Gaetano & Associates Inc., aka Gaetano, Diplacidi & Associates Inc. ***and*** **District Council of New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America** ***and*** **Construction and General Laborers Local 79, Laborers International Union of America, AFL–CIO** ***and*** **Wendell Henderson.** Cases 2–CA–35437,[1] 2–CA–35740, 2–CA–35555, 2–CA–35619, and 2–CA–35747

April 25, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On May 27, 2004, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Construction and General Laborers Local 79, Laborers International Union of America, AFL–CIO, each filed an answering brief. The General Counsel filed exceptions and a supporting brief.[2]

The National Labor Relations 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,[3] and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.

This proceeding concerns allegations of unfair labor practices by the Respondent in connection with two representation elections held in separate units at the Respondent's two construction sites in New York City. The first election was held in a bargaining unit of carpenters on May 30, 2003,[4] and the second was held in a unit of laborers on June 13. The Carpenters Union[5] won the May 30 election and was certified as the unit's bargaining representative. We adopt the judge's finding, for the reasons set forth in his decision, that the Respondent failed to meet and bargain with the Carpenters Union in violation of Section 8(a)(5) and (1) of the Act. The Laborers Union lost the tally in the June 13 election, and the judge recommended that a rerun election be held because of objectionable conduct by the Respondent. As stated supra, on November 16, 2004, the Board adopted the judge's recommendation and directed that a second election be held.

With respect to the unfair labor practice allegations, the judge made a number of findings that we adopt in the absence of exceptions.[6] The judge made additional findings of unfair labor practices to which the Respondent has excepted, which we adopt for the reasons set forth in his decision.[7] The judge made several further findings of unfair labor practices to which the Respondent has excepted, and which we adopt for the reasons set forth by the judge, and for the additional reasons discussed below. Finally, pursuant to the General Counsel's exceptions, we find, as set forth below, that the Respondent violated Section 8(a)(3) and (1) of the Act by subcontracting window installation work, and Section 8(a)(1) by threatening Sean Logan, both allegations which the judge failed to address directly.[8]

Discussion

1. We adopt the following unfair labor practice findings made by the judge, for the reasons set forth in his decision, and the additional reasons set forth below.

[1] On Nov. 16, 2004, the Board, by a three-member panel, severed Case 2–RC–22717 from the instant unfair labor practice cases, and issued a Decision, Order, and Direction of Second Election in Case 2–RC–22717.

[2] The General Counsel has excepted to the judge's inadvertent failure to list Jamie Rucker as co-counsel for the General Counsel. We correct the omission.

[3] The Respondent has excepted to 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.

[4] Unless otherwise noted, all subsequent dates shall be in 2003.

[5] District Council of New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America.

[6] The judge found that the Respondent violated: (1) Sec. 8(a)(5) and (1) by failing to furnish the Carpenters Union with information that is relevant and necessary to its role as the exclusive bargaining representative of unit employees; (2) Sec. 8(a)(1) by threatening Nicholas Blake with job loss in retaliation for his union activities; and (3) Sec. 8(a)(1) by giving employees the impression that their union activities are under surveillance. With respect to (1), the Respondent filed no exceptions. With respect to (2) and (3), the Respondent did not present any argument or grounds for disputing the judge's findings. See Sec. 102.46(b)(2) of the Board's Rules. (Any exception . . . not specifically urged shall be deemed to have been waived.).

[7] The judge found that the Respondent violated: (1) Sec. 8(a)(3) and (1) by discharging Paul Valle; (2) Sec. 8(a)(1) by soliciting employees to sign a petition indicating that they are not members of a union; and (3) Sec. 8(a)(1) by making an implied promise of benefits if employees voted against unionization.

[8] We find it unnecessary to pass on the following 8(a)(1) complaint allegations, because any violations found would be cumulative and would not affect the Order in this proceeding: (1) the Respondent interrogated employees by writing "no union" on their hardhats; (2) the Respondent threatened to physically remove an employee from the job site because of his union activities; and (3) the Respondent reprimanded and interrogated Benedict Plentie and Davidson Plenty.

We note that all charges in this proceeding were properly filed and served on the date set forth in the consolidated complaint (the complaint).

The Respondent's Unlawful Mass Layoff of Carpenters[9]

We agree with the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by its mass layoff of carpenters on April 16. The judge correctly found, as set forth in his decision, that the General Counsel satisfied his initial burden under *Wright Line*[10] of establishing that the employees' support of the Carpenters Union's organizing campaign was a motivating factor in the Respondent's layoff decision. The Respondent does not dispute the judge's key finding regarding the timing of the layoff: it occurred on the very same day and a mere few hours after the Respondent received a faxed copy from the NLRB Regional Office of the Carpenters Union's petition for a representation election, as well as a phone call from the Carpenters Union in which it claimed majority status among the Respondent's carpenters. "It is well settled that the timing of an employer's action in relation to known union activity can supply reliable and competent evidence of unlawful motivation." *Davey Roofing, Inc.*, 341 NLRB 222, 223 (2004) (unlawful layoffs on same day employer received prounion petition). An inference of antiunion animus is proper when—as here—the timing of a management decision is "stunningly obvious." *NLRB v. American Geri-Care*, 697 F.2d 56, 60 (2d Cir. 1982), cert. denied 461 U.S. 906 (1983).[11]

Further, we have carefully reviewed the record and agree with the judge's conclusion that the Respondent failed to meet its *Wright Line* burden of establishing that it would have made the same mass layoff decision even absent the protected organizing activity. The Respondent argues that the carpenters were laid off because they were qualified only to do rough carpentry work, and the Respondent had exhausted most of such rough carpentry work at the time of the layoff. At the hearing, the Respondent's owner Matthew Gaetano testified that at the time of the layoff, rough carpentry at the sites was 95 percent complete, and that this percentage would be "reflect[ed] in the bank requisitions" and banking documentation. The Respondent has failed to provide such banking documentation, or any other evidence documenting or corroborating its assertion that rough carpentry work was nearly complete. Finally, in its brief to the Board, the Respondent does not dispute, and indeed cites with approval, the testimony of carpenter Tony Auguste that at the time of the mass layoff approximately 20 percent of the rough carpentry work remained. Thus, even accepting the Respondent's characterization of the nature of "rough carpentry" and its assertion that the laid-off carpenters were qualified only for that work, the Respondent has failed to prove its affirmative defense that so little rough carpentry work remained on the project that it would have laid the carpenters off even in the absence of their protected activity. Compare, e.g., *American Coal Co.*, 337 NLRB 1044 (2002) (mass layoff found lawful under *Wright Line* based on employer's production of employee evaluations, disciplinary and attendance records).[12]

The Respondent Unlawfully Discharged Benedict Plentie and Davidson Plenty

We agree with the judge's finding, as set forth in his decision, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Benedict Plentie and Davidson Plenty. The judge credited testimony that Benedict and Davidson were told by Supervisor Sammy Superville that they had been fired for wearing prounion t-shirts, and discredited the Respondent's defense that they were terminated for poor work performance. In addition, the record fully supports the judge's finding that it was the Respondent's practice to shift workers among its various project sites. Further, we agree with the judge that the Respondent failed to meet its burden of showing that it would have laid off Benedict and Davidson in any event because it ran out of money to operate the project at which they worked. The record fully supports the judge's finding that carpentry work continued at the main site; that Benedict and Davidson were qualified to do that work; and that the Respondent continued to hire new carpenters at the main site.[13]

[9] The judge inaccurately described this complaint allegation at number 2 of the "Statement of the Case" section of his decision. The complaint alleges that the employees were laid off because of their union activity, not because of their attendance at a Board hearing.

