Matros Automated Electrical Construction Corp., BTZ Electrical Corp., Single Employers *and* Local 363, United Electrical Workers of America, IUJHAT *and* Local 3, International Brotherhood of Electrical Workers, AFL–CIO *and* Aparicio Garay, Gilberto Gonzalez, Joseph Hodge, and Jaroslaw Wencewicz. Cases 2–CA–36296, 2–CA–36297, 2–CA–36723, 2–CA–36522, 2–CA–36625, 2–CA–36707, 2–CA–36779, 2–CB–20075, and 2–CB–20099

December 8, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On September 1, 2006, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief, and Matros Automated Electrical Construction Corp. (Matros), BTZ Electrical Corp. (BTZ), and Local 363, United Electrical Workers of America, IUJHAT (UEW Local 363) filed answering briefs to those exceptions. Matros and BTZ filed exceptions and a supporting brief, and the General Counsel and Local 3, International Brotherhood of Electrical Workers (IBEW Local 3) filed answering briefs to those exceptions. UEW Local 363 filed exceptions and a supporting brief, and the General Counsel and IBEW Local 3 filed answering briefs to those exceptions.

The unfair labor practice issues in this case arose from separate campaigns by IBEW Local 3 and UEW Local 363 to organize the employees of Matros and BTZ, and the conduct of Matros and BTZ in response to those organizing campaigns. The judge found that Respondents Matros and BTZ committed numerous violations of Section 8(a)(1), (2), and (3) of the Act, and that UEW Local 363 violated Section 8(b)(1)(A) and (2), but he also dismissed certain allegations. We have considered the judge's decision and the record in light of the exceptions[1] and briefs and have decided to affirm the judge's rulings, findings,[2] and conclusions as modified, and to adopt the recommended Order as modified and set forth in full below.[3]

Background

Respondents Matros and BTZ, a stipulated single employer, are New York corporations engaged in the business of providing electrical contracting services for new and renovated buildings and apartments. Respondent UEW Local 363 and Charging Party IBEW Local 3 are New York-based labor organizations.

The owner of Matros, Stuart Moskowitz, adopted a multiemployer agreement with the Industrial Electrical Contractors Association (IECA) administered by UFCW Local 174, which ran from July 1, 1996, to June 30, 2001. When UFCW Local 174 was placed under a trusteeship in the spring of 2001, UFCW Local 342 became the administrator of the IECA agreement. But in 2003,

[1] No exceptions were filed to the judge's dismissals of allegations that employee Gilberto Gonzalez was unlawfully interrogated, threatened with discharge, or discharged.

[2] The Respondents have 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.

The Respondent Employers also assert that "[b]y virtue of the credibility findings, the ALJ has proven himself to be biased." The Respondents base their allegations on two main points. First, they argue that it was error for the judge to credit the testimony of Vincent McElroen, IBEW Local 3's financial secretary, because Chairman Schaumber "excoriated the judge for tacitly finding McElroen to be a credible witness" in another case—*Millennium Maintenance & Electrical Contracting*, 344 NLRB 516, 519–520 (2005). Second, the Respondents argue that the judge improperly instructed the General Counsel on the factors he needed to show to prove that employees of Respondents Matros and BTZ constituted a single unit. We reject the Respondents' bias allegations.

As to McElroen's testimony, it was relevant to only one issue in this case—the judge's finding that Matros and BTZ employees constituted a single unit, rendering unlawful BTZ' voluntary recognition of UEW Local 363 in a unit confined to the BTZ employees. It is not clear, however, that the judge relied on McElroen's testimony in making this finding. Even assuming that he did, the Respondents point to nothing in the record indicating that the judge's "credibility finding" was erroneous. In any event, the Respondents were not prejudiced because we have reversed the judge and found that BTZ' recognition of UEW Local 363 was lawful.

For essentially the same reason, we find that the Respondents were not prejudiced by any guidance the judge provided the General Counsel regarding the factors relevant to proving whether Matros-BTZ constituted a single unit. Thus, we have reversed the judge's single-unit finding.

Finally, to the extent that the Respondents contend that the judge's bias with respect to his Matros-BTZ unit findings "infused" his other findings in this case, we have carefully examined the judge's decision and entire record and are satisfied that the Respondents' contentions lack merit.

[3] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

when UFCW Local 342 became convinced that Matros' electricians could be better serviced by an electrical union, it asked IBEW Local 3 if it would be interested in representing those employees. The two locals signed service agreements in December 2003 and January 2004 retaining IBEW Local 3 as the administrator of the IECA agreement, but the IECA refused to recognize IBEW Local 3 as administrator.

Not long after the first service agreements were entered into, IBEW Local 3 began a series of organizing meetings with electrical employees of the IECA employers, including Matros. At one such meeting in the spring of 2004, an employee mentioned to IBEW Local 3 that he had been hired by Matros but put on the payroll of BTZ. He added that Moskowitz was "running two shops." This and similar reports eventually prompted the filing of an unfair labor practice charge by IBEW Local 3 alleging that Matros and BTZ were discriminatorily enforcing an unlawful members-only contract providing wages and benefits to electricians employed by Matros but not to those employed by BTZ, in violation of Section 8(a)(1) and (3). The judge dismissed this complaint allegation, finding that the bargaining history had, de facto, created two separate units (Matros electricians and BTZ electricians), and that the acquiescence of UFCW Local 174 and its successor Local 342 in these separate units was a defense to the allegation of discriminatory motive under Section 8(a)(3).[4]

Matros' supervisors, Joe Estamabil and Peter Azic, attended some of the organizing meetings held by IBEW Local 3. Estamabil testified that he saw several Matros employees at these meetings. Aparicio Garay, Gilberto Gonzalez, Joseph Hodge, and Jaroslaw Wencewicz were among a small number of Matros employees at these meetings. The judge discredited Estamabil's testimony that he did not tell Moskowitz that he saw the Matros employees at the meetings.

On March 23, 2004,[5] Moskowitz sent a letter to employees that stated in part, "You may be aware that Local 3 and Local 342 have tried to force us to deal with Local 3 right now. . . . Local 3 and Local 342 signed an agreement that Local 3 would handle your issues for Local 342 for the remainder of the union contract. Again, we think that this was a way for Local 342 to give Local 3 a head start. . . . We weren't willing to be pushed around or have Local 3 forced on us or on you. We refused to deal with Local 3 and . . . the Labor Board said that we don't have to deal with Local 3 unless or until they win an election."

On April 1, 2004, the IECA dissolved. The same day, BTZ recognized UEW Local 363 based on a card check, and the parties executed a contract with a term containing a union-security clause and a dues-deduction clause. On April 12, IBEW Local 3 filed representation petitions covering each of the former IECA contractors, including Matros. On May 11, IBEW Local 3 also filed a petition to represent BTZ employees. On May 21, the Board conducted an election pursuant to a Stipulated Election Agreement at Matros. The tally of ballots was 12 votes for and 21 votes against Petitioner IBEW Local 3, with one challenged ballot. On May 27, IBEW Local 3 filed objections to the election.

In the weeks before the May 21 election, UEW Local 363 held several meetings at the same address as the offices of Matros/BTZ. Supervisor Estamabil arranged use of the building, Matros' receptionist called employees in from the field during work hours for the meetings, and employees were paid for time spent in the meetings. The record indicates that at these meetings, UEW Local 363 urged employees to vote against IBEW Local 3.

Moskowitz spoke at the last such meeting, the day before the election. Both Hodge and Wencewicz testified that Moskowitz said that "he would never sign a contract with Local 3." Gonzalez testified that Moskowitz also said that if he lost the election he was going to "close the shop and he was going to Miami." Employee Jean Thony testified that Moskowitz said he will not "go Local 3," that he would rather shut down, and that before he goes Local 3 "hell will freeze over."[6]

Moskowitz and Project Manager John Mata also questioned employees concerning how they were going to vote in the election. During the week before the election, Mata asked Wencewicz while he was in the Respondent's office whether he was going to vote for or against IBEW Local 3. Wencewicz replied that he was going to vote for IBEW Local 3. Mata reported this to Moskowitz, who summoned Wencewicz to his office and told Wencewicz that employees were going to receive rate increases. Moskowitz then asked Wencewicz if he was going to vote for IBEW Local 3.[7] Moskowitz also summoned employee Garay to his office, asked him whether he had attended an IBEW Local 3 meeting, and later asked him at a jobsite whether he was going to support

[4] We affirm the judge's dismissal of this allegation.

[5] All dates hereafter are in 2004, unless stated otherwise.

[6] The judge found, and we affirm, that these remarks by Moskowitz violated Sec. 8(a)(1) of the Act. We also affirm the judge's finding that Moskowitz assisted UEW Local 363 in violation of Sec. 8(a)(1) and (2) at the May 20 meeting.

[7] We adopt the judge's finding that Moskowitz violated Sec. 8(a)(1) during this meeting by promising Wencewicz a rate increase in return for his vote against Local 3. Similarly, Moskowitz violated Sec. 8(a)(1) by promising Thony a promotion to a mechanic position if IBEW Local 3 lost the election.

him by voting "no" in the upcoming election. A week or so before the election, Moskowitz came to the jobsite and asked Hodge if he was "on his side." Hodge responded by saying, "I'm on your side."

On November 15, 2004, with the election objections of IBEW Local 3 still pending, Matros recognized UEW Local 363 pursuant to a card check. The parties executed a contract that included union-security and dues-deduction clauses.

