Union Square Theatre Management, Inc. *and* Theatrical Protective Union, Local One, I.A.T.S.E., AFL–CIO. Cases 2–CA–28430 and 2–RC–21540

August 17, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HURTGEN

On September 3, 1996, Administrative Law Judge Steven Davis issued the attached decision.[1] The Respondent filed exceptions and a supporting brief. The Charging Party filed cross-exceptions, a supporting brief, and an answering brief.

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

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order and to dismiss the complaint and the representation petition.

1. In his Decision and Direction of Election in Case 2–RC–21540, the Regional Director found that the Respondent's technical directors were employees, and not statutory supervisors, managerial employees, or guards, as the Respondent contended. He also found, contrary to the Respondent's contention, that a bargaining unit made up entirely of the technical directors at the four theaters managed by the Respondent was an appropriate bargaining unit. The Respondent filed a request for review of those findings, which the Board denied.

At the hearing on unfair labor practices, the judge allowed the Respondent to introduce the record from the representation case hearing and also to introduce additional documents bearing on the technical directors' status. In his decision, the judge found, in agreement with the Regional Director, that the technical directors were employees and that a multilocation unit of technical directors was an appropriate unit.

The Charging Party Union, citing Section 102.67(f) of the Board's Rules and Regulations, has excepted to the judge's allowing the Respondent to relitigate those issues, although it endorses his findings. Section 102.67(f) provides that "[d]enial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding." The Union argues that this unfair labor practice proceeding is "related" to the earlier representation proceeding, and therefore that the judge erred in reconsidering the matters previously decided by the Regional Director.

We reject the Union's contention that the judge should not have allowed the Respondent to challenge the Regional Director's determination that the technical directors are employees rather than statutory supervisors or managerial employees.[3] That determination is not binding on the Board when violations of Section 8(a)(1) and (3) are alleged, as they are here, and the resolution of those issues turns on the individuals' status.[4] We therefore find that the technical directors' status was properly relitigated.

Concerning the unit issue, we note that normally, when an employer in an unfair labor practice case is resisting a bargaining obligation, it is precluded by Section 102.67(f) from relitigating the appropriateness of a unit that was found appropriate in the representation case.[5] We therefore agree with the Union that the judge should not have reconsidered whether a single, multilocation unit, which the Regional Director found to be appropriate, was in fact an appropriate unit.

The Respondent, however, also contends that the unit is inappropriate because it consists entirely of technical directors, who the Respondent alleges are statutory supervisors or managerial employees. As we have found above, the Respondent is entitled to relitigate the issue of whether the technical directors are protected employees or unprotected supervisors or managerial employees in connection with the Section 8(a)(1) and (3) charges. Our determination of that issue will unavoidably determine whether the unit is appropriate. Accordingly, we find that the judge correctly allowed the Respondent to relitigate this aspect of the unit issue.

2. The Respondent has excepted to the judge's finding that the technical directors are statutory employees. The Respondent contends, as it did before the Regional Director, that the technical directors are either supervisors or managerial employees and thus are not protected by

[1] The judge incorrectly stated in the fourth paragraph of the section of his Opinion entitled "The Supervisory and Unit Issues," that the Respondent argued that the Regional Director had improperly certified the Union. The Union lost the election and was never certified.

We also correct the judge's citation to *New Horizons for the Retarded*, 283 NLRB 1173 (1987)

[2] 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.

[3] The Respondent no longer argues that the technical directors are guards.

[4] *Serv-U-Stores, Inc.*, 234 NLRB 1143, 1144 (1978); *Clothing & Textile Workers (Sagamore Shirt Co.)* v. *NLRB*, 365 F.2d 898, 904–905 (D.C. Cir. 1966).

[5] See, e.g., *Saginaw Education Assn.,* 298 NLRB 259, 263 (1990); *Clothing & Textile Workers (Sagamore Shirt Co.)* v. *NLRB,* 365 F.2d at 904. Although this principle usually is invoked in cases in which the employer is challenging a union's certification, it also applies in cases like this, where the Respondent is resisting an order, issued pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), to bargain with an uncertified union as a remedy for egregious unfair labor practices. Cf. *Sahara Datsun, Inc.* v. *NLRB*, 811 F.2d 1317 (9th Cir. 1987) (no relitigation of union's labor organization status in unfair labor practice case).

the Act. As the Regional Director correctly observed, the Respondent has the burden of proof on this matter.[6] On reflection, and contrary to our earlier denial of review, we find that the Respondent has demonstrated that the technical directors are supervisors under the Act.[7]

"Supervisor" is defined in Section 2(11) of the Act as

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

The possession of even one of those attributes is enough to convey supervisory status, provided the authority is exercised with independent judgment, not in a merely routine or clerical manner.

The Regional Director found that the technical directors sporadically hire casual employees to perform routine repairs and for brief 1- or 2-day projects, and that they also hire people to substitute for themselves. He found, however, that such hiring does not confer supervisory status. The judge agreed with the Regional Director. We disagree and reverse.

The principal duties of the technical directors include performing physical tasks of a craft or technical nature around the theaters. Much of that work consists of repairs and maintenance performed by the technical directors themselves. At times, however, there are carpentry, painting, and other types of maintenence jobs that require more than one person to perform and for which the technical directors must obtain individual employees or even crews on a temporary basis. The record establishes that a significant, if irregular, part of the technical directors' function is to find and hire those workers on the Respondent's behalf, set their pay rates, and determine their duration of employment.[8] Thus, in January 1994, then-technical director Robert Easter hired a crew of employees to pick up, move, and install seats in the Minetta Lane Theater. He also hired another crew to paint those seats. When Mitch Christenson was technical director at the Union Square Theater in 1994, he hired some 50 individuals to renovate the theater.[9] Christenson also testified that he hired other individuals on other occasions to build a buffer to minimize sound coming from an adjoining building, to do painting, and to do maintenance work. Patrick O'Hanlon hired an employee to help him paint and repair the bathrooms in the Orpheum Theater.[10] Patrick Mann hired one individual to help him with restoration and painting at the Minetta Lane Theater after a show closed in 1994, and another to assist him in changing the marquee and covering the lobby of the theater in March 1995. Even Timothy Hamilton, who had only been employed as a technical director for 3 months at the time of the hearing in May 1995, testified to having hired someone to perform carpentry work at the Union Square Theater. Thus, all of the individuals who were serving as technical directors at or near the time of the hearing had hired either single individuals or entire crews in either 1994 or 1995.