[10] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[11] Member Schaumber finds that the General Counsel has established the Respondent's antiunion animus through the numerous violations of Sec. 8(a)(1) found by the judge and adopted here. Thus, although the timing of the layoffs is significant, Member Schaumber finds it unnecessary to infer animus from the timing of the layoffs.

[12] The Respondent's additional contention that it made the layoff decision because it was "running low on cash" cannot be reconciled with its hire of two new carpenters on the very day of the layoff. The Respondent cites no exigent need for the two new carpenters that would reconcile the contradiction between laying off employees because of a shortage of operating cash and taking on new employees.

[13] We additionally agree with the judge, for the reasons set forth in his decision, that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging Wendell Henderson. The judge correctly found that the Respondent failed to produce evidence that Henderson engaged in sexual harassment. In addition, we find that the Respondent failed to produce credible evidence that it actually received any allegations of sexual harassment against Henderson. Supervisor Superville did not testify as to such harassment, even though he filled out a warning form regarding the alleged harassment. Nor did he testify as to his receipt of any complaints. Henderson's supervisor, who allegedly received the

The Respondent's Unlawful Unilateral Subcontracting of Sheetrocking and Related Work

We agree with the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally subcontracting sheetrocking and related work without first notifying the Carpenters Union and affording it an opportunity to bargain about the subcontracting. The judge properly rejected the Respondent's argument that the subcontracting was a management decision regarding which bargaining was not mandated. It is settled under *Fibreboard Paper Products v. NLRB*[14] and *Torrington Industries*[15] that subcontracting is a mandatory subject of bargaining if it involves nothing more than the substitution of one group of workers for another to perform the same work and does not constitute a change in the scope, nature, and direction of the enterprise. See *Sociedad Espanola de Auxilio de Puerto Rico*, 342 NLRB 458 (2004).[16] We find that the subcontracting at issue here involves carpentry work previously performed by unit employees and that the substitution of the subcontractor's employees for those of the Respondent did not alter the Respondent's enterprise. Thus, the Respondent has failed to demonstrate that its unilateral decision was privileged under Section 8(a)(5).[17]

2. We make the following unfair labor practice findings concerning the issues below that the judge did not directly address.

The Respondent's Unlawful Subcontracting of Window Installation Work

The General Counsel has excepted to the judge's failure to address the complaint allegation that the Respondent violated Section 8(a)(3) and (1) of the Act by subcontracting window installation work. We find merit in the General Counsel's exception.

The record shows that the Respondent formerly used subcontractors to perform all its construction work. In 1998, however, the Respondent decided to perform as much construction work with its own employees as possible, citing efficiency of operations and problems with subcontractors. In May, shortly after the Carpenters Union organizing drive began, however, the Respondent departed from this policy and subcontracted the installation of windows at the main project site.

The record fully supports a finding that the General Counsel satisfied his initial burden under *Wright Line*, supra, of establishing that the employees' union activity was a motivating factor in the Respondent's decision to subcontract the installation of windows rather than assign such work to its employees. It is undisputed that the Respondent knew of the Carpenters Union's campaign, which had begun in early April. The organizing campaign was openly conducted outside the Respondent's main project site as well as at a nearby delicatessen that was the employees' main lunchtime gathering spot. Further, the Respondent's animus against its employees' union activities is amply demonstrated by the Respondent's numerous unfair labor practices in response to the union organizing campaign. The burden thus shifts to the Respondent to establish its affirmative defense that it would have subcontracted the window installation even if the employees had not engaged in protected activity. See, e.g., *Star Trek: The Experience*, 334 NLRB 246, 246–247 (2001). We find that the Respondent has failed to carry this burden.

The Respondent argues that it made arrangements for the window installation subcontract "months before" the union organizing campaign. The Board has held that an employer establishes a successful *Wright Line* defense to an allegation of unlawfully motivated subcontracting by showing that its subcontracting decision was made prior to the onset of the employees' organizing activity. See *St. Vincent Medical Center*, 338 NLRB 888 fn. 4 (2003). The Respondent, however, has failed to produce the contract, or any other documentary or corroborating evidence of this claim. Indeed, the Respondent's arguments are directly contradicted by the testimony of owner Matthew Gaetano that he contracted for the windows at "the end of April, beginning of May [2003]"—after the onset of the organizing campaign and the unlawful mass lay-

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complaints, also failed to testify. In addition, Henderson's alleged victims did not testify. The only direct evidence that any complaints were made is Matthew Gaetano's testimony. It would appear that the judge discredited his testimony. In any event, given the state of the record, the Respondent has not met its burden of showing that it fired Henderson because of employee complaints.

In his decision, the judge inadvertently referred to the discharge of Henderson as a violation of Sec. 8(a)(5). We have corrected the Order and notice.

[14] 379 U.S. 203 (1964).

[15] 307 NLRB 809 (1992).

[16] Chairman Battista notes that the issue of subcontracting may turn, inter alia, on whether the subcontracting was based on labor costs or other factors that are particularly amenable to the bargaining process. In the instant case, the Respondent (who is the repository of evidence concerning the reason for its own subcontracting) has not proffered any particular reason for the subcontracting. Rather, the Respondent simply makes the broad generalization that company management "retained the right to make economic and management decisions regarding the running of its business." In these circumstances, Chairman Battista joins his colleagues in finding that the subcontracting was unlawful.

[17] The complaint additionally alleges that the Respondent violated Sec. 8(a)(3) and (1) of the Act by its subcontracting of sheetrocking and related work. We find it unnecessary to pass on that allegation because the finding of such an additional violation would not materially affect the remedy in this proceeding.

offs on April 16. We have considered Gaetano's subsequent testimony that the Respondent contracted for the window installation at an earlier date, and only after the Respondent's own employees failed to install the windows properly. However, the contradictory nature of Gaetano's testimony and the Respondent's shifting accounts of the subcontracting decision severely undermine Gaetano's credibility and the Respondent's arguments.[18] In these circumstances, we cannot find that the Respondent has met its *Wright Line* burden of establishing that it would have made the decision to subcontract window installation work even absent the protected organizing activity. We accordingly find that the Respondent subcontracted window installation work in violation of Section 8(a)(3) and (1) of the Act.

