Toma Metals, Inc. *and* United Steelworkers of America, District 10, AFL–CIO, CLC. Cases 6–CA–32055, 6–CA–32134, and 6–CA–32199

August 13, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 10, 2002, Administrative Law Judge Paul Buxbaum issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

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

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

Some of the Board's findings and conclusions in this decision reflect the panel's unanimous views, while others reflect the views of panel majorities, as more fully described below. We adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by selecting its employee, David Antal Jr., for layoff because of his union and protected concerted activities.[2] We also adopt the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by laying off[3] employees without providing the Union with adequate notice and opportunity to bargain about the layoffs.[4]

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

[2] In adopting this finding, Chairman Battista and Member Schaumber do not rely, for evidence of animus, on the judge's finding that the Respondent unlawfully interrogated Antal. As discussed infra, they find no such unlawful interrogation.

[3] The employees in question are John Craig, Chris Karsaba, Allen Ling, Joel Offman Sr., Robert Oravis, Lonny Smith, Larry Thomas, and Travis Thomas.

[4] The decision to lay off the employees is not alleged as unlawful. Rather, the violation is the failure to give advance notice of the layoff so that the Union could bargain about such things as who would be laid off and how the layoff would be carried out. According to the credited testimony, the Union did not learn of the layoff until June 8, the date on which it occurred. We find it unnecessary to rely on the judge's alternative rationales for finding that the Respondent's notice to the Union was insufficient.

Recall of Laid-Off Employees

A panel majority (Members Liebman and Schaumber) adopts the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by recalling[5] laid-off employees without providing the Union with adequate notice and opportunity to bargain about the recalls.

The Union became the employees' exclusive bargaining representative after winning an election on June 1, 2001. On June 8, 2001, during a noontime meeting, the Respondent announced the layoff of eight employees. Shawn Rolley, a representative of the United Steel Workers of America, testified that he first learned of the layoffs through telephone calls from plant workers on June 8, 2001. He stated that he did not contact the Respondent after learning of the layoffs because he felt that it would be futile, since the workers had been laid off by the time he received word of the Respondent's actions. Over the following months, three of the employees who were laid off in June were recalled to work. The Respondent did not give the Union prior notice of the recalls.

We agree with the judge that the Respondent violated the Act by failing to provide the Union with adequate notice and an opportunity to bargain over the recalls. "The recall of laid-off employees is . . . a bargainable matter." *Robertshaw Controls Co.*, 161 NLRB 103, 108 (1966), enfd. 386 F.2d 377 (4th Cir. 1967). See also *Clements Wire*, 257 NLRB 1058, 1059 (1981) (obligation to bargain over layoff includes duty to bargain over effects of layoff, including "manner in which any recalls are to be effected"). Here, the layoff and the recall of employees were linked: the Respondent gave the Union advance notice of neither.

Our dissenting colleague does not dispute that recall is a mandatory subject of bargaining. Rather, he argues that the Union waived its right to bargain over the recall. He contends that the Union knew that recalls were a possibility at least by July 30, when the first recall occurred and that the Union, thus, should have requested bargaining over the recalls. We reject this argument.

First, our dissenting colleague neglects the significance of the Respondent's violation of its duty to bargain with respect to the layoffs. We do not disagree with our colleague's observation that a layoff and a recall are distinct (if related) matters, and that an employer has a duty to bargain over both. But where the issue is one of the union's claimed waiver of its right to bargain, the employer's prior conduct clearly matters. By presenting the layoff as a fait accompli, and by then failing to give ad-

[5] The employees in question are Larry Thomas, Joel Offman Sr., and Lonny Smith.

vance notice of the recalls (an effect of the layoff), the Respondent excused any alleged failure of the Union's to demand bargaining with respect to either the layoff or the recalls. See, e.g., *Intersystems Design Corp.*, 278 NLRB 759, 759 (1986) (no waiver where union did not receive timely notice of layoff).[6]

On June 6, 2 days before the layoff, the Respondent sent a letter to union representative Shawn Rolley. The letter stated, "Due to continuing unfavorable economic conditions, Toma Metals, Inc. will be *permanently* laying off eight hourly employees" (emphasis added). Although the record is unclear as to precisely when Rolley received the letter, it is apparent that he had received it no later than the afternoon of June 8, shortly after the layoff occurred. In light of the Respondent's representation to the Union that the layoffs would be permanent, it is unreasonable to conclude that the Union should have expected, at the time it learned of the layoff, that the employees would be recalled.

We do not agree with our colleague's contention that the Union should have known that recall was always a "possibility." The Respondent itself had said that it was "permanently" laying off employees. "Permanent" is defined as "continuing or enduring in the same state, status . . . or the like . . . not temporary or transient."[7] We believe that the Union appropriately gave a literal reading to the word "permanent." Our colleague, however, apparently contends that the Union should have realized that the Respondent actually meant the precise opposite of what it said: that the layoffs would be temporary, not permanent.

Further, even assuming that the Respondent believed that there was a possibility of recall when it sent the letter to the Union, there is no evidence that the Respondent ever gave the Union any indication of such a possibility, or that the Union had information about the Respondent's financial situation placing it on constructive notice that the laid-off employees would eventually be recalled. Nor is there evidence that the Respondent gave the Union actual notice prior to the recalls. Rather, the Union did not find out about the recalls until after they had already occurred. Consequently, we find absolutely no basis to conclude the Union waived its right to bargain over the recalls.

[6] Our dissenting colleague insists that the Union should have demanded bargaining at least after the recall of the first employee. But the Respondent's course of conduct—failing to give advance notice of either the layoff or any of the later recalls—made clear that a demand for bargaining would have been futile. See, e.g., *Intersystems Design*, supra at 760.

[7] *Black's Law Dictionary* (6th ed. 1990).

Interrogation of Antal

A panel majority (Chairman Battista and Member Schaumber) reverses the judge's finding that the Respondent violated Section 8(a)(1) by interrogating its employee, David Antal Jr., about his union and protected concerted activities and the union activities and sympathies of his fellow employees.

On May 1, 2001, the Respondent decided to lay off six employees. That same day, three employees asked the plant materials manager, Richard Hajko Jr., whether there was any truth to the rumors that a union was attempting to organize the Respondent's employees. Hajko replied that he had no idea whether this was true. Between 3:30 and 4:30 p.m., Hajko approached employee Antal at his workstation and asked him, "[W]hat's up with the rumor of the union I'm hearing?" Antal responded that it was not a rumor, but that it was actually happening. Antal stated that the employees wanted a "piece of the pie," and illustrated the point by comparing the assertedly expensive cars driven by managers with the assertedly more modest cars driven by employees. Hajko responded, "You don't think a union will help you, do you?" Antal responded that it couldn't make things any worse. Hajko testified that he considered that Antal had an "attitude" and that he didn't need any "aggression from a laborer." Hajko then turned and walked away.

At 4:50 p.m., shortly after the conversation between Hajko and Antal, the Regional Office notified the Respondent that an election petition had been filed. At approximately 6 p.m., Antal was notified that he was going to be laid off.

The judge found that the Respondent violated Section 8(a)(1) of the Act by unlawfully interrogating Antal about his union sympathies and the union activities and sympathies of other employees. In determining whether an interrogation is unlawful, the Board examines whether, under all the circumstances, the questioning reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984). In analyzing alleged interrogations under the *Rossmore House* test, the Board examines the *Bourne*[8] factors:

> (1) The background, i.e., is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?

[8] *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

(3) The identity of the questioner, i.e. how high he was in the company hierarchy?

(4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?

(5) Truthfulness of the reply.

These and other relevant factors are not to be mechanically applied, but rather serve as a starting point for assessing the totality of the circumstances. *Medcare Associates, Inc.*, 330 NLRB 935 (2000); *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998).

Contrary to the judge, we find that Hajko's questioning of Antal was not coercive. Hajko, a low-level supervisor rather than a high-ranking manager, posed the question here. The question was prompted by employees who asked Hajko a question, viz., whether rumors of union organizing were true. Hajko did not know the answer and sought to find out. He asked Antal, "[W]hat's up with the rumor of the union I'm hearing?" Hajko testified that he approached Antal because Antal is his wife's first cousin, and they had friendly relations and engaged in daily conversations. The conversation occurred informally on the plant floor, rather than in a boss's office. Antal did not hesitate to answer truthfully, did most of the talking, and the conversation was brief. Furthermore, Hajko's questioning was broad and general, not focused on specific employees or groups, and was not sustained or repeated. Considering all the circumstances, we do not find that the questioning was coercive.[9]

Our dissenting colleague complains that Hajko did not tell Antal the reason for his question. In our view, the question itself told Antal that Hajko was attempting to verify what other sources had told him; Hajko was not trying to ascertain Antal's views.

Our colleague also piles inference upon inference. She infers antiunion animus, and she then infers that employee knowledge of employer awareness of a union campaign would instill fear in the employee. Neither inference is supported by the facts.

Hajko also asked another question of Antal. After Antal confirmed that there was a union campaign, he volunteered a reason as to why some employees wanted a union. Hajko responded, "[Y]ou don't think a union will help you, do you?" Antal responded that a union could not make matters worse. Hajko then walked away.

In our view, the question was not a coercive interrogation. Antal had revealed his prounion views,[10] and Hajko was stating a contrary view. The fact that Hajko did so with a rhetorical question does not establish a coercive interrogation.