The record also establishes that the technical directors' exercise of hiring authority is neither routine nor clerical in nature, but involves the use of independent judgment. In this regard, we note that once it is determined that additional help will be hired, the technical directors have complete discretion to decide whom to hire, based on their own assessments of what skills are needed for the particular job and whether the individuals they are considering hiring have the appropriate skills or qualifications.[11] Significantly, the technical directors also determine the rates of pay for the temporary employees.[12]

Notwithstanding the authority to hire assigned to and exercised by the technical directors, our dissenting colleague contends that they are not statutory supervisors because their hiring authority is exercised only sporadically, and because the employees whom they hire would not be included in the bargaining unit with them. We disagree.

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[6] *Biewer Wisconsin Sawmill*, 312 NLRB 506, 507 (1993).

[7] We agree that the Respondent has failed to demonstrate that the technical directors are managerial employees, for the reasons discussed in the Regional Director's Decision and Direction of Election.

[8] The record also reflects that the technical directors often hire individuals to substitute for them when they are absent and that they recommend individuals to succeed them when they are about to leave the Respondent's service. They also, at times, hire individuals as employees of the shows using the theaters. We do not rely on these facts in determining that the technical directors are statutory supervisors.

[9] The Regional Director found that those individuals were employees of the show, not of the Respondent, and therefore that Christenson's actions did not support the contention that he was a supervisor of the Respondent. In this regard, the Regional Director erred. Payroll documents introduced at the unfair labor practices hearing indicate that those individuals were employed by the Respondent; indeed, there seems to have been no show at the Union Square Theater when they were hired.

[10] The record does not clearly establish when this hiring took place, but it appears to have been in either 1994 or early 1995. O'Hanlon was employed by the Respondent in late 1993, and the show in question did not enter the theater until February 1994.

[11] Thus, for example, Christenson testified that in hiring the renovation crew he relied on people with whom he had previously worked and on recommendations from friends; he testified that he alone determined, from his past experience, how many people to hire for the crew. Mann testified that he hired a particular individual because he felt that individual was appropriate for the job, and Hamilton testified that he hired a particular individual because he had previously worked with him and he knew he did reliable work. Although at times the technical directors obtained the approval of Alan Schuster, the Respondent's managing director, to engage in hiring, the record reflects that Schuster did not review or approve their decisions to hire specific individuals.

[12] Rates of pay are set normally within ranges corresponding to the prevailing rates of pay in the area for similar work. However, that the authority to set pay rates is disciplined by market forces does not mean that it is not supervisory authority under Sec. 2(11).

The Board has held that an individual's sporadic exercise of supervisory authority over nonunit personnel does not necessarily so ally the individual with management as to warrant the individual's exclusion from a bargaining unit as a statutory supervisor. See *Detroit College of Business*, 296 NLRB 318 (1989), and cases cited therein.The Board has noted that this is particularly so with regard to professional employees, who frequently require the assistance of support personnel such as secretaries to enable them to perform their own professional duties. *New York University*, 221 NLRB 1148, 1156 (1975). Thus, for example, in *Adelphi University*, 195 NLRB 639 (1972), the fact that the director of admissions had authority to hire, fire, and direct his personal secretary was found not to be sufficient in and of itself to cause the director to be excluded as a supervisor from a faculty member bargaining unit.

Where, however, the performance of supervisory functions is "part and parcel of the individual's 'primary work product' rather than an ancillary part of their duties," *Detroit College*, supra at 321, the Board has concluded that the individual is a 2(11) supervisor. Thus, in *Detroit College*, the Board excluded as supervisors department coordinators who had been hired not just to teach but also to evaluate and hire part-time nonunit faculty. Similarly, in *Rite Aid Corp.,* 325 NLRB No. 134 (1998), pharmacy managers who were hired both to perform pharmaceutical work and to manage the pharmacy, including hiring, firing, and disciplining pharmacy technicians, were found to be statutory supervisors.[13]

In this case, the record reflects that the technical directors were hired not just to do minor maintenance and repair work themselves, but also with the specific understanding that they would be responsible, in the interest of the employer, for recruiting and hiring casual employees as needed to perform more extensive or more complicated maintenance projects.[14] The record further reflects that casual employees are hired not just to do work that is "adjunct to" that of the technical directors, but to work on projects which are separate from and in addition to those performed by the technical directors themselves. Thus, we do not agree that the cases cited by our colleague support his position.

3. Because we have found that the technical directors are statutory supervisors, it follows that the Respondent did not violate Section 8(a)(1) by making allegedly coercive statements to Timothy Hamilton and Patrick Mann, and did not violate Section 8(a)(3) by discharging Hamilton. Therefore, we shall dismiss the complaint. And because the unit petitioned for in Case 2–RC–21540 comprises only the technical directors and no statutory employees, we find that no question concerning representation exists, and we shall dismiss the petition.

ORDER

The complaint in Case 2–CA–28430 is dismissed.

IT IS FURTHER ORDERED that the petition in Case 2–RC–21540 is dismissed.

CHAIRMAN GOULD**,** dissenting.

Contrary to the majority, I would find that the technical directors (TDs) are statutory employees, not supervisors, and in agreement with the administrative law judge I would impose a *Gissel*[1] bargaining order based on the Respondent's multiple 8(a)(1) violations directed at TDs and the discharge of one of them in violation of Section 8(a)(3).

In making determinations of supervisory status under Section 2(11) of the Act, "the Board has a duty not to construe the statutory language too broadly because the individual found to be a supervisor is denied the employee rights protected under the Act*." St. Francis Medical Center-West*, 323 NLRB (1997). In my view, the majority has violated this obligation and thereby have denied the TDs their organizational rights.