Analysis

1. The judge found, inter alia, that Respondent Matros/BTZ, by Moskowitz and Mata, violated Section 8(a)(1) by interrogating employees. The applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation was adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Under *Rossmore House*, the Board considers whether, under the totality of the circumstances, the questioning at issue would reasonably tend to coerce the employee in the exercise of rights protected by Section 7 of the Act. In analyzing alleged interrogations, the Board

> considers such factors as whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. Id.; *Stoody Co.*, 320 NLRB 18, 18–19 (1995). The Board has held that questioning employees about whether they attended a union meeting and what occurred at the meeting is an unlawful interrogation. *Resolute Realty Management Corp.*, 297 NLRB 679, 685 (1990), and cases cited therein.

Bloomfield Health Care Center, 352 NLRB No. 39, slip op. at 1–2 (2008).

Applying these factors here, we affirm the judge's findings that Moskowitz unlawfully interrogated employees. In a context that included other unfair labor practices, including a threat of plant closure, Moskowitz, the Respondent's highest ranking official, and Mata, a project manager, asked employee Wencewicz in the Respondent's office whether he was going to vote for IBEW Local 3. Moskowitz also summoned Garay to his office and asked Garay if he had attended an IBEW Local 3 meeting, and later asked Garay at a jobsite whether he was going to vote "no" in the election. Moskowitz further questioned employee Hodge at a jobsite whether Hodge was on "his side," a clear reference to whether Hodge supported Moskowitz' position against IBEW Local 3, and Hodge untruthfully responded that he was on Moskowitz' side. There is no evidence that any of this questioning occurred in the course of a friendly, casual conversation. Furthermore, that such questioning would reasonably be taken as coercive is supported by the fact that Hodge failed to answer Moskowitz' question truthfully.

For these reasons, we affirm the judge's finding that Respondents Matros/BTZ unlawfully interrogated employees in violation of Section 8(a)(1).

2. The judge found that BTZ' recognition of UEW Local 363 on April 1 constituted a violation of Section 8(a)(1) and (2), and that its contract with UEW Local 363 containing union-security and dues-checkoff provisions constituted a violation of Section 8(a)(3). In so finding, the judge relied on the "fact that the multiemployer association had been dissolved . . . [and] the bargaining history that had previously separated the Matros employees from the BTZ employees was no longer in effect and therefore was no longer relevant or operative." On this basis, the judge found that the only appropriate unit was a combined unit of Matros/BTZ employees.

We find merit in the Respondents' argument that the judge incorrectly put aside bargaining history in finding that the only appropriate unit consists of a combined Matros/BTZ unit. When the IECA dissolved, the historical basis of multiemployer bargaining was abandoned by the parties to that agreement. See *Pennsylvania Garment Mfrs. Assn*., 125 NLRB 185, 195 (1959). But the previous bargaining history remained, under which BTZ' employees were treated as a separate bargaining unit. Because the record indicates that UFCW Locals 174 and 342 both acquiesced in the exclusion of BTZ employees from the Matros unit, and that as of April 1, 2004, the employees of BTZ were unrepresented, BTZ was free at that time to recognize and enter into a collective-bargaining agreement with UEW Local 363. See *G.M. Trimming, Inc*., 279 NLRB 890, 897-898 (1986) (the "conclusion that Local 169 acquiesced in the exclusion of GM employees from the unit . . . mandates a finding that GM did not violate [the Act] by entering into a collective-bargaining agreement with Local 157 . . . [whose] employees were not represented by Local 169").

For these reasons, we reverse the judge's finding that BTZ violated Section 8(a)(1) and (2) by recognizing UEW Local 363, and violated Section 8(a)(3) by signing the contract containing union-security and dues-checkoff provisions.[8]

[8] The judge also found that by accepting recognition and signing the contract with BTZ, UEW Local 363 violated Sec. 8(b)(1)(A) and (2). However, as the General Counsel notes in exceptions, the complaint did

3. The complaint alleges that Respondents Matros/BTZ violated Section 8(a)(3) and (1) by discharging Garay and Wencewicz and by failing to award Wencewicz, Gonzalez, and Hodge pay raises and "retroactive payments" because these employees supported IBEW Local 3.[9] The judge analyzed these allegations under *Wright Line*.[10]

As stated recently in *SFO Good-Nite Inn, LLC*:[11]

> Under *Wright Line*, the General Counsel must first show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes that showing by demonstrating protected activity, employer knowledge of that activity, and animus against protected activity, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity. *United Rentals*, 350 NLRB [951] (2007) (citing *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004)). If, however, the evidence establishes that the reasons given for the employer's action are pretextual—that is, either false or not in fact relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the *Wright Line* analysis. Id. [at 951–952] (citing *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)).

With respect to pretext, the Board may infer both knowledge of protected activity and animus towards that activity if the proffered reasons for adverse personnel action are found to be pretextual. *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enfd. mem. 97 F.3d 1448 (4th Cir. 1996). See also *Metropolitan Transportation Services*, 351 NLRB No. 43, slip op. at 2–3 and fn. 6 (2007).[12]

These principles apply here. Moskowitz was the one who made the decisions to discharge Garay and Wencewicz and to deny raises and retroactive payments to Wencewicz, Gonzalez, and Hodge. The judge found that Moskowitz was not a credible witness and that his assertedly lawful reasons for discharge (or, in Wencewicz' case, his claim that Wencewicz quit) and denying employees raises and retroactive payments were pretextual. We find no basis for disagreeing with these conclusions.

The judge provided a sufficient rationale for his credibility determination. He relied on his observation of Moskowitz' demeanor in discrediting his testimony, as well as documentary evidence that directly contradicted his testimony. Specifically, Moskowitz testified that he did not become aware of the organizing efforts of IBEW Local 3 until April 5, but in a letter to employees on March 23, Moskowitz made clear that he was aware of the Union's organizing activities. Further, Moskowitz explained in a letter to a State agency that he discharged Garay "two weeks" after Garay's last act of alleged "insubordination," but the actual writeup of the insubordi-

not allege these violations. Accordingly, we reverse the judge's 8(b)(1)(A) and (2) findings.

As stated above, in November when IBEW Local 3's objections to the May 21 election were pending, Matros recognized UEW Local 363 as the bargaining representative of Matros employees and signed a collective-bargaining agreement and a successor agreement containing union-security and dues-checkoff provisions. UEW Local 363 accepted recognition from Matros and signed the contracts.

The judge found, and we agree, that under the rule set forth in *Bruckner Nursing Home*, 262 NLRB 955, 957 (1982), and extended in *Wackenhut Corp.*, 287 NLRB 374, 375–376 (1987), it is unlawful for an employer to recognize a nonincumbent union, and equally unlawful for a union to accept recognition, when a representation petition of a rival nonincumbent union "is in process." As explained in *Wackenhut*, a representation petition "is in process" when election objections are pending before the Board. Accordingly, applying *Bruckner* and *Wackenhut*, the judge correctly found that Matros violated Sec. 8(a)(1) and (2) by recognizing UEW Local 363 when IBEW Local 3's election objections were pending, and violated 8(a)(3) by signing contracts with UEW Local 363 containing union-security and dues-checkoff provisions. By accepting recognition and signing the contracts, UEW Local 363 violated Sec. 8(b)(1)(A) and (2). Because the contracts were unlawful, we further agree with the judge that UEW Local 363 violated Sec. 8(b)(1)(A) by threatening employee Hodge that the union-security clause in the contract would be enforced against him if he refused to sign a union membership card.

The General Counsel excepts to the judge's failure to address his alternative theories, set forth in fn. 5 of the judge's decision, for finding unlawful Matros' recognition of UEW Local 363 and UEW Local 363's acceptance of recognition. In light of our findings that the recognition and acceptance of recognition were unlawful under *Bruckner* and *Wackenhut*, we find it unnecessary to address the General Counsel's alternative theories of violations.

In accord with our finding that only Matros, and not BTZ, unlawfully recognized UEW Local 363 and signed collective-bargaining agreements with UEW Local 363, we shall modify the Order to reflect these findings.

[9] The judge did not address complaint allegation 11, which alleges that Gonzalez was unlawfully threatened with layoff. Because no party excepted to the judge's failure to address this complaint allegation, we deem it dismissed.

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

[11] 352 NLRB No. 42, slip op. at 2 (2008).

[12] Thus, Chairman Schaumber finds it unnecessary to rely on the judge's finding that Moskowitz' knowledge of the discriminatees' union activity was based on the inference that Supervisor Estamabil, whom the judge discredited, told Moskowitz that he saw the discriminatees at the IBEW Local 3 meetings.

Member Liebman agrees with Chairman Schaumber that knowledge of protected activity is properly inferred here from the pretextuality of Moskowitz' explanations. In addition, she agrees with the judge's inference that Estamabil told Moskowitz that he saw the discriminatees at the IBEW Local 3 meeting.

nate act states that it occurred just 4 days prior to Garay's discharge. The judge further noted that in the letter to the State agency, Moskowitz explained that Garay received "numerous warnings" prior to his discharge, but none were produced in evidence and Garay testified that he received none. Other evidence supporting the judge's credibility findings includes the substantial mutual corroboration of the employees whom Moskowitz unlawfully interrogated, threatened, and promised benefits to, as compared to Moskowitz' summary denial that he engaged in this conduct.