Our colleague notes that Hajko testified that he walked away from his conversation with Antal because he did not need any "aggression from a laborer." However, what Hajko thought when he walked away is immaterial. The key is what Antal would reasonably understand from the questioning.[11]

In addition, our colleague reasons backwards in time to find that Hajko's conversation with Antal was unlawful because of the subsequent layoff of Antal. That approach is not correct in the circumstances of this case. There is nothing to suggest that Antal, at the time of his layoff, would reasonably believe, in retrospect, that Hajko's question was really an "effort to ferret out his union sentiments."[12] Rather, as was made plain at the time, Hajko was simply trying to track down a rumor that a union campaign had begun.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Toma

[9] See *Cardinal Home Products*, 338 NLRB 1004 (2003) (questioning of employee not coercive where posed by front-line supervisor rather than high-level manager, conversation occurred on plant floor, employee did not hesitate to answer truthfully, and exchange was brief and friendly).

The judge cites *Acme Bus Corp.*, 320 NLRB 458 (1995), enfd. 198 F.3d 233 (2d Cir. 1999), as support for finding that Hajko and Antal's friendly relations magnified the coercive impact of the questioning. *ACME*, however, is distinguishable on the basis that, unlike here, the supervisor's questioning was part of an ongoing solicitation of information about the union from several employees. The judge also relies on *Cumberland Farms, Inc.*, 307 NLRB 1479 (1992), enfd. 984 F.2d 556 (1st Cir. 1993), for support of his finding that the interrogation was unlawful. *Cumberland Farms* is distinguishable on the basis that, unlike in this case, the interrogation involved specific questions such as which groups of employees and how many had signed authorization cards. The Board also found the interrogation to be coercive in *Cumberland Farms* because of the repeated, probing, and focused nature of the questioning.

[10] We acknowledge that Antal had not disclosed his union sympathy prior to the first question posed by Hajko. However, this fact does not outweigh the many circumstances surrounding Hajko's questioning that show no coercion. Cf. *Demco New York Corp.*, 337 NLRB 850, 851 (2002) (coercive interrogation included pointed question about employee's union membership, and it was accompanied by an implied threat to link job assignments to an employee's union support); *Sundance Construction Management*, 325 NLRB 1013, 1013 (1998) (coercive interrogation probed into whether a particular employee had participated in a specific union-sponsored event).

[11] Member Schaumber also relies on *NLRB v. Acme Die Casting Corp.*, 728 F.2d 959, 962 (7th Cir. 1984), in which the court reversed an interrogation finding where an employee was asked, similar to Hajko's question, whether he knew "something about the Union." The court found that the "question [was] neither tendentious nor intimidating either in content or inflection, [was] asked casually and in a friendly manner, and [was] not followed up." Id. at 963.

[12] See *Medcare*, 330 NLRB 935, 940 fn. 17.

Metals, Inc., Johnstown, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the subsequent paragraphs accordingly.

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

CHAIRMAN BATTISTA, dissenting in part.

Contrary to my colleagues, I do not find that the Respondent's recall of its laid-off employees, without providing the Union with notice and opportunity to bargain about the procedure for the recalls, was unlawful.

The judge found that the Respondent failed to provide adequate notice and appropriate opportunity to bargain with the Union over the employee recalls. Relying on *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994), the judge found no waiver by the Union of its right to bargain over the recalls, in light of the Respondent's failure to provide the requisite notice prior to implementing the recalls.

I disagree. Although I agree that the Respondent's notice to the Union about the June 8 layoffs was untimely, I find that the Union subsequently became aware that there would be recalls. Even after such awareness, the Union never requested bargaining about the manner in which recalls would be undertaken. Rather, it simply filed unfair labor practice charges.

The Board has held that it is "incumbent upon a union which has notice of an employer's proposed change in terms and conditions of employment to timely request bargaining in order to preserve its rights to bargain on that subject. The union cannot be content with merely protesting the action or filing an unfair labor practice charge over the matter." *Citizens National Bank of Willmar*, 245 NLRB 389 (1979), enfd. 644 F.2d 39 (D.C. Cir. 1981).

In the instant case, the layoffs were announced on June 6 and they began on June 8. The majority seizes upon the phrase "permanent layoff" in the letter of June 6. The majority believes that permanent means forever. The instant case turns on its evidence, not on the dictionary. The evidence shows that it was clear at least by July 30, when the first recall occurred, that there would be recalls. Even if the Union thought, prior to July 30, that permanent meant forever, it knew by that date that recalls were not only a possibility but a reality. There were five persons who were authorized to act for the Union. Four of them were employees in the plant. Despite this, none of these persons sought to bargain about the recalls that were occurring in their midst. The Respondent therefore proceeded, reasonably, with recalls on August 10 and September 17.

Contrary to my colleagues' position, I do not find that layoffs and recalls are part and parcel of the same thing. They are not. There is a duty to bargain about both, but that is not to say that they are the same thing. Thus, for example, a layoff can be unlawful, and the recalls therefrom can be discriminatory. Similarly, an employer could lawfully bargain about layoffs and unlawfully refuse to bargain about recalls, or vice-versa. In sum, layoffs are not the same thing as recalls. They are separate and discrete events, and the duty to bargain about one is not encompassed in the duty to bargain over the other. Accordingly, there can be, as here, a refusal to bargain about layoffs, and a waiver of the right to bargain about recalls.

My colleagues say that the Respondent's conduct prior to the August 10 and September 17 recalls excused the Union's failure to request bargaining as to those recalls. I disagree. The prior conduct consisted of the June 8 layoff and the July 30 recall. With respect to the former event, I have previously made the point that a layoff and a recall are two different matters. With respect to the latter event, it may well be that the failure to request bargaining as to the July 30 recall was excusable. The Union may well have been surprised by the event, in as much as the Respondent had said on June 8 that the layoffs were permanent. However, the very event, i.e., the recall of July 30, apprised the Union that there would be recalls. And yet, the Union did not seek to bargain about any aspect of recalls. Accordingly, the Respondent reasonably went ahead with the recalls of August 10 and September 17.

MEMBER LIEBMAN, dissenting in part.

The majority mistakenly concludes that Richard Hajko did not unlawfully interrogate employee David Antal. In so doing, they ignore the circumstances that establish the coercive tendency of the questioning.

Hajko specifically sought out Antal to confirm the truth of a rumor that the Union was engaging in organizing activity in the Respondent's plant.[1] The majority acknowledges this fact, but asserts that Hajko was acting in response to inquiries from other employees and was not trying to determine Antal's own sentiments. Neither asserted fact, whatever its relevance, was communicated

[1] The majority acknowledges this fact, but asserts that Hajko was acting in response to inquiries from other employees and was not trying to determine Antal's own sentiments. Neither asserted fact, whatever its relevance, was communicated to Antal. And even if Hajko's interrogation of Antal was prompted by questions from other employees, it obviously could still be coercive. A reasonable employee, suspecting his employer's antiunion animus, would be more likely to regard an interrogation as coercive if he was also aware of the employer's suspicion that organizing activity was underway.

to Antal. And, even if Hajko's interrogation of Antal was prompted by questions from other employees, it obviously could still be coercive. A reasonable employee, suspecting his employer's antiunion animus, would be more likely to regard an interrogation as coercive if he was also aware of the employer's suspicion that organizing activity was underway. There is no evidence that Antal was an open union supporter at the time, a significant factor in applying the *Rossmore House* analysis.[2] After Antal confirmed the rumor and explained why the employees wanted a union, Hajko abruptly ended the conversation with a disparaging remark ("You don't think a union will help you, do you?") and walked away—because, in his words, he did not need any "aggression from a laborer." Moreover, a few hours after the questioning took place, Antal was laid off. We all agree that the layoff was in retaliation for Antal's union activity. Given that Antal was laid off only a few hours after he expressed his support of the Union to Hajko, it is not likely that an employee in Antal's position would view Hajko's questioning as innocuous.[3] Nor can the remarks be dismissed as merely a "friendly" exchange between in-laws.[4]

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT select for layoff any employees for engaging in protected concerted activities.

WE WILL NOT unilaterally lay off employees without providing the Union with adequate notice and opportunity to bargain about the layoff, alternatives to the layoff, and the effects of any layoff.

WE WILL NOT unilaterally recall employees from layoff without providing the Union with notice and opportunity to bargain about the manner in which employees are recalled from layoff.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce any employee in the exercise of the rights guaranteed by Federal labor law.

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

WE WILL make David Antal Jr. whole for any loss of earnings and other benefits resulting from his layoff, less any net interim earnings, plus interest.

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

WE WILL, within 14 days of the date of the Board's Order, offer John Craig, Chris Karsaba, Allen Ling, Joel Offman Sr., Robert Oravis, Lonny Smith, Larry Thomas, and Travis Thomas full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make John Craig, Chris Karsaba, Allen Ling, Joel Offman Sr., Robert Oravis, Lonny Smith, Larry Thomas, and Travis Thomas whole for any loss of earnings and other benefits resulting from their layoff, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the layoff of John Craig, Chris Karsaba, Allen Ling, Joel Offman Sr., Robert Oravis, Lonny Smith, Larry Thomas, and Travis Thomas, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the layoff will not be used against them in any way.

WE WILL, upon request, bargain with the Union concerning the lay off of employees on June 8, 2001, and the effects of that decision.

WE WILL, upon request, bargain with the Union concerning the manner of recall of employees on July 30, August 16, and September 30, 2001.

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[2] 269 NLRB 1176 (1984); see, e.g., *Demco New York Corp.*, 337 NLRB 850, 851 (2002); *Sundance Construction Management*, 325 NLRB 1013 (1998).

[3] See generally *Medcare Associates*, 330 NLRB 935, 940–944 (2000) (Board may consider subsequent events in determining whether interrogation is coercive).

[4] My colleagues distinguish *Acme Bus Corp.*, 320 NLRB 458 (1995), relied upon by the judge, on its facts. Notwithstanding, *Acme* stands for the proposition that a friendly relationship between a supervisor and an employee does not necessarily diminish the coerciveness of an interrogation.