The Respondent provides theatrical management services to four theatres in New York City. In this capacity, it negotiates license agreements with shows that perform in the theatres, performs bookkeeping and payroll functions, and provides box office personnel, house management, and janitorial services. The Respondent's managing director is in charge of these duties and responsible for supervising the TDs whom he hired at each of the four theatres.

The duties of the TDs include attending preproduction meetings with representatives of the touring show, interacting with show personnel regarding technical concerns in theatre production (e.g., advising on weight limits for hanging equipment and suggesting methods for set in-

[13] Member Hurtgen notes that *Rite Aid* involves professionals. As to such persons, the Board seeks to accommodate Sec. 2(12) of the Act (professionals are employees). More particularly, the Board does not necessarily view as supervisory the authority that professionals have with respect to employees who perform "merely adjunct" services for the professional. The persons involved herein are not professionals. In Member Hurtgen's view, because they are supervisors under the *Rite Aid* test, it follows a fortiori that they are supervisors under the "normal" test for supervisory status.

[14] In this regard, *Clothing & Textile Workers*, 210 NLRB 928 (1974), relied on by our dissenting colleague, is distinguishable. The employees whose status was at issue in that case were members of the staff of a national union whose duties were to coordinate local boycotts of nonunion products and who on occasion hired individuals to picket at targeted stores. As explained in the decision, pickets were hired only on those occasions when sufficient volunteers could not be recruited from the ranks of striking union members, retired workers, relatives of union members, and local community groups, and the hiring was just as often done by local union officials as it was by the national union staff members. There is no indication that it made any difference whatsoever to the national union whether the staff members involved themselves in the recruitment and hiring of pickets or whether they left those matters to the local officials. Here, in contrast, it is clear that the hiring of casuals was one of the specific duties of the technical directors which they were required to perform in order to properly perform their jobs.

[1] *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969).

stallations), ensuring that fire and safety rules are adhered to by show personnel, and performing maintenance and repair services such as painting theatre seats, changing marquee signs, and replacing burned out stage lighting. None of these functions are cited by the majority as evidence of the TDs' supervisory authority. Rather, it is their occasional hiring of outside assistance to complete certain maintenance tasks which the majority finds transforms the TDs into supervisors. I do not subscribe to this view.

I agree with the Regional Director that the exercise of hiring authority by the TDs is too sporadic to find them supervisors. The Board, including one member of the instant majority, held recently that where, as here, individuals exercise sporadic supervisory authority over *nonunit* personnel, they will not be considered statutory supervisors. *Legal Aid Society of Alameda County,* 324 NLRB No. 135, slip op. at 3 (Attorney Dwight Dickerson) (1997). I concurred with the majority in that case, but went further to state that regardless of how often supervisory authority was exercised by any of the attorneys at issue therein, including by Attorney Carolyn Leftridge, the fact that such duties were exercised over nonunit support personnel eliminated the potential for "divided loyalty" or conflict of interest within the unit and, therefore, no basis existed for excluding them, as supervisors, from the professional unit of attorneys.[2]

Indeed, in a nonprofessional setting like the instant case, the Board has emphasized this conflict of interest theme as the proper focus in determining whether part-time exercise of supervisory powers over nonunit employees requires a finding of statutory supervisory status. In *Clothing & Textile Workers*,[3] the petitioned-for unit were "union label staff" members whose duties on behalf of their employer, a labor organization, consisted of coordinating consumer boycott and organizational activities throughout the country. In connection with these duties, they occasionally hired individuals on a temporary or casual basis to picket or handbill, set their pay within certain monetary limits established by the employer, and terminated them when funding ran out or the union campaign ended. The Board rejected the contention that the staff members were supervisors because (1) as casual employees, the pickets/handbillers did not belong in the unit with staff members who hired them and thus no danger of intraunit conflict of interest was presented; and (2) the staff members' occasional hiring was too infrequent to align them with management as to create the more generalized type of conflict of interest envisioned by Congress in adopting Section 2(11) of the Act.[4]

In this case, there exists no generalized conflict of interest between the Respondent and the TDs because their hiring authority is exercised with minimal frequency. Nor is there any danger of intraunit conflict of interest because those whom the TDs hire are casuals whose short-term tenure with the Respondent, lasting no longer than a few days (or even hours as was the case with Timothy Hamilton, who hired only one individual to do 6-8 hours of carpentry work), precludes their inclusion in the same unit with the TDs. Accordingly, consistent with *Clothing & Textile Workers* and *Legal Aid*, I would find that the TDs are not supervisors and I would adopt the judge's order that the Respondent bargain with Union as the collective-bargaining representative of the TDs.[5]

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Joseph Turzi (Akin, Gump, Strauss, Hauer & Feld, L.L.P.), of New York, New York, for the Respondent.
James Murphy, Esq. (Spivak, Lipton, Watanabe, Spivak & Moss, Esqs.), of New York, New York, for the Union.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based upon a charge filed by Theatrical Protective Union, Local One, I.A.T.S.E., AFL–CIO (the Union) on May 19, 1995, a complaint was issued by the Regional Office of the National Labor Relations Board on February 23, 1996, against Minetta Lane Management, Inc. At the hearing, the Respondent's name was changed to Union Square Theatre Management (Respondent) to reflect its correct name.

The complaint alleges that during an organizational campaign by the Union, Respondent violated the Act by having (a) created the impression that it was surveilling employees' union activity; (b) warned and advised employees that it would be

[2] My only disagreement with the majority, which was the basis of my partial dissent in *Legal Aid*, was their decision to affirm and apply the test set forth in *Detroit College of Business*, 296 NLRB 318 (1989) to exclude Attorney Leftridge from the attorney unit. I stated that I would overrule *Detroit College*, but our disagreement in this regard does not, I submit, affect the supervisory question in this case.

[3] 210 NLRB 928 (1974).