In sum, because we agree with the judge's well-supported credibility determination, we affirm his findings that Moskowitz' assertion that Wencewicz quit and the reasons advanced by Moskowitz for discharging Garay and Wencewicz and denying raises and retroactive payments to Gonzalez, Hodge, and Wencewicz were pretextual. Accordingly, we find that by these acts, the Respondents violated Section 8(a)(1) and (3).[13]

ORDER

A. The Respondents, Matros Automated Electrical Construction Corp. and BTZ Electrical Corp., New York, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Recognizing and entering into collective-bargaining agreements with UEW Local 363 as the collective-bargaining representative of the employees of Matros Automated Electrical Construction Corp., and cease giving effect to the union-security and dues-checkoff clauses of the Matros/UEW November 15, 2004 contract or any subsequent agreements, unless and until that labor organization is certified by the Board as the collective-bargaining representative of such employees.

(b) Interrogating employees about their sympathies or activities on behalf of IBEW Local 3.

(c) Promising employees promotions and other benefits in order to dissuade them from voting for IBEW Local 3.

(d) Threatening employees that it would shut down the business if IBEW Local 3 won the election.

(e) Telling employees that even if IBEW Local 3 won the election it would never sign a contract with that labor organization.

(f) Discharging Aparicio Garay and Jaroslaw Wencewicz because of their activities and support for IBEW Local 3.

(g) Failing to give raises or retroactive payments to Joseph Hodge, Jaroslaw Wencewicz, and Gilberto Gonzalez because of their activities and support for IBEW Local 3.

(h) Giving illegal assistance to UEW Local 363.

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

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

(a) Withhold recognition from UEW Local 363 as the representative of the employees of Matros Automated Electrical Construction Corp. unless and until that Union has been certified by the Board as their exclusive collective-bargaining representative.

(b) Jointly and severally with UEW Local 363 reimburse all former and present employees employed for all initiation fees, dues, and other moneys that may have been exacted from them, with interest, pursuant to the November 15, 2004 collective-bargaining agreement between Matros Automated Electrical Construction Corp. and UEW Local 363.

(c) Within 14 days from the date of this Order, offer Aparicio Garay and Jaroslaw Wencewicz 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.

(d) Make Aparicio Garay and Jaroslaw Wencewicz whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(e) Make whole, with interest, Joseph Hodge, Jaroslaw Wencewicz, and Gilberto Gonzalez for the loss of earnings they suffered as a result of the failure of the Respondent to give them raises or retroactive payments given to its other employees.

[13] The judge mistakenly found in his Conclusions of Law 7 and 8 that the denial of raises and the discharge of Wencewicz violated only Sec. 8(a)(1). In accord with the complaint allegations and the judge's *Wright Line* analysis, we correct this error by clarifying that this conduct also violated Sec. 8(a)(3).

The General Counsel argues on exception that, although the judge correctly found that the Respondents unlawfully denied raises to the three discriminatees in November 2004, he erred by failing to find the same violations with respect to the raises that were not paid Hodge and Gonzalez in December 2005. The General Counsel contends that the judge also erred by failing to find that the retroactive payment made to unit employees on January 20, 2005, was unlawfully denied to Wencewicz, who was not discharged until the next day. We find merit in these exceptions. There is no dispute that Hodge and Gonzalez did not receive the raises paid other unit employees in December 2005, or that Wencewicz did not receive the retroactive payment made to unit employees on January 20, 2005, when he was still employed. Moskowitz offered no reason for denying Wencewicz the retroactive payment, and his reasons for denying Hodge and Gonzalez the December 2005 raises were the same reasons the judge rejected as pretextual when addressing the November raises.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against Aparicio Garay and Jaroslaw Wencewicz, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(g) 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 initiation fees, dues, backpay and other moneys due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facilities in New York, New York, copies of the attached notice marked "Appendix A."[14] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent Employer's authorized representative, shall be posted by the Respondent Employer 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 Employer 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 Employer has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent Employer 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 1, 2004.

(i) 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.

B. The Respondent, Local 363, United Electrical Workers of America, IUJHAT, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Acting as the collective-bargaining representative of the employees of Matros Automated Electrical Construction Corp. pursuant to the November 15, 2004 agreement unless and until we are certified by the Board as the collective-bargaining representative of such employees.

(b) Entering into collective-bargaining agreements with Matros Automated Electrical Construction Corp. and cease giving effect to the union-security and dues-checkoff clauses of such contracts, unless and until UEW Local 363 is certified by the Board as the collective-bargaining representative of the employees of Matros Automated Electrical Construction Corp.

(c) Threatening employees that it would cause their discharge if they did not sign applications to become members of UEW Local 363.

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

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

(a) Jointly and severally with Matros Automated Electrical Construction Corp., reimburse all former and present employees employed for all initiation fees, dues, and other moneys that may have been exacted from them, with interest, pursuant to the November 15, 2004 collective-bargaining agreement between Matros Automated Electrical Construction Corp. and UEW Local 363.

(b) 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 initiation fees, dues, and other moneys due under the terms of this Order.

(c) Within 14 days after service by the Region, post at its offices and meeting halls copies of the attached notice marked "Appendix B."[15] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent UEW Local 363's authorized representative, shall be posted by UEW Local 363 and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent UEW Local 363 to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Sign and return to the Regional Director copies of the notice for posting by Respondent Matros/BTZ.

[14] 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."

[15] See fn. 14, supra.

(e) 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 Respondent UEW Local 363 has taken to comply.

Dated, Washington, D.C. December 8, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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 recognize and enter into collective-bargaining agreements with UEW Local 363 as the collective-bargaining representative of the employees of Matros Automated Electrical Construction Corp., and will cease giving effect to the union-security and dues-checkoff clauses of the Matros/UEW November 15, 2004 contract or any subsequent agreements, unless and until that labor organization is certified by the Board as the collective-bargaining representative of such employees.

WE WILL NOT discharge employees, withhold wage increases or other benefits, or otherwise retaliate against any of our employees because of their membership in or support for IBEW Local 3.

WE WILL NOT interrogate employees about their sympathies or activities on behalf of IBEW Local 3.

WE WILL NOT promise our employees promotions and other benefits in order to dissuade them from voting for IBEW Local 3.

WE WILL NOT threaten our employees that we would shut down the business if IBEW Local 3 won the election or became the bargaining representative.

WE WILL NOT tell our employees that even if IBEW Local 3 won an election we would never sign a contract with that labor organization.

WE WILL NOT give illegal assistance to UEW Local 363.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed to them by Section 7 of the Act.

WE WILL withhold recognition from UEW Local 363 as the representative of our Matros employees unless and until that Union has been certified by the Board as their exclusive collective-bargaining representative.

WE WILL jointly and severally with UEW Local 363 reimburse all former and present Matros employees for all initiation fees, dues, and other moneys exacted from them, with interest, pursuant to the November 15, 2004 collective-bargaining agreement between Matros Automated Electrical Construction Corp. and UEW Local 363.

WE WILL, within 14 days from the date of the Board's Order, offer Aparicio Garay and Jaroslaw Wencewicz, who have been found to have been illegally discharged, immediate and 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 Aparicio Garay and Jaroslaw Wencewicz whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL make whole, with interest, Jaroslaw Wencewicz, Gilberto Gonzalez, and Joseph Hodge for the loss of earnings they suffered as a result of our failure to give them raises or retroactive payments given to our other employees.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Aparicio Garay and Jaroslaw Wencewicz, and WE WILL, within 3 days thereafter, notify these employees in writing that this has been done and that these actions will not be used against them in any way.

MATROS AUTOMATED ELECTRICAL CONSTRUCTION CORP., AND BTZ ELECTRICAL CORP.

APPENDIX B

NOTICE TO MEMBERS
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 on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT act as the collective-bargaining representative of the employees of Matros Automated Electrical Construction Corp. pursuant to the November 15, 2004 agreement unless and until we are certified by the Board as the collective-bargaining representative of such employees.

WE WILL NOT maintain or give any force or effect to the November 15, 2004 collective-bargaining agreement between us and Matros Automated Electrical Construction Corp., and cease giving effect to the union-security and dues-checkoff clauses of such contract, unless and until we are certified by the Board as the collective-bargaining representative of such employees.

WE WILL NOT threaten employees of BTZ that we will cause their discharge if they do not sign applications to become members of UEW Local 363.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

WE WILL, jointly and severally with the employer, reimburse all former and present employees for all initiation fees, dues, and other moneys exacted from them, with interest, pursuant to the November 15, 2004 collective-bargaining agreement between Matros Automated Electrical Construction Corp. and UEW Local 363.

LOCAL 363, UNITED ELECTRICAL WORKERS OF AMERICA, IUJHAT

Allen M. Rose, Esq. and *Nancy Slahetka, Esq.,* for the General Counsels.
Richard I. Milman, Esq., for the Employers.
Eric J. LaRuffa, Esq. and *Richard M. Greenspan, Esq.,* for Local 363.
Richard S. Brook, Esq., for the Charging Parties.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York on various days from March 6 to June 8, 2006.

The charge and amended charges in Case 2–CA–36296 were filed by Local 3 against Matros Automated Electrical Construction Corp. and BTZ Electrical Corp. on May 27, July 9, and August 27, 2004. The charge in Case 2–CA–36297 was filed by Local 3 against Matros and BTZ on May 27, 2004. The charge in Case 2–CA–36273 was filed by Local 3 against Matros on January 7, 2005. The charge and amended charge in Case 2–CA–36552 was filed by Joseph Hodge against Matros on October 1, 2004, and February 15, 2005. The charge in Case 2–CA–36625 was filed by Aparicio Garay against Matros on November 2, 2004. The charge and amended charge in Case 2–CA–36707 was filed by Gilberto Gonzales against Matros on December 21, 2004, and March 11 and December 16, 2005. The charge in Case 2–CA–36779 was filed by Jaroslaw Wencewicz against Matros on February 9, 2005. The charge in Case 2–CB–20075 was filed by Hodge against Local 363 on December 21, 2004. The charge in Case 2–CB–20099 was filed by Local 3 against Local 363 on January 7, 2005.