TOMA METALS, INC.

Barton A. Meyers, Esq., for the General Counsel.
J. Michael Klutch, Esq., of Pittsburgh, Pennsylvania, for the Respondent.
Shawn R. Rolley, of Johnstown, Pennyslvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Johnstown, Pennsylvania, on December 17, 2001. The original charges were filed May 3, 2001, with additional charges filed on June 18 and July 24. Amendments to each of the charges were filed on November 15. The consolidated complaint was issued September 28, 2001, and a motion to amend the consolidated complaint was filed December 17.[1]

The consolidated complaint alleges that the Company interrogated employees[2] about their union membership, activities, and sympathies and the union membership, activities, and sympathies of other employees; that the Company selected an employee, David R. Antal Jr., for layoff because he engaged in protected concerted activities; and that the Company laid off other employees and recalled certain of those employees without affording the Union notice and opportunity to bargain with the Company with regard to these decisions. It is further alleged that these actions are in violation of Section 8(a)(1), (3), and (5) of the Act. The Company's answer to the consolidated complaint denies the material allegations and raises the defense that the Union waived its entitlement to bargain over the issues described in the consolidated complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, manufactures stainless steel components at its facility in Johnstown, Pennsylvania, where it annually sells and ships from its Johnstown, Pennsylvania facility goods valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Toma Metals is a Pennsylvania corporation founded in 1986 by its president, Pat Torcia. The Company does business in the secondary market for stainless steel by purchasing steel that is of less than prime quality and using it to manufacture components for appliances and equipment that do not require prime quality steel.[3] For most of its history, the Company has been a profitable enterprise.[4] It enjoyed a period of growth in 1999, leading to its biggest year in earnings and to the hiring of significant numbers of new employees. On June 1, 2000, the Company was purchased by Reliance Steel. Additional new employees and managers were hired. This period of prosperity and expansion is reflected in the Company's sales figures that increased from $600,000 for the month of May 1999, to $2.4 million for January 2001.

Daniel Yunetz, the Company's chief financial officer, testified that, beginning in August and September 2000, management "start[ed] to get a little nervous" due to a downturn in business. (Tr. 15.) While the Company remained profitable, it was beginning to experience declining markets and increasing competition. For example, due to falling prices for stainless steel, the Company's customers were able to purchase prime steel for the same price as the Company's subprime product. During the ensuing 6 months, the Company's sales fell from the January 2001 level of $2.4 million to $1.2 million per month. The Company's declining fortunes were reflected in the balance sheet for the final quarter of 2000. During that quarter, the Company lost almost $200,000, the first quarterly loss in its history.[5] Thereafter, there was some temporary improvement and the Company showed a profit of $140,000 in January 2001. It was able to pay a bonus to its employees in the following month. It earned a profit of $40,000 for February, but by March 2001, it was reporting a loss of $78,000. This situation, following closely on the heels of the Company's acquisition by Reliance Steel, caused considerable anxiety among the corporate officials. As Yunetz put it, the lack of profitability was "a pretty tough nut for us to swallow." (Tr. 137.)

Against this gloomy background, both management and labor took steps to cope with the economic challenges posed by the downturn in the stainless steel market. Consequences flowing from these measures led to the charges under consideration in this case. The process began with management's effort to scrutinize the Company's expenditures in order to cut costs. Yunetz testified that one major component of expenditure was the cost of labor. In order to trim this area of cost, several initiatives were undertaken at the end of March 2001. On March 30, Gary Sheesley, the plant superintendent, met with the employees to announce these measures. The employees were told that there would be no further bonuses and that overtime would be regulated. In addition, it was announced that 15 employees would be laid off.[6] Selection of the employees to be laid off was made by management officials based on assessment of individual employee productivity.

[1] This motion was unopposed and I granted it at the hearing.

[2] Although this allegation of the complaint is phrased in the plural, at trial the General Counsel proceeded on the theory that one particular employee was unlawfully interrogated.

[3] As one company official described it, the Company "recycles" this poorer grade of stainless steel.

[4] Counsel for the Company observed that, "Toma was a very profitable business until Fall 2000." (R. Br. 2.)

[5] The Company experienced its first-ever monthly loss in October 2000 when it lost $140,000. November was profitable, but December was not.

[6] Yunetz estimated that the Company had a total of about 94 employees at that time.

Reacting to these adverse measures, an employee, David Antal Jr., took the initiative. He contacted Shawn Rolley, staff representative with District 10 of the United Steelworkers of America. Rolley's duties include conducting union organizational campaigns. Such a campaign was initiated at Toma Metals.

The economic climate failed to improve during April. The Company lost $284,000 in that month.[7] On April 29, Rolley held a meeting for Toma employees at the Local 2635 union hall in Johnstown. Antal attended the meeting and signed a union authorization card. Rolley testified that 21 workers attended. Some authorization cards were completed and Rolley gave additional cards to the attendees to take to employees who had not attended the meeting. On the following day, Antal did take some of the cards to work and obtained signatures of three or four additional employees. He delivered these to Rolley on May 1.[8]

On May 1, management took additional steps to cut labor costs and the employees' effort to respond by organizing reached a critical stage. Yunetz testified that his estimate of the Company's performance for May indicated that the Company would lose $300,000 for the month. As a result, it was decided to lay off another six employees. As in the first layoff, managers made the choice of whom to lay off based on their assessments of the productivity of individual employees.

Also on May 1, three employees asked the plant materials manager, Richard Hajko Jr., whether there was any truth to rumors that a union was attempting to organize the Company's employees. Hajko replied that he had no idea whether this was true. He decided to ask Antal. He testified that he approached Antal because Antal is his wife's first cousin and they had friendly relations, engaging in daily conversations about family matters and work-related topics.[9] Hajko approached Antal at his workstation sometime between 3:30 and 4:30 p.m. Both Hajko and Antal agree that nobody would have been able to overhear their conversation. Hajko asked Antal, "[W]hat's up with the rumor of the union I'm hearing?" (Tr. 41.) Antal informed him that it was not a mere rumor, but was actually happening. He told Hajko that the laborers wanted a "piece of the pie." (Tr. 41.) He illustrated the point by comparing the expensive cars driven by managers with the far more modest cars driven by the workers.[10] After hearing this, Hajko walked away since he felt that he did not need any "aggression from a laborer." (Tr. 45, 46.)

Shortly after the conversation between Hajko and Antal, the Regional Office notified the Company that an election petition had been filed. This notification was faxed to the Company at 4:50 p.m.[11] Sometime after 5 p.m., the Company's attorney, Mr. Klutch, came to the plant and discussed the election petition with Yunetz.

Antal testified that at approximately 6 p.m., Sheesley told him that he was going to be laid off.[12] He was given a letter dated May 1, 2001, formally notifying him of his layoff and that the layoff was due to "current economic conditions" and was "temporary." (GC Exh. 3.)

Hajko testified that he did not learn of the election petition until the next day. He denied reporting his conversation with Antal to other managers until after Antal had been laid off, stating that, "I think we might have discussed the conversation the next day [May 2] that me and Antal had." (Tr. 46.) Hajko also testified that he believed that he did not see the Company's attorney on May 1, but did speak with him on the next day at approximately 9 or 10 a.m. He reported that during this conversation Klutch told him not to discuss the Union with employees.

As was his custom, during the month of May, Yunetz prepared financial projections for June. He projected a June loss of $171,917.[13] As a result, he anticipated another layoff of a dozen laborers.

On June 1, the NLRB conducted a representation election at the Company. The Union prevailed on a vote of 29 to 12.[14]

Yunetz testified that by June 5, the evolving financial situation had confirmed the need for further action to cut labor costs. He explained that this was because "our backlog [of orders] was not sufficient enough, at that time, to again go more than maybe three to four days worth of work." (Tr. 26.) However, it was decided that the Company could wait a couple of days in order to see if the backlog of sales improved. Yunetz also testified that he had recognized that a June layoff would be "different from the first two" and that it was necessary to obtain advice from the Company's attorney and from the appropriate official of Reliance Steel who dealt with union issues. Yunetz confirmed that "we asked them directly if there was any type of union notification required, because round about June 1, there was a vote to accept a union at Toma." (Tr. 25.) They responded by advising that the Company "needed to contact the Union and explain to them what was going on." (Tr. 26.)

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[7] Toma's losses did provide some tax benefit to the parent company, Reliance. Thus, Toma's net loss for April was $146,212.

[8] Rolley testified that his goal was to accumulate authorization cards from 65 percent of the employees. If this goal were attained, he would submit a petition for a representation election to the Regional Office of the NLRB.

[9] Antal testified that they did speak about family matters, but they "usually didn't talk about work much." (Tr. 74.)

[10] There is little disagreement between Hajko and Antal regarding the content of their conversation. The one significant difference was that Antal testified that in addition to asking about the organizing campaign, Hajko stated, "you don't think a union could help you, do you?" (Tr. 70.) I credit Antal's testimony about this. It is logical that Hajko would express an opinion on the important issue that he had chosen to discuss, particularly given his testimony that he frequently conversed about work-related matters with Antal. Furthermore, other evidence generally corroborated Antal's trial testimony, while Hajko's testimony was frequently the subject of sharp dispute.

[11] Rolley testified that he filed the election petition with the Regional Office of the NLRB earlier that afternoon.

[12] Counsel for the General Counsel repeatedly asserts that Antal was the first person laid off on this day. (GC Br. 5, 8, and 9.) There is no evidence of record regarding the order in which persons were laid off.

