Fred'k Wallace & Son, Inc. *and* Sheet Metal Workers International Association, Local No. 19. Cases 4–CA–25156 and 4–CA–25744

July 31, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

On October 17, 1997, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs.

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

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

1. The Respondent, in excepting to the judge's findings that the 8(a)(1) allegations set forth in the complaint are not barred by Section 10(b) of the Act, relies on *Nippondenso Mfg. U.S.A.*, 299 NLRB 545 (1990). In *Ross Stores, Inc.*, 329 NLRB 573 (1999), the Board recently reaffirmed the "closely related" test of *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), and overruled *Nippondenso*. Under the "closely related" test as set forth in *Nickles Bakery* and *Ross Stores*, we find, for the reasons stated by the judge, that the interrogation, threat, impression of surveillance, and job application allegations in the amended charges are closely related to the 8(a)(3) allegations in the original, timely filed charges.

2. We also agree that the Respondent violated Section 8(a)(3) by refusing to hire John Barzeski. In *FES*, 331 NLRB No. 20, slip op. at 4 (2000), the Board restated the elements that the General Counsel must establish to meet its burden of proof in a discriminatory refusal-to-hire case as follows: "(1) that 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." Although the judge decided this case before the issuance of *FES*, and thus applied slightly different standards in assessing the General Counsel's case, we nevertheless find that the General Counsel met its burden of proof regarding the refusal to hire Barzeski under the *FES* standards. The Respondent offered Barzeski a position, and then retracted that offer after learning that he was an organizer for the Union. Thus, elements (1) and (2) of the *FES* test have been proven based on the simple fact that the Respondent offered Barzeski a position, which establishes that the Respondent was hiring, and that Barzeski must have had experience or training relative to the requirements of the job for which it was hiring. And we agree, for the reasons set forth by the judge, that the General Counsel has established that antiunion animus contributed to the decision to retract Barzeski's job offer and that the Respondent failed to establish that it would have retracted Barzeski's offer even absent his union activity.

In accord with *FES* and *Dean General Contractors*, 285 NLRB 573 (1987), the Respondent shall have the opportunity, in compliance proceedings, to show that it would not have transferred discriminatees Barnes and Barzeski to other worksites on the completion of the project at which the unlawful conduct occurred. See *FES*, supra, slip op. at 7.

3. Finally, we agree that, under the circumstances described by the judge, statements made by the Respondent's superintendent, James L. Heron, and its owner, Fred Wallace Jr., created the impression of surveillance of employees' union activities, in violation of Section 8(a)(1).

> [T]he test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement that their [sic] union activities had been placed under surveillance . . . . The idea behind finding "an impression of surveillance" as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaigns without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways. *Flexsteel Industries*, 311 NLRB 257 (1993).

Applying this test, we agree with the judge that, by asking employee Barnes how the conversations went that he and other employees had had with union organizers on the roof at the Birney school earlier that day, both Heron and Fred Wallace Jr. reasonably gave Barnes the impression that they were keeping the union activities of their employees under surveillance.[3]

[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.

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

[3] Chairman Truesdale would not adopt the judge's findings that the Respondent created the impression of surveillance. The employees' conversations with union organizers occurred on the roof, i.e., in an open area in the workplace. The Board has long held that an employer's mere observation of open union activity on or near its property does not constitute unlawful surveillance. *Impact Industries*, 285 NLRB 5 at fn. 2 (1987); *Hoschton Garment Co*., 279 NLRB 565 (1986). Having met with union representatives in such an area, employees would not reasonably believe from Heron and Wallace's state-

Contrary to our dissenting colleague, Barnes could reasonably assume from the statements made to him by Heron and Wallace that they were doing far more than merely "observing open union activity." By asking Barnes about his conversations earlier in the day on the roof with the union representatives, they clearly let him know that they were keeping track of his activities, "taking note of who is involved in union activities, and in what particular ways." *Flexsteel,* supra. Similarly, while an employer can watch open union activity, if it, for example, openly takes down names[4] or videotapes[5] that activity, it goes too far and unlawfully creates the impression of surveillance, a different violation of the Act. In this respect Heron and Wallace were not merely observing the activities but were making clear to Barnes that they were taking particular note of them, thereby creating the impression of surveillance. Thus, the cases cited by our dissenting colleague do not control.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Fred'k Wallace & Son, Inc., Philadelphia, 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(e).

"(e) 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 Thomas Barnes in writing that this has been done and that the discharge will not be used against him in any way."

2. Substitute the following for paragraph 2(g).

"(g) Within 14 days after service by the Region, post at its facility in Philadelphia, Pennsylvania, copies of the attached notice marked "Appendix." 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 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 is own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1, 1996."

ments that the Respondent was keeping track of their activities. Contrary to his colleagues, Chairman Truesdale would not find Heron and Wallace's statements in these circumstances to be comparable to openly writing down the names of employees or to videotaping their activity. Accordingly, he would dismiss these allegations.

[4] *Crown Cork & Seal Co.,* 254 NLRB 1340 (1981) ("Accepting the legality of Respondent's observations of the Union's handbilling efforts, it does not follow that Respondent's note-taking was also legal.").

[5] *F. W. Woolworth Co*., 310 NLRB 1197 (1993) ("Photographing and videotaping clearly constitute more than 'mere observation'" of open union activity).

Mark E. Arbesfeld Esq., for the General Counsel.
Jayne M. Billinson, Esq., and *John Hilser, Esq*., of Philadelphia, Pennsylvania, for the Respondent-Employer.
James Katz, Esq., of Cherry Hill, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania on June 23, 24, and 25, 1997, pursuant to an order consolidating cases based on a complaint and notice of hearing (the complaint) issued in Case 4–CA–25156 on January 24, 1997, and a complaint in Case 4–CA–25744 issued on April 22, 1997, by the Regional Director of the National Labor Relations Board (the Board) for Region 4. The complaint in Case 4–CA–25156 was based on an original charge filed on August 5, 1996,[1] and an amended charge filed on January 24, 1997, by Sheet Metal Workers International Association, Local No. 19 (the Charging Party or the Union). The complaint in Case 4–CA–25744 was based on an original charge filed on February 19, 1997, and an amended charge filed on April 22, 1997, by the Union. Those charges allege that Fred' K Wallace & Son, Inc. (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed answers to both complaints denying that it had committed any violations of the Act.