[4] Although the absence of a conflict of interest problem was the touchstone of the Board's finding in *Clothing & Textile Workers,* that the union staff members were not supervisors, the Board also held, relying on *Adelphi University*, 195 NLRB 639 (1972), that the staff members could not be deemed supervisors in any event because there was no evidence that they spent more than 50 percent of their time exercising supervisory duties with respect to the pickets/handbillers. *Detroit College* reversed *Adelphi* to the extent it was interpreted as establishing a per se rule that any individual who supervises nonunit employees less than 50 percent of his time is not supervisor. Although, in *Legal Aid*, I advocated overruling *Adelphi* as well as *Detroit College*, I specifically endorsed the underlying premise of both cases that "professionals who only supervise nonunit employees may nevertheless be included in a professional bargaining unit." *Legal Aid*, supra, 324 NLRB No. 135, slip op. at 4. See also my concurring and dissenting opinion in *Rite Aid Corp*., 325 NLRB No. 134, slip op. at 3 (1998). That rationale is equally applicable here in a nonprofessional setting and warrants the conclusion that the TDs are not statutory supervisors and may be represented for purposes of collective bargaining.

[5] I find unpersuasive my colleagues' attempt to distinguish *Clothing & Textile Workers* on the basis that there was "no indication" that it mattered to the employer whether the staff members, as opposed to local union officials, hired the pickets. The Board placed no relevance on this point in concluding that the staff members were not supervisors and it is irrelevant to the issue here.

futile for them to select the Union as their bargaining representative; (c) interrogated employees about their union activity; and (d) discharged employee Timothy Hamilton.

The complaint further seeks a bargaining order as a remedy for the above conduct, inasmuch as a majority of Respondent's employees had selected the Union as their collective-bargaining representative, and a fair election could not be held.

On April 29, 1996, a notice of hearing on objections and order consolidating cases was issued, consolidating for hearing the unfair labor practice case, noted above, with objections to the election, filed by the Union which essentially parallel the alleged unfair labor practices.

Respondent denied the material allegations of the complaint, and asserted certain affirmative defenses, and on May 22 and 23, 1996, a hearing was held before me in New York City.

Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, having its principal office and place of business at 100 East 17 Street, New York City, is engaged in the business of providing theatrical management services, and managed four off-Broadway theaters, including the Cherry Lane Theater, Minetta Lane Theater, Orpheum Theater, and the Union Square Theater.

Annually, Respondent, in conducting its business operations, provides services valued in excess of $50,000 to theaters located within New York State which meet a direct test for the assertion of jurisdiction by the Board. 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.

Respondent admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Organizational Campaign*

Respondent manages four off-Broadway theaters, as set forth above. It employs a technical director at each theater.

The duties of the technical director include the upkeep and maintenance of the facility; providing services to the productions or shows which rent the theater; assisting in the installation of the show, its run, and its removal from the theater; and ensuring that the theater facility is not damaged by the production company, and that the city fire codes concerning scenery are adhered to by it.

During the running of the production, the technical director acts as a member of the crew, performing stagehand and prophand duties, and operating the light or sound board.

In early April 1995, the Union began an organizing campaign in which it sought to represent the technical directors of Respondent at each of its four locations. Meetings were held, at which or shortly after which three of the four technical directors signed cards authorizing the Union to represent them as their collective-bargaining representative. By April 10, cards were signed by Timothy Hamilton, Patrick Mann, and Patrick O'Hanlon, who served as the technical directors at the Union Square Theatre, Minetta Lane Theatre, and the Orpheum Theatre, respectively.

On May 4, the Union filed a representation petition with the Board. The alleged unfair labor practices occurred between May 4 and 12.

The representation hearing opened on May 30, and on July 20, a Decision and Direction of Election was issued, in which the Regional Director found, inter alia, that a unit of technical directors employed by Respondent at the four theaters was appropriate. The Regional Director specifically found, after considering evidence on the issues, that those employees were not managerial employees or supervisors as defined by the Act.

Respondent filed a request for review with the Board, and on September 14, the Board denied the request as it raised "no substantial issues warranting review."

The election results were that of approximately three eligible voters, one cast a vote against the Union, there were no votes cast for the Union, one ballot was void, and one ballot was challenged.

On September 28, the Union filed objections to the conduct of the election, alleging the matters set forth in its charge filed in the instant case.

B. *Respondent's Knowledge of the Union*

Hamilton testified that in mid-February he was interviewed and hired as a technical director by Alan Schuster, the managing director and top management official of Respondent. Present was Mitch Christenson, the technical director Hamilton was replacing.

Hamilton stated that Schuster told him that Christenson was leaving to take an apprenticeship with the Union for a position with ABC-TV. Schuster then "jokingly" said that Christenson was a "traitor" and that he did not like unions. Hamilton responded that he had nothing to do with them.[1] Schuster testified, denying the remarks attributed to him by Hamilton.

Hamilton worked in the Union Square Theater, the same theater in which Schuster had his office. As set forth above, the Union filed its petition on May 4. Hamilton testified that on May 4 or 5, he was present in Schuster's office when Schuster opened the envelope which contained the petition. Schuster announced that he received a petition from the Board for a vote for unionization, and that "it looks like you are the only one that gets a vote." Hamilton questioned this, and Schuster noted that "it says employees of Minetta Lane Management." Hamilton asked if that would mean that the employees of all his theaters were included. Schuster said that he thought so.

The body of the petition reads, "Minetta Lane Management" as the name of the employer, and lists the Union Square Theater as the address of the establishment involved. It should also be noted that the petition stated that four employees were in the unit. The unit sought refers the reader to a rider, which states that employees at all four theaters were included in the unit.

Hamilton testified that about 1 hour later, Schuster summoned him to his office in which Doreen Chila, Schuster's assistant, was present. Schuster told him that he wished that Hamilton had not "lied" to him when he asked about the Union earlier. Hamilton replied that he did not believe that he had lied, adding that Schuster did not ask him a question about the Union. Schuster responded that Hamilton had lied by "omission." Hamilton again answered that he did not lie since Schuster had

[1] It should be noted that in his pretrial affidavit, Hamilton only quoted Schuster as saying that he did not like unions, and had no use for unions. The affidavit did not mention Christenson, or Schuster's alleged statement that he was a traitor.

not asked a specific question, and he had not volunteered any information. Hamilton added, that if he was being asked now, he knew about the Union, but did not think it was going to go "very far."