[13] The actual June loss proved to be $131,035 with a net loss after considering the tax benefits to Reliance of $72,082. The net loss for the quarter ending in June was $375,198.

[14] The Union was certified as the exclusive collective-bargaining representative on June 14 in Case 6–RC–11980.

On June 6, Yunetz wrote a letter to Rolley. The body of this letter consisted of the following two sentences:

> Due to continuing unfavorable economic conditions, Toma Metals, Inc. will be permanently laying off eight hourly employees. If you have any questions please give me a call. (GC Exh. 2.)

Company officials testified that they elected to transmit this letter in three ways. The letter was sent to Rolley's home by overnight mail using Airborne Express as the carrier. It was faxed to the Local 2635 union hall. Finally, a copy was given to Hajko for hand delivery to Rolley.

It is necessary to examine the circumstances involving these three methods of transmission. There is no evidence regarding the fax to the union hall. The Company did not introduce copies of any fax transmission or other evidence of transmission and neither counsel asked Rolley whether he received this document.[15] By contrast, there is considerable, albeit contradictory, evidence regarding the other copies of the Company's letter. The Company's order form to Airborne Express specified that a "signature [was] required." (R. Exh. 1.) The receipt provided to the Company by Airborne Express indicates that the letter was delivered at 11:35 on June 7. The block on this receipt form marked "RECEIVED BY" contains an "X" followed by a blank space, followed by a series of typed letters and numbers. It does not contain a signature or other indication of whether anyone signed for the letter. (R. Exh. 1.) The only other evidence regarding the delivery of this copy of the letter was Rolley's testimony. He testified that he found this Airborne Express envelope late in the afternoon of June 8. It was stuffed behind his mailbox and he surmised that it was placed there because it was too big to fit inside the mailbox.

As to the hand delivery of the third copy of the letter, Hajko testified that he was asked to deliver this on June 6 at sometime between 2:30 and 4 p.m. He was not told what was inside the envelope. He testified that he had previously delivered a letter from the Company to Rolley's home and he knew the location. He also indicated that he and Rolley "had been friends for a while." (Tr. 118.) He proceeded to Rolley's home but testified that "at first, I went to the wrong side of the house." (Tr. 118.) Rolley resides in a duplex and his parents occupy the second half of the building. When he knocked on the parents' door, Rolley's nephew, Adam, responded. Hajko was acquainted with Adam, who informed him that Rolley lived on the other side of the house.

Hajko testified that at approximately 4 p.m., he knocked on Rolley's door. He reported that he observed Rolley looking out the window at him. According to Hajko, the two men made eye contact. Despite this, Hajko reported that Rolley did not respond to several knocks on the door. When Rolley failed to answer the door, Hajko testified that he placed the envelope in the mailbox without making any further attempt to communicate with Rolley. By contrast, Rolley testified that he was "not sure" whether he was at home at the time Hajko stated that he came over to his house. However, he added that if he had been at home, "I would have answered." (Tr. 187.) He further testified that he did not see Hajko or hear any knocking, nor did he receive any letter from the Company on June 6. Both Hajko and Rolley agree that they did see each other on June 10. Hajko asserts that at that time he asked Rolley why he failed to answer his door on the June 6. He testified that Rolley responded that he knew that Hajko's visit must have something to do with the Company and "I didn't feel I needed to answer the door." (Tr. 122.) Rolley denied having any such discussion with Hajko regarding the delivery of the letter.

Yunetz testified that, by June 8, the Company's backlog of work was only sufficient to "work our hourly force three days the subsequent week." (Tr. 26.) As a result, the decision to lay off another eight employees was confirmed. This occurred during a noontime conversation between Yunetz and Company President Torcia. During that conversation, Yunetz told Torcia that the Company had not heard from the Union regarding the upcoming layoffs. Yunetz testified that Torcia's response was that:

> [H]e just sort of chuckled, because his feeling was that no one was really being represented very well, that, you know, we're telling them that there's probably going to be a layoff here and no one has taken the time to pick the phone up and call us. I remember he thought it was pretty funny. (Tr. 168.)

In addition to discussing the need for a layoff and the absence of union response, Yunetz and Torcia also considered the option of shutting down the plant temporarily as a means of cutting expenditures. It was decided to lay off the eight employees. The workers selected for layoff were chosen using the same criterion as in the previous two layoffs but this time the procedure was changed by conducting a poll of supervisors who were asked to rate the employees. Sheesley described the objective as keeping "the people that performed the best to get the ultimate production from the plant." (Tr. 99.) The eight individuals selected were notified of the layoff on June 8.[16]

Rolley testified that he first received notice of the layoff through telephone calls from plant workers on June 8. They told him that management officials had told them that he had been given advance notice of these layoffs. He testified that later that afternoon he found the Airborne Express letter behind his mailbox. He did not contact the Company after learning of the layoffs as he felt it would be futile since the workers had been laid off by the time he received word of the Company's action.

As June progressed, steps were taken to initiate the collective-bargaining process between the Company and the newly certified Union. On June 22, Robert Ravotti, staff representative of the Union, wrote to Yunetz, informing him that Ravotti would be chief negotiator for a collective-bargaining agreement and that the remainder of the negotiating committee would consist of four employees, Larry Thomas, Mat Harrison, Bob Oravis, and Joel Offman Jr. (as alternate). The Company's

[15] Rolley did testify that his first notice of the layoffs came on June 8, when employees telephoned to inform him about them.

[16] These individuals were John Craig, Chris Karsaba, Allen Ling, Joel Offman Sr., Robert Oravis, Lonny Smith, Larry Thomas, and Travis Thomas.

copy of this letter contains fax identifiers showing that it was in the Company's possession by June 24. (R. Exh. 2.)

It will be recalled that at the time of the June layoffs, the Company had also considered the device of a temporary plant shutdown as a method of trimming labor costs. While this was not done in June, such a temporary shutdown did occur during the week containing the July 4 holiday. Yunetz described the procedure as:

> If somebody wanted to work, we didn't deny them.[17] But we pretty much closed the plant down for the sake of trying to build a back-log to go through the rest of the three [weeks] of July, for instance. (Tr. 146.)

Yunetz testified that this tactic was successful and the Company developed sufficient backlog to work the remaining weeks of July. Under questioning by the counsel for the General Counsel, Yunetz agreed that the situation confronting management in both June and July was the same; "do we do another layoff or do we try to shut the plant down a little bit." (Tr. 179.) Yunetz further testified that in June management selected a layoff, while in July it chose a temporary shut down to respond to the adverse economic situation.

Over the following months, three of the employees laid off in June were recalled to work. Larry Thomas was recalled on July 30. Joel Offman Sr., was recalled on August 16. Lonny Smith was recalled September 17. The Union was not given prior notice of any of these employee recalls. Also during this period, management and the union's negotiating committee met repeatedly to discuss terms for their first collective-bargaining agreement. No final agreement had been achieved as of the date of the trial in this matter.

B. Analysis

1. The alleged violations of May 1 dealing with Antal

The General Counsel contends that the Company committed two unfair labor practices in its treatment of Antal on May 1, an improper interrogation and a discriminatory decision to include him in the layoff of employees. In considering these matters, I cannot view these allegations in isolation from each other. Rather, I find that the events concerning both allegations form a vital context necessary for accurate appraisal of each individual contention. This is particularly so since the allegations involve the Company's actions regarding the same person on the same day. Thus, a complete understanding of the circumstances requires full consideration of what occurred throughout the day.

Regarding the lawfulness of Hajko's interrogation of Antal, consideration of the full set of circumstances is particularly important since the Board has eschewed a mechanical approach to interrogation of employees in favor of an evaluation of the totality of circumstances involved in the questioning. *Rossmore House*, 269 NLRB 1176 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Among the factors I have considered is Hajko's position in the Company. His job title is "materials manager" and it is conceded that he is a supervisory employee. (Respondent's answer to consolidated complaint at pps. 1 and 2.) The record does not disclose whether Hajko directly supervises Antal, nor does it indicate Hajko's relative position among the Company's supervisors.[18] I do not conclude that Hajko's questioning of Antal was rendered coercive due to the particular nature of his supervisory status.

By contrast, I do find that Hajko's prior friendly relations and distant kinship with Antal enhanced the significance of their conversation. Hajko's disparaging comment upon learning from Antal that organizing activity was underway and his abrupt termination of their conversation after hearing Antal's opinions about the reasons for such activity would be expected to have magnified coercive impact upon Antal given his prior relationship with Hajko. I find the situation to be similar to that described by the Board in *Acme Bus Corp.*, 320 NLRB 458 (1995), enf. 198 F.3d 233 (2d Cir. 1999). In *Acme*, a dispatcher had "relatively friendly" relations with the bus drivers. The Board found that this fact did not "diminish the coerciveness of his actions" but rather "increased the likelihood" of the employees understanding the strength of the company's resolve. 320 NLRB at 458. Likewise, Hajko's expression of negative commentary and his abrupt termination of the conversation would be expected to produce the same effect upon Antal.

I have also considered the scope of the interrogation. While the questioning was terse, it was also very broad. Hajko did not merely solicit Antal's personal opinion about union organizing. He sought a much more general account of the organizing activity in the plant. In *Cumberland Farms, Inc.*, 307 NLRB 1479 (1992), enfd. 984 F.2d 556 (1st Cir. 1993), a supervisor asked an employee whether there was "[a]nything new I should know about around here like the union?" In finding this and other questioning to be coercive, the Board cited the fact that the supervisors sought information "about the organizing effort in general" as a significant factor. The same is true here.

In assessing the impact of Hajko's interrogation of Antal, there can be no doubt that dramatic evidence of coerciveness arose when, not more than 3 hours later, Antal was given formal notification that he was being placed on temporary layoff. It is not difficult to imagine the impact of the timing of two such events upon an employee.