The Respondent Unlawfully Threatened Sean Logan

The judge found that as employee Sean Logan was entering the delicatessen, where, as noted, much of the union solicitation took place, Supervisor Sammy Superville cautioned Logan to "be careful talking to him," referring to Union Agent Anthony Williamson. In addition, a fellow employee stated to Logan that "he could lose his job for talking to Williamson." The judge observed that the latter statement was not unlawful because it came from a fellow employee, but the judge failed to address Supervisor Superville's statement to Logan to "be careful" talking to the union agent. The General Counsel has excepted, arguing that this statement constitutes an unlawful warning about engaging in union activity and a threat of unspecified reprisal. We find merit in the General Counsel's exception. The Board has held that such "be careful" warnings convey the threatening message that union activities would place an employee in jeopardy. See, e.g., *St. Francis Medical Center*, 340 NLRB 1370, 1383–1384 (2003) ("be careful" statement by supervisor in context of union activity held unlawful); *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462 (1995) (supervisor's statements such as "watch out" are unlawful implied threats). We accordingly find that the Respondent violated Section 8(a)(1) of the Act by threatening Sean Logan.

3. Finally, the Respondent argues in its exceptions that a reinstatement and backpay remedy is a "practical impossibility" because it has completed the construction projects involved in this proceeding. The Respondent further argues that a reinstatement remedy is also inappropriate as to four of the carpenters it laid off on April 16, because it subsequently recalled those carpenters.[19] These issues are appropriately left to the compliance stage of these proceedings.

ORDER[20]

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Gaetano & Associates Inc., aka Gaetano, Diplacidi & Associates Inc., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employees to sign a petition indicating they are not members of a union or otherwise interrogating employees about their membership in or activities on behalf of a labor organization.

(b) Threatening employees with job loss in retaliation for their union activities or otherwise threatening employees because of their union activities.

(c) Promising benefits to employees if they vote against unionization.

(d) Giving employees the impression that their union activities are under surveillance.

(e) Laying off or discharging employees because of their union activities or in retaliation for the efforts of the Unions to organize them.

(f) Failing and refusing to meet and bargain with the District Council of New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America (Carpenters Union), as the exclusive bargaining representative of its employees in the bargaining unit set forth below.

(g) Refusing to bargain with the Carpenters Union as the exclusive bargaining representative of its employees in the bargaining unit set forth below by unilaterally subcontracting bargaining unit work without first notifying the Carpenters Union and affording it an opportunity to bargain about such subcontracting.

(h) Subcontracting window installation or other bargaining unit work of employees represented by the Carpenters Union because its employees engaged in union activities.

(i) Failing to furnish the Carpenters Union with information that is relevant and necessary to its role as the exclusive bargaining representative of unit employees.

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

[18] See, e.g., *Zengel Bros.*, 298 NLRB 203, 206 (1990) (an employer's failure to offer a consistent account of its actions warrants an inference that the real reason for its conduct is not among those asserted).

[19] The four are Drabio Dollin, Hainson George, Marvin Gullen, and Michael Sargeant.

[20] We have modified the judge's recommended Order to conform to the violations found, and to correct certain inadvertent errors. We have substituted a new notice to comport with these modifications.

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

(a) To the extent that it has not already done so, within 14 days from the date of this Order, offer Tony Auguste, Nicholas Blake, Drabio Dollin, Hainson George, Marcus Williams, Lavistor Joseph, Marvin Gullen, Vitals Mathorin, John Nash, Anderson Pilgrim, Shondell Richardson, Michael Sargeant, Ali Sillah, Davidson Plenty, Benedict Plentie, Paul Valle, and Wendell Henderson 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.

(b) Make Tony Auguste, Nicholas Blake, Drabio Dollin, Hainson George, Marcus Williams, Lavistor Joseph, Marvin Gullen, Vitals Mathorin, John Nash, Anderson Pilgrim, Shondell Richardson, Michael Sargeant, Ali Sillah, Davidson Plenty, Benedict Plentie, Paul Valle, and Wendell Henderson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to its unlawful layoff of Tony Auguste, Nicholas Blake, Drabio Dollin, Hainson George, Marcus Williams, Lavistor Joseph, Marvin Gullen, Vitals Mathorin, John Nash, Anderson Pilgrim, Shondell Richardson, Michael Sargeant, and Ali Sillah, and its unlawful discharge of Davidson Plenty, Benedict Plentie, Paul Valle, and Wendell Henderson, and within 3 days thereafter notify them in writing that this has been done and that the unlawful layoff or discharge will not be used against them in any way.

(d) Make the bargaining unit employees represented by the Carpenters Union whole for any loss of earnings and other benefits suffered as a result of its unilateral subcontracting of sheetrocking and related work, with interest, in the manner set forth in the remedy section of the judge's decision.

(e) Make the bargaining unit employees represented by the Carpenters Union whole for any loss of earnings and other benefits suffered as a result of its unlawful subcontracting of window installation work, with interest, in the manner set forth in the remedy section of the judge's decision.

(f) On request, bargain with the District Council of New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America, as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All regular full-time carpenters, including lead carpenters, employed by the Employer out of its 2098 Frederick Douglas Boulevard, New York, New York office at various construction sites in the New York City Metropolitan area, excluding all other employees, office clerical employees, and guards, professional employees, foremen and supervisors as defined in the Act.

(g) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees represented by the Carpenters Union, notify and, on request, bargain with the Carpenters Union as the exclusive collective-bargaining representative of employees in the above-described unit.

(h) Upon request, bargain with the Carpenters Union about the subcontracting of sheetrocking and related work.

(i) Furnish the Carpenters Union the name, date of hire, job title, and current rate of pay of each employee in the bargaining unit represented by the Carpenters Union, as requested by letter dated June 30, 2003.

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

(k) Within 14 days after service by the Region, post at its facilities in New York, New York, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that the notices are not altered, defaced, or covered by any other material. In addition, because the evidence shows that the Respondent's employees do not often go to the Respondent's home facility, but rather are dispersed at various locations in New York City, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 16, 2003.

[21] 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."

(l) 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.

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 solicit you to sign a petition indicating you are not a member of a union or otherwise interrogate you about your membership in or activities on behalf of a labor organization.

WE WILL NOT threaten you with job loss in retaliation for your union activities or otherwise threaten you because of your union activities.

WE WILL NOT promise you benefits if you vote against unionization.

WE WILL NOT give you the impression that your union activities are under surveillance.

WE WILL NOT lay off or discharge you because of your union activities or in retaliation for the efforts of the Unions to organize you.

WE WILL NOT fail and refuse to meet and bargain with the District Council of New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America (Carpenters Union) as the exclusive bargaining representative of our employees in the bargaining unit set forth below.

