Keith Miller, d/b/a Miller Electric Pump and Plumbing *and* International Brotherhood of Electrical Workers, Local Union No. 95. Cases 17–CA–19301 and 17–CA–19425

July 30, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On July 10, 1998, Administrative Law Judge James M. Kennedy issued the attached decision. The General Counsel filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that in July and August 1997,[1] the Respondent committed several independent violations of Section 8(a)(1) and, on or about September 19, violated Section 8(a)(3) and (1) by failing to recall four employees from layoff status. The judge dismissed the complaint allegations in their entirety. The General Counsel excepted to the judge's failure to find that certain statements by the Respondent in July and August violated the Act, and as explained below, we find merit in these exceptions.

1. It is undisputed that on a few occasions between July 3 and August 5, the Respondent's owner**,** Keith Miller**,** stated he would have to close the business if he was forced to recognize the Union. On two occasions, July 3 and August 5, Miller made this statement to employee Ron Lundien. Lundien, a paid union organizer, did not disclose his union affiliation to Miller until August 5. On July 21 and 29, Miller repeated this statement to Union Business Agent Phillip Brown and union member Mickey Hemphill who was seeking employment with the Respondent. In dismissing the complaint allegation that these statements violated Section 8(a)(1), the judge found that there was no tendency to interfere with the free exercise of employee rights under the Act because the statements were "directed" at paid union officials (Lundien and Brown) and, although "witnessed" by Hemphill, he was a "salt" and "[h]is union sentiments were clearly known." We disagree.

Initially, we emphasize that Lundien was an employee of the Respondent, and Hemphill was an applicant for employment. Under *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), these individuals were statutory employees entitled to the protections of the Act, irrespective of their status as paid union organizer or "salt."

Furthermore, as conceded by the judge, the Board has long found plant-closure statements to be highly coercive, or "hallmark" violations. *Regency Manor Nursing Home*, 275 NLRB 1261, 1262 (1985) (Member Dennis concurring). Contrary to the judge's finding, we find that the prounion sympathies of the threatened employees do not negate, or even mitigate, the statement's coerciveness. In determining the coerciveness of such a remark, the Board applies the objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect. *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998); *Miami Systems Corp*., 320 NLRB 71 fn. 4 (1995), enfd. in relevant part sub nom. *Uforma/Shelby Business Forms v. NLRB*, 111 F.3d 1284 (6th Cir. 1997). We also find the judge's reliance on *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel Employees & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), to be misplaced. Although an employer does not necessarily violate the Act when it questions open and active union adherents about their union sentiments, a violation does occur if the employer's statements contain express or implied threats or promises. *Christie Electric Corp*., 284 NLRB 740, 741 (1987) (interrogation of open union supporter unlawful where accompanied by unlawful threat to "do anything" to keep the union out and to not sign a contract). Accordingly, we find that Miller's comments violated Section 8(a)(1) of the Act.

2. It is also undisputed that on July 21 when Miller repeated his plant closing remark to the business agent, Brown, in the presence of Hemphill, Miller said that "he wasn't going to go Union, he would shut the doors if they tried to organize him, and that Philip [Brown] was wasting his time." The reference to organizing being a waste of time is alleged to be an unlawful expression of the futility of the selecting union representation. In dismissing this allegation, the judge characterized this comment as noncoercive posturing to a union official because "Miller knew, as did Brown, that it was unlikely that Miller's core employees would select a union if offered the opportunity." The judge found that Miller's remarks, made in the context of Brown's request that Miller hire union member Hemphill, were not designed to be further disseminated to the employees and that

[1] Unless otherwise indicated all dates are in 1997.

In the absence of exceptions, we adopt pro forma the judge's dismissal of the complaint allegations that the Respondent violated Sec. 8(a)(1) by informing employees that they would not be hired if they were union organizers and Sec. 8(a)(3) by refusing to recall the four employees.

Miller was simply seeking to dissuade the Union from starting an organizing campaign.

Contrary to the judge, we find that Miller's remarks are an unlawful expression of the futility of choosing union representation. As noted above, Miller's statement that Brown was "wasting his time" was made in conjunction with Miller's unlawful threat of plant closure. In this context, Miller's comment indicated to Hemphill that seeking union representation would be futile because it would result in Miller closing his business. *Mr. Z's Food Mart*, 325 NLRB 871 fn. 2 (1998). We also reject the judge's speculation regarding both the unlikelihood of Miller's core employees forming a union and the dissemination of the statement to employees. Moreover, as discussed above, speculation as to the subjective reactions of the Respondent's other employees is irrelevant since the objective tendency of this statement is to interfere with the free exercise of employee rights. Accordingly, we reverse the judge and find that the Respondent violated Section 8(a)(1) of the Act by conveying the futility of seeking union representation.

3. The undisputed testimony also establishes that during the course of the telephone conversation in which Miller hired Hemphill, Miller asked him not to attempt to organize or talk to the other electricians. The judge dismissed the allegation that this statement violated Section 8(a)(1), finding the comment to be a noncoercive attempt at persuasion unconnected to any force or penalty. The judge also noted that "Hemphill did not perceive the remarks as anything but an innocent request."