Counsel for the Company cites three arguments to support his view that there is "no merit whatsoever" in the allegation of an unlawful interrogation. (R. Br. at 12–13.) First, he notes the parties' relationship and prior history of conversations about work issues. As previously discussed, I find that in the particular circumstances of this case, the parties' relationship and past history magnified rather than ameliorated the coercive impact of the questioning. Indeed, this can be gauged by the fact that Antal testified that he and Hajko have had no contact whatsoever since this conversation and the ensuing events on that day.

Counsel next argues that the conversation was "innocuous" and that Antal did most of the talking. It does appear that Antal did most of the talking, but I have found that Hajko expressed a disparaging opinion of the organizing effort and made an abrupt termination of the discussion. Furthermore, Hajko's own testimony belies the effort to characterize the conversation as "in-

[17] Those who reported for work performed routine maintenance, preventive maintenance, and inventory work.

[18] I infer that his position was not within the top ranks, given his selection as the delivery person of the letter to Rolley.

nocuous." It will be recalled that Hajko testified that he walked away from Antal because he "didn't need the aggression." (Tr. 46.)

Lastly, counsel argues that Hajko was not aware of or involved in the layoff decisions, did not know of the union organizing campaign, and did not inform other managers about his discussion with Antal. Uncontroverted evidence undercuts much of this argument. Hajko testified that the very reason he approached Antal was because three other employees had come to him to discuss the organizing campaign. It was precisely because of this knowledge that he decided to question Antal. In addition, while Hajko contends that he did not discuss his conversation with Antal with other management officials prior to Antal's layoff, he clearly testified that he did inform them of the conversation at some point, probably on May 2.

Upon consideration of the totality of circumstances involved in Hajko's questioning of Antal, I conclude that it constituted an unlawful interrogation because it had a reasonable tendency to interfere with, coerce, and restrain Antal in the exercise of his rights guaranteed by Section 7 of the Act.

Three hours after Hajko's interrogation of Antal, Antal and five other employees were notified that they were being laid off. The General Counsel does not contest the Company's position that the decision to lay off employees was motivated by unfavorable economic factors. However, the General Counsel does contend that the decision to include Antal among those being laid off was based upon his participation in protected concerted activities. As a result, it is alleged that Antal's selection for layoff was made in violation of Section 8(a)(1) and (3) of the Act.

In assessing this charge, I must apply the analytical method established by the Board in *Wright Line*.[19] Under this test, the General Counsel must show that Antal was engaged in protected activity, that the Company was aware of his protected activity, and that the activity was a substantial or motivating reason for the Company's decision to lay him off. If this showing is made, the burden shifts to the Company to establish that it would have selected Antal for layoff even in the absence of his protected conduct.

There is no doubt that Antal engaged in protected concerted activity. He was one of two employees who originally contacted the Union to seek representation. He attended an organizing meeting, signed an authorization card, and obtained the signatures of other employees on such cards.

Regarding the Company's knowledge of Antal's activities, it is vital to first consider the uncontroverted evidence of timing on the day in question. In response to interrogation, Antal informed Hajko of his strong union sympathies at approximately 3:30 to 4:30 p.m. At 4:50 p.m., the Regional Office notified the Company that an election petition had been filed. At approximately 6 p.m., Antal was notified that he was being laid off. This chronology conclusively establishes that one supervisor, Hajko, was aware of Antal's union activities prior to the announcement of Antal's layoff.

The Company denies that the management officials who made the layoff decisions were aware of Antal's participation in such activities at the time they decided to lay him off. (R. Br. 14.) It is true that Hajko testified that he did not inform these officials of his conversation with Antal until after Antal had been laid off. However, close analysis of Hajko's testimony casts considerable doubt on this assertion. First of all, Hajko conceded that, "candidly, I'm confused as to when it [the layoff] took place." (Tr. 43.) Second, Hajko also conceded that he did discuss the conversation with Antal with these management officials at some point. Once again, he was unclear about the timing of this, testifying that, "I think we might have discussed the conversation the next day that me and Antal had." (Tr. 46.) Third, Hajko recalls being told by the Company's attorney not to discuss union matters with the employees. He expressed confusion about the date of this conversation, eventually concluding that it took place on May 2. However, it must be noted that the Company's counsel was present at the plant on May 1 "sometime" after 5 p.m. (Tr. 23.) Certainly, such a conversation with counsel would have been particularly apt if Hajko had told officials and counsel about his interrogation of Antal. Given the vagueness of Hajko's testimony on this point, I do not credit his assertion that he did not inform other management officials regarding Antal's protected activities until after the layoff had taken place.

In addition to rejecting Hajko's testimony as to this point, I deem it appropriate to make certain inferences based upon the relevant circumstantial evidence. In this regard, I note that the Board has often held that timing may constitute important evidence of employer knowledge of protected activity, particularly when coupled with other indicia of such knowledge such as general knowledge of union activity in the plant and assertion of pretextual reasons for company action. *Metro Networks*, 336 NLRB 63 (2001), and the cases cited therein. Here, the management officials clearly had dramatic evidence of general union activity, having received notice of a petition for a representation election shortly before Antal's layoff. In addition, as I will discuss in detail later in this analysis, I find that the reasons asserted by the Company for the decision to include Antal among the laid-off employees were pretextual.

As to this issue of knowledge, I also note that the United States Court of Appeals for the Third Circuit has addressed the permissible use of inference in evaluating the evidence. In *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808 (3d Cir. 1986), cert. denied 481 U.S. 1069 (1987), the court found that it was permissible to infer that a supervisory employee who gained knowledge of union activity communicated such knowledge to his superiors. Furthermore, the court approvingly cited various cases establishing the propriety of the Board's practice of inferring "knowledge of union activity solely on the basis of the timing and nature of the discharge despite company claims that no management officials were aware of union activity." 804 F.2d at 814. I deem it appropriate to form such an inference as to the facts under consideration given the remarkable and persuasive chronology of events between 3:30 and 6 p.m. on May 1 and the other evidence I have discussed.

Having concluded that Antal engaged in protected concerted activities and that the Company had knowledge of such partici-

[19] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 989 (1982).

pation, I must consider whether antiunion animus was a substantial or motivating reason for the Company's decision to include him in the layoff. There is some direct evidence of antiunion animus. A supervisor, Hajko, disparaged the attempt to organize the employees in his conversation with Antal shortly before Antal's layoff.

In addition to this direct evidence, I must again consider the circumstantial evidence. Indeed, the Board has recently noted that, "[i]t is well established that a discriminatory motive may be inferred from circumstantial evidence and the record as a whole, and that direct evidence of union animus is not required." *Tubular Corp.*, 337 NLRB 99 (2001), and the cases cited therein. The Board has placed considerable emphasis on evidence regarding timing. For example, in *Olathe Health Care Center*, 314 NLRB 54 (1994), the employee was given disciplinary notices just 2 hours after the Company became aware of the employee's union activity. This evidence of timing was characterized as "particularly strong." 314 NLRB at 54. Interestingly, the Third Circuit has used the same adjective to describe evidence of timing in the assessment of motivation. In *NLRB v. Treasure Lake, Inc.*, 453 F.2d 202 (3d Cir. 1971), the court noted that the dismissals of employees came immediately upon discovery of union activity, thereby raising a "strong inference that they were reprisals, despite [the company's] protestations that they had an economic motivation." 453 F.2d at 204.

In this case, Antal was told of his immediate layoff less than 3 hours after his interrogation and expression of strong support for union representation and less than 2 hours after the Company was notified of the filing of a petition for a representation election. I find this sequence of events to raise a strong inference of antiunion animus as forming a substantial and motivating factor for Antal's selection as one of the employees subject to immediate layoff.

In evaluating the circumstantial evidence on the issue of discriminatory motivation, the General Counsel urges that "Respondent's pretextual post hoc explanation for Antal's selection for layoff" be considered under the doctrine set forth in *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). This doctrine permits the trier of fact to draw an inference of unlawful motivation where the stated motivation is found to be pretextual, at least where "the surrounding facts tend to reinforce that inference." 362 F.2d 466, 470. The Board has endorsed this principle and has gone so far as to cite such evidence as being the most significant evidence of illegal motivation in a particular fact pattern. *Active Transportation*, 296 NLRB 431 (1989), enf. mem. 924 F.2d 1057 (6th Cir, 1991). The Second Circuit, in *Holo-Krome Co. v. NLRB*, 954 F.2d 108, 113 (1992), observed that the Board has employed this doctrine as a "consistent rule in practice" and that the Supreme Court "understood" that this was the Board's practice during that Court's consideration of the *Wright Line* doctrine in *Transportation Management Corp.*, supra. This analysis by the Second Circuit has also been cited with approval by the D.C. Circuit in *Laro Maintenance Corp.*, 56 F.3d 224, 230 (1995). In light of the direct evidence of animus and the strong circumstantial evidence as to timing, I deem it appropriate to consider the application of *Shattuck Denn* to this case.

In explaining the reasons for Antal's selection for layoff, the Company relied primarily upon evidence regarding his productivity as compared to the productivity of another employee who was retained. My analysis of the Company's explanation will be set forth shortly. Suffice it to say that I have concluded that the explanation is pretextual. Having reached this conclusion, I deem it appropriate to consider this as circumstantial evidence of antiunion animus. In other words, having concluded that the stated motive for Antal's layoff is false, I infer that "the motive is one that the employer desires to conceal—an unlawful motive." *Shattuck Denn*, supra at 470.