WE WILL NOT refuse to bargain with the Carpenters Union as the exclusive bargaining representative of our employees, in the bargaining unit set forth below, by unilaterally subcontracting bargaining unit work without first notifying the Carpenters Union and affording it an opportunity to bargain about such subcontracting.

WE WILL NOT subcontract window installation or other bargaining unit work of our employees represented by the Carpenters Union because our employees engaged in union activities.

WE WILL NOT fail to furnish the Carpenters Union with information that is relevant and necessary to its role as the exclusive bargaining representative of unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, to the extent that we have not already done so, within 14 days from the date of the Board's Order, offer Tony Auguste, Nicholas Blake, Drabio Dollin, Hainson George, Marcus Williams, Lavistor Joseph, Marvin Gullen, Vitals Mathorin, John Nash, Anderson Pilgrim, Shondell Richardson, Michael Sargeant, Ali Sillah, Davidson Plenty, Benedict Plentie, Paul Valle, and Wendell Henderson 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 Tony Auguste, Nicholas Blake, Drabio Dollin, Hainson George, Marcus Williams, Lavistor Joseph, Marvin Gullen, Vitals Mathorin, John Nash, Anderson Pilgrim, Shondell Richardson, Michael Sargeant, Ali Sillah, Davidson Plenty, Benedict Plentie, Paul Valle, and Wendell Henderson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to our unlawful layoff of Tony Auguste, Nicholas Blake, Drabio Dollin, Hainson George, Marcus Williams, Lavistor Joseph, Marvin Gullen, Vitals Mathorin, John Nash, Anderson Pilgrim, Shondell Richardson, Michael Sargeant, and Ali Sillah, and our unlawful discharge of Davidson Plenty, Benedict Plentie, Paul Valle, and Wendell Henderson, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the unlawful layoff or discharge will not be used against them in any way.

WE WILL make the bargaining unit employees represented by the Carpenters Union whole for any loss of earnings and other benefits suffered as a result of our unilateral subcontracting of sheetrocking and related work, with interest.

WE WILL make the bargaining unit employees represented by the Carpenters Union whole for any loss of earnings and other benefits suffered as a result of our

unlawful subcontracting of window installation work, with interest.

WE WILL, on request, bargain with the District Council of New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America, as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All regular full-time carpenters, including lead carpenters, employed by the Employer out of its 2098 Frederick Douglas Boulevard, New York, New York office at various construction sites in the New York City Metropolitan area, excluding all other employees, office clerical employees, and guards, professional employees, foremen and supervisors as defined in the Act.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees represented by the Carpenters Union, notify and, on request, bargain with the Carpenters Union as the exclusive collective-bargaining representative of employees in the above-described unit.

WE WILL, upon request, bargain with the Carpenters Union about the subcontracting of sheetrocking and related work.

WE WILL furnish the Carpenters Union the name, date of hire, job title, and current rate of pay of all employees in the bargaining unit represented by the Carpenters Union, as requested by letter dated June 30, 2003.

GAETANO & ASSOCIATES INC., AKA GAETANO, DIPLACIDI & ASSOCIATES INC.

Margit Reiner Esq., for the General Counsel.
Kevin J. Nash Esq., for the Respondent.
Haluk Savci Esq., for the Mason Tenders District Council.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York City on February 26 and 27 and March 1 and 5, 2004.

On May 5, 2003, Laborers Local 79 filed a petition for an election in Case 2–RC–22717. Pursuant to a Stipulated Election Agreement approved on May 22, 2003, an election was conducted in the following unit:

> Included: All regular full-time laborers, including mason tenders, employed by the Employer out of its 2098 Fredrick Douglass Blvd. office and at various construction sites in the New York City Metropolitan area.
>
> Excluded: All other employees, office clerical employees, foremen, guards, professional employees and supervisors as defined in the Act.

The tally of ballots showed that of about 56 eligible voters, there were 5 cast for the Petitioner and 23 against.

On June 19, 2003, the Laborers' Union filed timely Objections to the Election. These alleged:

> Objection 1: That the Employer failed to post copies of the Notice of Election at least 72 hours before the election.
>
> Objection 2: That the Employer engaged in surveillance of employees' union activities, interrogated employees and required employees to sign statements attesting to any past union membership or affiliation.
>
> Objection 3: That the Employer used a guard as an observer at the election.
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> Objection 4: That the Employer reduced the pay of union supporters.[1]
>
> Objection 5: That the Employer threatened employees with discipline if they supported the Union.
>
> Objection 6: That certain supervisors actively campaigned against the Union on the day of the election and within yards of the polling area.

On October 10, 2003, the Acting Regional Director concluded that the Laborers' objections raised substantial and material factual issues that would best be resolved by a hearing. He therefore ordered that the objections be consolidated with the unfair labor practice complaint described below.

The charge, amended charge and second amended charge in Case 2–CA–35437 were filed by the Carpenters Union on April 17, May 27, and July 16 2003. The charge in Case 2–CA–35583 was filed by Greenidge on June 19, 2003. The charge and amended charge in Case 2–CA–35555 were filed by the Laborers Union on June 4 and August 28, 2003. The charge in Case 2–CA–35619 was filed by the Laborers on July 7, 2003. The charge in Case 2–CA–35740 was filed by the Carpenters on August 28, 2003. And the charge in Case 2–CA–35747 was filed by Wendell Henderson September 5, 2003.

At the opening of the hearing, the General Counsel withdrew the allegations of the complaint relating to Greenidge and withdrew the charge filed by him in Case 2–CA–35583.

As amended, the consolidated complaint that was issued on October 31, 2003, alleged

1. That on June 9, 2003, the Carpenters' Union was certified as the exclusive collective-bargaining agent for the Respondent's employees in a unit of

> All regular full-time carpenters, including lead carpenters, employed by the Employer out of its 2098 Fredrick Douglass Blvd. office and at various construction sites in the New York City Metropolitan area, excluding all other employees, office

[1] There is no charge and no allegation in the complaints alleging that the Employer reduced the pay of union supporters. Although testimony to this effect was given by Sean Logan, I don't think that objections, which essentially raise an allegation that otherwise would be a violation of Sec. 8(a)(3) of the Act, can be successful if there is no corresponding unfair labor practice allegation. *Times Square Stores Corp*., 79 NLRB 361 (1948. See also *Texas Meat Packers*, 130 NLRB 279 (1961); *Cooper Supply Co*., 120 NLRB 1023 (1958); and *Capitol Records*, 118 NLRB 598 (1957.

clerical employees, and guards, professional employees, foremen and supervisors as defined in the Act.