A consolidated complaint was issued in Cases 2–CA–36296, 2–CA–36297, 2–CA–36723, 2–CB–20075, and 2–CB–20099 on May 23, 2005. Thereafter, a second amended consolidated complaint was issued on February 6, 2006. This added Cases 2–CA–36552, 2–CA–36625, 2–CA–36707, and 2–CA–36779. The second consolidated complaint as subsequently amended made the following allegations:

1. That Matros and BTZ are affiliated business enterprises having a place of business at 214 West 29th Street, New York, New York, and constitute a single employer within the meaning of the Act.

2. That on April 12, 2004, Local 3, IBEW filed a petition in Case 2–RC–22832 pursuant to which an election was held on May 21, 2004.

3. That on or about May 20, 2004, the Respondent by Stuart Moskowitz, its president told employees **(a)** that it would be futile to select Local 3 as their representative because he would never sign a contract with Local 3; and **(b)** threatened employees that he would close his business if Local 3 won the election.

4. That in May 2004, the Respondent by Stuart Moskowitz, promised employees promotions and other benefits if Local 3 did not win the election.

5. That in April and May 2004, Respondent interrogated employees about their union activities and sympathies.

6. That on or about May 21, 2004 (the day of the election), the Respondent by Stuart Moskowitz threatened employees with discharge if they voted for Local 3.[1]

7. That on or about January 19, 2005, the Respondent threatened to lay off Gilberto Gonzalez.

8. That on or about February 14, 2005, the Respondent threatened to lay off Joseph Hodge.

[1] In their brief, the General Counsels withdrew this allegation.

9. That in or about April and May 2004, including on May 20, 2004, the Respondent illegally assisted Local 363 by orchestrating meetings during working hours, requiring employees to attend these meetings and having management attend the meeting on May 20, 2004.

10. That on April 1, 2004, BTZ granted recognition to and entered into a contact with Local 363, notwithstanding that Union's lack of majority status, in a unit including all electricians, electrical maintenance mechanics, helpers and apprentices and trainees, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

11. That in November or December 2004, Matros granted recognition to and entered into a contact with Local 363, notwithstanding that Union's lack of majority status, in a unit which included all electricians, electrical maintenance mechanics, helpers and apprentices and trainees, but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

12. That the contracts between Matros, BTZ, and Local 363 contained union-security clauses and dues-checkoff clauses which required membership after 31 days of employment; required the Respondent to discharge employees who were not members in good standing and required the Respondent to deduct and remit union dues to Local 363.

13. That in or about November and December 2004, Matros assigned job classifications to its employees and in doing so gave lower classifications to employees who supported or assisted Local 3.

14. That on or about November 19, 2004, and December 9, 2005, Matros, for discriminatory reasons, failed to give wage increases to Gilberto Gonzalez, Joseph Hodge, and Jaroslaw Wencewicz because they assisted or supported Local 3.

15. That on or about January 20, March 11, and June 30, 2005, Matros for discriminatory reasons, failed to grant retroactive payments to Gonzalez, Hodge, and Wencewicz.

16. That Matros discharged the following employees for discriminatory reasons:

Aparicio Garay	October 29, 2004
Jaroslaw Wencewicz	January 24, 2005
Gilberto Gonzalez	December 14, 2005

17. That since about December 2, 2003, Matros and Local 342 have had a discriminatory practice of applying the wage rates and benefits of a labor contract only to those employees that Matros had selected to be members of Local 342 and not to employees who are not members.[2]

18. That on or about December 8, 2004, Local 363, by Charles E. Shimkus, threatened employees with loss of employment unless they joined Local 363.

[2] As to the "members only" theory, the charge that relates to this would be Case 2–CA–36296–1 filed on July 8, 2004. This alleged, in part, that the Respondent violated the Act by "repudiating and refusing to give any effect to any of the terms of the UFCW, CBA to the employees of unit employees employed by BTZ."

In addition to the usual denials, the Respondents made a number of assertions that are described below in order to delineate some of the issues.

They contend that BTZ was a company established in 1997 as a separate entity and operated for many years, with the explicit or implicit consent of Local 342, as a nonunion enterprise, whose employees were not represented by the Union which represented the employees of Matros and who were not covered by that collective-bargaining agreement. They assert that since the employees of BTZ have historically constituted a separate unit, the fact that they were not paid in accordance with the Matros/Local 342 contract (over a period of about than 7 years), cannot be construed as being illegal. Moreover, they argue that this allegation, made for the first time in 2004, can hardly be viewed as being timely under Section 10(b) of the National Labor Relations Act (the Act).

They also contend that BTZ, as a historically separate bargaining unit, was entitled to recognize Local 363 in April 2005 based on that union's demonstrated majority support. Although not asserted, an argument could also be made that because BTZ, is a construction industry employer and the unit consists of construction industry workers, it was entitled to recognize Local 363 under Section 8(f) of the Act even if that Local 363 did not obtain majority support from BTZ' employees.

With respect to the discharge of Gilberto Gonzalez, the Company asserts that he was discharged because he refused to do his assigned work and showed disrespect to the owner, Stuart Moskowitz.

With respect to the discharge of Aparicio Garay, the Company asserts that this was caused by his remarks to a company supervisor designed to humiliate him in the presence of other employees. Garay is accused of calling Supervisor John Mata a rat in front of other employees.

With respect to Jaroslaw Wencewicz, the Company asserts that after he was laid off for a few days, he refused to respond when asked to return to work. It therefore asserts that he quit.

The Company responds to the General Counsels' contention that Gilberto Gonzalez and Jaroslaw Wencewicz were misclassified because of their union activities by asserting that they were classified in accordance with their skill levels and were not, in any event, given any reduction in their pay. Similarly, the Company denies that it refused to give raises to any employees for discriminatory reasons.

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

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the employers are engaged in commerce as defined in Section 2(6) and (7) of the Act. I also find that all of the labor unions involved in this case, either were or are now, labor organizations within the meaning of Section 2(5) of the Act. (Local 174 went out of existence when it was merged into Local 342.)

II. THE RELEVANT FACTS

A. The History of the Companies and the History of Bargaining

Both Matros and BTZ are New York corporations that are engaged in the business of providing electrical contracting services for new and renovated buildings and apartments. They employ a group of electrical workers who do this work and who have a variety of skill levels from beginner to mechanic. The owner of Matros and the person who runs both companies is Stuart Moskowitz. He is a "master" electrician who holds a New York license to do this type of work. All of the employees who work for him do so under his immediate or ultimate direction and do so under his license.

At the hearing, it was stipulated that Matros and BTZ constitute a singe employer within the meaning of Section 2(2), (6), and (7) of the Act. Respondents, did not, however, stipulate that the employees on each corporate payroll constituted a single unit. They maintain that notwithstanding the single-employer status, the employees of each corporation constitute a separate appropriate collective-bargaining unit.

Joe Estamabil and Peter Azic are project managers and are the supervisors who are mainly assigned by Moskowitz to Matros. John Mata and Victor Treccaricho are project managers and the supervisors who are mainly assigned by Moskowitz to BTZ. The evidence shows that all four of these individuals, although mostly assigned to either Matros or BTZ, can and do supervise employees who happen to be on the payrolls of both Companies.

Stuart Moskowitz is the sole owner of Matros, which he purchased in, or about 1996 from a man named Alan Matros. Before this, Moskowitz became an electrician and was a member of Local 3, IBEW. He went through the Local 3 apprenticeship program and became a master electrician. After about 12 years working for Local 3 shops, he opened his own business as Automated Electric. When he purchased the business from Alan Matros, Moskowitz changed the name of the company from Matros Electrical to Matros Automated Electrical. He nevertheless, kept the same employees, supervisors and customers of the predecessor.

After acquiring Matros, Moskowitz adopted the collective-bargaining agreement in existence with Local 174 United Food and Commercial Workers, AFL–CIO and applied its terms to all of the employees of the new company. That contract was a multiemployer agreement that was made with the Industrial Electrical Contractors Association (IECA), and ran from July 1, 1996, to June 30, 2001. The Respondents point out that this agreement and the successor agreement had a split shop clause which allowed the Company to recognize another union for workers who did not do bargaining unit work. The bargaining unit covered by these agreements was the electrical workers employed by Matros *and* the electrical workers employed by the other employer-members of the Association.

In 1997, Moskowitz formed another company called BTZ and he ran this as a nonunion company. His mother, living in Queens, is the sole stockholder of BTZ. This new company is also engaged in the electrical business. And although nominally owned by his mother, BTZ is actually run by Moskowitz who describes it as a company doing smaller jobs and employing people who have had no experience or limited experience in the electrical business. He testified that as they get experience and gain competence as electrical workers, he may offer them jobs at Matros. If one were to make some distinction, it appears that BTZ employees are more likely to be assigned to do residential apartments whereas Matros employees are more likely to be assigned to do commercial work or new construction. But in both cases, the work being done is electrical work and BTZ does its work as a subcontractor to Matros and not on its own. Obviously, these are not arm's-length transactions. Moskowitz explains that the customers know the name Matros and not BTZ, so that most job orders are held in the name of Matros. All contracts, for both companies are signed by Moskowitz.

Both Matros and BTZ use the same offices at 214 West 29th street. (Moskowitz' mother has a space in her home, which is used as a BTZ address.) They both utilize the same office staff, the same accountants and the same telephones. Although Moskowitz testified that there are two project manager/supervisors for each company, they will fill in for each other when needed.