ISSUES

The complaint in Case 4–CA–25156 alleges that the Respondent discharged employee Thomas Barnes because he supported the Union and engaged in independent violations of Section 8(a)(1) of the Act including coercive interrogation, creating the impression of surveillance of Barne's union activities, and threats to close the Respondent if employees selected the Union as their collective-bargaining representative. The complaint in Case 4–CA–25744 alleges that the Respondent refused to consider and to hire John Barzeski because he was a member of the Union and engaged in independent violations of Section 8(a)(1) of the Act including threatening a union representative with bodily harm in the presence of employees refusing to provide an application for employment, and telling an applicant that Respondent did not hire union members.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs.[2] Briefs, which have been carefully considered were filed on behalf of all parties.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged in business as a roofing contractor, with an office and place of business in Philadelphia, Pennsylvania, where it annually purchased and received goods and materials at its facility in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. The

[1] All dates hereafter are in 1996 unless otherwise indicated.

[2] The General Counsel's unopposed motion to correct the transcript, dated September 4, 1997, is granted and received in evidence as GC Exh. 26.

Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent started its business in 1912 and has continuously operated as a nonunion employer since that time. At all material times, Frederick S. Wallace Jr. (the father) is the owner and treasurer of Respondent, Frederick S. Wallace III (the son) is the president, Kenneth O'Connell is the superintendent, and James L. Heron and Kenneth Erdman hold the positions of sheet metal and roofing foreman.

The vast majority of Respondent's work is performed for the School District of Philadelphia and consists of prevailing rate jobs governed by the Pennsylvania Prevailing Wage Act. All contractors performing work pursuant to these jobs must submit weekly certified payroll records to the Commonwealth of Pennsylvania. Wallace III is the authorized officer of Respondent responsible for submitting and signing the Respondent's certified payroll records.

John Barzeski commenced his position as an organizer for the Union in June 1996, while Patrick Keenan served in this capacity since 1992. Keenan, in the 5 years that he has been a union organizer, has continuously tried to organize the sheet metal employees of the Respondent. In June 1996, Barzeski telephoned Respondent's employee Thomas Barnes, a union member, and scheduled a meeting for July 1. On that date Barzeski and Keenan arrived at the Respondent's Birney School jobsite in the morning, went up on the roof and had a 30minute meeting with sheet metal employees Michael Higginbottom, Paul Crawford, and Barnes in which the benefits of representation by the Union were discussed.

On July 10, Keenan returned to the Birney School jobsite, met with Barnes and the same employees as on July 1, and provided more information about the benefits of the Union. He also addressed the prevailing wages that must be paid by the Employer on such a project. Additionally, Keenan gave Barnes a number of union authorization cards to distribute to the employees. Barnes gave an authorization card to employee Crawford at lunchtime, another card was given to employee Karl Rosenberg at his home after work hours, and an authorization card was given to Higginbottom at a local pub. After Barnes and Higginbottom talked about the Union at the pub, Higginbottom threw the authorization card on the floor.

On July 16, Keenan again went to the Birney School jobsite and met with Barnes for approximately 15 minutes in the school's courtyard. He gave Barnes some additional information on the role of the Board in union elections and a letter about organizing and signing union authorization cards. On that same date, Keenan also talked to Respondent's Forman Heron, introduced himself and inquired whether Heron was interested in joining the Union. Heron replied, not at this time as he was getting ready to retire. Keenan also asked Heron how Barnes was working out and Heron said he does good work.

B. Respondent's Motion to Dismiss

Respondent alleges that the Section 8(a)(1) allegations set forth in the amended charges and the complaints in Cases 4–CA–25156 and 4–CA–25744 are time barred under Section 10(b) of the Act. Respondent asserts that the original charges in both cases only allege violations of Section 8(a)(3) of the Act as follows:

> Case 4–CA–25156
>
> On or about July 29, 1996, the above named Employer, by its officers' agents and supervisors, terminated the employment of Thomas Barnes because of his protected activity on behalf of the Sheet Metal Workers' International Association Local No. 19, a labor organization.
>
> Case 4–CA–25744
>
> On or about September 30, 1996, I applied at Wallace and Son Roofing Company for the position of Sheet Metal Roofer. When I was contacted by Wallace for the job, I went to the office for an interview. After the interview, I was told that I would start in approximately two (2) weeks. In that time, I was in contact with Wallace Roofing and they found out that I was a member of the Sheet Metal Workers' Local #19 and was told that the job was not available to me. In turn, I have come to find that the job has been filled by two men.

Respondent argues that the 8(a)(1) allegations contained in the amended charges filed on January 24 and April 22, 1997, and in the above noted complaints not only took place more than 6 months before the filing of the amended charges but also were not alleged in the original charges. Likewise, the 8(a)(1) amendment to paragraph 7(a) of the complaint in Case 4–CA–25156, which was offered and accepted at the hearing after advance notice was given to Respondent, is also time barred as it was never alleged in the original or amended charge and occurred on July 1, a time more then 6 months prior to the filing of the amended charge on January 24, 1997. Therefore, the 8(a)(1) allegations in both complaints should be dismissed in their entirety.