2. That on April 16, 2003, the Respondent laid off the following employees because they assisted and supported the Carpenters' Union at a hearing before the Board in Case 2–RC–22710 and attended the hearing for the purpose of providing testimony.[2]

Tony Auguste	Nicholas Blake
Drabio Dollin	Hainson George
Marcus Williams	Lavistor Joseph
Marvin Gullen	Vitals Mathorin
John Nash	Anderson Pilgrim
Stonde Richardson	Michael Sargeant
Ali Sillah	

3. That on or about April 21, 2003, the Respondent by Matthew Gaetano, an owner, required employees to sign a document denying that they were union members and threatened employees with unspecified reprisals if they refused to do so.

4. That on or about May 5, 2003, the Respondent by Matthew Gaetano, threatened employees with discharge if they continued to support a union and implied that a strike was inevitable if they selected a union.

5. That on May 13 and 15, 2003, the Respondent by Joseph Superville, a supervisor, told employees that they would not be recalled because they joined or assisted the Carpenters' Union and because they assisted that Union in Case 2–RC–22710.

6. That in the last week of May 2003, the Respondent by Matthew Gaetano, threatened employees with discipline and discharge if they selected a union.

7. That on May 29, 2003, the Respondent by Joseph Superville, told employees that they had to choose between supporting the Union and continuing to work for the Respondent.

8. That in May 2003, the Respondent, for discriminatory reasons, subcontracted window installation and other work, all which had previously been done by employees in the Carpenters' unit.

9. That on June 10, 2003, the Respondent, for discriminatory reasons, unilaterally and without notice to the Carpenters' Union, subcontracted sheet rock and other work to T. Walker Construction Inc.

10. That on June 12, 2003, the Respondent, by Joseph Superville, threatened employees with unspecified reprisals if they voted for the Laborers' Union and created the impression of surveillance.

11. That on June 13, 2003, the Respondent by Joel Little, a foreman and supervisor, coerced employees by writing anti-union messages on their garments and hardhats.

12. That on July 2, 2003, the Respondent by Stephen Gaetano, an owner, reprimanded employees for supporting a union and interrogated employees about their union activities.

13. That on July 2, 2003, the Respondent by Joseph Superville, interrogated employees about their activities for the Laborers' Union.

14. That on July 2, 2003, the Respondent, for discriminatory reasons discharged Davidson Plenty and Benedict Plentie.

15. That on July 3, 2003, the Respondent, for discriminatory reasons discharged Paul Valle.

16. That on August 27, 2003, the Respondent, for discriminatory reasons discharged Wendell Henderson.

17. That since August 27, 2003, the Respondent has refused to bargain with the Carpenters' Union.

The Respondent asserts that between April 18 and May 3, 2003, it laid off seven employees for business reasons; namely that the individuals were "rough" carpenters whose work had been completed at the project. The Respondent further asserts that it subcontracted the window installation work as it normally does because of the specialized nature of this work and that it had made this decision more than a year prior to the start of the project. The Respondent asserts that Davidson Plenty and Benedict Plentie were discharged for cause and that it was aware that they were union members when it hired them. Finally, the Respondent asserts that Paul Valle was terminated after being warned about poor work performance and that Wendell Henderson was discharged for misconduct.

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the Briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

In both Stipulated Election Agreements executed by the Respondent through its legal counsel, it agreed that it purchased goods and supplies valued in excess of $50,000 for its New York jobsites from firms located within the State of New York, and that such goods originated directly from suppliers located outside the State of New York. Accordingly, as the Employer at the time of the events in these cases, was engaged in interstate commerce and met the Board's indirect inflow standards, I conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. *Siemons Mailing Service*, 122 NLRB 81 (1959); *Food & Commercial Workers Local 120 (Weber Meats),* 275 NLRB 1376 fn. 1 (1985); *Combined Century Theatres*, 120 NLRB 1379 (1959); George Schuwirth, 146 NLRB 459 (1964); *Better Electric Co.,* 129 NLRB 1012 (1961).

At the hearing, the Respondent also conceded and I conclude that the two Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

At the hearing the Respondent stipulated that Stephen Gaetano and Mathew Gaetano (the owners), Patrick Lewis, William McGuigan, and Joseph (Sammy) Superville were supervisors and/or agents within the meaning of Section 2(11) or (13) of the Act. In this respect, the Employer asserts that William McGuigan was the job supervisor until his discharge in or about mid-April 2003 and that Superville, who until that time was a carpenter, took over that position. The Employer denies, however, that Joel Little or Donovan Lewis were supervisors and asserts that they were merely masons.

[2] In her brief, the General Counsel withdrew from this list of alleged discriminates, the name Don Joseph.

The Company is the owner and developer of properties in New York City. Before 1998, it utilized contractors within the various building and construction trades to complete projects. But in or around 1998, it decided to become its own General Contractor and to perform as much of the construction work as was possible. It decided to do this because its management believed that this would be a more efficient way of doing construction and would avoid legal and other problems with subcontractors. Whether this was a good or poor decision remains to be seen. It is not, however, within my purview.

The primary construction site involved in this case involves the renovation of three attached apartment buildings located in Manhattan between 113 and 114th Street on Frederick Douglas Blvd. This involves gutting existing structures while retaining the outside walls and rebuilding them completely. Ultimately, the intent is to sell the apartments as condominiums. The vast majority of the labor that was assigned, was allocated to this project, which began in or about November 2002. For purposes of this decision I shall refer to it as site 1.

As part of the deal by which the Respondent purchased the properties, it also agreed to rebuild a two family brownstone located a short distance away, which after completion, would be turned over, at no cost, to the original owners of the properties. During the months of April, May, and June 2003, this site was manned by a much smaller crew. For purposes of this Decision I shall refer to this as site 2.

As noted above, work at site 1 began in November 2002. The first part of the work essentially involved demolition. And to this end, the Company hired a group of people who basically reduced the inside of the buildings to a shell. This work, apart from muscle power, did not involve much skill, and was mostly accomplished by January or February 2003 at which time the Respondent began hiring carpenters, masons and laborers. Insofar as the carpentry work, the initial stages after demolition, involved putting in beams, studs and the framing for the floors and walls of the buildings. This, I believe, involves creating the internal framework for the structures within which the floors, walls, windows, and ceilings would be placed. During this stage of the work, the evidence shows that there were about 25 carpenters employed under the direction of Patrick Lewis, William McGuigan, and later Joseph (Sammy) Superville.

The Company asserts that this initial stage of carpentry is considered to be "rough" carpentry and that many of the employees who were hired to do this initial phase were hired only as temporary workers whose jobs would end at the completion of this phase of work. It therefore asserts that when this "rough" carpentry work was completed as of April 16, 2003, a fair number of these employees were no longer needed and that the next stage of carpentry work required people with higher skills to do "finish" carpentry. Virtually all of the General Counsel witnesses who were employed as carpenters and who had prior experience in this field, testified that the next stage of carpentry work would also be considered as "rough" carpentry and that they were perfectly competent to do such work. We will come back to this.