For all these reasons, I conclude that the General Counsel has made the required showing under *Wright Line* and the burden shifts to the Company to demonstrate that Antal would have been chosen for layoff even in the absence of his protected conduct.

Turning to a detailed consideration of the Company's asserted justification for Antal's selection for layoff, it will be recalled that the May 1 layoff was the second layoff in Company history. The testimony establishes that the Company's guiding principle involved in the layoff selection process was evaluation of employee productivity. However, beyond this statement of general principle, the Company's layoff selection procedure appears to have been decidedly informal. It consisted primarily of discussion among the plant superintendent, the human resource manager, and the marketing manager. The only documents relied upon by the selecting officials were ratings produced late in 2000 for award of employee bonuses.[20]

Plant Superintendent Sheesley testified regarding the manner in which Antal was selected for layoff. He noted that Antal was employed as a cut-to-length line operator. At the time of the layoff, the Company had seven such operators. In deciding which one of these employees to lay off, Sheesley testified that the measure of productivity would be the number of coils of steel cut and the total poundage of cut steel per operator, taking into consideration only the hours the machine was actually being run. Actual running time was significant since cut-to-length line operators had other duties as well. Sheesley further testified that he compared these statistics for Antal and another operator, Scott Filowsky. The figures showed that Antal's average production was 1.3 coils per hour and 1775 pounds per hour. Filowsky's average production was 2.2 coils per hour and 2920 pounds per hour. As a result, Antal was selected for layoff.

I have a number of reasons for rejecting this explanation of the layoff selection. As already mentioned, there was considerable general testimony that the layoff selections were made in a rather informal process of discussion among top managers without consideration of detailed statistical information. Yet, on direct examination by the Company's counsel, Sheesley appeared to leave an impression that he made a detailed statistical comparison of Antal and Filowsky. Close reading of the transcript of his pertinent direct testimony suggests that he was deliberately vague on this point but carefully avoided outright

[20] During the next company layoff in June, procedures appear to have been modified in that additional documentation was obtained through use of a poll of supervisors.

falsehood. For example, his counsel asked him if he utilized this detailed statistical information in determining whether to lay off Filowsky or Antal. He responded that, "[a]t the time of the layoff, it was my feelings that this was—I put these numbers together just to satisfy my curiosity and I see with the numbers I did make the right decision." (Tr. 102.)

On cross-examination, counsel for the General Counsel asked when the statistical information was compiled. Sheesley responded that it was "shortly after the layoff, just to satisfy my reason for laying Dave off." (Tr. 104.) This is significant for two reasons. First, I conclude that during his direct testimony, Sheesley attempted to leave a misleading impression that Antal was selected for layoff on the basis of a seemingly impressive statistical analysis of his comparative production. In reality, Antal's selection was made on the basis of the subjective means customarily used by management up to that time. Indeed, when viewed in light of Sheesley's testimony on cross-examination, it appears that it was indeed his "feelings" that formed the basis for Antal's selection. This is also consistent with the informal and subjective selection process. Sheesley's attempt to mislead on this point is evidence of pretext.

The second reason Sheesley's testimony regarding the detailed statistical analysis suggests pretext is the unusual timing and rationale for its creation. Sheesley contends that he went to the considerable effort of compiling and analyzing the statistics on Antal and Filowsky shortly after Antal had been laid off. His alleged purpose was to confirm his impression that Antal was the less productive employee. This is decidedly peculiar given that Antal was already gone. It smacks of an attempt to create what the General Counsel terms "an after-the-fact justification for that layoff decision." (GC Br. 9.) In other words, I find that the compilation of the statistical analysis consisted of an attempt to manufacture a pretextual justification for a discharge that was actually based upon subjective factors, including antiunion animus.

Beyond the circumstances surrounding the creation of the statistical analysis and the misleading manner in which it was presented at trial, there are two substantive problems with the analysis itself. While Sheesley asserted that consideration of the number of coils and pounds of steel cut was the appropriate method of comparative analysis, further exploration of the nature of the actual working conditions of the two cut-to-length line operators suggests otherwise. Filowsky was provided with two helpers. Antal had only one helper. Filosky's extra helper was used to bringing the coils to the machine by forklift. Antal had to do this himself. In addition, Antal had to manufacture his own skids. Someone else made Filosky's skids.[21] Overall, I am left with the distinct impression that the probative value of the comparison was greatly undermined by these differences in working conditions.

Filowsky's comparatively higher production figures also beg the question of why Antal was being compared with Filowsky. There were seven cut-to-length line operators. When the average figures for all seven are considered, Antal's production appears adequate. His production of 1.3 coils of steel per hour was exactly average. His hourly poundage of 1775 was certainly closer to the average of 2151 than to Filowsky's much higher production of 2920. Sheesley testified that he chose to compare Antal and Filowsky because their machines were similar and other cut-to-length line machines cut heavier or lighter gauge metal. Once again, this assertion does not withstand close scrutiny. Upon further questioning of Sheesley, it became clear that another operator, Lou Gutskey, would be reassigned to replace Antal. As counsel for the General Counsel correctly observes, "Thus, the comparison, if one was to be legitimately made as to who would be laid off, should have been between Antal and Gutskey, not between Antal and Filowksi, Respondent's top performer." (GC Br. 10.) I agree, and conclude that the post-layoff compilation of statistics to cast Antal in a poor light vis-à-vis Filowsky was designed to create a pretext to justify his selection for layoff on the basis of subjective criteria, including antiunion animus.[22]

During trial, once it became apparent that the appropriate comparison should have been between Antal and Gutskey, Sheesley was asked to comment on their relative merits. Significantly, he did not raise any issue regarding the comparative poundage or number of coils produced by the two operators. Instead, he opined that he decided to keep Gutskey because he was more "versatile." (Tr. 115.) This injected a new element into the purported analysis. Apparently the decisive consideration had shifted from productivity to versatility. The Board has long held that "when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted." *Black Entertainment Television*, 324 NLRB 1161 (1997) (internal citations omitted). I find this inference to be appropriate here.

For all the foregoing reasons, I conclude that Antal was engaged in protected concerted activity, that the Company was aware of this, and that antiunion animus formed a substantial and motivating reason for his selection for layoff. I also conclude that the Company has failed to establish that it would have selected Antal for layoff even in the absence of his concerted protected activity. Accordingly, I conclude that the selection of Antal for layoff violated Section 8(a)(1) and (3) of the Act.

2. The alleged bargaining violations

On June 1, the Company's employees voted in favor of representation by the Union. The General Counsel contends that the Company thereafter failed to comply with the requirement of Section 8(a)(5) and (1) of the Act in failing to engage in

[21] It may be that Sheesley's comparison of only actual machine running times would partially accommodate this difference in working conditions. However, the fact that the working conditions were so different could well have contributed to Antal's lower production statistics due to such factors as worker fatigue, distraction by other duties, and lack of uninterrupted time on the machine.

[22] It should be noted that Antal had been employed by the Company since September 2000, and had worked his way up from laborer to machine operator. He had only one disciplinary complaint for failing to call in when he missed a day of work. He testified without contradiction that in the past Sheesley had made favorable comments about his work.

collective bargaining in regard to its decision to conduct a third round of layoffs on June 8, and in regard to its decisions to recall workers on July 30, August 16, and September 17. Specifically, the General Counsel contends that the Company failed to give the Union adequate notice and opportunity to bargain regarding the layoffs and recalls. The Company asserts that it did provide adequate notice of the June 8 layoff and that the Union waived its right to bargain about the issue.

Analysis of this question begins with consideration of whether the Company's decision to lay off employees constituted a mandatory subject of collective bargaining. Counsel for the General Counsel cites *Lapeer Foundry Machine*, 289 NLRB 952 (1988), for the proposition that the layoff was a mandatory subject of bargaining. While I agree that *Lapeer Foundry* has useful things to say about bargaining procedures and remedial issues,[23] the Board has twice cautioned against citing *Lapeer* in determining whether an issue is subject to mandatory collective bargaining. See *Holmes & Narver*, 309 NLRB 146, 147 fn. 3 (1992); and *Executive Cleaning Service*, 315 NLRB 227 fn. 5 (1994), enf. in pertinent part 67 F.3d 446 (2d Cir. 1995). Nevertheless, I agree that this layoff is properly found to be a mandatory subject of collective bargaining. It is uncontroverted that the Company decided to conduct the layoff as a means of reducing labor costs, rather than as part of a change in the scope and direction of the business. The Supreme Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), specifically held that decisions regarding such issues as the "order of succession of layoffs and recalls" fall within the Act's imposition of a duty to bargain. 452 U.S. 666, 667. Apart from bargaining over the procedures for implementation of any layoff and subsequent recall, the parties here also had a wide range of issues for potential discussion and bargaining as alternatives to reducing labor costs through use of a layoff. The Board has listed a number of such alternatives, including "modified work rules, nonpaid vacations, restricted overtime, job sharing, shortened workweek, and reassignment of work and job reclassifications." *Holmes & Narver*, supra at 147. Indeed, the alternatives of nonpaid vacations and shortened workweek are very similar to the procedure adopted by the Company in July in the successful effort to avert yet another layoff. I conclude that the Company's decision to conduct a layoff on June 8 in order to reduce its labor costs was subject to the mandatory bargaining requirement of Section 8(a)(5) of the Act. The same is true regarding the Company's selection of three laid-off employees for recall in the following months.

After the representation election, management sought expert advice about its duty to bargain with the Union regarding layoffs. Yunetz testified that he asked the Company's counsel, "what are our responsibilities?" (Tr. 164.) He was told that "we have to notify them [about the layoff] because now they're the bargaining unit." (Tr. 164.) Indeed, Yunetz testified that, based upon this advice, he understood that "even though there wasn't a contract, we still had to now almost partner with them in some respect." (Tr. 165.) As a result, the Company drafted its letter notifying Rolley about the upcoming layoff.