Schuster responded that "apparently pledge cards were signed and you've had meetings with Union officials." Hamilton replied that Schuster would have to ask the Union whether pledge cards were signed or meetings held because he did not have to answer that question, and he believed that the inquiry was illegal.

Schuster answered that he had to speak to a labor attorney, because he would "fight it tooth and claw and the Union will ask for something and we won't budge, and so you'll be paying union dues and your paychecks will get smaller and then they'll ask for something and you won't get it and you'll be asked to go out on strike — and you'll be on a picket line and somebody else will be in here taking your job." Hamilton responded that he believed that "this is a good thing for me personally and I [don't] think that it should bother our working, professional relationship."

Schuster flatly denied that either conversation had taken place. Chila testified that she could not recall that conversation, and did not believe that she was in the office on May 5.

Patrick Mann, the technical director at the Minetta Lane Theatre, testified that sometime in May, Schuster came to the theater and told him that he had "received information that Tim and P. J. had been approached and had expressed interest in being represented by Local 1, and had signed pledge cards." Schuster added that he could not ask Mann that question. Mann replied that if Schuster had been told that those two had been approached, then he was sure that they had been approached.

Mann further stated that Schuster said that it "would not be in the best interests of off-Broadway if we became unionized" because it would "escalate costs," and noted that the directors would be paid the same amount of money, but they would take home less money because they would have to pay union dues. Mann stated that he could have initiated the above conversation with Schuster by asking him if any one Mann knew was at the hearing, and noted that Schuster did not pressure or threaten him in any way.

Schuster denied saying this to Mann. He conceded speaking to Mann, however, at about that time, and related being told at the hearing by Alan Myers, a union official, that if Schuster permitted the Union to represent the men, he (the official) would make sure that the employees did not make any more money than they earned now. Schuster observed that the employees would actually be making less money since they had to pay union dues. The union official told him not to worry about such matters. Myers testified, denying he made such a comment to Schuster.

C. *Hamilton's Employment and Discharge*

In early February 1995, Hamilton began his employment at the Union Square Theatre as a technical director. He testified that his duties included photocopying timesheets, fire code laws, invoices, and copies of receipts, and stated that he copied documents for Schuster at his specific request. Schuster denied ever asking Hamilton to copy documents for him.

Hamilton testified that on May 12, he went to the copy machine in order to copy an invoice for an order of lamps. He noticed fax paper, one or several pages, face down, on top of the machine. He picked them up, lifted the machine's lid, and saw a page on the glass face down, and also noticed that two or three copies, face up in the copy tray, had already been made.

Hamilton picked up the copy that was on the glass, noticed that it was not the same page that was face up in the tray, and then determined that it had not been copied. He put it back on the glass and made a copy of it. In deciding to make copies of these pages, Hamilton stated that he believed that he was helping a coworker, Chila, who may have inadvertently left the papers in the machine or forgotten to finish copying them.

He took the next page that was in his hand and began to read it: It said, "what are the duties of the technical director?" He then realized that these papers were related to the union situation.

At that moment, Chila entered the room and told him she needed the document. Hamilton said that he was going to copy it but it looked like it was none of his business. He gave her the documents and left. Hamilton denied making a copy of the pages for himself, or keeping any copies he made.

Chila testified that she was told by phone by Respondent's attorney that he was sending an important and confidential fax concerning the union situation and the hearing, and that she should watch for it, remove it from the fax machine and give it to Schuster as soon as he arrived at work. She received the fax. As she was preparing to copy it she was called away to take a phone call. Before leaving the room, she put the documents face down on a counter next to the fax machine, and turned on the copy machine.

When Chila returned to the room after only about 5 minutes, she saw Hamilton looking at, and "thumbing through" the documents, while copying them. She saw him copy only one page. Chila asked Hamilton for the document and he said he was "just going to copy it for you. They're asking . . . the same questions they're asking us." Hamilton then gave Chila the documents. Chila did not see Hamilton take or keep any of the papers.

Chila phoned Schuster and told him that he saw Hamilton making photocopies of a confidential document that she had received from Respondent's attorneys.

Hamilton testified that he was called into Schuster's office. Schuster asked him if he was making copies of the document. Hamilton admitted that he had, "but not in the way that you mean to be asking me," explaining that he believed that he was helping Chila, stating that he assumed that she left the document and that he was helping her complete its copying. Schuster told him that the paper stated that it was a confidential document between him and his attorney. Hamilton replied that he had not seen that page. Schuster asked him why he copied it, and Hamilton repeated that he believed that he was doing Chila a favor. Schuster then told Hamilton that he could not tolerate such behavior and fired him. Hamilton said that he did not do "what you are accusing me of." Schuster then said that he could not trust Hamilton and discharged him.[2]

Schuster testified that he did not discharge Hamilton for simply looking at the document. He fired him for taking, copy-

[2] Hamilton testified that he made notes of his May 5 and 12 conversations immediately after the conversations occurred. Copies of the notes that he retained were received in evidence. He also testified that he sent copies by fax to the Union. Upon a request by the Union at the hearing, I directed that a search be made for those notes, and if an agreement was reached concerning them, they should be submitted to me for receipt in evidence. No agreement having been reached, I reject their offer in evidence, and I have not considered them.

ing, and reading it. Schuster noted that if Hamilton had simply come across a document left by accident and read it, that probably would not be grounds for discharge. He further conceded that it would not have been unusual for Hamilton to have seen a document "lying around," pick it up, and see who it belonged to. But such were not the extent of Hamilton's actions.

Chila testified that Hamilton told Schuster that he was trying to do Chila a favor by completing the copying of papers, but denied that she had begun the copying process when she left the room to take the call.