We disagree and find that the remark was unlawful. As an initial matter, we find Miller's statement to be coercive since the limitation on Hemphill's activities was simultaneous with the offer of employment. Cf. *Lassen Community Hospital*, 278 NLRB 370, 374 (1986) (interrogation of an employee in the course of employment interview long held inherently coercive). Moreover, we reject the judge's assessment of Hemphill's reaction to Miller's request. Rather, we must again assess the objective tendency of the statements to coerce employees, and not the employees' subjective reactions. *Miami Systems Corp*., supra, 320 NLRB 71 fn. 4. Contrary to the judge, we find that this statement tends to interfere with the employees' protected right to discuss union representation with their fellow workers on nonworking time. *Our Way, Inc.*, 268 NLRB 394 (1983); S*chnadig Corp.*, 265 NLRB 147, 156 (1982). By telling Hemphill not to discuss the Union with his fellow employees, the Respondent violated Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Keith Miller d/b/a Miller Electric Pump and Plumbing, Mountain Grove, Missouri, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Threatening employees that the Respondent would close down in the event that the employees choose union representation.

(b) Telling employees that seeking union representation would be futile.

(c) Telling employees not to discuss the Union during nonworking time.

(d) 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 after service by the Region, post at its facility in Mountain Grove, Missouri, copies of the attached notice marked "Appendix."[2] Copies of the notice, on forms provided by the Regional Director for Region 17, 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, as the General Counsel asserts, 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 July 3, 1997.

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

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

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

[2] 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."

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 employees that we would close our doors in the event that the employees choose union representation.

WE WILL NOT tell employees that seeking union representation would be futile.

WE WILL NOT tell employees not to discuss the Union during nonworking time.

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.

KEITH MILLER, D/B/A MILLER ELECTRIC PUMP AND PLUMBING

Richard C. Auslander, for the General Counsel.
Keith Miller, pro se, of Mountain Grove, Missouri, for the Respondent.
Ronald D. Lundien, Organizer (IBEW Local Union No. 95), of Joplin, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was tried in Mountain Grove, Missouri, on May 7, 1998. The charge in Case 17–CA–19301 was filed on August 6, 1997,1 by International Brotherhood of Electrical Workers, Local Union No. 95 (the Union); it was amended on September 25 and November 4. The charge in Case 17–CA–19425 was filed on October 27 and amended on December 17. The Regional Director for Region 17 issued the consolidated complaint on December 18. It asserts that Respondent, Keith Miller d/b/a Miller Electric Pump and Plumbing (Miller or Respondent), has violated Section 8(a)(1) of the National Labor Relations Act in various ways as well as Section 8(a)(3) of the Act with respect to the rehire of four employees. Respondent admits some of the conduct (but not the legal conclusions), denies some of it and denies violating Section 8(a)(3) in any respect.

Issues

The issues raised by the complaint are whether in July and August Respondent committed several independent violations of Section 8(a)(1) and whether it violated Section 8(a)(3) of the Act when about September 19 it "failed to recall from lay-off status its employees Ron Lundien, Michael (Mickey) Hemphill, William Blanchard. and Cory Hannon." Fundamental to the latter issue is the threshold question of whether these four individuals actually held any expectancy of recall under the circumstances of their "layoff" of August 4. The complaint does not allege that the individuals had earlier been discharged/laid off unlawfully.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine, cross-examine witnesses, and to argue orally. The parties waived the filing of briefs. Their oral arguments have been carefully considered. Based upon the entire record of the case as well as my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is the sole proprietor of an electrical contracting business in the building and construction industry. The business is located in Mountain Grove, Missouri. On the record he admitted that during the 12-month period ending October 31, 1997, he purchased goods and merchandise valued in excess of $50,000 from points outside the State of Missouri. He therefore admitted that at all material times he has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. He also admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Keith Miller is about 36 years old. He opened his business in Mountain Grove, a small town in the Ozark Mountains some 60 miles east of Springfield, 7 years ago. He generally employs, as a permanent core, two electricians besides himself and his wife Kathy. His most valued employee is Aaron Harvison, a veteran journeyman who has been with him for 4 years. He also has an a senior apprentice named John Paden whom he has employed for 3 years. In addition, he has hired, from time to time, his childhood friend, Brett Ford. His wife Kathy is responsible for most of the paperwork, although there is a clerical, Teresa, who helps out in the office. When the work is performed outside the Mountain Grove area, Kathy often accompanies her husband and works as an electrician under his trained eye or that of Harvison.

The Union is headquartered in Joplin, near Missouri's western border and about a 2-1/2-hour drive west of Mountain Grove. Its organizer is Ron Lundien. Sometime toward the end of 1986 Lundien became aware that Respondent was to be the electrical subcontractor on the construction of the Carthage Elementary School, in Carthage, Missouri. That town is 10 or 12 miles northeast of Joplin. Since it was a project being built at public expense, it required contractors to pay employees a prevailing wage as set by State law. Lundien decided to try to induce Miller to hire him as a journeyman electrician. He is a fully qualified journeyman. He testified that in early January 1997 he went to Mountain Grove and filed a job application. He did not tell Miller of his connection to the Union. He was persistent: "I called monthly to check for employment. They said they didn't have anything at that period of time whenever I called. I'd go by the job two or three times a month and I'd call probably twice a month." Eventually his persistence paid off.

The electrical portion of the Carthage Elementary School job began in early 1997. Respondent was to install the electrical wiring for the entire project except for the control wiring for the heating/ventilating/air conditioning system. Miller, Kathy, and another apprentice named Kevin Hutsell were the principal workers on that job. Both Harvison and Paden were occupied with other projects, including one in Licking, Missouri, about 40 miles north of Mountain Grove.