Since the Company sent the Union a letter regarding the layoff,[24] the issue becomes whether "the union had clear notice of the employer's intent to institute the change sufficiently in advance of actual implementation so as to allow a reasonable opportunity to bargain about the change." *American Distributing Co. v. NLRB*, 715 F.2d 446, 450 (9th Cir. 1983), cert. denied 466 U.S. 958 (1984). The adequacy of notice has been found to be a question of fact and it has been observed that the precedents "fail to yield a bright-line rule as to what constitutes adequate notice." *NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030, 1036 (10th Cir. 1996). The Board has held that if notice is provided too shortly prior to implementation or if the employer provides notice but "has no intention of changing its mind, then the notice is nothing more than a fait accompli." *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982). It is therefore necessary to evaluate the particular facts at issue and assess the adequacy of the notice.

The content of the notice is remarkable for its brevity.[25] While it informs the Union that a layoff is planned and that it is based on economic considerations, it utterly fails to convey any sense of urgency or provide any particulars as to the implementation date of the layoff. Rather than indicating that the contemplated action was imminent, it was silent as to any timeframe. This is troubling since the failure to convey information about the immediacy of the proposed action had the result of conveying a potentially misleading impression as to the urgency of a response to the letter. This is particularly true given the Company's history regarding the past two layoffs. The circumstances involved in the previous layoffs were such that an informed observer could reasonably conclude that the Company's practice would be to make layoffs around the beginning of the month. The Company's first layoff was announced on March 30, and the second layoff was announced and implemented on May 1. The letter to Rolley was dated June 6. In the absence of a contrary indication, it would have been reason-

[23] For example, the Board in *Lapeer* recognized that a bargaining requirement involving layoffs was a significant infringement on management's freedom of action in confronting adverse economic conditions. As a result, it required that the bargaining take place in "timely and speedy fashion." 298 NLRB at 954. It also crafted a limited exception to the bargaining requirement for "extraordinary" situations involving "compelling economic circumstances." 298 NLRB at 954. It does not appear to me that the Board's subsequent disapproval of reliance upon *Lapeer* extends to these portions of that decision. Nor do I conclude that it extends to the portion of *Lapeer* that addresses the appropriate remedy for a failure to bargain over a layoff made in order to reduce labor costs. See 298 NLRB at 955.

[24] While there are factual disputes regarding the Company's contention that it transmitted a copy of the letter by facsimile and by hand delivery, there is no dispute as to the Company's use of Airborne Express to deliver a copy of this letter to Rolley. Rolley testified that this was the only version of the letter he actually received.

[25] The content of the notice is also phrased in terms of a fully developed decision to conduct the layoff. As counsel for the Company correctly observes, use of such language is sometimes permissible. *Haddon Craftsman*, 300 NLRB 789 (1990), rev. denied 937 F.2d 597 (3d Cir. 1991). I find the Company's use of such language acceptable, particularly since the notice letter also informed the Union that the Company was willing to entertain "questions" about the layoff. (GC Exh. 2.)

able to conclude that the contemplated layoff would be implemented at the very end of June or the beginning of July. This would have been in keeping with past practice and would also have allowed time for bargaining in the timely and speedy fashion required by the Board. For these reasons, I conclude that the content of the Company's letter was not the type of clear notice necessary to fulfill its bargaining obligation.

There is also a substantial issue as the sufficiency of the timing of the Company's notice letter to Rolley.[26] It will be recalled that factual issues exist regarding the precise period of notice that was actually provided to Rolley. Rolley has testified that he did not receive notice from the Company until the afternoon of June 8, when he found the envelope from Airborne Express behind his mailbox. This was after the layoff had already taken place. By contrast, the Company cites three attempts to provide earlier notice. I am unable to place any reliance upon the Company's assertion that a copy of the notice was sent by facsimile to the Local 2635 union hall. No evidence was produced to document the fax transmission and there was no evidence that it was received or, indeed, that it was appropriate to send it to this location as a means of notifying Rolley.[27] The letter sent by Airborne Express also presents a quandary. Airborne's records appear to indicate that it was delivered at 11:35 a.m. on June 7. Although the Company sought personal delivery, Rolley testified that the envelope was stuffed behind his mailbox. Airborne's receipt form does not show a signature establishing personal delivery. In any event, if one accepts Airborne's representation that the letter was delivered at 11:35 on June 7, then the Company provided Rolley with approximately 24 hours notice.[28] Finally, there is the asserted hand delivery of the letter to Rolley's home by Hajko. Even if one were to accept Hajko's version of this event, such hand delivery would have provided no more than 44 hours of notice to Rolley.[29]

Examination of the evidence shows that the amount of advance notice provided to Rolley by the Company was somewhere between zero (Rolley's testimony) and 44 hours (Hajko's testimony). Viewing the evidence in the light most favorable to the Company, I have considered whether the provision of approximately 2 day's notice of the layoff would have fulfilled the Company's obligation to provide notice sufficiently in advance of implementation. In so doing, I recognize that the issue is primarily one of fact and must be evaluated in the particular circumstances presented. Nevertheless, it is useful to examine the Board's treatment of similar periods of notice in past cases as cited by the parties in their briefs.

In support of its argument that 2 day's notice is insufficient, the General Counsel cited *Cliffside Health Care Center*, 279 NLRB 1126 (1986), where the Board affirmed the administrative law judge's decision, including a finding that 2 day's notice of the grant of a wage increase and an additional holiday was insufficient. The judge had relied upon *M.A. Harrison Mfg. Co.*, 253 NLRB 675 (1980), enf. 682 F.2d 580 (6th Cir. 1982), where the Board found 3 day's notice of a wage increase to be inadequate.

By contrast, counsel for the Company cites *Medicenter, Mid-South Hospital*, 221 NLRB 670 (1975), where the Board affirmed an administrative law judge's decision that 2 day's notice of the institution of polygraph testing was adequate. However, I note that the judge based this finding, in part, on the fact that the actual polygraph testing took place over a period of an additional 6 days and the union took no action to seeking bargaining throughout the 8-day period from the provision of notice to the completion of the testing.

Counsel for the Company also notes that the Board affirmed an administrative law judge's approval of the provision of 2 day's notice of a layoff in *Chippewa Motor Freight*, 261 NLRB 455 (1982). However, in *Chippewa*, the issue concerned bargaining over the effects of the layoff. The judge noted that, "Surely, if Respondent Chippewa was not required to bargain about the decision to close, it was not required to give notice before the decision was made." 261 NLRB at 460. The judge then found that there was adequate opportunity to bargain over the effects of the layoff. By contrast, the issues here involved the procedures used to conduct the layoff and the Union's opportunity to propose alternatives to the use of a layoff as a means of cutting labor costs. Since the purposes of bargaining were to consider the possibility of averting a layoff and the manner in which any layoff would be conducted, meaningful collective bargaining would have had to take place before the commencement of implementation.

Turning to the particular circumstances here, I cannot conclude that the provision of 2 day's notice was adequate to permit meaningful opportunity to bargain. Provision of such meaningful opportunity would have had to include sufficient

[26] This is true whether one accepts the Company's contention that the letter was delivered by Hajko on June 6, or Rolley's assertion that he did not actually receive a copy of the letter until June 8. Although I find either version to constitute insufficient timeliness of notice, to the extent it is necessary to resolve the credibility dispute, I do so in favor of Rolley. Hajko's account is illogical. He claims that Rolley was his friend. He also claims that he and Rolley made direct eye contact through Rolley's window. Despite this, he does not claim that he made any effort to talk to Rolley or signal him, aside from repeated knocking on the door. In addition, Hajko says that immediately before knocking on Rolley's door, he spoke to Rolley's nephew Adam whom he also knew and who lived on the other side of Rolley's duplex. When he was unable to raise Rolley by knocking, he does not appear to have made any effort to give the letter to Adam for later delivery to Rolley. I do not find this version of events to be credible.

[27] In fact, this purported fax raises more questions than it answers. Since the Company was able to locate the telephone number necessary to transmit this fax, it is reasonable to find that it could also have located the telephone number necessary to call the union hall in order to seek assistance in contacting Rolley so as to provide urgent notice of the imminent layoff. The failure to attempt telephonic communication with Rolley either through the union hall or at his home is puzzling. Indeed, it is striking to observe that the Company's president expressed amazement that Rolley had not "taken the time to pick the phone up and call us" to discuss the layoff. (Tr. 168.) Yet, the Company made no effort to telephone Rolley to notify him regarding the same layoff.

[28] It will be recalled that Yunetz testified that he met with Torcia around noon on June 8. At that meeting, they made the decision to implement the layoff.

[29] Hajko testified that he arrived at Rolley's home around 4 p.m. on June 6. The decision to implement the layoff was made at approximately noon on June 8.

time for the Union to investigate the situation and canvas its members in order to be in a position to propose alternatives to the layoff. This is particularly true for two reasons. First, the workers had very recently selected the Union as their representative and its officials cannot be expected to have had extensive familiarity with the operation of the Company and with the desires and priorities of the workers in the face of the proposed layoff. I note that the Board has recently found that a newly certified union had acted "diligently" when it delayed responding to notification of a change in company policy until after taking "the time necessary to consult within its organization and with the employees." *Pontiac Orthopedic Hospital*, 336 NLRB 1021, 1024 (2001). Second, it was necessary to provide the Union with adequate time to formulate alternative proposals designed to avert the layoff. The evidence reveals that meaningful alternatives to layoff certainly existed. For example, management actively considered the alternative of a temporary shut down, a potentially less drastic option that was actually employed with success in the following month. For these reasons, I cannot find that the provision of 2 day's notice was adequate, unless such short notice was justified by compelling economic circumstances.