Hopefully for purposes of organizational clarity, I am going to divide this decision into two major sections; one dealing with the Carpenters' unit and the other with the Laborers' unit. However, it should be noted that both groups of people worked side by side at the Company's jobsites and that many of the events overlapped in time. Thus, events and actions described in the carpenter's section, necessarily impacted on the laborers and vice versa.

B. The Carpenters

1. The 8(a)(1) and (3) allegations Cases 2–CA–35437 and 2–CA–35437

Representatives of the Carpenters' Union began organizing efforts at the primary site in early April 2003. Organizer, Bryan Schuler, talked to people outside the site on the sidewalk or at a delicatessen located across the street where employees and supervisors normally went to get food or drinks at their breaks. At some point shortly thereafter, he invited representatives of the Laborers' Union to accompany him to the jobsite to sign up masons and laborers. As this union activity was carried out in the open and as Sammy Superville was among the people solicited by the Carpenters' representative, it is likely that the Company was aware of the union organizing activity even before a petition for an election was filed by either union.

Byron Schuler called the Company on April 16, 2003, and speaking to William Gaetano, represented that his union represented the carpenters. This was followed up by a letter dated April 16 advising that the Union claimed to represent a majority of the carpenters employed by the Company.

Also on April 16, 2003, the Carpenters' Union filed a petition for an election. The NLRB's Regional Office immediately faxed a copy of this petition along with a notice that a representation hearing would take place on April 25, 2003. The transmission was started at 12:41 p.m. and completed on April 16, 2003, at 12:46 p.m.

At the end of the working day on April 16, 2003, the Respondent, at a meeting at site 1, read a list to the carpenters. They were told that if their names were called, they would continue to work, but if their names were not called, they were being laid off. Reviewing the testimony of witnesses and payroll records, the evidence shows that the people who were laid off on this date were Tony Auguste, Nicholas Blake, Dabio Dottin, Hainson George, Lavister Joseph, Marvin Julien, Vitalis Mathurin, John Nash, Anderson Pilgrim, Michael Sargeant, Ali Sillah, and Marcus Williams. Of this group, Dabio Dottin, Hainson George, Marvin Julien, and Michael Sargeant were later recalled to work in May or June 2003.

On April 16, 2003, the Respondent hired Roger Superville and Leonard Alexander to work as carpenters at site 1. A week later, it hired McKenneth Fleming to work as a carpenter at site 1. And soon thereafter, the Respondent hired three more carpenters to work at site 1. (Donnell Vialet, Trevor Haynes, and Stephen Samuel). In addition, the evidence shows that after the April 16 layoff, the Company entered into subcontracts with a company called STD to install windows and another company, T. Walker, to install sheetrock. Except for the window casements, the evidence convinces me that the installation of the windows was, with appropriate supervision, within the capability of the "rough" carpenters who had been laid off. Similarly, with respect to the sheet rock work, the evidence convinces me that except for taping, the installation of sheet rock was, with

appropriate supervision, work that could and would have been done by the "rough" carpenters.

In short, given (1) the timing of the layoffs, (immediately after the union demanded recognition and after receipt of the election petition); (2) the fact that the Company hired more carpenters, (either directly or through subcontractors), to replace those laid off, and (3) the inaccurate assertion that the existing carpenters could not do most of the remaining work, its is my opinion that the evidence establishes that the layoffs/discharges of April 16 were motivated by antiunion considerations. Moreover, I do not think that the Company has established that it would have laid off or discharged these people, notwithstanding the activity of the Union to organize them. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

As noted above, the Company executed a Stipulated Election Agreement on April 30, 2003, and the election in the carpenter unit was scheduled for May 30, 2003.

There was testimony regarding a meeting held by Mathew Gaetano with employees before the election. Sean Logan, a mason, testified that after explaining why Superville was replacing McGuigan, Gaetano said something to the effect that he couldn't keep people who were affiliated with a union. In a similar vein, Paul Valle, a bricklayer, testified that Mathew told employees that if they voted for the union he couldn't use them, but if they voted no, they would have a job. Both stated that Gaetano had something for the employees to sign.

According to Mathew Gaetano, after receiving the phone call from Union Agent Schuler on April 16, 2003, he called his general attorney and prepared a form that was left for employees to sign if they so chose. This document, which is Respondent's Exhibit 2, is in the form of a petition that was signed by many of the employees after being asked to do so by Patrick Lewis. The heading states: "By signing this petition you are acknowledging that you are an employee of Gaetano and Associates, Inc. and are not a member of the Union."

Where an employer solicits employees to sign a document such as the one described above, this constitutes coercive interrogation because if tends to force employees to declare whether or not they are sympathetic to a union. *Beverly California Corp*., 326 NLRB 232, 233–234 (1998) enf. denied on other grounds 277 F.3d 817 (7th Cir. 2000). See also *Kurz-Kasch Inc.,* 239 NLRB 1044 (1978), where the Board held that an employer's request that employees wear a "vote no" button constituted coercive interrogation. Accordingly, I conclude that in this respect, the Respondent violated Section 8(a)(1) of the Act.

Employee Sean Logan testified that in mid-May 2003, as he was entering the deli, Superville and another employee passed by whereupon Superville said, "[B]e careful talking to him." (Referring to union agent Anthony Williamson.) According to Logan, the other employee told him that he could lose his job for talking to Williamson. Since this statement was made by an employee and not by anyone from management, I conclude that this did not violate the Act.

Employee Blake testified that on May 29, 2003, he went to the jobsite and asked Superville for his job back. He testified that Superville said that he couldn't do anything until they saw how the election went and that he couldn't get his job back because he went against the boss. I conclude that this constituted a threat within the meaning of Section 8(a)(1) of the Act.[3]

On July 2, 2003, the Respondent discharged Benedict Plentie and his brother, Davidson Plenty.[4]

At one time, Benedict Plentie was the owner of his own firm called B.P. Construction, which was a small enterprise engaged in carpentry work. He is a carpenter who is qualified to do "finish" work. He also was a journeyman-member of the Carpenters' Union and this was known to Gaetano when, in the previous 5 years, he contracted carpentry work with B.P.

In February or March 2003, the Company hired the two brothers as direct employees to work as carpenters at the brownstone project. (Site 2.) They were left there to work without supervision and were responsible for doing all of the carpentry work for that location. At times they were assisted by one or two laborers. The fact that Mathew Gaetano hired them with the knowledge that at least Benedict was a union member is not particularly significant. Since he took a job which was nonunion, Gaetano could reasonably have surmised that Plentie's attachment to the Carpenter's union was not particularly strong.

In any event, on July 2, 2003 (shortly after the Union made a demand to bargain), Steven Gaetano visited site 2 and saw Benedict and Davidson wearing union T-shirts. When Benedict responded that he had gotten the shirt from the union agent, Gaetano asked if he knew the problems they were having with the Union. When he saw that Davidson was wearing a union T-shirt, Gaetano angrily said, "[Y]ou probably orchestrated the whole thing." (Steven Gaetano did not testify and therefore, the testimony regarding his conversations with the two brothers was uncontradicted.)