On May 7, according to Lundien, he went to the Carthage jobsite and spoke to Miller at some length. Although Miller did not offer him a job at that time, he did tell Lundien he would probably be the next person he hired. He gave Lundien a W-4 form to fill out. However, about 7 weeks passed before Miller called him in the evening on June 29. After that conversation, Lundien reported for work on July 1. He was on the payroll until August 4.2

B. The 8(a)(1) Allegations

On July 3, Miller's father, Don Miller, came to the jobsite. He has been a Teamsters steward for his employer in Cabool, Missouri, for many years and was wearing his Teamsters shirt while he visited with his son. Lundien observed the elder Miller wearing the Teamsters shirt and later asked Keith about it. Upon learning of the elder Miller's union background, he asked Miller why he "wasn't in the Union." Keith explained that he had attempted to participate in the IBEW's apprentice program but they never put him to work, so he had had to get experience elsewhere. He went on to say that he didn't have a problem hiring union people but if he was forced to go union he would have to close his doors.

[1] All dates are 1997 unless otherwise noted.

[2] The last day Lundien actually worked was July 31.

On July 21, Local 95 Business Agent Phil Brown came to the jobsite with union member Mickey Hemphill and spoke to Miller about hiring some union electricians. Miller again said that he had no problem hiring union electricians, but if forced to recognize a union, he'd have to close his doors. He returned on July 28, again accompanied by Hemphill. He acknowledged to Brown that he might need some help shortly. He took Hemphill's name and phone number. According to Lundien, who was present, Miller repeated his earlier remark that he had no problem hiring union members, but if forced to go union he'd have closed his doors.

That night, Miller decided that he needed to bring aboard some additional people. He had counted on getting Harvison and Paden from the Licking job which was supposed to have been completed, but it had been delayed. Since they hadn't yet finished, he decided it was necessary to hire some other people. On July 29, he called Hemphill asking him to come to work on July 30. Hemphill said he would.

> A. (HEMPHILL) I was sitting at home in the evening time and received a call from Mr. Miller wanting me to go to work for him and I agreed to go to work for him the next day, July 30, and he told me to be there at, I believe it was 8:00 o'clock.
>
> Q. (MR. AUSLANDER) Okay. He say anything else?
>
> A. Yes, and that while I was there on the job he would appreciate it if I didn't try to organize any of the hands, not to talk to any of the other electricians, just do my job.

Miller's version is not greatly different. He said: "I never told anybody that they could not discuss Union on their own time. I never even told them they couldn't discuss it during the[ir] work. The only time I ever did was with Mickey when I did talk to him over the phone and asked him if he would not mention it because I didn't want the employees riled up. And [t]hat is supposed to be done, from what I have looked up, according to law and stuff, done on—on their own time anyway whether it be after hours or what. And I have never not allowed anybody to discuss it after hours."

Also that day, Miller had asked Lundien if he knew any electricians who might want to work on the job. That night Lundien contacted two union members, Cory Hannon and Bill Blanchard. The next day they came to the jobsite and spoke to Miller. He told them to report to work the next day, July 30. Those two, as well as Hemphill, did report and worked that day and the next, July 31. All three agree that Miller told them during the hiring process that he would use them temporarily, until he was able to transfer the members of his permanent staff to the site. Hannon and Hemphill worked together on wiring some classrooms and some emergency exit lighting. Blanchard worked by himself nearby in what was to become a hallway.

At the start of the workday on Friday, August 1, a Carpenters local began picketing the jobsite in an unrelated dispute with the general contractor. All four IBEW members decided to honor the Carpenters' picket line and not work behind it. Led by Lundien, they informed Miller that they would honor the line. He told them to return on Monday, August 4, in the hopes that the dispute would be over and in any event since Monday was a payday, they could get their checks for work performed through Thursday. Lundien asked for Monday off for personal reasons. It was his son's 16th birthday and Lundien wanted to take his son to the driver's license test. Miller agreed.

All four left the site and went to the IBEW office where they filled out authorization cards and Business Agent Brown filled out an NLRB petition for a representation election. It was telefaxed to the Board's Regional Office in Overland Park, Kansas. That afternoon a notice of filing was faxed to Respondent's office in Mountain Grove. Although seen by the office clerical there, it was not given to Miller until Monday. Hutsell had gone home over the weekend and returned Monday morning both with the paychecks[3] for Kathy's signature and a copy of the petition.

In the meantime, on Friday evening, one of Respondent's permanent employees, veteran journeyman Harvison, arrived in Carthage. Miller, Kathy, and perhaps the newly arrived Harvison continued to work at the site over the weekend. Harvison's presence caused Miller to reconsider the employment of the local hires. Both Miller and Harvison testified to a think session in the company truck on Sunday night. The result of the session was that with Harvison aboard and the estimated number of hours left, as well as the expected arrival of Paden, Miller determined it was not necessary to continue to keep the four local hires, who were not working anyway because of the Carpenters' picket line.

On Monday morning when Hannon, Blanchard, and Hemphill came in, the Carpenters' picket line was still up. Miller gave them their paychecks and informed them of their layoff. Hemphill had brought a copy of the petition as well as some other material relating to union-negotiated matters and gave them to Miller. They had a short discussion about how to contact Business Agent Brown, and the three left.