The Company contends that the speedy implementation of the layoff was justified by such compelling circumstances. There are several difficulties with this contention. It must be recognized that the Board has held that such justification for a failure to bargain is reserved for "extraordinary situations." *Lapeer Foundry*, supra at 954. The Company argues that its declining economic position constituted such an extraordinary factor. The evidence shows that the Company had been experiencing financial distress for many months. There was no sudden crisis requiring quick action to save the Company. Rather, the situation was comparable to that described by the Seventh Circuit in *NLRB v. Emsing's Supermarkets, Inc.*, 872 F.2d 1279 (7th Cir 1989), a case involving no immediate emergency, "but instead . . . a steady erosion of [the company's] financial well-being." 872 F.2d at 1287. In this circumstance, the court affirmed the Board's rejection of an economic emergency defense to the failure to provide notice. More recently, the Board has observed that layoffs are frequently the result of economic problems and that such business necessity "is not the equivalent of compelling considerations which excuse bargaining." *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995). While the layoffs in *Hankins* grew out of a supply shortage, the Board noted that the shortage had been a continuous problem for months and that there was no "precipitate worsening of this situation that required immediate action prior to bargaining with the newly certified Union."[30] 316 NLRB at 838.

In this case, the Company's situation was one of ongoing economic difficulties rather than unforeseen emergency conditions. The evidence shows that Yunetz prepared his customary economic forecast for June during the month of May. This showed a projected loss of $171,917. Nevertheless, the situation was not deemed to be so urgent as to require immediate action. Rather, Yunetz testified that "the thought was let's see what happens to volume [of sales]." (Tr. 164.) Furthermore, the lack of circumstances that would have compelled an immediate layoff is illustrated by Yunetz' testimony that the situation in June was the same as the situation in July and that, in July, a temporary plant shut down averted the need for a layoff. The Company's chronic economic condition did not constitute an extraordinary or compelling circumstance that would excuse the failure to provide clear and timely notice to the Union so as to create a meaningful opportunity to bargain about the layoff and alternatives to the layoff.

The Company contends that the Union waived its right to bargain over the June 8 layoff. The Board has held that a finding of waiver of the statutory right to bargain is appropriate where the union has failed to request bargaining if the union had "clear and unequivocal notice" of the proposed change in terms and conditions of employment and the notice was given "sufficiently in advance of implementation to permit meaningful bargaining." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enf. 15 F.3d 1087 (9th Cir. 1994). Similarly, the Third Circuit has held that there is no obligation to request bargaining if an attempt to bargain would be futile. *NLRB v. National Car Rental Systems, Inc.*, 672 F.2d 1182 (3d Cir. 1982). Having concluded that the Company failed to provide the required clear notice in timely fashion, I further find that the Union did not waive its statutory entitlement to bargaining over the proposed layoff and any available alternatives.

The General Counsel's final allegation is that the Company again violated its obligation to provide notice and an opportunity to bargain about the recall of three employees who had been subject to the June 8 layoff. Examination of the evidence as to this issue provides the clearest indication of the Company's failure to fulfill its obligation to bargain. It is enlightening to contrast the evidence regarding the recalls with the situation existing in early June when the Company implemented the layoff. In early June, the Union had just been selected as bargaining representative and the evidence indicates that the only union official known to management was Rolley. There had not been any formal communication from the Union to the Company. By contrast, between the June 8 layoff and the July 30 recall of employee Thomas, the situation had evolved.

On June 22, Ravotti, the union's staff representative, wrote to Yunetz to advise him that Ravotti would be the chief bargaining representative and to provide him with the names of four of the Company's employees who would constitute the remainder of the union's bargaining committee. The evidence shows that the Company received this letter within the next 2 days. Ravotti's letterhead provided the Company with his mailing address, telephone number, and facsimile number. (R. Exh. 2.) As a result, company management was now in possession of the names of five persons authorized to act on behalf of the Union. They were aware of multiple means to contact the lead individual and could contact the other four persons directly at the workplace. Despite the greatly increased opportunity to provide timely and effective notice of the proposed recall of an

[30] Instructively, in *Hankins*, the company provided notice to the union that "[u]nless we hear from you immediately, this decision will go into effect in seven days or less." 316 NLRB at 838. However, the layoffs actually began on the day this letter was received by the union. While Hankins was found to have failed to provide timely notice, the wording of its notice certainly did more to convey a sense of urgency and immediacy than did the notice sent to the Union herein.

employee scheduled for July 30, no notice was provided. Similarly, no notice was provided to the Union prior to the recalls of two additional employees on August 16 and September 17. Yunetz has testified that based on the legal advice he obtained, he had concluded that the law required that he provide notice to the Union and, indeed, that even in the absence of a collective-bargaining agreement, the Company had to "now almost partner with" the Union. (Tr. 165.) Despite this understanding of the legal requirements and the greatly increased presence of the Union in July, August, and September, the Company made no effort whatsoever to fulfill its legal obligation.[31]

Upon consideration of the entire circumstances involving the Company's decision to layoff and recall employees subsequent to the representation election, I am led to the conclusion that the Company failed to provide adequate notice and appropriate opportunity to bargain over the layoff, alternatives to the layoff, and the three recalls. As a result, the Company's conduct violated Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. By interrogating its employee, David Antal Jr., about his union and protected concerted activities and the union activities and sympathies of his fellow employees, the Respondent violated Section 8(a)(1) of the Act.

2. By selecting its employee, David Antal Jr., for layoff because of his union and protected concerted activities, the Respondent violated Section 8(a)(1) and (3) of the Act.

3. By unilaterally laying off its employees, John Craig, Chris Karsaba, Allen Ling, Joel Offman Sr., Robert Oravis, Lonny Smith, Larry Thomas, and Travis Thomas without providing the Union with adequate notice and opportunity to bargain about the layoff and alternatives to the layoff, the Respondent violated Section 8(a)(5) and (1) of the Act.

4. By unilaterally recalling its laid off employees, Larry Thomas, Joel Offman Sr., and Lonny Smith, without providing the Union with notice and opportunity to bargain about the procedure for the recalls, the Respondent violated Section 8(a)(5) and (1) of the Act.

REMEDY

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

With regard to affirmative relief, the Respondent having discriminatorily selected its employee for layoff, it should be ordered to offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of layoff to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Regarding the violations of Section 8(a)(5) and (1), the Board has held in *Lapeer Foundry*, 289 NLRB 952, 955 (1988), that the appropriate remedy for the failure to bargain regarding a layoff is reinstatement of the laid-off employees with backpay from the date of the layoff to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, supra., plus interest as computed in *New Horizons for the Retarded*, supra. In addition, the Board held that a bargaining order is also required to remedy the failure to bargain.

The General Counsel also seeks an Order requiring the Company to reimburse the employees entitled to monetary awards for any extra taxes that would result from their receipt of a lump sum backpay distribution in one tax year "that represents a backpay award for a multi-year period that would have encompassed several tax years." (GC Br. 17.) Although raised by the General Counsel in its brief, the issue is not discussed in any further detail. The Board addressed the identical circumstance in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001). It noted that granting the request would require a change in Board law. Since the issue had not been fully briefed by the affected parties, the Board declined to order the relief sought. For the same reasons, I must similarly decline to recommend this form of relief.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[32]

ORDER

The Respondent, Toma Metals, Inc., of Johnstown, Pennsylvania, its officers, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees regarding their union and protected concerted activities and the union and protected concerted activities of their fellow employees.

(b) Selecting for layoff or otherwise discriminating against its employees for engaging in protected concerted activities.

(c) Unilaterally laying off its employees without providing the Union with adequate notice and opportunity to bargain about the layoff, alternatives to the layoff, the procedures used to implement the layoff, and the effects of the layoff.

(d) Unilaterally recalling its employees from layoff without providing the Union notice and opportunity to bargain about recall procedures.

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

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

(b) Make David Antal Jr., whole for any loss of earnings and other benefits suffered as a result of the discrimination against

[31] I have considered whether the Union waived the right to bargain over any of the three recall decisions. Since the Union was never given any notice of the recalls, it could not have received the clear notice sufficiently in advance of implementation required to support a finding of waiver. *Bottom Line Enterprises*, supra at 374.

[32] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

him, in the manner set forth in the remedy section of this decision.

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

(d) Within 14 days from the date of this Order, offer John Craig, Chris Karsaba, Allen Ling, Joel Offman Sr., Robert Oravis, Lonny Smith, Larry Thomas, and Travis Thomas reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make John Craig, Chris Karsaba, Allen Ling, Joel Offman Sr., Robert Oravis, Lonny Smith, Larry Thomas, and Travis Thomas whole for any loss of earnings and other benefits suffered as a result of their layoff, in the manner set forth in the remedy section of this decision.

(f) Within 14 days from the date of this Order, remove from its files any reference to the layoff of John Craig, Chris Karsaba, Allen Ling, Joel Offman Sr., Robert Oravis, Lonny Smith, Larry Thomas, and Travis Thomas, and within 3 days thereafter notify these employees in writing that this has been done and that the layoffs will not be used against them in any way.

(g) On request, bargain with the Union concerning the decision to lay off employees on June 8, 2001.

(h) On request, bargain with the Union concerning the manner of the recall of laid-off employees on July 30, August 16, and September 17, 2001.

(i) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(j) Within 14 days after service by the Region, post at its facility in Johnstown, Pennsylvania, copies of the attached notice marked "Appendix."[33] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since May 1, 2001.

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

[33] 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."