Schuster testified that Chila phoned him, telling him that she "just caught Tim Hamilton taking a document and photocopying it." Schuster stated that he discharged Hamilton for taking, reading and photocopying a confidential document. When he asked Hamilton why he copied the document, Hamilton replied that he was curious. Schuster asked if he was aware that he was copying a confidential document, and Hamilton replied that he was not, adding that he was not a spy. Schuster noted that he did not discharge Hamilton for simply looking at the documents. Further, Schuster conceded that he had no evidence that Hamilton had copied and then taken the document with him. Schuster further stated that part of the reason for the discharge was that he believed that it was possible that he would take the documents for his use or for the use of the Union.

At the representation hearing, Schuster testified that he discharged Hamilton because he had "misappropriated" the documents, which Schuster defined as stealing. He testified here that when requested, Hamilton gave Chila the document.

The fax itself consists of a fax transmittal page, a cover letter, and a seven-page questionnaire. The transmittal page and cover letter clearly state that the message is from Respondent's attorneys to Schuster. The transmittal page notes that the information contained in the message is privileged and confidential. The cover letter states that the message contains charts and questions that must be answered in preparation for the representation hearing. The questionnaire requests information concerning the ownership of the four theaters, the names and responsibilities of management personnel, clerical employees, other employees, the names and dates of employment of technical directors of Respondent, and also requests detailed information concerning the technical directors' responsibilities. The documents contained no legal advice from Respondent's attorneys or information of a substantive nature.

The theater staff, as well as production company personnel not employed by Respondent, have access to and use the fax and copy machine, which are located in a well-traveled area of the theater.

Mann testified that shortly after the termination, Hamilton told him that the reason for the discharge was that he had been "mistakenly" making some copies he later learned was information between Schuster and his attorney, and that he had "fucked up."

There was testimony concerning two incidents involving Hamilton's work performance. However, Schuster did not consider them in his decision to discharge him.

D. *The Supervisory and Unit Issues*

Respondent asserts as an affirmative defense that Hamilton and the other technical directors are managerial employees and supervisors within the meaning of the Act. It also denied that the unit alleged in the complaint was an appropriate unit; that Hamilton did not have the protection of the Act; and that the alleged 8(a)(1) conduct was made to statutory supervisors.

I denied the General Counsel's request to strike that affirmative defense. In seeking to prove its affirmative defense, Respondent relies on the same evidence as it presented at the representation hearing. In its answer, and at the hearing, Respondent sought to relitigate that issue. The General Counsel objected, and I permitted Respondent to submit evidence concerning that matter. Accordingly, the record in the representation case was received in evidence here.

As set forth above, based upon such evidence, and a request for review filed on those issues, the Board denied the request for review, finding that it raised no substantial issues warranting review, and upheld the Regional Director's findings that the unit was appropriate, and that the technical directors were not managerial employees or supervisors.

I have carefully considered the record in the representation case, and Respondent's arguments, which it raised in the representation hearing, that Hamilton and the other technical directors are managerial employees and statutory supervisors, that the unit sought is inappropriate, and that the Regional Director improperly certified the Union following the election.

Section 102.67(f) of the Board's Rules and Regulations states in relevant part that "denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding."

I need not reach the question of whether this is a related unfair labor practice proceeding in view of my decision herein that even assuming that such evidence was properly received herein, the evidence, as set forth in the representation case hearing supports the findings reached by the Regional Director, who concluded that the technical directors are employees covered by the Act, and not managerial employees or supervisors within the meaning of the Act.

Thus, I find, for the reasons set forth by the Regional Director in the Decision and Direction of Election dated July 20, 1995, that the technical directors do not possess the authority, in the interest of the Respondent, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees of Respondent, or responsibly direct them, or adjust their grievances, or effectively recommend such actions. I also find that the technical directors do not formulate or effectuate Respondent's policies, or have routine discretion in the performance of their jobs independent of Respondent's established policies.

I further find, for the reasons set forth in the Decision and Direction of Election, that the unit set forth therein, and also alleged in the complaint, as follows, is an appropriate collective-bargaining unit:

> All full-time and regular part-time technical directors employed by Respondent at its Union Square Theater, 100 East 17th Street, New York, New York; Orpheum Theater, 126 Second Avenue, New York, New York; Minetta Lane Theater, 18 Minetta Lane, New York, New York; and Cherry Lane Theater, 38 Commerce Street, New York, New York, excluding all other employees, including box office staff, porters, ushers, concession staff, managers, and guards, professional employees and supervisors as defined in the Act.

Analysis and Discussion

The Alleged Violations of Section 8(a)(1) of the Act

The complaint alleges that on about May 4 and 8, Schuster created the impression that Respondent was surveilling its employees' union activity, and warned and advised employees that it would be futile for them to select the Union as their bargaining representative.

I find, as set forth above, that on about May 4, when Schuster received the Union's petition, he told Hamilton that "apparently pledge cards were signed and you've had meetings with Union officials", and that Respondent would fight its organization "tooth and claw." Schuster also gave a scenario as to what Hamilton could expect from union representation: the payment of union dues, smaller paychecks, the Union's making a demand, Respondent's refusal to accede to the demand, a strike and picketing, and his replacement.

I credit Hamilton's version of this conversation. He gave a forthright, detailed, credible version of Schuster's reaction when he received the Union's petition. On the other hand, Schuster's flat denial that the conversation took place strains credulity. In crediting Hamilton, I stress particularly that he quoted Schuster saying that it appeared that Hamilton would be the only employee who would vote. That Schuster would mention that is supported by the body of the petition which lists the Union Square Theater as the address of the establishment involved. Further, Hamilton's testimony that he corrected Schuster's misreading of the petition by noting that "employees of Minetta Lane Management" might include all the employees at all the theaters is quite believable.

The May 8 conversation apparently refers to employee Mann's testimony that he was told by Schuster that Schuster had received information that Hamilton and O'Hanlon "had been approached and had expressed interest in being represented by Local 1, and had signed pledge cards." I credit Mann's testimony, which is believable in part because Schuster made similar statements to Hamilton 1 week before.