That night Miller called Lundien at home and told him that one of his regular employees had come to the job and he wouldn't need Lundien any more and he could come to the site on Tuesday morning and pick up his check. Lundien did go to get his check on Tuesday. He describes the conversation:

> A. I found Mr. Miller and he—he gave me my check. I asked Mr. Miller that—he told me that, he said he appreciated my work and . . . but my services wasn't needed any more. And I asked him, I said, well, did I—was there a problem with—because of the strike. And he said no. I asked him if there was a problem because authorization cards were signed and the petition was filed for election. He said no. And I asked if there was a problem with my work. He said no, that he had his employee come down from Licking and they were—that he only had 1,000 hours left on the project, and that my services weren't needed any more.[4]
>
> Q. Did he say how many employees he could finish the project with?
>
> A. Four.
>
> Q. What, if anything, did you tell Miller at that time?
>
> A. I told Mr. Miller that I—at that time I give him my card and told him I was an Union organizer. He said he had a pretty good suspicion at that time here lately. I told him, I said, I was hoping that we could possibly work together and get a project agreement with the Local and use [union] labor, and he said that—excuse me. Mr. Miller said that, again, that he didn't have a problem hiring Union help, but he would close his doors if he was forced to go Union. I told him that—that the—and that he didn't like the sneakiness. And I said, would you had hired me if you knew who I was? And he said again that he didn't have a problem using Union labor. I asked Mr. Miller that if he would proceed in hiring me to finish up the project and he said that he was only going to do it with the four people that he had and that—and I told him, I said I knew the people on the project and I'd be keeping a report on the project and they would report to me whether or not

[3] The hours had been telephoned to Mountain Grove on Friday.

[4] At the hearing Miller could not remember how many hours he estimated were left on the job when he made the decision to let the four go. In most respects it does not matter whether it was 1000 as Lundien recalled Miller using (a figure which I think is a bit high) or the 200 which Harvison recalled (which is clearly too low). The complaint has not put the early August "layoffs" in issue, only Respondent's mid-September hire of Brett Ford and Jeff Tomlin as somehow being an unlawful refusal to rehire any of the four earlier laid off. Thus, Miller's judgment of how many hours remained in early August has no bearing on what happened 6 or 7 weeks later.

the—he hired anybody else. And he said that he wasn't going to hire anybody else but the four people that was left on the job. [unrelated sentence omitted].

Q. Was anything said about recalling you to the job?

A. I'm sorry?

Q. Was there anything said about recalling you to the job?

A. Calling me to the job?

Q. Recalling you to that job?

A. Oh, he said that he didn't need any more help and that—that they were going to finish it with just the four people that they had on it.

Paden testified that he came to the Carthage Elementary School site in mid-August, apparently about 2 weeks after the four had been laid off. He worked until the project ended. He testified that Miller asked him shortly after he arrived on the job to redo some work which had been done incorrectly. Some emergency lighting had been miswired to a switch leg and some of the classrooms had been wired so that the switches turned on the lighting in adjacent classrooms. He also found some loose connections. Although he did not know who had made the mistakes, he described the work as being in the same area where the three who had been hired in late July had been working. Furthermore, he found some wires to a junction box which had been cut too closely to allow sufficient play to work with properly. His testimony is corroborated by Harvison. In addition, Miller had earlier noticed that at least some of the new hires were not using a protective insert (known both as a "red grommet" or an "anti-short") in the cut flex conduit. He told Kathy to tell them to do so. He thought it was an instruction he should not have had to give to experienced journeymen electricians.

C. The Conduct Alleged to Violate Section 8(a)(3)

Those four, Miller, Kathy, Harvison, and Paden continued to work as a unit until about September 19 when Respondent rehired Brett Ford, his childhood friend and longtime intermittent employee. At Ford's suggestion Miller also hired Jeff Tomlin later that week. Tomlin left during the week of October 23 and Ford during the week of October 30.

Lundien became aware of Tomlin's hire and concluded that the union members had been discriminated against because Respondent had hired someone else instead of any of the four who had been on the project before.

Counsel for the General Counsel on the record advised that pursuant to the Union's petition for a representation election, that an election had been conducted and that the ballots of the union members who appeared to vote were challenged. The challenges were sustained and none of those votes were counted, resulting in a tally which showed that no votes were cast in favor of union representation. The Board affirmed the Regional Director's conclusions with respect to the challenged ballots.[5] I take official notice of the Regional Director's Report on Challenged Ballots issued on March 9, 1998, in Case 17–RC–11518. His report observes that the election petition was filed on August 1, and that he approved a Stipulated Election Agreement on August 15. The election was conducted on August 26. In that report the Regional Director sustained the challenges to the ballots of all four union members, Lundien, Hannon, Hemphill, and Blanchard. The Regional Director decided that all four of the challenged voters failed to meet the 30-days-of-employment test for the eligibility of noncore employees in the construction industry. See *Steiny & Co.*, 308 NLRB 1323 (1992). Upon sustaining the challenges the tally showed 4 eligible voters of which 3 voted against representation by the Union and none voted in favor.

III. ANALYSIS

A. The 8(a)(1) Allegations

First, as part of the inquiry about the nature of the union animus supposedly held by Respondent, I think it is important to understand Miller's personal background. He is the son of a 30-year union steward, a Teamsters steward who has held that union position at a dairy in Cabool since 1968, and who has been a union activist since 1960. Respondent's father testified:

Q. (BY RESPONDENT) Okay. At that time and all during my childhood was I brought up pro-union?

A. (DON MILLER) You—you was sent through school, grade school and high school, by union dollars, union money, and we've discussed for years and years and years union, union, union. And you were pro-union, to answer your question, yes.

While that fact is far from demonstrating Keith Miller's current state of mind regarding union organizing at his own company, it does explain his willingness to hire IBEW members without concern. The evidence which several witnesses testified to, that Miller said he had no problem hiring union members is quite credible in the circumstances. It also explains his equanimity when the four left the job while honoring the Carpenters picket line against another contractor. Even so, there is other testimony, including allowances made by Respondent, suggesting that he is not entirely free from animus when it comes to concerns about organizing his company. Yet, the General counsel's evidence is less than clear on each of these issues. Careful analysis is required and the allegations do not withstand scrutiny very well.