Stuart Moskowitz hires and fires for both companies. In the majority of cases, he assigns the work for both companies and he is the person who sets labor and personnel policies for both companies. For both companies, Moskowitz testified that he is the person who decides what classifications the employees should be assigned, who should be given raises and who should be promoted.

The evidence shows that there has been and continues to be substantial interchange between the employees of Matros and BTZ. For example, among the group of about 29 employees who were listed on the Matros payroll during 2004 (see GC Exh. 20), Moskowitz testified that about 40 percent of them had previously worked on the BTZ payroll. Also, the evidence shows that on numerous jobsites, employees from both companies worked on the same jobsite. General Counsels' witnesses including Wencewicz, Joseph Hodge, Pablo Arcy, Gilberto Gonzalez, and others, credibly testified that in 2003 and 2004, on many of the projects that they worked (as employees on the Matros payroll), they worked alongside employees who are on the BTZ payroll. Examples of such projects were 315 Hudson Street, 44 Wall Street, 5 Hanover Square, 520 8th Ave., 1359 Broadway, and 200 South Street.

As described above, the evidence shows that notwithstanding the close relationship between Matros and BTZ, Moskowitz did not apply the terms and conditions of the Local 174 contract to the electrical employees that he put on the BTZ payroll and I surmise that that this arrangement was tacitly accepted and condoned by Local 174. There is no question but that for a substantial period of time and up to the events in 2004, Moskowitz, as the operator of Matros and BTZ had, de facto, set up two separate groups of employees who were treated as separate entities, one of which was given the wages and benefits of the collective-bargaining agreements (Matros) and the other (BTZ) who were not. I note that this arrangement was not kept a secret as the evidence shows that for many years, employees of both companies, and presumably the shop stewards

for Local 174, were well aware that employees who were first put on the BTZ payroll were thereafter transferred to the Matros payroll and that employees of both companies worked with each other on various jobsites. The evidence also shows that they were aware that those on the Matros payroll were given wages and benefits in accordance with Local 174's multiemployer contract and those on the BTZ payroll were not.

B. The Merger of Local 174 into Local 342 and the Emergence of Local 3

At some point, Local 174 was put into trusteeship by its International Union and in 2002 it was merged into Local 342. Matros continued to operate under the terms of the 2001–2004 contract that had been executed between Local 174 and the multiemployer association.

Raymond West, a Local 3 representative, testified that in 2001, he started to become involved in discussions with employees of the various employers in the Association, many of whom wanted to join Local 3.

West testified that he was advised that Local 174 had been put into trusteeship and had been taken over by Local 342. He states that he had discussions with representatives of Local 342 who felt that they did not have the experience or expertise to represent electricians. And so there were talks about Local 3 being designated as the representative for the employees to administer the existing contract. This was done with an eye to having Local 3 take over the full representation of the employees when the 2001–2004 contract expired.

In December 2002, the newly designated Local 342 entered into a service agreement with Local 3 IBEW whereby the collective-bargaining agreement would be serviced by Local 3. This agreement stated:

> Effective January 1, 2003, IBEW Local 3, shall, acting on behalf of UFCW local 342, service the employees employed by the employers listed on Appendix A . . . . [lists Matros but not BTZ]. Servicing for purposes of this agreement shall include . . . administering the Collective Bargaining Agreement, filing for and conducting arbitrations as appropriate, filing unfair labor practices with the National labor Relations Board as appropriate and initiating other administrative and legal actions, all on behalf of UFCW Local 342. . . .

In April 2003, counsel for the Association (Fred Klein), wrote to the Union stating that it would not recognize Local 3. A charge was filed on this issue and the charge was withdrawn. (Case 2–CA–35833 filed on October 1, 2003.)

In the spring of 2004 and perhaps as early as February 2004, Local 3 set up a series of about three meetings for employees of the 12 participating members of the Association. The purpose of these meetings was to convince the employees to designate Local 3 as their direct bargaining representative. At one of these meetings, an employee mentioned that he had been hired by Matros and was put on the payroll of BTZ. He told union representative Vincent McElroen that Moskowitz was running two shops.

The credible evidence is that Joe Estamabil and Peter Azic, two of the Respondent's supervisors, attended some of these meetings.

By the spring of 2004, Moskowitz was cognizant of the organizing activities of Local 3, is demonstrated by a letter he sent to his employees on March 23, 2004:

> You may be aware that Local 3 and Local 342 have tried to force us to deal with Local 3 right now. We think that Local 342 is trying to give Local 3 a head start for when our union contract ends. We think that you should be the ones to decide who speaks for you. We don't think that Local 3, Local 342 or even your Company should decide for you. If there is going to be any change in unions in the future, we think that should be your decision.
>
> Local 3 and Local 342 signed an agreement that Local 3 would handle you issues for Local 342 for the remainder of the union contract. Again, we think that this was a way for Local 342 to give Local 3 a head start. If you had a grievance, they wanted us to deal with Local 3. If the shop had an issue, they wanted us to deal with Local 3.
>
> We weren't willing to be pushed around or have Local 3 forced on us or on you. We refused to deal with Local 3 and they took us to the Labor Board. We fought back- and we won. The Labor Board said that we don't have to deal with Local 3 unless or until they win an election.
>
> YOU and YOU ALONE get to decide who your union will be. Local 3 and Local 342 can't trade you off between them or make this decision for you. You have many options—maybe more than you think you have—and we'll be writing to you about them in the coming months. We believe (and we think some of you are beginning to understand) that the more you know about Local 3, the less you'll want to be a part of it.

This letter clearly indicates that Moskowitz well understood, by no later than March 23, 2004, that Local 3 was intent on organizing the employees of the various members of the multiemployer association, including his own, and that Local 342, which was the current representative, was going to stand aside and allow Local 3 to take over. I cannot credit Moskowitz' testimony to the extent that he denied having any knowledge of Local 3's activity in 2004 until about April 5, 2004, when he received a petition for an election. Additionally, I note that the Respondent's "lack of knowledge" claim is belied by the evidence showing that Supervisors Joe Estamabil and Peter Azic attended some of the Local 3 meetings. And in the latter regard, I do not think that Estamabil's testimony was plausible or credible insofar as he claimed that he did not tell Moskowitz about attending these meetings. (Azic did not testify.)

Estamabil testified that when he attended the Local 3 meetings he saw that about five or six Matros employees were present; four of whom were Gilberto Gonzalez, Joseph Hodge, Aparicio Garay, and Jaroslaw Wencewicz.

By letter dated April 1, 2004, Fred Klein, on behalf of the Employer Association sent a letter to Local 342 stating that the Association was disbanding and that the employers would be negotiating on their own. This, in effect, destroyed the existing bargaining unit wherein Matros employees had been part of a multiemployer unit. It therefore rendered the bargaining history irrelevant.

C. Recognition of Local 363 by BTZ

On April 1, 2004, a card check was held and based on that, Local 363 was recognized by BTZ as the representative of BTZ's electrical workers. General Counsel's Exhibit 22 is a document dated April 1, 2004, signed by arbitrator Gene Coughlin, certifying that a majority of the 11 BTZ employees had signed authorization cards for Local 363.[3] General Counsel's Exhibit 23 is a collective-bargaining agreement dated April 1, 2004, between BTZ and Local 363, which runs from April 1, 2004, to November 30, 2005. It contains union-security and dues-checkoff clauses. General Counsel's Exhibit 24 is a contract between BTZ and Local 363 running from December 1, 2005, to December 30, 2008. This also contains union-security and dues-checkoff clauses.

D. The Representation Petitions

On April 2, 2004, Local 363 filed a petition in Case 2–RC–22822 involving the employees of Matros. This was soon withdrawn and the Regional Director issued an order approving the withdrawal on April 28, 2004.

On April 5, 2004, Local 3 filed a representation petition involving the employees of the Association as a whole. This was later withdrawn because Local 3 was advised that the Association had been disbanded. The Regional Director issued an order approving the withdrawal on May 7, 2004.

On April 12, 2004, Local 3 filed individual petitions for each employer that had previously been a member of the Association. The Petition for Matros was Case 2–RC–22832.

On April 15, 2004, Local 342 notified the Regional Office that it was disclaiming any interest in representing the employees of the members of the Association. This disclaimer was reiterated on April 21, 2004.

In late April 2004, a conference was held at the Board's offices between Local 3 and all of the employers of the Association. A Stipulation for Certification upon Consent Election was executed by representatives of Local 3 and Matros and was approved by the Regional Director on April 30, 2004. This provided that an election be held on May 21, 2004. Local 3's representative testified that when he said that he had heard that there was another company called BTZ, the Company's attorney stated that BTZ was not involved and that she didn't want to discuss it. The Stipulated Election Agreement does not mention BTZ and the employees of BTZ were neither included nor excluded from the unit, which at that time consisted of about 30 electrical employees. Also, neither the old union, Local 342, nor Local 363 were parties to the election proceeding and neither was on the ballot. On May 21, 2004, the election was held and Local 3 lost by a vote of 21 to 12. Local 3 filed objections to the election but these have been held in abeyance by the Regional Director.

On May 11, 2004, Local 3 filed a representation petition asking that an election be conducted amongst the electrical employees of BTZ. In response to this new petition, BTZ and Local 363 asserted that Local 3's petition should be dismissed based on a contract bar argument. On May 19, 2005, Local 342 disclaimed any interest in being a party to the representation case involving BTZ and that matter has been put on hold where it remains today.