Traditionally, the Board and the courts have allowed the General Counsel to add complaint allegations outside the 6-month 10(b) period, if they are closely related to the allegations of the timely filed charge. The most frequently cited test for finding allegations closely related is set forth in *Dinion Coil Co.,* 201 F.2d. 484, 491 (2d Cir. 1982):

(1) A complaint, as distinguished from a charge need not be filed and served within the 6 months, and may therefore be amended after the 6 months. (2) If a charge was filed and served within 6 months after the violations alleged in the charge, the complaint (or amended complaint), although filed after the 6 months, may allege violations not alleged in the charge if (a) they are closely related to the violations named in the charge, and (b) occurred within 6 months before the filing of the charge.

In deciding whether complaint amendments are closely related to allegations in the charge, the Board and the courts have looked at whether the amendments are factually and legally related to the charge. In *National Licorice, Co.,* 309 U.S. 350, 369 (1940), the Supreme Court held that various complaint allegations were related to the charge when the violations alleged in the complaint were "of the same class of violations as those set up in the charge and were continuations of them in pursuance of the same objects."

In applying the traditional "closely related" test the Board stated in *Redd-I, Inc.,* 290 NLRB 1115 (1988), that it would look at several factors. First, one must look at whether the otherwise untimely allegations are of the same class as the violations alleged in the pending timely charge. This means that the allegations must all involve the same legal theory and usually the same section of the Act. Second, you look at whether the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the pending timely charge. This means that the allegations must involve similar conduct, usually during the same time period with a similar object. Finally,

you may look at whether a respondent would raise the same or similar defenses to both allegations, and thus whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge. Here, in Case 4–CA–25156, the facts show that Barne's layoff/termination on or about July 24, occurred within 6 months from the filing of the timely original and amended charge. While the 8(a)(1) allegations in the complaint occurred at a time more than 6 months prior to the filing of the original and amended charge, the subject matter is "closely related" to Barnes discharge. In this regard, the allegations in paragraph 7 of the complaint involve acts of interrogation, creating the impression of surveillance of an employee's union activities, and threats to close the Employer if the employees selected the Union as their collective-bargaining representative. The common thread is that all of these allegations involve Respondent's admitted supervisors, occurred during the course of a union organizational campaign, and took place shortly before Barnes layoff/termination on July 24. Under these circumstances, I find that the untimely allegations are of the same class as the violations alleged in the pending timely original and amended charge, arise from the same factual situation or sequence of events as the allegations in the pending original, and amended charge and involve the same or similar defenses to both allegations. Thus, the alleged unlawful interrogation, threats of plant closure, and creating the impression of surveillance of Barnes union activities, all occurred during a time period closely related to his layoff/termination.

The fact that the amended charge in this case involves 8(a)(1) allegations and the original charge includes 8(a)(3) claims is not controlling. In *Fiber Products,* 314 NLRB 1169 (1994), the Board held that the fact that the timely filed charge allegations and the amended complaint allegations involve different sections of the Act does not preclude a finding that they are based on essentially similar legal theories.

With respect to Case 4–CA–25744, the facts show that John Barzeski's application for and denial of employment at Respondent occurred within 6 months of the filing of the original charge. The 8(a)(1) allegations alleged in the amended charge and the complaint occurred at a time more than 6 months prior to the filing of the amended charge. I find, however, that the 8(a)(1) allegations contained in the amended charge and paragraphs 6 and 7 of the complaint are "closely related" to the allegations in the timely filed original charge. In this regard, the allegations contained in paragraph 6 of the complaint that occurred on October 4 and involve Barzeski, preceded by 3 days the Respondent's refusal to hire him as a sheet metal worker. Likewise, the allegations in paragraph 7 of the complaint, although they concern union organizer Patrick Keenan, involve the same factual situation or sequence of events and time period involved in the application and hiring process of Barzeski. Finally, the Respondent would raise the same or similar defenses to both allegations and would preserve similar evidence in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge.

As the Board stated in *Pincus Elevator & Electric Co.,* 308 NLRB 684, 690 (1992), enfd. 998 F.2d 1004 (3d Cir. 1993), in allowing similar amendments involving both 8(a)(1) and (3) allegations:

> While the complaint contains additional allegations regarding threats of business closure and promise of benefits, clearly distinct acts separate in time, the legal theory underlying all of them is identical: that is, that the Respondent engaged in unlawful conduct as part of an effort to prevent the organization of it employees . . . . The fact that different sections of the Act are involved does not alter this determination.

For all of the above reasons, I recommend that Respondent's motion to dismiss the 8(a)(1) allegations contained in the complaints for Cases 4–CA–25156 and 4–CA–25744 be denied.

C. The 8(a)(1) Violations in Case 4–CA–25156

1. Allegations concerning James Heron

The General Counsel alleges in paragraph 7(a) of the complaint that on or about July 1, Heron interrogated an employee concerning the employee's union activities and created the impression of surveillance by asking an employee about his meeting with the Union.

The evidence establishes that on July 1, Barzeski and Keenan arrived at the Birney School jobsite in the morning and went up on the roof to meet with Barnes and fellow sheet metal employees Paul Crawford and Michael Higginbottom. During this conversation, the benefits of joining the Union were discussed. After finishing work on that day, Barnes and Higginbottom returned to the shop and in the presence of Higginbottom, according to Barnes, Heron asked him, "How it went with the organizers that day." Barnes replied, "that they were there." Heron said, "Freddy wouldn't go for it." Heron denied that he ever had a conversation with Barnes in July 1996 about his union activities or that he inquired about any meeting that occurred with union organizers.

The general test applied to determine whether employer statements violate Section 8(a)(1) of the Act is "whether the employer engaged in conduct which reasonably tends to interfere with, restrain, or coerce employees in the free exercise of rights under the Act" *NLRB v. Aimet, Inc.,* 987 F.2d 445 (7th Cir. 1993); and *Reeves Bros.,* 320 NLRB 1082 (1996).