Before turning to the allegations that Respondent has violated Section 8(a)(1), we look, of course, to the statute. Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . ." Section 7 is quoted in the footnote below.[6] Another section of the Act, Section 8(c), specifically permits free speech which is not aimed at coercing employees from exercising those Section 7 rights. It states: "The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, *if such expression contains no threat of reprisal or force or promise of benefit*." (Emphasis added.)

The Board and the courts have said that Section 8(a)(1) and (c), when read together, leave an employer free to communicate with his employees so long as the communication does not contain a "threat of reprisal, or force, or a promise of benefit." *Advanced Mining Group,* 260 NLRB 486 (1982); *TRW, Inc. v. NLRB*, 654 F.2d 307 (5th Cir. 1981); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617–618 (1969).

In addition, although Section 7 appears to grant employees the absolute right to engage in union organizing at all times and in all places, the Board has recognized that working time is for work and employees do not have the authority to set their own terms and conditions of when they will work and when they will not. That is particularly so when a nondiscriminatory rule against solicitations/distributions is in effect. The Board has long approved of such rules. *Peyton Packing Co.*, 49 NLRB 828, 843 (1943); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962); *Our Way, Inc.*, 268 NLRB 394 (1983). Without such a rule the statute and Board case law will govern the appropriateness of any discipline which might be levied upon an employee who engages in union activity on the job. The conduct may or may not be protected, depending

[5] MR. AUSLANDER: So, we conducted the election. The four electrician, Union electricians showed up to vote and their ballots were challenged. The Region sustained the challenge to their ballots and the Employer won the election. I forgot what the score was. I don't know if all three [core employees] voted or not, but all the votes that were cast that were opened were 'no' votes. The Employ—excuse me. The Charging Party, slash, Petitioner then took an appeal to the Board and the Board sustained the Regional Director.

[6] Sec. 7 of the Act states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

on the circumstances. *Bird Engineering,* 270 NLRB 1415 (1984); *Waco, Inc*., 273 NLRB 746 (1984); *Interlink Cable Systems,* 285 NLRB 304, 306–307 (1987). Indeed, while the rights of employees to solicit union membership may be balanced against an employer's right to maintain discipline7 or to assure that working time is for work, that fact does not make the right to solicit any less protected where lawful circumscriptions do not apply. *Hoerner-Waldorf Corp.*, 227 NLRB 612, 613 (1976).

On the other side, although Section 8(c) appears to permit an employer to say nearly anything which is neither threat, coercion nor promise of benefit, in practice that is not quite true. The Board is often called upon to determine if remarks, otherwise "relatively inconsequential" standing alone, should be construed as coercive in the context of other unfair labor practices or considering the totality of the circumstances. See, e.g., *New Alaska Development Corp. v. NLRB*, 441 F.2d 491, 493 (7th Cir. 1971). *Gissel*, supra at 617. And, if the remark is to be scrutinized under the Act it is usually pursuant to an objective, not subjective test. The Board will not ordinarily look to the Employer's motive, or whether the alleged coercion succeeded or failed, but whether the employer's conduct may reasonably be seen as tending to interfere with the free exercise of employee rights under the Act. See *American Freightways Co.*, 124 NLRB 146, 147 (1959); *El Rancho Market*, 235 NLRB 468, 471 (1978); *Williamhouse of California*, 317 NLRB 699, 713 (1995). Even so, there are situations where motive and probable success or failure of the coercion may be considered. See *Rossmore House,* 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985), for the appropriate test relating to the treatment of open and active union supporters. *Cf. Sunnyvale Medical Center*, 277 NLRB 1217 (1985) (balancing surrounding circumstances to determine if questioning was coercive).

I observe that in the fact pattern seen here, Hemphill was presented as a known and open union member. In fact, Union Business Representative Brown brought Hemphill to the jobsite on two occasions in an effort to see if Respondent would hire him. Brown then engaged Miller in conversations during which Miller made statements which are under scrutiny here. Lundien is a professional union organizer who went "underground" as a "salt" and who also engaged Miller in union-related conversations or listened to Miller as he spoke to Brown and others. And, although Blanchard and Hannon are "salts" who were brought to the job by Lundien, they were not witnesses to anything Miller said to the two paid union officials. They did join the other two in walking off the job in honor of the Carpenters picket line against the general contractor but noted that Miller was not upset by their decision to leave the job and told them they would still have jobs when the line came down. On the following Monday they gave Miller a copy of the petition for an NLRB election and gave Miller some information about the Union's area contract and how to get in touch with Business Representative Brown.

The complaint alleges that Respondent violated Section 8(a)(1) in four separate ways, all occurring on or before the August layoffs. These include contentions that Respondent informed employees that they would not be hired if they were union organizers, "promulgat[ed] a rule" prohibiting employees from discussing the union, made a representation that union representation was a futility, and uttered several threats to close the business if the Union was selected as their representative.

With respect to the allegation that Respondent said he would not hire union organizers, the proof consists entirely of Lundien's testimony about Tuesday, August 5, after Miller had informed Lundien that he had decided to proceed without him. That morning Lundien finally identified himself as a professional union organizer and began fishing for evidence of a discriminatory motive to support the unfair labor practice charges that were coming regarding the layoffs. He testified: "And I said [to Miller], would you had hired me if you knew who I was? And he said again that he didn't have a problem using Union labor." Lundien could testify to nothing further. Clearly Miller was answering that he would hire union members, which Lundien obviously was. Moreover, he had hired Hemphill whose union membership was known. And, Miller knew there was a substantial likelihood that Hemphill would serve as a union organizer, for he could not be certain that his bid to Hemphill (discussed next) would be honored.