E. Alleged Preelection Misconduct

As noted above, Moskowitz distributed a letter to employees dated March 23, 2004, that described his feelings about the efforts of Local 3 to represent his employees. Aparicio Garay testified that at this time, he was called into the office by Moskowitz who told him that he wanted to talk about Local 363; that he was trying to get that Union for the employees and that it had good benefits. According to Garay, Moskowitz told him that his lawyer told him not to talk about this but that he still wanted him to know which union he wanted to get for the employees. Garay testified that Moskowitz asked him if he would be part of his team and he responded; "I'm with you."

Garay testified that in April 2004 Moskowitz asked him if he had attended a meeting with Local 3 and that after he said yes, Moskowitz asked who else was there. According to Garay, Moskowitz asked what the Local 3 wage scale was and that after discussing this subject, Moskowitz said that if he could get the employees to select Local 363, their pay would be $25 per hour for mechanics and $31 per hour for foremen.

According to Garay, he had a third conversation with Moskowitz in early May 2004. Garay testified that Moskowitz came to his jobsite and after asking him if he was going to support him by voting "no" in the election, he told Moskowitz; "I got to listen to the rest of the people, I have to listen to everybody." He also testified that Moskowitz told him that he wanted to get the employees to vote no so he could get the people in Local 363. Garay testified that he responded, "[Y]ou do whatever you have to do."

Prior to the election held on May 21, 2004, Local 363 held several meetings at the building on 214 West 29th street with the employees who were on the Matros payroll. These were held on a floor not owned or occupied by the Respondent companies and their use was facilitated by Supervisor Joe Estamabil with the building superintendent. At each meeting, the employees were called in from the field during working hours by the Respondent's receptionist and were paid for the time spent at the meetings. Supervisors were present during these meetings and Moskowitz admittedly spoke at the last meeting that was held on the day before the election.[4] There is no dispute that at these meetings, Local 363, which was not on the ballot, urged the employees to vote against Local 3 so that it could represent the employees in the future.

Joseph Hodge testified that in the weeks before the election, he was called to the shop by the receptionist to participate in meetings that Local 363 held on company time and for which Hodge was paid. He testified that during the first two meetings, two of the project managers were present but didn't say anything. He also testified that during the last meeting, Moskowitz told the employees that he couldn't afford a contract with Local

[3] The General Counsels points out that the BTZ payroll journal, (GCs Exh. 41), shows that there were 20 employees on the BTZ payroll as of April 1, 2004.

[4] Garay testified that he did not attend the third meeting where Moskowitz spoke to the employees.

3 and that even if Local 3 won the election, he would have to negotiate but would not enter into a contract with them.

Gilberto Gonzalez testified that before the election he attended meetings that were held in the shop at 29th Street where Local 363 people spoke to employees. He testified that Local 363 representatives talked about that Union's history and the benefits it could offer. Although Gonzalez testified that company supervisors were present at the meeting, he did not recall that they made any comments during the meetings. According to Gonzalez, Moskowitz spoke at the final meeting and at first told the employees how he had given jobs to people and trained them to be electricians. Gonzalez testified that Moskowitz then stated that he would not go with Local 3 and that if he lost the election he was going to close the shop and move to Miami.

Jean Thony, an employee who was still employed by the Respondent at the time of the hearing, also testified about these meetings. Regarding the third meeting, he testified that the Local 363 representatives said that the employees should vote no so that if Local 3 lost the election, they could come in and represent the employees. Thony testified that Moskowitz said he will not go Local 3; that he would rather shut down and that before he goes Local 3, hell will freeze over.

Hodge testified that during May 2004, Moskowitz on two occasions, asked him if he supported the Company.

According to Wencewicz, about a week before the election in May 2004, Mata asked him if he was going to vote for or against Local 3. Wencewicz states that he responded that he was going to vote for Local 3 because he was not very happy with the way that Moskowitz was treating him and the other workers. Wencewicz testified that later in the day, Moskowitz spoke to him in the office and said that he had heard from Mata that he (Wencewicz) was not happy with the way he was being treated. According to Wencewicz, he responded that there were other workers with less experience than him who had better positions. He states that Moskowitz replied that in the future, they were going to get rate increases and that everything was going to be very favorable for the workers. At this point, according Wencewicz, Moskowitz asked him if he was going to vote for or against Local 3 and he said yes.

Wencewicz also testified that on the day before the election, Moskowitz attempted to dissuade him from voting for Local 3. He states that Moskowitz told him that even if we voted for Local 3, he would never sign a contract with them.

Thony testified that in early May 2004, Moskowitz came to his jobsite and spoke to him privately. According to Thony, Moskowitz said: "Jean, I will always take care of you. You are a good worker. I want you to stay with me." Thony testified that when he asked Moskowitz why he didn't recognize him as a mechanic, Moskowitz responded that he was close and that if Local 3 lost the election, he would make him a mechanic. Thony described more of the conversation but this was difficult for me to understand. As best as I can tell, Moskowitz was comparing Local 3 shops where there were layoffs to his own company where he kept people working all the time and that Local 3 was trying to run him out of business.

Moskowitz denied the statements that were attributed to him by the General Counsels' witnesses. He stated that he was instructed by his counsel as to what he could or could not say and that he wasn't about to ignore them because the advice was so expensive.

The Respondents also offered the testimony of John DeVaynes another employee. DeVaynes testified that he was the person who was primarily responsible for getting Local 363 interested in the employees and that it was he who arranged with Joe Estamabil to get the space in the building for the Local 363 representatives to talk to the employees. He testified that he had a meeting with employees at a jobsite before the election and that he proffered his opinion that if Local 3 won, Moskowitz would close his business. With respect to the meeting held on May 20, 2004, DeVaynes testified that Moskowitz said that he wouldn't sign a contract that would be detrimental to the men and that would not benefit them.

The testimony of DeVaynes, aside from being different from Moskowitz', really doesn't make much sense. What does he mean when he testified that Moskowitz said that he wouldn't sign a contract that was detrimental to his employees? Since the standard Local 3 contracts offer higher wages and conditions, I don't know what he could possibly mean by such a statement. If such a contract would be detrimental to anyone, it would more likely be detrimental to Moskowitz and not to his employees.

With respect to the conduct described above, I conclude, based on the credited testimony of Garay, Hodge, Wencewicz, and Thony that the Moskowitz and Mata **(**a**)** interrogated employees about their union sympathies; **(**b**)** that Moskowitz at a meeting held on May 20, 2004, told employees that even if Local 3 won the election, he would never sign a contract with them and that he would rather shut down the business; and **(**c**)** that Moskowitz, in May 2004, promised employee Thony that he would promote him and promised Thony and Wencewicz that he would give other benefits to the employees if they voted against Local 3. In all of these respects, I conclude that the Respondent violated Section 8(a)(1) of the Act.

F. The Postelection Recognition of Local 363 by Matros

On November 15, 2005, a card check was held before arbitrator Martin F. Scheinman who certified that he was presented with a payroll listing 30 Matros employees and that he counted 24 cards signed by those employees.

Thereafter, Moskowitz executed a collective-bargaining agreement with Local 363 in relation to the employees on the Matros payroll. This agreement had a term from November 1, 2004, to November 30, 2005. A new agreement was executed in 2005 to run until November 30, 2008. The agreements contained a union-security clause, requiring union membership after 31 days of employment, and a dues-deduction clause. Hodge testified, without contradiction that Local 363 representative Shimkus, told him that unless he filled out an application for Local 363 membership, he would recommend to the employer that Hodge be fired. Of course, if the recognition were lawful, then such a statement by Shimkus would be a perfectly legal enforcement of what is a facially valid union-security clause.

However, Matros' recognition of Local 363 occurred while the objections to the election was still pending. Accordingly, the General Counsels contends that this recognition was unlaw-

ful as it took place when there was an existing question concerning representation. It could also be argued that this recognition of a rival union while the NLRB was still processing an election petition, interfered with the Board's processes to the detriment of the employees' right to have their choice of a bargaining representative determined by a secret-ballot election.[5]

G. Alleged Discriminatory Actions (Apart from the "Members Only" Allegation)

The complaint alleges that the Respondent, motivated by a desire to retaliate against employees because of their activities on behalf of Local 3 IBEW, discharged Aparicio Gary on October 29, 2004, Jaroslaw Wencewicz on January 24, 2005, and Gilberto Gonzalez on December 14, 2005. The complaint also alleges that the Respondents, for the same reason, assigned Gilberto Gonzalez and Jaroslaw Wencewicz to lower classifications than what they were entitled to. Finally, the complaint alleges that the Respondent, for discriminatory reasons, failed to give raises and/or retroactive payments to Gilberto Gonzalez, Joseph Hodge.

The legal principle relating to whether or not an adverse action taken against an employee was illegally motivated is set forth in *Wright Line,* 251 NLRB l083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert denied 495 U.S. 989 (1982). Once the General Counsels has established a prima facie showing of unlawful motivation, the burden is shifted to the Respondent to establish that it would have taken the same action for good cause despite the employee's union or protected activities.

1. The discharge of Aparicio Garay

Aparicio Garay was initially hired in 1997 and at various times was either on the BTZ or Matros payrolls. At various times he has been assigned to be a foreman, thereby indicating to me that Moskowitz felt that Garay's skill level was at a reasonably high level. Garay testified that during 2003 and 2004, he was a foreman at a number of jobs where the work force was composed of people who were on both corporate payrolls. All were doing electrical work.

Garay testified that he first became familiar with Local 3 IBEW in 2002 when Local 174 (the incumbent union), talked to employees about the possibility of them being represented by Local 3 IBEW. He testified that after that time, he was a vocal supporter of Local 3 and spoke to employees in support of Local 3 at various jobsites.