I find Barnes to be a very credible witness who throughout his testimony convinced me of his sincerity and ability to remember dates, meetings, and events that occurred during his tenure of employment at the Respondent. Conversely, I found Heron not to be a reliable witness concerning dates and times and found the majority of his testimony to be contradicted by his previously sworn affidavit which was introduced in evidence. Specific examples of these contradictions and inconsistencies will be addressed more thoroughly in the discussion concerning the discharge of Barnes and the refusal to hire Barzeski. It should be noted, however, that the Board held in *Precision Industries,* 320 NLRB 661, fn. 5 (1996), that "When a party's story keeps changing, it is perfectly appropriate for the finder of fact to conclude that none of the various versions are true."

Indeed, I find Barnes' testimony on this issue and other events to hang together and also note that Higginbottom, who was called as a witness by Respondent and was present during the July 1 conversation between Heron and Barnes, did not deny that such a conversation took place.

Therefore, I conclude and find that Respondent violated Section 8(a)(1) of the Act by Heron's coercive interrogation of Barnes on July 1, which tends to interfere with Section 7 rights. See *Flexsteel Industries,* 311 NLRB 257 (1993) (creating impression of surveillance) and *House Calls, Inc.,* 304 NLRB 311, 319 (1991) (coercive interrogation).

2. Allegations concerning Frederick Wallace Jr.

The General Counsel alleges in paragraph 7(b) of the complaint that on or about July 16, Respondent by Frederick S. Wallace Jr. (Wallace Jr.) at the Birney School jobsite, created the impression among its employees that their union activities were under surveillance by telling an employee he was aware of the employee's activities on behalf of the Union, interrogated the employee concerning his union activities, and threatened to close the Company if the employees selected the Union as their collective-bargaining representative.

On the morning of July 16 union organizer Keenan met with Barnes in the Birney School courtyard and gave him some additional union informational packets. Keenan also met with Respondent's foreman, Heron, on that date, introduced himself, and inquired whether Heron was interested in joining the Union. After Keenan left the jobsite, Superintendent O'Connell notified Wallace Jr. and Frederick S. Wallace III (Wallace III) that Barnes invited the union men on the roof and that he was passing out union authorization cards to the employees. About an hour after Keenan left the jobsite, Wallace Jr. and Wallace III arrived at the Birney School jobsite. Since Wallace Jr. knew that Barnes was the employee who took the union organizers on the roof, he asked one of his foreman to have Barnes come off the roof and meet with him. Wallace Jr. asked Barnes if there was a problem. He then asked Barnes who had given permission to these union guys to come up on the roof. He asked Barnes to take a message back to these guys and tell them if they set one foot in the school yard or school property, "he would have an injunction on their asses." Wallace Jr. further stated that "we do not need this shit and we will close the company." Barnes told Wallace Jr. that he was a member of the Union and he was going to "knock off" and pass the message to the union guys. In a separate conversation with Wallace III immediately after Barnes told Wallace Jr. that he was "knocking off," Barnes informed Wallace III that he was a union card carrier and under those circumstances he should leave. Wallace III said, "I am not telling you to leave." "I am not terminating or firing you." "If you leave, it is strictly voluntary." After Barnes punched out, he telephoned Keenan at the union hall and told him about his conversations with Wallace Jr. and Wallace III. Keenan confirmed this and testified that during the telephone call on July 16, Barnes told him that he was not on the jobsite, that Wallace Jr. and Wallace III had come to the Birney School to talk with him and Wallace Jr. had said something to the effect of "what is this bullshit that these union guys are on the job again. If they come out here again, I will put an injunction on their asses."

The Respondent takes the position that the sole reason that Wallace Jr. and Wallace III visited the Birney School jobsite on July 16 was to talk with Barnes and convey to him the seriousness of permitting unauthorized individuals on the roof because of the potential for losing their insurance which could force the business to close down.

Contrary to this position, I do not agree that this was the true motivation for the visit to the jobsite. Both Wallace Jr. and Wallace III admitted that Superintendent O'Connell apprised them prior to their going to the jobsite that Barnes invited union organizers on the roof and was distributing union authorization cards to the other sheet metal employees. Likewise, Wallace III admitted that it was highly unusual for both he and his father to go to a jobsite together in order to counsel an employee. Significantly, it was Wallace Jr. rather then Wallace III, that initiated the conversation with Barnes by instructing one of the foreman to ask Barnes to come off the roof and meet with him in the courtyard. I conclude and find that Wallace Jr. was concerned about the possibility of the Respondent being organized by the Union and therefore, created the impression among employees that their union activities were under surveillance, interrogated Barnes about the Union, and told Barnes that the Company would close if the employees selected the Union. While Wallace Jr. denied all of these allegations, it was quite apparent to me that he was accustomed to having his way and being in charge and while he testified that he did not raise his voice during the conversation with Barnes, the tone of his testimony during the hearing convinces me otherwise. I previously found Barnes to be a credible witness concerning his testimony involving Heron and as will be discussed more thoroughly in the decision involving his layoff/termination, Barne's testimony has a ring of truth to it.

Under these circumstances, I find that Wallace Jr. made the statements imputed to him. I further find that Wallace Jr.'s statements tended to coerce employees in the exercise of their Section 7 rights and that they violate Section 8(a)(1) of the Act. See *T&J Trucking Co.* 316 NLRB 771 (1995) (threatening plant closure) and the cases cited above.

D. The 8(a)(1) Violations in Case 4–CA–25744

1. Allegations concerning Kenneth Erdman

The General Counsel alleges in paragraph 6 of the complaint that on or about October 4, Kenneth Erdman at the Central High School job site, in the presence of employees threatened a union representative with bodily harm by brandishing an ax because the union representative sought to speak to Respondent's employees.

On October 4, union organizer, Barzeski, visited the Respondent's Central High School jobsite, went on the roof, and visited with the sheet metal workers for a brief time. Erdman came up to Barzeski and identified himself as the roofing Forman. Barzeski introduced himself and gave Erdman his business card. Erdman told Barzeski to get the fuck out of here. Erdman walked away and Barzeski saw him make a telephone call and heard Erdman state, "there is a guy from the Union, what should I do?" After finishing the telephone call, Erdman started walking toward Barzeski and picked up an ax. Erdman held the ax at his side while standing in front of Barzeski and said, "I told you to get the fuck out of here." Barzeski turned around, walked toward the door while talking to a couple of sheet metal employees and gave them his business card.