In that circumstance, the General Counsel's evidence is insufficient to support the allegation that Miller said he would not hire union organizers. If anything, the evidence is to the contrary. Miller had already hired a person known to be a potential union organizer. The allegation should be dismissed.

The next 8(a)(1) allegation is the claim that Respondent "promulgated orally" a "rule" prohibiting employee discussion of the subject of the Union. The facts are simple and uncontested. Hemphill and Business Agent Brown visited the jobsite twice in July to ask if Miller would consider hiring Hemphill. On the second occasion Miller said that he might just do that, he was considering adding some more hands, but needed to check with Kathy first, apparently to determine financial feasibility. A day or two later, on July 29 Miller telephoned Hemphill at home and asked him to come to work the next day. Hemphill's testimony was: "[W]hile I was there on the job he would appreciate it if I didn't try to organize any of the hands, not to talk to any of the other electricians, just do my job." Miller agrees. He said he asked Hemphill, "[I]f he would 'not mention it' because I didn't want the employees riled up."8

Yet this testimony does not qualify as the promulgation of a "rule." *Hotel Roanoke*, 293 NLRB 182, 189 (1989).9 At worst it is a directive to a single employee regarding how to behave, not a broad prohibition. At best it is only a noncoercive request that the employee not engage in union activity. The issue to be decided is whether the comment was coercive. I conclude that in context it was not. As noted in the introductory portion of this section, Section 8(c) permits employers to say nearly anything to an employee so long as it does not contain a threat of reprisal or force or promise of benefit. Here Respondent was offering Hemphill a job. Hemphill did not testify that a condition of the offer was his willingness to abandon his union organizing propensity; and he did not say that a threat of job loss was connected to the request; nor did he describe the conversation in detail sufficiently clear so that such a condition or threat could reasonably be inferred. The remark instead appears to have come as an afterthought and was just what it appeared—a simple bid or attempt to persuade.

This remark may be compared to several similar cases. For example in *American Thread*,10 a union officer was returning to work after attending a 2-day NLRB hearing about which other employees had expressed marked interest. The employer asked him "not to bunch up talking, just run the job as usual." The Board found that to only be a bar from talking with others in such a way that production would be adversely affected, not a deterrent against talking about the hearing or the union. See also *SCA Services of Georgia*, 275 NLRB 830, 836 (1985). There an employer asked strikers to abandon their strike and return to work. His request was unaccompanied by any threats or promises and the Board held the request to be lawful. Also, in *Entronic Corp.*, 227 NLRB 1770, 1773 (1977), the Board found no violation when an employee was told to "shut up" when he observed "maybe if we had a union here we wouldn't have any problems."

These may be contrasted with cases involving "force" of one kind or another in which a violation was found. See the following cases: *Seligman & Associates*, 240 NLRB 110, 116–117 (1979) (statement that employee not talk about the union to others under pain of discharge); *Tendico, Inc.*, 232 NLRB 735, 748 (1977) (same); *D.R.C., Inc.*, 233 NLRB 1409, 1414 (1979) (ordering employee to cease discussing union); *Lincoln Hills Nursing Home*, 266 NLRB 740 (1983) (warning employee not to maintain contacts with union supporters); *East Side Sanitation Service*, 234 NLRB 1099, 1108 (1978), enfd. 653 F.2d 235 (6th Cir. 1980) (cautioning laid-off employee that he could return to work, but not talk about the union, the Board, or anything of that nature during working hours); *ConAgra, Inc.*, 248 NLRB 609 (1980) (instruct-

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[7] The Supreme Court said in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956): "No restriction may be placed on the employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline."

[8] The portion of the quote relating to Miller's desire not to rile up the employees was an explanation to me, but not anything which he said to Hemphill. If he had, Hemphill would have reported it. The quotation has been edited to reflect that differentiation.

[9] In *Hotel Roanoke*, the Board held that telling an unlawfully suspended food service worker who was returning to work, that she could "talk about the veal and the lemon sauce, but not the union," was not the promulgation of a rule, although the comment was otherwise coercive. See also *American Thread Co.*, 270 NLRB 526, 528 (1984).

[10] Supra at 528.

ing an employee not to talk about the union with another employee); *F.W.I.L. Lundy Bros. Restaurant*, 248 NLRB 415, 428 (1980) (announcement by manager to assembled employees that he didn't want them to discuss the union).

Taking the remark from Hemphill's point of view ("he [Miller] would 'appreciate it' if I didn't try to organize any of the hands, not to talk to any of the other electricians, just do my job") it is clear to me that Hemphill did not perceive the remark as anything but an innocent request. His perception is correct. (It is equally clear that Hemphill had no intention of honoring the request.)11 Not only was it couched in "request" terms, it was not connected to any force suggesting any penalty would attach if he ignored the request. As in *American Thread*, the emphasis was on getting the work done. In fact on the next day Hemphill was assigned to work with Hannon (whose union views were then unknown to Miller). Respondent did not even isolate Hemphill. (If Hemphill had wanted to talk to Hannon about the Union he not only could have, he would have. Talking to Hannon was unnecessary of course since Hannon was a fellow union salt and Hemphill knew it.) This allegation will be dismissed.

The third allegation is that Respondent told employees in early July that it would be futile for them to select a union as their representative. The testimony does not show any occurrence during that specific time period; instead the General Counsel points in his argument to Hemphill's testimony about the conversation Miller had with Union Business Agent Phil Brown in mid-July (actually July 21). That was when Brown first took Hemphill to the Carthage site to ask if Miller would hire Hemphill and if he had a problem using union help.