The two brothers credibly testified that on the same day, they received a visit from Superville who told them that Mathew Gaetano was closing the jobsite down because he was having a problem with the bank. Davidson testified that after he and his brother picked up their tools, Superville told him that it was not right that they were fired for wearing T-shirts after they had worked for Mathew Gaetano for such a long period of time.

The brothers were never asked to return to work and were never transferred to the other jobsite where the evidence shows that the Company continued to either hire new carpenters or hire subcontractors to do the installation of windows and sheetrock. Thus, even if there was some problem with financing, and even if it was not possible for the Company to continue to carry on work at site 2, there is no question but that carpentry work continued on site 1 and that Benedict and Davidson were qualified to do the carpentry work at that location. I also note that it was not uncommon for the Company to shift workers from site to site as needed. I also reject the Company's assertion that these two people were lax in their work performance or that they failed to do the work assigned to them. (Respon-

[3] A recording of this alleged conversation that was made by Blake and was offered into evidence. However, as the recording was largely inaudible, I am not relying on it.

[4] They spell their last names differently.

dent admits that it never issued any warnings to them.) In this respect, I credit the testimony of the two carpenters.

Accordingly, I conclude that the Respondent violated Section 8(a)(1) and (3) by discharging the Plentie (Plenty), brothers.

2. The refusal to bargain
2–CA–35740

Notwithstanding the layoffs and the other conduct described above, the Carpenters' Union won the election that was held on May 30, 2003. The Union was certified on June 9, 2003.

On June 30, 2003, Ed McWilliams wrote to the Respondent requesting that negotiations begin on July 10. This letter also requested the names, dates of hire, job titles, and current rates of pay for the bargaining unit employees. When the Union received no response, McWilliams sent out another letter on July 23, asking for a meeting on August 5. He repeated his request for the information.

The parties met on August 5 and after tendering a copy of the standard agreement, the Company's lawyer essentially said he would have to review it. The parties agreed to a meeting on August 27 and the Respondent promised to tender the requested information by August 12, 2003.

The Respondent did not proffer the requested information and did not show up for, or call to reschedule the August 27 meeting. As a result, McWilliams sent another letter dated September 2 asking to bargain. This was followed up by a letter dated September 22 asking that a meeting be scheduled. No response was received.

Having been certified by the Board on June 9, 2003, the Respondent was obligated, under Section 8(d) of the Act, to meet at reasonable times and places and to bargain in good faith with the Carpenters' union during the certification year. It clearly did not do so, and except for one short meeting in August 2003, the Respondent essentially ignored the Union's repeated requests for negotiations. Any statement during this hearing that the Respondent is now willing to bargain, is too late and insufficient to mitigate against a finding that the Respondent failed to engage in bargaining in a timely and responsive manner.

Moreover, I reject any assertion that the Union either bargained in bad faith or that a valid impasse was reached. In this regard, the Respondent claimed that at the only meeting held on August 5, 2003, the Union's representatives took a "take it or leave it" stance when presenting a contract proposal. This contention, in my opinion, is absurd. I credit the Union's representative who testified that the contract tendered was a proposal and that he invited the Respondent to review it and make counterproposals of its own. The Respondent did not do so and instead simply refused to respond to the Union's requests for further negotiations. In this respect, I conclude that the Respondent violated Section 8(a)(1) and (5) of the Act.

By the same token, the evidence shows that the Respondent failed to respond to the Union's request for information concerning the employees' names, dates of hire, job titles, and current rates of pay. All of this information is presumptively relevant to collective bargaining and the Respondent's refusal to furnish this information constitutes a violation of Section 8(a)(1) and (5) of the Act. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1956); *NLRB v. Boston Herald-Traveler Corp*., 209 NLRB F.2d 134 (1st Cir. 1954); *Gloversville Embossing*, 314 NLRB 1258 (1994). *Toms Ford, Inc*., 253 NLRB 888, 895 (1990); *Georgetown Holiday Inn,* 235 NLRB 485, 486 (1978).

The evidence shows that the Respondent, on or about June 10, entered into a subcontract with T. Walker to perform insulation, sheetrock, spackle, and taping work at site 1. All of these functions are those that are normally performed by carpenters. (Taping is a function that everyone agrees is "finished" carpentry.)

Inasmuch as the Carpenters' Union had just been certified, and as the Respondent has not shown that the decision to subcontract this work was not one based on "core entrepreneurial concerns," the Respondent was therefore obligated to first notify and offer to bargain with the Union before making any unilateral changes in the terms and conditions of employment for the employees covered by the certification. Since subcontracting affected the tenure or job opportunities of unit employees, particularly those who had been laid off and could have been recalled, it is my opinion that this decision to unilaterally subcontract bargaining unit work was a violation of Section 8(a)(1) and (5) of the Act. *Fiberboard Corp. v. NLRB*, 379 U.S. 203 (1964); *Overnite Transporation Co.*, 330 NLRB 1275 (2000).

The General Counsel also alleges that this subcontracting decision separately violated Section 8(a)(3) of the Act. Inasmuch as I have previously concluded that certain carpenters were discriminatorily laid off or discharged, and as I have relied, at least to some extent on this subcontracting, as undermining any contention that there was insufficient work for the laid-off carpenters, any separate finding that the subcontracting, by itself, violated 8(a)(3), would be superfluous.

C. The Laborers

1. The election
2–RC–22717

Laborers Local 79 started organizing employees sometime later than the Carpenters' Union. As noted above, Local 79 filed its petition for an election on May 5, 2003. Pursuant to the petition and a Stipulated Election Agreement approved on May 22, 2003, an election was held on June 13, 2003. The Union lost.

On June 19, 2003, Local 79 filed timely objections to the Election. The allegations thereof are listed at the beginning of this decision.

The uncontested evidence showed that the Employer failed to post the required election notice to employees. Pursuant to Section 103.20 of the Board's Rules and Regulations, the notice must be (1) posted for 3 full working days in advance of the election; (2) a party responsible for misposting is estopped from objecting to the nonposting; (3) an employer is conclusively deemed to have received the notices unless it notifies the Regional Office at least 5 full working days before the election of its nonreceipt; and (4) failure to post the notices as required is ground for a new election when objections are filed. *Sugar Food,* 298 NLRB 628 (1990) for a discussion of the rule and the policy with respect to defaced notices. The Board has held

that the rule is strictly enforced. *Smith's Food & Drug*, 295 NLRB 983 (1989).[5]

Inasmuch as I have concluded that Objection 1 has merit, it is unnecessary for me to make findings or conclusions with respect to the other objections, as this is enough to overturn the election. Accordingly, I recommend that the election in Case 2–RC–22717 be set aside and that this portion of the case be remanded to the Regional Director in order to conduct a new election.