In the spring of 2004, Garay attended a number of meetings held by Local 3 with employees from the various employers that were part of the existing multiemployer unit. The purpose of these meetings was to acquaint the employees with Local 3 and to convince them to allow Local 3 to independently represent them. Attending some of these meetings was a relatively small number of Matros employees, including Garay, Hodge, Wencewicz, and Gonzalez. Also attending some of these Local 3 meetings were Estamabil and Azic, Matros project managers. As noted above, I do not believe Estamabil's testimony that he did not notify Moskowitz about these meetings and who attended them.

Garay testified that from about March 23, 2004, to shortly before the election, he had three conversations with Moskowitz and one with Supervisor John Mata. He testified that during these conversations, Moskowitz essentially asked him if he supported the Company and urged him to favor Local 363. It seems to me that Garay's responses, at that time, were noncommittal; neither indicating support for Local 3 nor support for Local 363. Based on demeanor and the consistency of his testimony, I am going to credit Garay's testimony.

The election was held on May 21, 2004, and Local 3, IBEW lost. Joseph Hodge was the observer for Local 3.

Garay testified that in July 2004, John Mata asked him if he was a Local 3 member and that he replied that he was not. Garay states that when Mata insisted that Garay was a member, he turned to Mata and said, "Are you a rat?"

On or about August 11, 2004, Garay left his worksite early and was docked a half hour's pay by Moskowitz. Prior to this incident, Garay had never been disciplined in any way and had never received any warnings. There is no contention by the General Counsels that the docking of his pay was discriminatorily motivated.

On August 31, 2004, Garay circulated a long letter in which he expressed why he was supporting Local 3 IBEW.

Previously, Garay had been a supporter of Local 3, but perhaps in a more restrained way than Gilberto Gonzales and Joseph Hodge. Garay concedes that Moskowitz had given him three separate and substantial loans in 2002 and 2003 and this could show that Moskowitz liked Garay. But this cuts both ways. Betrayal is not something that happens between enemies or adversaries. It only occurs between people who were friends. When Garay publicly expressed his opinions on August 31, 2004, this might very well have been viewed by Moskowitz as a betrayal by someone that he had previously trusted. Garay was discharged less than 2 months later.

In September 2004, Garay was in Panama to attend his father's funeral. He returned on September 21 and resumed working on September 22.

According to Garay, he was talking to Gilberto Gonzalez at the jobsite, when he saw John Mata approaching. He states that he told Gonzalez; "Watch out what you're saying because this guys a rat." Garay testified that this incident occurred soon after he returned from Panama, and that it was the second and last time that he referred to Mata as a rat. He states that he heard nothing more about either "rat" incident and received no warnings about them.

Garay was discharged on October 29, 2004. He testified that he was told of his termination by Victor Treccaricho, who did not give him any reason.

John Mata testified that sometime in September or October 2004, he was temporarily assigned to supervise the Kate Spade job where Garay and Gonzalez were working. He states that on the second or third time that he visited the site, he found that

[5] The General Counsels contends that the recognition of Local 363 by Matros could not have been lawful for two other reasons. First, that it was granted in an inappropriate unit inasmuch as the only appropriate unit at the time would have consisted of the employees on the payrolls of Matros and BTZ. And second, if the only appropriate unit would be based on the combined set of employees then the Union could not have had a majority of cards because at that time, the combined unit would have had at least 50 employees.

Garay and Gonzalez had left about a half hour early without permission from the office. Mata testified that when told Moskowitz about the incident, Moskowitz told him that Garay would have to be docked. According to Mata, about 5 days later and after Garay had been docked, he met him at the office and that Garay said that he (Mata), was a rat for ratting him out to Moskowitz for leaving early. Mata testified that he told Garay that he was just doing his job.

With respect to the incident described above, the company records show that Garay was paid for 39.5 hours (instead of the regular 40), during the week ending August 13, 2004. This is more consistent with Garay's timing of these events than Mata's and it is more probable that the initial "rat calling" incident took place in August and not in September or October 2004.

Mata testified that at some later point, he went to the jobsite and noticed that Mata had installed a galvanized rigid conduit in an EMT situation. He states that inasmuch as this type of conduit is extremely expensive, he asked Garay why he had used it. Mata states that Garay said that there was water leaking down the wall. According to Mata, he told Garay that this was the building's problem and that the job was already costing too much. At this point according to Mata, he told Garay to forget about it when Garay, in the presence of the customer and other tradesmen who were at the site said; "Hey everybody, here's my rat." According to Mata, he went back to the office and told Moskowitz about what had happened and said that Garay had publicly humiliated him. Mata states that he told Moskowitz that he couldn't tolerate this and that Moskowitz should find someone else to supervise that job because he didn't want to go back. Mata states that Moskowitz told him that he would talk to Garay.

Moskowitz testified that Mata had reported that Garay had left the job early and that he told Mata that they would have to dock Garay for the time. He states that about a week later, he was in the office when Garay called Mata a rat. Moskowitz testified that Garay said something like; "You're a rat. You're my rat. Hey how you doing, rat."

According to Moskowitz, about a week or two later, Mata told him that he had gone to the jobsite where Garay had announced to the entire room of workers, "Hello everybody, this is my rat with me; I'd like to introduce you to my rat." Moskowitz states that when Mata reported this to him, he told Mata that he would take care of it. He claims that he then asked Mata to write the incident up and Respondent's Exhibit 20 is a document that purports to be the write up dated October 25, 2004, and which sets the second rat incident as having occurred on October 25, which is 4 days before Garay's discharge.

The problem with the Respondent's version of these events is the time line. The Respondent is asserting that the proximate cause of Garay's discharge was the second rat-calling incident that took place a few days before his discharge. But assuming, based on company records, that Garay was docked in mid-August, then the first "rat calling" incident would have taken place before September. After that, Garay was in Panama and returned to work on September 22, 2004. According to Garay, the second "rat calling" incident happened in September, and according to Moskowitz' account it took place only a week or two after the first incident. In fact, General Counsels' Exhibit 86 shows that in a letter dated December 23, 2004, to the New York State Department of Labor, Moskowitz stated that Garay's last day of employment was on October 29, 2004, and that the "act was committed two weeks before the termination date." In this document, Moskowitz stated that the reason for Garay's discharge was "gross insubordination, repeatedly calling a manager a rat and the rat despite numerous warnings to cease the misconduct." (Actually there were no warnings.) Thus, not only is the Respondent's version of the sequence of events contradictory, it also shows that the alleged cause of the discharge took place anywhere from 2 weeks to a month before the discharge and not within days, as asserted by Moskowitz.

Both sides offered evidence of other employees who have either been disciplined or terminated for insubordinate conduct. For example, Reynold Caton was discharged on May 16, 2003, for an incident where he screamed at a supervisor, made threatening gestures and refused to listen to orders. Nevertheless, the evidence shows that this individual had received three or four prior warnings, one of which was for urinating in a client's bathtub. Another example is Ronald Hawson who was discharged on July 20, 2005, for "gross misconduct in the form of insubordination and threatening behavior to Supervisor Joseph Estamabil." This, however, could be considered a more serious example of insubordination inasmuch as Hawson threatened to throw Estamabil out of the window.

So what are my conclusions? Did Garay call Mata a rat at the jobsite and in the presence of other workers? Yes he did. Could this have been a legitimate reason for discharging him? Yes it could. Do I believe that Moskowitz decided to discharge Garay because of this reason? No I do not.

On balance, and given the evidence of knowledge, animus and Garay's prior work record, it is my opinion that the General Counsels have made out a prima facie case that Garay was discharged because of his activities on behalf of Local 3, IBEW and that this has not been rebutted by the Respondent as per *Wright Line*.

2. The lay off of Jaroslaw Wencewicz

The General Counsels alleges that Wencewicz was illegally discharged on January 25, 2005. The Respondent claims, however, that Wencewicz, after being laid off for a few days, refused to return to work and quit. The Respondent makes no claim that Wencewicz was fired for cause or that he was let go for economic reasons.

Wencewicz was hired in 1999 and was initially put on the BTZ payroll. In 2001 he was put on the Matros payroll and became a member of the incumbent union.

Wencewicz testified that he heard about Local 3 in 2001 and went to a meeting with representatives of that Union. He states that in 2001 he solicited other employees to sign authorization cards for Local 3 and that on one occasion, Mata found them in his notebook and took them for a few days before returning them.

Wencewicz was one of the small number of Matros employees, along with Gonzalez, Garay, and Hodge, who attended a series of Local 3 meetings held in the spring of 2004. They

were observed at these meetings by Supervisors Estamabil and Azic.

Wencewicz also testified that he was separately interrogated about his union sympathies by Mata and Moskowitz about a week before the May 21 election and that he told Moskowitz that he intended to vote for Local 3. He also testified that on the day before the election, Moskowitz tried to dissuade him from voting for Local 3 and said that even if Local 3 won the election, he would never sign a contract with that Union.

The last day that Wencewicz worked was on January 21, 2005, and this was almost 7 months after the election. But from the day of the election until January 21, 2005, the pot was still being stirred and a number of union related events occurred. Local 3 filed objections to the election and these were still pending. On November 17, 2004, after a card count, and despite the continued pendency of the Local 3 election proceeding, Moskowitz recognized and executed a collective-bargaining agreement with respect to the electrical employees of Matros.

According to Wencewicz, he was told by Joe Estamabil in late January 2004, that he should take 2 or 3 days off because business was slow. Wencewicz states that he objected to this, stating that he had been sent home for a couple of days in December and that he thought that under the Local 363 contract, employees should be laid off by rotation.