Erdman testified that the first time he saw Barzeski was in January 1997 on the roof at the Key School but Barzeski did not introduce himself. Several days later, Erdman again saw Barzeski at the Key School and after checking with the office, called the police. After the police arrived at the jobsite, Barzeski gave Erdman his business card and told him he was trying to organize the employees. Counsel for Respondent showed Erdman a copy of the police report that refreshed his recollection that the police were summoned to the Key School jobsite on February 18, 1997, rather then in January 1997.

I find contrary to Erdman's testimony that a confrontation did take place between Erdman and Barzeski on October 4, at the Central High School jobsite. First, I reach this conclusion based on the clear and convincing testimony of Barzeski throughout the course of the hearing and note that the certified payroll records for the Central High School job establish that Erdman was working at that job on October 4. Second, to further support this conclusion, I find that Barzeski's diary for October 4 specifically shows that he visited the Central High School jobsite and the notation for that

date indicates he was approached by an individual with an ax. Therefore, I do not credit Erdman's testimony that the first time he met Barzeski was in 1997, nor do I believe his testimony that at no time did he ever brandish an ax towards Barzeski.

In sum, I find that Erdman, in the presence of employees, threatened Barzeski with bodily harm by brandishing an ax because Barzeski sought to speak to Respondent's employees about the Union. Such conduct tends to interfere with, restrain, and coerce employees in the free exercise of rights under Section 7 of the Act. Accordingly, Erdman's actions violated Section 8(a)(1) of the Act. *Dayton Hudson Corp.,* 316 NLRB 477 (1995).

2. Allegations concerning James Heron

The General Counsel alleges in paragraph 7 of the complaint that on October 7, Heron told an applicant for employment that Respondent did not hire union members and refused to provide an application for employment because the applicant for employment was a union member.

On October 7, Barzeski and Keenan went to Respondent's Front street facility to inquire about a job that Barzeski was previously offered and accepted.[3] Upon arriving at the shop around 8:30 a.m., they saw Heron inside the garage. Heron let them in and Barzeski introduced himself and said he was there to see about the job that was previously offered. Heron asked for Barzeski's driver's license, made a xerox copy, and returned the license to Barzeski. Heron then said, "there's no work available here for you, we don't hire you fucking people here." Keenan then asked Heron if he could fill out a job application for employment. Heron said, "we don't have any applications, I told you there is no work here for you people."

Heron testified that he met Keenan on July 16 at the Birney School jobsite but he had no contact with him after that date. Heron specifically denied meeting Keenan in the shop on October 7 or refusing to provide him a job application for employment on that date.

Contrary to Heron's testimony, I find that he met Barzeski and Keenan on October 7 and made the statements imputed to him. First, I find the testimony of Barzeski and Keenan to be credible and consistent and an accurate description of what occurred on October 7. Second, I find that Respondent's personnel records contain Barzeski's job application that includes a copy of his drivers license which casts doubt on Heron's testimony that he never made a xerox copy of the license. Third, I find that Barzeski's diary entry for October 7 states, "Wallace shop with P.K. to apply for job, was told no work. P.K. could not apply." This document confirms that Barzeski and Keenan were present at Respondent's facility on October 7, and that Keenan attempted to apply for work. Lastly, Keenan's sworn affidavit dated February 21, 1997, is totally consistent with his testimony regarding the conversations that took place on October 7 with Heron.

For all of the above reasons, including my evaluation of Heron's overall credibility which will be more thoroughly discussed in the portion of the decision regarding the layoff/termination of Barnes, I find that Heron told Keenan that Respondent did not hire union members and did not provide an application for employment to him because he was a union member. Therefore, I conclude that Heron's statement and actions tend to coerce employees in the exercise of their Section 7 rights and that they violate Section 8(a)(1) of the Act.

[3] As will be developed more thoroughly later in the decision, I find that Heron offered and Barzeski accepted a sheet metal worker position on September 30, to commence work in 2 weeks.

E. The 8(a)(1) and (3) Violations

1. Case 4–CA–25156

The General Counsel alleges in paragraph 8 of the complaint that on or about July 25, Respondent discharged its employee Thomas Barnes because he supported the Union.

Barnes commenced work at Respondent in May 1995, after having completed a 4-year union apprenticeship program and was classified as a journeyman sheet metal worker. He has been a member of the Union since 1979. Barnes was interviewed and hired by James Heron who supervises the sheet metal workers and assigns and directs their work. Barnes was the most recent hire of the four other employees who primarily perform sheet metal work at the Respondent. These individuals are Paul Crawford, Steve Crawford, Karl Rosenberg, and Michael Higginbottom.