"The test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement that his union activities had been placed under surveillance." *Flexsteel Industries*, 311 NLRB 257 (1993). By telling Hamilton that he believed that pledge cards were signed and Hamilton had meetings with union officials, Schuster clearly created the impression that Hamilton's union activities were monitored. That may not have actually been the case. In fact, Schuster may just have assumed from the petition's filing that union activities had occurred. But nevertheless, in order to find a violation, it is not necessary that Schuster actually possessed knowledge of Hamilton's union activities, or that he was actively engaged in surveillance. *Flexsteel,* supra.

I also find that Schuster's remarks to Mann are equally unlawful. Although Schuster did not say that he had information that Mann had signed a card, that implication was clear since Schuster said that he could not ask that question of Mann. Clearly, if Schuster possessed information that Hamilton and O'Hanlon had been approached, expressed interest in joining the Union, and had signed cards, the impression being given Mann was that Schuster knew that the same applied to him. Schuster did not say that he had no information concerning Mann's union activities — only that he could not ask Mann about it. Under the standard set forth above, I find that Schuster created the impression that Mann's union activities had been monitored.

The complaint further alleges that these remarks to Mann constitute unlawful interrogation. I find that by telling Mann that his coworkers had expressed an interest in union representation and had signed cards, but that Schuster could not ask that question of Mann, Schuster was thereby inviting Mann to disclose his own desire for representation, or causing him to choose between lying to Schuster or revealing that he had, in fact, signed a card for the Union. *De Jana Industries*, 305 NLRB 845, 848 (1991).

These comments to Mann are unlawful "not only because [they] create the impression of surveillance, but also because [they] solicit a reply regarding the employee's union sympathy, thus constituting an attempt to interrogate in violation of Section 8(a)(1) of the Act." *Great Dane Trailers*, 293 NLRB 384, 385 fn. 8 (1989). An employer cannot put an employee in such a position without violating the Act. I find that Schuster's comment reasonably tended to restrain, coerce, or interfere with Mann in the exercise of the rights guaranteed by the Act. *Rossmore House*, 269 NLRB 1176 (1984).

I accordingly find that Schuster's remarks to Hamilton and Mann created the impression of surveillance of their union activities, and that he interrogated Mann by his remarks to him.

Schuster's statements to Hamilton concerning the predicted course of bargaining clearly presented a picture that union representation would be futile, as alleged in the complaint. Thus, Schuster spoke in absolute terms concerning the consequences of unionization and the bargaining process. He said that the Union would make a demand and Respondent "won't budge" and the employees "won't get it" and then they would strike and replacements would be hired. Thus, Respondent told Hamilton in effect that the Union's selection would result in his going on strike and losing his job.[3]

Respondent, thus, unlawfully anticipated a refusal to bargain in good faith with the Union. The implication of Schuster's remarks was that Respondent would not bargain in good faith with the Union, thereby foreclosing agreement. I accordingly find that Respondent violated the Act by advising Hamilton that it would be futile for him to select the Union as his bargaining representative. *Forrest City Grocery Co*., 306 NLRB 723, 729 (1992).

III. THE DISCHARGE

Schuster discharged Hamilton for, inter alia, "taking" the document. He stated that Chila told him that Hamilton took it. Chila did not so testify. It is clear the Hamilton did not take the document, he only looked at it and copied it. There is no evidence that he retained a copy.

Hamilton's testimony at hearing was consistent with the explanation he gave Schuster immediately when confronted, as testified by Chila: that he believed he was doing Chila a favor by copying a document whose pages had been partly copied, and was left at the copy machine.

[3] In her brief, the General Counsel asserts that Schuster's comments to Hamilton are also an unlawful interrogation and a threat of discharge, and urges that I make findings to that effect. However, since those statements were not so alleged in the complaint, and since such findings would only be cumulative, I will not do so.

A. The General Counsel's Case

As set forth above, the evidence establishes that Hamilton signed a card for the Union, and that he was the subject of a hostile encounter with Schuster when he received the Union's petition. Thus, Schuster accused Hamilton of lying by not answering fully Schuster's question concerning the petition. In addition, I have found that Hamilton was the subject of 8(a)(1) violations of the Act committed by Schuster: the unlawful creation of the impression of surveillance, and a warning that it would be futile for employees to select the Union as their bargaining representative.

In addition, the timing of the discharge, coming only about 1 week after the violations of Section 8(a)(1), strongly supports a finding of unlawful motivation in the discharge.

I accordingly find that the General Counsel has shown that Hamilton's union activities were a motivating factor in his discharge. *Wright Line*, 251 NLRB 1083 (1980). The burden then shifts to Respondent to prove that it would have discharged Hamilton even in the absence of his union activities. *Wright Line*, supra.

B. Respondent's Defenses

Schuster testified that he discharged Hamilton, in part, because he "took" a confidential document. The evidence does not support the claim that Hamilton took the faxed document. Rather, the evidence which Respondent does not dispute, is that Hamilton came upon the fax, looked at it, and made photocopies of all or part of it. Hamilton's defense is that he undertook that action innocently, in an effort to help a coworker who had left it, according to him, partly copied, in the copying machine.

Accordingly, Respondent's claim that Hamilton took the document is not supported by the evidence. Thus, the record does not show that Respondent had a reasonable or honest belief that Hamilton took a confidential document. *Paper Mart*, 319 NLRB 9, 10 (1995).

Respondent's argument is that Hamilton deliberately looked at it, and made a copy of it with an intent to use it or give it to the Union.

The first question is whether the material viewed by Hamilton was in fact confidential which he had no right to view. The first pages of the fax set forth that it was confidential, and clearly stated that it was a communication from Respondent's attorneys to its client. Hamilton stated that he did not see the notice of confidentiality.

