union members, a claim I have rejected. As the Board noted in *Aztech*, supra (slip op at 6), a respondent must prove not only that a disabling conflict existed, but also that it actually did rely on this conflict with respect to the alleged discriminatory actions in this case. The Respondent here has failed on both counts.

[22] Nothing in this decision, however, shall be construed as requiring the Respondent to withdraw the wage increases that were unlawfully granted to employees. *Sewell-Allen Big Star, Inc.*, 294 NLRB 312, 319 (1989).

[23] 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.

which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

(b) Make Richard Schraeder, Paul Casparro, Martin Cecci, Gerald Trygar, Patrick Hartman, and Thomas Burns whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Order, remove from its files any reference to the unlawful refusal to hire or to consider for hire Richard Schraeder, Paul Casparro, Martin Cecci, Gerald Trygar, Patrick Hartman, and Thomas Burns, and within 3 days thereafter notify them in writing that it has done so and that the refusal to hire will not be used against them 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, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Taylor, PA copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 10, 2000.

(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.

Dated, Washington, D.C. April , 2002

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

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 interrogate job applicants about their Union membership or sympathies.

WE WILL NOT unlawfully poll our employees to determine if they wished to be represented by the Union.

WE WILL NOT promise to increase wages if employees vote against the Union in an election, and WE WILL NOT grant employees wage increases in order to discourage their support for the Union.

WE WILL NOT refuse to hire or consider for hire job applicants because of their membership in or affiliation with the Union.

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, within 14 days from the date of this Order, offer Richard Schraeder, Paul Casparro, Martin Cecci, Gerald Trygar, Patrick Hartman, and Thomas Burns instatement to the positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

WE WILL make Richard Schraeder, Paul Casparro, Martin Cecci, Gerald Trygar, Patrick Hartman, and Thomas Burns whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against them, with interest.

WE WILL, within 14 days from the date of the Order, remove from its files any reference to the unlawful refusal to hire or to consider for hire Richard Schraeder, Paul Casparro, Martin Cecci, Gerald Trygar, Patrick Hartman, and Thomas Burns, and within 3 days thereafter notify them in writing that it has done so and that the refusal to hire will not be used against them in any way.

LACKAWANNA ELECTRICAL CONSTRUCTION, INC.

[24] 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."