2. Alleged 8(a)(1) and (3) violations 2–CA–35555, 2–CA–35619, 2–CA–35619, and 2–CA–35747

The evidence shows that after the Carpenters' Union won their election, Mathew Gaetano held a meeting with the employees eligible to vote in the Laborers' election. Mathew Gaetano asserts that he merely told employees that after spending thousands of dollars in the prior election, the employees should do whatever they wanted. However, the credible evidence convinces me Gaetano also told employees that the carpenters had betrayed him by voting for that union and that although he could not give raises now, if the laborers voted against the Union, "things would look different" or that "there would be a possibility to make changes." This, in my opinion, is an implied promise of benefit designed to induce the employees to vote against unionization. Therefore, I conclude that in this respect, the Employer violated Section 8(a)(1) of the Act. *Superior Emerald Park Landfill*, *LLC*, 340 NLRB 449, 459–460 (2003).

Employee Logan testified that on June 12, 2003, (the day before the election), Sammy Superville told him that if he voted no, "I'll know." Wendell Henderson testified that on that same day, Foreman Donovan told him that if he didn't stop talking about the union, he (Donovan) would have Henderson removed from the job even if he had to use force. In addition, employees Logan and Valle testified that shortly before the Laborer's election, the Mason Foreman Joe Little wrote on the men's hardhats, "No Union."

Since I credit the testimony of the employees describing the above events, I conclude that the Respondent thereby violated Section 8(a)(1) of the Act. In the case of Superville, I conclude that his remarks to Logan on June 12 conveyed the impression of surveillance. *Feldkamp Enterprises*, 323 NLRB 1193, 1198 (1997); *Sarah Neuman Nursing Home*, 270 NLRB 663 fn 4 (1984). In the case of Donovan, I conclude that his remarks to Henderson, constitute threats of reprisal. And in the case of Little's notation on the men's hard hats, I conclude that this was the equivalent of illegal interrogation. *Fieldcrest Cannon*, 318 NLRB 470 (1995), enfd. in relevant part 97 F.3d 65 (4th Cir. 1996).

Paul Valle, who was employed as a laborer and who acted as the Union's observer in the Laborers' election, was discharged on July 3, 2003, shortly after the firing of the Plenty brothers. He credibly testified that Superville stated that he was being let go because "he was down with the union."

The Respondent claims that Valle worked slowly and had a record of poor work performance. This was credibly denied by Valle. In this regard, the Respondent could produce no written warnings relating to Valle and the Company's policy manual contains a progressive disciplinary system.

Based on all of the other violations, thereby showing that the Company had a predisposition to retaliate against employees for their union activities, it is my conclusion that the General Counsel has met her burden under *Wright Line*, supra, and that the Respondent has failed to meet its burden. Therefore, I conclude that by discharging Valle, the Respondent violated Section 8(a)(1) and (3) of the Act.

With respect to Wendell Henderson, he was accused on August 25 of sexual harassment and was given a written warning to that effect that he refused to sign. He was thereafter discharged on August 26, 2003.

There is evidence that Henderson got mad and yelled at Summerville when the accusation was made. But Henderson credibly denied that that he engaged in the alleged sexual harassment or that cursed at Summerville.

The Company also asserts that on August 27, 2003 (after his discharge), Henderson made a threat to kill Mathew Gaetano if he didn't get his paycheck.

I credit Henderson's denials of the accusations made against him and I note that the Employer did not produce any evidence that he actually engaged in the alleged harassment.

For the same reasons given in Valle's case, I conclude that the Respondent, by discharging Henderson, violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. By soliciting employees to sign a petition indicating they were not members of a union and by requiring them to wear vote no signs on their hardhats, the Respondent has illegally interrogated employees about their union activities in violation of Section 8(a)(1) of the Act.

2. By threatening employees with job loss, the Respondent has threatened employees in retaliation for their union activities and has violated Section 8(a)(1) of the Act.

3. By promising benefits to employees if they voted against unionization, the Respondent has violated Section 8(a)(1) of the Act.

4. By giving employees the impression of surveillance, the Respondent has violated Section 8(a)(1) of the Act.

5. By threatening to physically remove employees from the jobsite because of their union activities, the Respondent has violated Section 8(a)(1) of the Act.

6. By laying off or discharging employees because of their union activities or in retaliation for the efforts of the Unions to organize them, the Respondent has violated Section 8(a)(1) and (3) of the Act.

[5] In *Madison Industries*, 311 NLRB 865 (1993), the Board did not set aside an election where an amended notice was posted for a portion of the time. The Board found that the change (eligibility) did not affect the notice to employees that is the purpose of the Rule. In another case, an election was not set aside in an election involving two unions where the circumstances could "invite collusion" by any employer who might favor one of the competing unions. The employer"s failure to post the Notice in such circumstances would provide an unsuccessful favored union with a basis to set aside the election. *Maple View Manor, Inc.,* 319 NLRB 85 (1995).

7. By failing and refusing to meet and bargain collectively with District Council of New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America, the Respondent has violated Section 8(a)(1) and (5) of the Act.

8. By failing to furnish relevant information to the Union such as the names, job titles, dates of hire, and rates of pay, the Respondent has violated Section 8(a)(1) and (5) of the Act.

9. By unilaterally subcontracting carpentry work without first notifying or bargaining with the Carpenters' Union, the Respondent has violated Section 8(a)(1) and (5) of the Act.

10. By failing to post the election notices in Case 2–RC–22717, the Respondent has interfered with the conduct of the election and it should therefore be set aside so that a new election can be conducted.

11. The aforesaid acts of the Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

The Respondent having discriminatorily discharged Tony Auguste, Nicholas Blake, Drabio Dollin, Hainson George, Marcus Williams, Lavistor Joseph, Marvin Gullen, Vitals Mathorin, John Nash, Anderson Pilgrim, Stonde Richardson, Michael Sargeant, Ali Sillah, Davidson Plenty, Benedict Plentie, Paul Valle, and Wendell Henderson, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their discharge to the date of their reinstatement or a valid reinstatement offer, 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). See also *Florida Steel Corp*., 231 NLRB 651 (1977).[6]

In addition to ordering the Respondent to bargain with the Carpenters' union and to furnish it with relevant information upon request, I also shall recommend that the certification year be extended so that the bargaining unit employees will be accorded the services of their collective-bargaining representative for the full period provided by law. I therefore recommend that the initial period of certification as beginning on the date the Respondent commences to bargain in good faith with the Union. See *Mar-Jac Poultry Co.*, *Inc*., 136 NLRB 785 (1962).

[Recommended Order omitted from publication.]

[6] Backpay for Dabio Dottin, Hainson George, Marvin Julien, and Michael Sargeant would terminate on the dates that they were recalled to employment. These individuals were recalled in May or June 2003.