As previously noted, Hemphill said Miller said he had no problem with hiring union help, but, "he wasn't going to go Union, he would shut the doors if they tried to organize him, and that Philip [Brown] was wasting his time." This allegation focuses on that part of the remark referring to organizing being a waste of Brown's time.

Hemphill is the only witness who testified about this aspect of the conversation. Brown was not a witness and Miller (operating on a pro se basis) neglected to talk about it. Frankly, as an independent violation of the Act, the allegation puzzles me. The remark sounds in posturing from the outset.

Miller knew, as did Brown, that it was unlikely that Miller's core employees would select a union if offered the opportunity. Lundien had undoubtedly reported to Brown that the only statutory employees who Miller had on the site were apprentice Hutsell and himself. Thus both of them knew that Miller was referring to the fact that Brown would be unable to organize the employees and it was for that reason that Respondent was asserting that Brown was wasting his time. While at that point Miller may not have known what Lundien's sentiments toward unionization were, he knew Hutsell's feelings. Furthermore, he knew that permanent employees Harvison and Paden were unlikely to favor union representation. Thus, his "wasting time" remark to Brown was not coercive, but was simply posturing to a union official and was undoubtedly perceived as such by Hemphill, the only statutory employee (and "salt") who seems to have heard it. (Lundien was present but didn't testify to it, undoubtedly because it made no impression on him.)

In other circumstances the Board has often held such references to wasting "time" or "effort" or "money" as noncoercive. For example, even though it found other violations connected to the remarks, it declined to hold that an employer violated Section 8(a)(1) when it told two employees who had complained to a state department of labor inspector about their wage scale that their actions were not going to accomplish anything. That finding was made even though the employees' conduct was found to be protected concerted activity and the discharges which followed to be unlawful. *Kyle & Stephen, Inc.*, 259 NLRB 731, 733 (1981). Similarly, an employer did not violate Section 8(a)(1) when a manager told employees they should not follow a coworker as the leader of the union's organizing drive since his motive was revenge for not being promoted and because he was only a "parking lot lawyer." The implication was that following such a man could only end fruitlessly. The Board held the comments to be protected by Section 8(c) even though it was said in a context of other unfair labor practices including threats of discharge. *Haynes Motor Lines*, 273 NLRB 1851 (1985).

In addition, the Board affirmed an administrative law judge in *W & F Building Maintenance*, 268 NLRB 849, 858 (1984), who dismissed a "futility" allegation where an employer told his employees that it was "a waste of money to join the union" and the employees' "job security was not in the union, but in doing a good job." The remarks were held to be the lawful expression of opinion and therefore privileged by Section 8(c).

Commonly, the unfair labor practice of declaring the "futility of selecting a union" refers to an employer's expression to employees that it will not bargain in good faith when obligated to do so; that it is the employer who will set the wages and other terms and conditions of employment and not the union. It most often occurs during an election campaign or after a certification of representative is issued. Occasionally, it will occur before that stage, usually during an organizing drive where the employer is attempting to blunt a union's effort. In either case it is invariably directed at employees who are believed to be willing to transmit the message to others.

Here, in contrast, Respondent had not yet been faced with an organizing drive much less a demand for recognition. Business Agent Brown was simply testing Respondent's willingness to hire a union member. A posturing remark of the type Miller made to Brown in that context is totally predictable and of little significance. Certainly Brown would not have repeated the message to employees and neither would Hemphill. It was not a pronouncement designed for repetition to employees, but a naive and somewhat feeble attempt to dissuade Brown from commencing an organizing effort. This allegation will be dismissed.

The last 8(a)(1) allegation is that, beginning in July, Miller repeated on several occasions, that he would have to close the business if he was forced to recognize the Union. There is really no dispute that Miller made the statements. He admitted doing so, saying on at least four occasions in July that while he didn't have a problem with hiring union members, he would be forced to close the doors of the business if he was obligated to recognize a union. The first was during a conversation initiated by professional organizer Lundien who was curious why Respondent wasn't "in the Union" if his father was a union steward. Lundien at that time was well aware that Respondent was a rural contractor who normally did business in an area of lesser opportunity and where contract prices were much lower than in urban areas.

The second two occurred later when Brown presented Hemphill for hire. Lundien and Hemphill both testified to these instances. As noted before, at least part of these remarks are nothing more than posturing to a union official in the hope that he would go away and leave the company alone.

The fourth time Miller made the statement was to Lundien on Tuesday August 5 when Lundien revealed his true status to Miller and was hoping to induce Miller to make admissions against interest regarding the layoff decision which Miller had implemented on Monday and which he had applied to Lundien the night before.

Looking at the context in which the remarks were made, it is striking that in each case it was directed to a person who was a paid union official. True, Lundien was not known to Miller to be a paid union official until August 5, but the other two were directed at Union Business Representative Brown. Only Hemphill, who witnessed the remarks to Brown, was not on the Union's payroll, but even he was a "salt" who was hardly a naïf. Moreover, Brown was presenting him to Miller as a union member who needed some work. His union sentiments were clearly known.

In addition, all of the persons involved in the "threats," whether Miller or the Local 95 people, knew that Miller was not talking about the Carthage job when he spoke of closing the business. It was all hypothetical and everyone knew it. The Carthage job was well on its way to completion and even if (as actually occurred) a representation election could be run before that job ended, Respondent would not have shut that particular job down. The project was funded publicly and the union-scale wages, if negotiated promptly, would not have affected its viability. The "threat," if it can be so described, was aimed at some time in the distant future.