In June 1996 Barnes was contacted by union organizer John Barzeski to set up a meeting on one of Respondent's jobsites so Barzeski could meet the other sheet metal workers and discuss the benefits of the Union. The meeting was scheduled for July 1, and Barzeski and fellow union organizer Patrick Keenan went to the Birney School jobsite, climbed on the roof and discussed the benefits of the Union with several of Respondent's employees. After finishing work on July 1, Barnes returned to the shop and saw Heron. Heron asked Barnes, "How it went with the organizers that day?" Barnes replied, "that they were there." Heron said, "that Freddy wouldn't go for it." Higginbottom was also present during this conversation. On July 10, Keenan returned to the Birney School jobsite and gave Barnes some union authorization cards to distribute to the employees. Barnes gave an authorization card to Paul Crawford during lunch and to Rosenberg at his home later that evening. Barnes ran into Higginbottom at a local pub, gave him an authorization card and after they discussed the Union, Higginbottom threw the card on the floor. On July 16, Keenan again came to the Birney School jobsite and gave some union materials to Barnes for distribution to the sheet metal employees. Between July 10 and July 16, Barnes had a conversation with Superintendent O'Connell who asked him who gave these union guys permission to be on the roof and Barnes replied that he did because he was a member of the Union. Approximately an hour after Keenan left the Birney School jobsite on July 16, Wallace Jr. and Wallace III arrived. Barnes was told by one of the roofing foreman that Wallace Jr. wanted him to come down from the roof so he could talk with him. Barnes approached Wallace Jr., who was standing in the courtyard, and he asked Barnes if there was a problem. Wallace Jr. then said, "who gave these guy's permission to come up on the roof," and asked Barnes to take a message back to these guys "that if they set one foot in the school yard or school property, he would have an injunction on their asses." Barnes told Wallace Jr. that he was a member of the Union. Wallace Jr. then said, "We will close down the company, we don't need this shit." Barnes told Wallace Jr. that he was going to "knock off" so he could pass the message. Barnes punched out after telling Wallace Jr. and Wallace III that it was voluntary and proceeded to telephone Keenan at the union hall. He told Keenan that he was off the jobsite and repeated the conversations that he had with Wallace Jr. and Wallace III. Barnes returned to work on July 17 and also worked on July 18. He was not assigned any work from July 19 to July 24 and was told by Heron on July 24 that he was laid off.

Between July 25 and the second week of August 1996, Barnes telephoned the Respondent five or six times and visited the office

on two or three occasions inquiring about work. On each occasion, he was told that no work was available.

During the second week of August 1996, Wallace III telephoned Barnes and requested that he come to the facility to discuss possible settlement of a prevailing wage lawsuit that Barnes had filed against the Respondent. During this meeting, Barnes asked Wallace III whether work was available. Wallace III referred Barnes to Heron who told Barnes that he thought he was working with another outfit. Barnes told Heron that he was not working. Barnes testified that during this period he knew there was work available because fellow employee Higginbottom told him in late July or early August 1996, that work was available at the Taggart School jobsite.

In late August 1996, Barnes met again with Wallace III at the Respondent's facility to discuss settling the prevailing wage law suit. During this meeting, Barnes asked Wallace III about getting his job back. Wallace III said that Barnes would not be getting his job back. He did not feel it would be right at this time. Barnes stopped telephoning the Respondent about work after this conversation with Wallace III, but testified that he never quit his employment.

The Respondent takes the position that Barnes was laid off for lack of work and his union activities had nothing to do with the layoff. Moreover, when work became available in August 1996, Barnes was called back to work at the Taggart School project but told Heron that he was not able to start work until he talked with his lawyer and business agent and he would get back to Heron. At no time did Barnes get back to Heron, therefore he voluntarily chose not to return to employment at Respondent.

In *Wright Line,* 251 NLRB 1083 (1990), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1993). In *Manno Electric,* 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

For the following reasons, I find that the General Counsel has made a strong showing that the Respondent was motivated by antiunion considerations in laying off and terminating Barnes. First, the evidence establishes that a majority of Respondent's admitted supervisors knew of Barnes' union activity several weeks before his layoff/termination, and on July 1 and 16, interrogated him about these activities. Moreover, Superintendent O'Connell observed Barnes distributing union authorization cards and reported this fact to Wallace III. Thus there is union activity, knowledge and animus.

The burden shifts to the Respondent to establish that the same action would have taken place even in the absence of the employee's protected conduct.

Respondent first advances that all of the sheet metal employees were laid off on July 24, when work on the Birney School project was substantially completed and the Taggart School project was not scheduled to commence until sometime in August 1996. Contrary to this position, payroll records introduced in evidence show that other than Barnes none of the remaining sheet metal workers were laid off on July 24, and that several sheet metal workers were working during the payroll period ending July 26 and continued to perform work at the Birney School project through August 2. Indeed, these records also show that Higginbottom and Paul Crawford worked on the Birney School project on July 25 for 10 hours each, which Heron admitted was highly unusual. Significantly, this was the only time that employees worked 10 hours straight since the inception of the project. Moreover, the records show that Respondent's sheet metal workers continued to perform metal work during the pay periods ending August 2, 9, 16, 23, and 30, yet Barnes was not offered the opportunity to perform any of this work. It is also noted, that around the date of the layoff, Respondent lost the services of sheet metal worker Steve Crawford due to a hernia operation. Wallace III testified that Crawford was offered work but because of his condition he was unable to continue working as a sheet metal worker and terminated his employment effective July 17. This admission establishes that the Respondent, as of July 17, was short one experienced sheet metal worker and had sufficient sheet metal work available, but did not offer or permit Barnes to perform this work. Of further interest is a letter that Wallace III wrote on August 12, which states in pertinent part that, "Mr. Barnes is free to reapply for any work that we have where he can be used." With the loss of Crawford and the admission that work was available for him to perform, there is no legitimate reason that Barnes could not have performed this work. Indeed, Heron admitted that he never called Barnes to apprise him that there was additional sheet metal work available on the Birney or other School projects.

As another part of Respondent's affirmative defense, Wallace III testified that since October 7, no roofers or sheet metal workers were hired. Contrary to this testimony, I find that John Barzeski was offered a sheet metal worker position on September 30, to start 2 weeks later, Michael Gleason was hired on October 15 as a roofing foreman, but within 2 months was performing journeyman sheet metal work and paid at the same rate as other journeyman, Richard Gray was hired on October 23, for a 3-day emergency job that involved sheet metal work, and James McStravog was hired in December 1996. At no time was Barnes contacted to return to his old position or to perform these duties.

The main reason advanced by Respondent for not offering Barnes a job is that he refused to report to work at the Taggart School project when offered a position in August 1996.