The document was clearly not intended for inspection by anyone other than Schuster or his assistant, Chila, to whom it was entrusted. However, it appears obvious that Hamilton did not by surreptitious means seek to obtain the document. "He did not sneak into the office and the office was not one where he had no right to be." His conduct was, "throughout the incident, open and frank." *Gray Flooring*, 212 NLRB 668, 669 (1974). In addition, the document was located in a well-traveled area at machines which are routinely used by employees and visitors. *Gray*, supra. Rather, the information came to him in the "normal course of work activity and association." *Ridgely Mfg. Co*., 207 NLRB 193, 197 (1973).

Most significantly, Schuster stated that he would not have discharged Hamilton if he had simply looked at the document. That is all that Hamilton did. He looked at the document and was in the process of copying it for Chila. In addition, by stating that Hamilton's viewing of the document would be permissible, Schuster waived any claim of confidentiality he might have had.

Schuster of course, claims that Hamilton did more than merely looking at the document to determine who it belonged to. Rather, according to Schuster, he made a copy of it in order to supply it to the Union. As noted above, no evidence exists to support this claim. I accept Hamilton's statement, made immediately when confronted by Schuster, and as corroborated at the hearing by Chila, that he made the copy in order to help her.

Thus, this case is far different than those in which employees were lawfully discharged for taking confidential documents. In such cases, the employee entered private offices, searched through private files and copied confidential documents. *Roadway Express*, 271 NLRB 1238, 1239 (1984); *Western Clinical Laboratory*, 225 NLRB 725, 750 (1976). The evidence here supports a finding that Hamilton had photocopied documents as part of his daily routine, and had copied documents for Schuster. He did not enter any private office or open any files with a purpose to take and copy the document. Rather, the document came to his attention as he was performing his regular work activities.

I accordingly find and conclude that Respondent has not proven that it would have discharged Hamilton even in the absence of his union activities. *Wright Line*, supra.

IV. THE BARGAINING ORDER

The appropriate collective-bargaining unit is set forth above. On about April 10, 1995, the unit consisted of four employees. As of that date, three, a majority, had signed cards authorizing the Union to represent them for the purposes of collective bargaining.

Based upon the violations found above, I find that the Board's traditional remedies would not be sufficient to ensure that a fair election could be held. Thus, immediately upon his receipt of the representation petition, Schuster engaged in a hostile confrontation with Hamilton, accusing him of lying concerning his knowledge of the Union. That same day, Schuster created the impression of surveillance, and warned Hamilton that it would be futile for him to seek representation by the Union. A few days later, Schuster again created the impression of surveillance with Mann and interrogated him about his union activities. A few days after that Hamilton was discharged in violation of the Act. That occurred only 1 week following Respondent's receipt of the petition.

It must be noted that all these violations were committed by Schuster, Respondent's top management official. The unit affected was very small — only four individuals, 50 percent of whom were the subject of direct violations by Schuster.

The swiftness of Respondent's unlawful response to the union campaign, the extent of the violations, which included the discharge of 25 percent of the unit, and the small size of the unit "sent its employees the unequivocal message" that Respondent would not tolerate union organization. That message may be expected to have a "lasting effect on the unit employees' exercise of their rights to organize. *Electro-Voice, Inc*., 320 NLRB 1094 (1996).

Respondent's activities struck at the core of the Union's organizational effort and served to destroy any opportunity of union representation without a bargaining order. Accordingly a bargaining order authorized in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), is the only meaningfully appropriate remedy.

V. THE REPRESENTATION CASE

The election results were that of approximately three eligible voters, one cast a vote against the Union, there were no votes cast for the Union, one ballot was void, and one ballot was challenged.

On September 28, the Union filed objections to the conduct of the election, alleging the violations set forth in its charge in this case: that Respondent discharged Hamilton, interrogated employees concerning their union membership and activities, and threatened employees with reprisals because of such activities. The Union's objections were substantially identical to the conduct alleged as unfair labor practices.

Inasmuch as I have found that Respondent committed sufficiently pervasive and extensive unfair labor practices to warrant the issuance of a bargaining order, I shall recommend that the election be set aside, that Case 2–RC–21540 be dismissed, and that all proceedings in connection therewith be vacated.

CONCLUSIONS OF LAW

1. Respondent, Union Square Theatre Management, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Theatrical Protective Union Local No. One, I.A.T.S.E., AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By discharging Timothy Hamilton, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By creating the impression that its employees' union activities had been placed under surveillance, Respondent violated Section 8(a)(1) of the Act.

5. By interrogating employees about their union activities and membership, Respondent violated Section 8(a)(1) of the Act.

6. By warning and advising its employees that it would be futile for them to select the Union as their bargaining representative, Respondent violated Section 8(a)(1) of the Act.

7. The following unit is an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time technical directors employed by Respondent at its Union Square Theater, 100 East 17th Street, New York, New York; Orpheum Theater, 126 Second Avenue, New York, New York; Minetta Lane Theater, 18 Minetta Lane, New York, New York; and Cherry Lane Theater, 38 Commerce Street, New York, New York, excluding all other employees, including box office staff, porters, ushers, concession staff, managers, and guards, professional employees and supervisors as defined in the Act.

8. Since on about April 10, 1995, the Union has been the exclusive collective-bargaining representative of the employees set forth in the appropriate collective-bargaining unit, above.

9. By the conduct set forth in paragraphs 3 through 6, above, Respondent has undermined the majority status of the Union, and has precluded any likelihood that a fair election could be held.

10. Respondent has violated Section 8(a)(5) and (1) of the Act since April 10, 1995, by refusing to recognize and bargain with the Union in the above-defined collective-bargaining unit.

11. The unfair labor practices found above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom, and take certain affirmative action which is necessary to effectuate the policies of the Act.

Having found that Respondent unlawfully discharged Timothy Hamilton, it is recommended that the Respondent offer him immediate and 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, and make him whole for any loss of earnings he may have suffered by reason of his unlawful discharge, less any interim earnings, to be computed in the manner established by the Board in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded,* 233 NLRB 1173 (1987).

It is further recommended that Respondent recognize and bargain with the Union as its employees' collective-bargaining representative in the unit found appropriate.

[Recommended Order omitted from publication.]