As with the "wasting time" portion of the remark, the threat to close must also be perceived as posturing and part of Miller's effort to make the Union go away. As a threat it could only

[11] It is appropriate to view the remark from the employee's perspective. Thus, Miller's recollection is not particularly important to resolving the issue, although he is under the mistaken belief that he can lawfully impose broad limits on organizing, even if he has not actually done so. ("And [t]hat is supposed to be done, from what I have looked up, according to law and stuff, done on—on their own time anyway whether it be after hours or what. And I have never not allowed anybody to discuss it after hours.") In point of fact he has never "not allowed it" during working hours either.

have been seen as implausible or at the very least so premature as to be accorded no credibility. No one reasonably could have thought it to be real.

Under normal circumstances, one might be tempted to find an 8(a)(1) violation with respect to Miller's repeated statement that that he would close if forced to recognize the Union. Certainly case law is legion holding that statements of this nature are coercive, even "hallmark" coercive. Yet basic to such a finding is the requirement that the message be aimed at employees whose free selection of a bargaining representative is at stake. Here there really is no such employee. Lundien is a paid union organizer and staffer who by definition can't be influenced and Hemphill is a "salt" who observed what was essentially a private conversation between Miller and Union Business Representative Brown. Moreover, the conversations which Hemphill heard can't be taken at face value. They occurred in a specialized context which all three Local 95 people could only have understood as bluster preliminary to whatever Miller actually thought or might say if a debate over organizing ever opened. Had this occurred as an interrogation, it would not have been perceived as coercive. *Rossmore House,* 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985); *Sunnyvale Medical Center*, 277 NLRB 1217 (1985). Likewise here, it objectively had no "tendency to interfere with the free exercise of employee rights under the Act." It should be dismissed as well.

B. The Alleged Unlawful Refusal to Recall

Twenty years ago, the Board adopted Judge John F. Corbley's recitation of the elements necessary to find a violation of Section 8(a)(3) in a refusal to hire (or rehire) employees. He said:

> Essentially, the elements of a discriminatory refusal-to-hire case are the employment application by each alleged discriminatee, the refusal to hire each, a showing that each was or might be expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus. [*Big E's Foodland*, 242 NLRB 963, 968 (1979).]

Applying those principles to this case, I find that the last two of the elements are missing entirely. It is true that by September 19 (actually by Aug. 5), Respondent knew of the union sympathies of each of the persons alleged to be discriminatees in the complaint: Lundien, Hemphill, Hannon, and Blanchard. Yet the elements of animus and the nexus between animus and the decision not to recall them are missing entirely. Moreover, the first element, that the employees had applied for the job, is flawed as well.

With respect to the first element, that the employees did not have job applications pending, I observe first that three of the four had been told during the hiring process that the job would last only until Respondent was able to bring his permanent employees to the site. It was a temporary job, even more temporary than construction jobs usually are. Second, all were laid off in early August with the explanation that Respondent intended to finish the job with his own permanent employees, the first of whom had just arrived. There was no discussion of any intention to recall any of them and all four understood, despite the use of the phrase "lay off" that they were being permanently separated from employment. In the construction industry as well as others, terminations which are not for cause are often referred to as layoffs. That is by design for it is the intent of the employer to tell the individual that his work has been satisfactory, but he simply cannot continue to employ the individual for some reason unconnected to the employee's performance. The context demonstrates the true nature of the separation, not the words. If there is an intent to recall the laid-off employee, then evidence of that intent will be generated, such as a statement or reference to a policy.

Here, Miller by his words and deeds let all four know that they had no expectancy of recall. He said he intended to finish the job without them. Once he said that all four knew they were not coming back to the job unless they applied anew when Miller was once again hiring. That is the construction industry practice and all four were familiar with it. Therefore the first element of the prima facie case is missing.

Moreover, after those four had left, Respondent discovered some things which left him less than satisfied with the work they had done. Before they left, he had had to remind them to use a standard antishort-circuit device and afterwards he had to reconnect some wires where they had made mistakes. These mistakes were connecting the emergency exit lights, which are supposed to always be illuminated, to an on-off switch and connecting classroom three-way switches so that when one turned the switch to the "on" position it lighted the adjacent classroom. While these errors were not difficult to correct, the mistakes threw a different light on the workmanship of three of the individuals, Hemphill, Hannon, and Blanchard.

It is true that Respondent in September hired two "new" employees. One, however, was hardly new. That was Brett Ford, whose workmanship was a known quantity and who was entirely acceptable to Miller. If he needed to add another employee because of a newly perceived need, his choosing someone whose work he knew over people who had made fundamental mistakes can hardly be faulted. Likewise, the fact that he accepted Ford's recommendation to hire his working partner Jeff Tomlin meant only that Miller was relying on the judgment of someone he trusted. It is hardly the preference of a nonunion employee over a union member.

And, insofar as the other two elements are concerned, animus and an animus nexus to the decision not to hire, no animus has been shown. Respondent has hired union members (and one who was a likely organizer) in the past. He did so because of his own personal family history. And he did not discharge any of the employees who honored a stranger union's picket line. Moreover, the alleged 8(a)(1) conduct is either unproven or has not been demonstrated to have been coercive.

Indeed, even if it had been coercive, there is no connection to the decision not to recall those who had been permanently laid off, so the nexus element is missing. There is no prima facie case with respect to the 8(a)(3) allegation. It should be dismissed.

Accordingly, I conclude that the General Counsel has failed to prove any violation of the Act. The entire case will be dismissed.

Based on the foregoing findings of fact, I draw the following

CONCLUSIONS OF LAW

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

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

3. The General Counsel has not demonstrated, either by sufficient evidence or by appropriate legal analysis that Respondent committed any of the violations alleged in the complaint.

[Recommended Order for dismissal omitted from publication.]