Heron testified that on a Friday, either August 9 or 16, around 3:30 p.m., he made a telephone call to Barnes and left a message on his answering machine to report to the Taggart School on Monday morning. According to Heron, Barnes telephoned him on Monday and said he was not able to start work at the Taggart School until he talked with his lawyer and business agent and he would get back to him. At no time did Barnes get back to Heron and Heron did not attempt to contact him again. Heron testified that the next time he saw Barnes was in October 1996, when he came into the shop and told Heron that he was working at Beaver College. In November 1996, Barnes came into the shop and permitted Heron and Higginbottom to read his Board affidavit and told both of them that he was working for DuRoss and had a good

job. Heron stated that other then those three times, he did not talk to or see Barnes.

I am suspect of Heron's testimony for a number of reasons. First, Barnes testified that he never received a telephone call from Heron or any other representative of Respondent on his answering machine informing him to report for work at the Taggart School project. Indeed, certified payroll records for the Taggart School show that no sheet metal work was performed on either Monday, August 12 or Monday, August 19, and did not commence until Thursday, September 12. Second, Higginbottom testified that Heron instructed him on a Friday to get in touch with Barnes and tell him to come to work on Monday at the Taggart School project. He telephoned Barnes on a Friday evening and left a message on his answering machine for Barnes to show up on Monday at the Taggart School. Higginbottom testified that Barnes showed up around 10 a.m. at the Taggart School in a van accompanied by another individual whom Higginbottom did not know and Barnes told him that he was not going to do anything until he talked to his business agent. Third, Heron testified that other then the telephone call he received from Barnes on a Monday concerning work at the Taggart School and Barnes coming to the shop in October and November 1996, Barnes did not contact him to inquire about the availability of work. This, of course, is contrary to Barnes' testimony who stated that he telephoned the Respondent five or six times between July 25 and the second week in August 1996, and visited the office two or three times in this period looking for work. It was only after Barne's conversation with Wallace III in late August 1996, wherein Wallace III told him that he would not be getting his job back, that Barnes stopped calling the Respondent to inquire about work. I also find that Heron's testimony is contradicted by his sworn affidavit previously given on November 15, wherein he admits that Barnes called intermittently on the telephone looking for work. Each time that Barnes called to find out if work was available, Heron stated in his affidavit that he told him there was no work available and Heron also stated in the affidavit that he was not aware of Barnes working anywhere else during this period. This, of course, is contrary to Heron's sworn testimony at the hearing. As found above, Respondent's payroll records and offers of employment to a number of individuals after July 24, belies Heron's and Wallace III's testimony that no such offers were made. Likewise, Wallace III wrote on August 12, that Barnes "is free to reapply for any work that we have where he can be used." I find that there was sheet metal work available as early as July 24 and continuously thereafter, that Barnes could have performed. Yet Barnes, was never contacted or given the opportunity to work.

Likewise, I do not credit Heron's or Higginbottom's testimony that they telephoned Barnes on a Friday evening and left a message on his answering machine to report for work at the Taggart School on the following Monday. Rather, I credit Barnes testimony that no such telephone call was received from any representative of Respondent concerning reporting to work at the Taggart School and I am suspect that Heron and Higginbottom manufactured this story but did not get the facts straight of who allegedly placed the telephone call to Barnes. In any event, I do not credit Respondent's affirmative defense that Barnes was offered and refused employment at the Taggart School project in August 1996.

In conclusion, I find the Respondent's affirmative defenses to be wholly without merit and conclude that they are pretextual. Thus, I find that the true reason for Barnes layoff/termination on July 24, was his engaging in protected activity. If there is any doubt, I would also find that the Respondent has failed to demonstrate that it would have taken the same action against Barnes even in the absence of his engaging in union activities.

Accordingly, for the reasons noted above, I find that Respondent's layoff/termination of Thomas Barnes violated Section 8(a)(1) and (3) of the Act.

2. Case 4–CA–25744

The General Counsel alleges in paragraph 8 of the complaint that since on or about October 7, Respondent has refused to consider and to hire John Barzeski because he was a member of the Union.

The evidence establishes that Barzeski filed an application for employment with Respondent on March 1. At the time the application was filed, Barzeski was unemployed. It was not until June 1, that he started his job with the Union as an organizer. The employment application did not indicate that he was a union member.

Barzeski's wife, Christina, credibly testified that she received a telephone call in late September 1996 from a male who stated he was from the Respondent. The call was made to her home and the message was that they had a position for her husband. She immediately telephoned Barzeski and told him that she received a telephone call from the Respondent and someone said that a position was available. She gave him the telephone number that was left by the unidentified male caller.

Barzeski testified that on September 30, he received a telephone call from his wife on his car phone that Respondent had a position for him. Upon returning to his union office, he telephoned the Respondent. He spoke to an individual who identified himself as the shop foreman and during the course of the conversation stated his name was James Heron. An offer of employment was made by Heron and accepted by Barzeski for a sheet metal position that was to start in two weeks.

On October 2, Barzeski telephoned Heron to confirm that the job was still available. Heron said he would be in touch with Barzeski when the work was ready.

On October 4, Barzeski visited Respondent's Central High School jobsite and went on the roof to meet with the metal men and discuss the benefits of the Union. It was at this time that Barzeski met Forman Erdman, introduced himself and gave Erdman one of his business cards. Erdman told Barzeski "to get the fuck out of here." Barzeski saw Erdman make a telephone call and heard him state there is a guy from the Union, what should I do? After finishing the telephone call, Erdman started walking toward Barzeski and picked up an ax. Erdman came up to Barzeski and while holding the ax at his side said, "I told you to get the fuck out of here." Barzeski turned around, walked towards the door while talking to several of the sheet metal employees, and gave them business cards.

On October 7 Barzeski and fellow union organizer Patrick Keenan went to Respondent's shop on Front Street to inquire about the job that was previously offered. On arriving at the shop around 8:30 a.m., they saw Heron inside the garage. Heron let them in and Barzeski introduced himself and told him he was there to see about the job offer. Heron asked for Barzeski's driver's license, made a xerox copy, and returned the license to Barzeski. Heron then said, "There's no work available here for you, we don't hire you fucking people here." Keenan then asked Heron for a job application. Heron said, "We don't have any job applications here and I told you before we don't hire you people." After this dialogue, Barzeski and Keenan left Respondent's shop.

The Respondent, relying on the testimony of Heron, takes the position that the above October 7 meeting between Barzeski and Heron never took place. Heron testified that the first time he met Barzeski was at the subject hearing. He never spoke on the telephone with Barzeski in September or October 1996, and denied seeing Barzeski's employment application until the June 1997 hearing in this case.

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that protected conduct was a motivating factor in the employer's decision. In a refusal-to-hire case, the General Counsel specifically must establish that each alleged discriminatee submitted an employment application, was refused employment, was a union member or supporter, was known or suspected to be a union supporter by the employer, who harbored antiunion animus, and who refused to hire the alleged discriminatee because of that animus. *Big E's Foodland,* 242 NLRB 963, 968 (1979). Inferences of animus may be inferred from the total circumstances of direct evidence. *Fluor Daniel, Inc.,* 304 NLRB 970 (1991). Once that is accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that it would have made the same decision even in the absence of protected activity.

Contrary to the Respondent's affirmative defense that the September and October 1996 telephone calls between Barzeski and Heron and the October 7 meeting at Respondent's shop never took place, I conclude and find that they did. In this regard, I credit the testimony of Barzeski concerning his telephone conversations and meetings with Heron. Barzeski impressed me as a sincere witness whose testimony had a ring of truth to it unlike that of Heron. As discussed above, I found Heron to be an unreliable witness who was evasive and impeached by his prior sworn statement. Moreover, I find that Barzeski's diary entries for September 30, October 2, 4, and 7, buttress his testimony that the above telephone calls and the October 7 meeting took place with Heron. I further find that the Respondent was aware that Barzeski was an organizer for the Union. In this regard, he had been on the Birney School jobsite on July 1, had met and given his business card to Forman Erdman at the Central High School jobsite on October 4, and overheard Erdman make a telephone call where he asked what should be done about the union guy on the roof. Considering Heron's statements to both Barzeski and Keenan on October 7, it is apparent that the sole reason that Barzeski was not hired at Respondent was because he was a union member.

In sum, I conclude that the affirmative defense advanced by Respondent concerning this aspect of the case is pretextual. The inescapable conclusion, as to why Barzeski was not hired at Respondent, was due to his status as a union member. If there is any doubt, I further find that the Respondent has failed to demonstrate that it would have taken the same action against Barzeski even in the absence of his engaging in protected activity.

Accordingly, for the reasons noted above, I find that the Respondent's refusal to consider and to hire John Barzeski violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(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. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by interrogating employees concerning their union activities, creating the impression among its employees that their union activities were under surveillance, threatening to close the Company if the employees selected the Union as their collective-bargaining representative, threatening a union representative with bodily harm in the presence of employees, refusing to provide an application for employment, and telling an applicant that it did not hire Union members.

4. Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act by laying off/terminating Thomas Barnes and by refusing to hire John Barzeski.

5. The unfair labor practices described above 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.

Having found that the Respondent failed or refused to hire John Barzeski in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that the Respondent be ordered to immediately offer him employment at rates paid journeyman sheet metal workers hired by the Respondent with commensurate experience; if necessary, terminating the service of employees hired in his stead, and to make him whole for wage and benefit losses that he may have suffered by virtue of the discrimination practiced against him computed on a quarterly basis as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950); less any interim earnings, with the amounts due and interest thereon computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

Further, Respondent having discriminatorily laid off/terminated employee Thomas Barnes, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in the cases cited above.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondent, Fred' K Wallace & Son, Inc., Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their union membership, sympathy and activity.

(b) Threatening employees with closure of the facility in retaliation for the employees' union activities.

(c) Creating the impression among its employees that their union activities were under surveillance.

(d) Threatening a Union representative with bodily harm in the presence of employees.

(e) Refusing to provide an application for employment and telling an applicant for employment that it did not hire Union members.

[4] 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.

(f) Discharging or otherwise discriminating against any employee for supporting Sheet Metal Workers International Association, Local No. 19, or any other union.

(g) Failing or refusing to hire a job applicant because of his known or suspected membership in and/or support of Sheet Metal Workers International Association, Local No. 19, or any other union.

(h) 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 Thomas Barnes 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 Thomas Barnes 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, offer immediate employment to John Barzeski at rates paid to journeyman sheet metal workers hired by the Respondent with commensurate experience; if necessary, terminating the service of employees hired in his stead.

(d) Make John Barzeski 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.

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

(f) 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.

(g) Within 14 days after service by the Region, post at its facility in Philadelphia, Pennsylvania copies of the attached notice marked "Appendix."[5] 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 August 2, 1996.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[5] 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."

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

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 threaten to close our business if the employees select Sheet Metal Workers International Association, Local No.19, the Union, as their bargaining representative, coercively interrogate our employees about union activities, threaten a Union representative with bodily harm in the presence of employees, refuse to provide an application for employment or tell an applicant for employment that we do not hire union members, or create the impression among our employees that their union activities are under surveillance.

WE WILL NOT discriminatorily discharge our employees because they join, support, or assist the Union or because they engage in other protected and concerted activities.

WE WILL NOT fail or refuse to hire job applicants because of there known or suspected membership in and/or support of the Union, or any other labor organization.

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 the Board's Order, offer Thomas Barnes 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.

WE WILL make the above employee whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

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

WE WILL, within 14 days from the date of the Board's Order, offer immediate employment to John Barzeski at rates paid to journeyman sheet metal workers hired by us with commensurate experience; if necessary, terminating the service of the employees hired in his stead.

WE WILL, make John Barzeski whole for any wage or benefit losses he may have suffered by virtue of our unlawful failure or refusal to hire him because of his known or suspected membership in or support of the Union, less any interim earnings, plus interest.

FRED'K WALLACE & SON, INC.