Wencewicz testified that when he returned to the worksite on Wednesday, he called the office and spoke to Estamabil who asked, "[W]ho told you to come back to work?" According to Wencewicz, he replied that Estamabil had told him that he was going to be out for only 2 or 3 days whereupon Estamabil said: "No, no, no. We will call you when you're supposed to come back to work."

Wencewicz testified that he went to the office that Friday to pick up a check and asked Estamabil if he was being fired. He states that Estamabil put up his hands and said that he didn't know anything, that it was not his decision and that the decision belonged to Moskowitz.

According to Wencewicz, he did not receive a call to return to work until late March 2005. He therefore assumed that he was fired. Wencewicz testified that when he finally received a call, Estamabil stated that he should go back to work and that he responded that had gotten another job from Local 3.

Moskowitz asserts that it was only a few days after Wencewicz was laid off that he told Estamabil to call Wencewicz and tell him to return to work. Estamabil testified that pursuant to Moskowitz' instructions, he called Wencewicz a few days after the layoff and told him to come back to work. He states that Wencewicz said, "[L]eave me alone" and hung up the phone.

According to Moskowitz, Estamabil told him about his phone conversation with Wencewicz about 2 or 3 weeks later. Moskowitz testified that "I think I tried to call him . . . and couldn't get through." He states that about another 2 weeks passed before he finally got to talk to Wencewicz and asked him if he was coming back to work and was told that he had gotten another job.

General Counsels' Exhibit 57 is a letter dated March 11, 2004, from Moskowitz to Wencewicz that states:

> This letter shall serve as a follow up to our telephone conversation of last night. In that telephone conversation I asked you if you were returning to work and you replied you were not returning to work due to the fact that you are currently employed at another job. Please be advised that if you are prepared to return to work at Matros Automated Electrical Corp. you must return on Wednesday, March 16, 2005 at 8:00. . . .
>
> . . . .
>
> If you fail to comply with the instructions in this letter we will view your actions as your resignation of employment at Matros Automated Electrical Corp.

Once again, it is my opinion that a problem with the Respondent's story is the time line. The Respondent's witnesses testified that only a few days after his layoff on January 21, 2005, Wencewicz was asked to return to work by Estamabil. But after this alleged first contact, Moskowitz by his own account, waited up to 3 weeks before making any further attempts to call Wencewicz and only spoke to him about 5 weeks after the initial layoff. (According to the letter, on March 10, 2005.)

As noted above, I believe that Moskowitz was not truthful regarding his claim that he was not aware of Local 3 union activity in 2004 until he received the election petition. I also think that Estamabil should not be credited regarding his implausible assertion that although he did see Hodge, Garay, Wencewicz, and Gonzales at the Local 3 meetings, he did not share that information with Moskowitz.

Accordingly, crediting Wencewicz over Moskowitz and Estamabil, I conclude that Wencewicz was not asked to come back to work within a few days after being laid off on January 21, 2005. Rather, I conclude that Wencewicz was falsely led to believe that his layoff would be for only a couple of days and that the Company did not offer to recall him until 1-1/2 months later and only after an unfair labor practice charge had been filed on February 15, 2005. I therefore conclude that per *Wright Line*, the General Counsels have made out a prima facie case of discrimination and that the Respondent has failed to rebut it.

3. The discharge of Gilberto Gonzalez

Gonzalez was hired in 1999 and after being on the BTZ payroll was transferred to the Matros payroll in 2002. At times he was assigned to be a foreman and worked on Moskowitz' home. This latter piece of evidence presumably was presented by the General Counsels to show that Moskowitz trusted Gonzalez' work enough to have him do electrical work at his own home.

Gonzalez attended the Local 3 meetings that were held in the spring of 2004 and testified that he solicited other employees to sign union authorization cards. He further testified that about 6 months before the election, Moskowitz asked him if he wanted to go to Local 3 and that he (Moskowitz) said that didn't want to go to Local 3. In other respects, Gonzalez' version of this conversation was unintelligible to me.

According to Gonzalez, he and Joseph Hodge resumed soliciting new authorization cards for Local 3 in 2005, after Matros had entered into a contract with Local 363. (That agreement was made on November 17, 2004.)

Gonzalez claims that sometime in 2004 or 2005, while he was employed at the Hanover job, he asked Moskowitz why he, as opposed to other employees, had not received retroactive pay and that he was told that he wasn't getting it and that he would soon be laid off.

Gonzalez was discharged on December 14, 2005, while briefly working at a BTZ jobsite located at 20 Tiffany Street, Brooklyn, New York.

Gonzalez was assigned to this jobsite, which was relatively large construction project in Red Hook. He was assigned to work with Shay Chickly, an electrician who was on the BTZ payroll. Everyone agrees that the work was out in the open and that it was cold outside.

According to Gonzalez, when he arrived at the site, the workers were on a long break and that after the break was over, it was already lunchtime. He testified that he was fired at around 1:45 p.m. by Mark Aminov, the foreman. He states that he called the office and spoke to Estamabil who confirmed that he had been fired.

I found Gonzalez' testimony regarding the circumstances of his work at this jobsite and his termination to be evasive and confusing. As far as I can tell, his story is that everyone else who was on the jobsite was not working and that he was the only person who was doing his job. I don't believe him.

Shay Chicly testified that Gonzalez appeared at the site in December 2005 and was assigned to work with him. He states that during the lunchbreak, the men were talking about anticipated Christmas bonuses and Gonzalez stated that for his bonus, he hoped that he would be fired. After that, according to Chicly, he told Gonzalez to pull a cable but at the end of the day, Gonzalez hadn't completed the work to which he was assigned.

On the following day according to Chicly, Gonzalez arrived about 1-1/2 hours late and by the morning break, still hadn't done the work assigned to him. Chicly states that after the break he told foreman Mark Aminov that he couldn't find Gonzalez and Aminov told him that he would take care of it. Aminov testified that he went looking for Gonzalez and found him hiding in a room. He states that when Gonzalez complained about the cold, he told Gonzalez to go downstairs where there was a heater and then go back to work. According to Aminov, after the morning break, he again went looking for Gonzalez and when he found him, Gonzalez expressed his reluctance to go back to work and stated that he was cold. Aminov states that he again told Gonzalez that he could warm himself downstairs but that he should then return to work. He states that Gonzalez then said, "Fuck Stuart. I don't care about Stuart."

Aminov testified that after the last incident with Gonzalez, he called John Mata and asked him to pull Gonzalez off the job. He states that when Mata asked why, he reported the morning's events. Aminov testified that Mata asked for a second, and then told him to tell Gonzalez to pack his tools. Aminov states that when he told Gonzalez to leave, Gonzalez thanked him and said that he could now collect unemployment insurance. Aminov testified that he didn't understand Gonzalez' comments and told him that he didn't think that he could collect unemployment. According to Aminov, Gonzalez called Mata and asked if he was being fired.

Moskowitz testified that he approved Mata's decision to fire Gonzalez after being told by Mata that Gonzalez was reported to be shirking his work and had said, "Fuck Moskowitz."

In my opinion, the Respondent has shown by credible evidence that it would have discharged Gonzalez notwithstanding his union or protected activity. I credit the testimony of Chicly and Aminov to the effect that Gonzalez arrived at the Tiffany Place jobsite with a chip on his shoulder and with the intention of avoiding his work. I also credit the testimony of Aminov that Gonzalez cursed Moskowitz.

Additionally, because I do not think that Gonzalez was a reliable witness, I am going to recommend dismissal of the interrogation allegation and the alleged discharge threat to the extent that they were based solely on his testimony.

4. Roses and raises

You know the expression: "A rose by any other name . . . ." But sometimes a cliché can be a useful metaphor.

The General Counsels asserts that in December 2004, the Respondent violated the Act by assigning Gilberto Gonzalez and Jaroslaw Wencewicz lower classifications than what they deserved. This took place at about the same time that Matros recognized and executed a collective-bargaining agreement with Local 363. The evidence indicates that all of the employees were assigned formal classifications at this time so that Local 363 and Moskowitz could fit them into the appropriate pay categories under the Local 363 contract.

Under the previous contract with Local 174/342 there were four categories of employees for purposes of minimum hourly pay rates. These were:

Journeyman	$20/hr
Advance Helper	18/hr
Helper	14/hr
Beginner	11/hr

As of the expiration of the old contract, Gonzalez was paid $20 per hour and Wencewicz was paid $18 per hour. Nevertheless, the evidence does not indicate that the Company had previously used official classifications. It seems that employees on the Matros payroll worked until they learned aspects of the craft and then were given wage rates determined by Moskowitz in accordance with his evaluation of their skill levels. The old contract also contained a provision that provided that employees were supposed to attend the Mechanic's Institute and take electrician classes. The contract provided that upon the successful completion of the courses at various stages, employees would be promoted from beginner to journeyman. Thus, the old contract provided an objective method for promotions and not one based on Moskowitz' opinion. For better or worse, neither Gonzalez nor Wencewicz availed themselves of these courses.

The bottom line is that when the Wencewicz and Gonzalez received job classifications in late 2004, they did not have their pay or benefits reduced. Nor is there evidence that any other aspect of their employment was adversely affected. Whatever name they were called, there was no adverse action taken vis a vis their employment. I therefore reject the contention that the

Respondent discriminated against them in this respect and recommend that this allegation be dismissed.

There is no dispute that after the contract with Local 174/342 expired, Moskowitz decided to give raises and/or retroactive payments to the employees who were on the Matros payroll. The first set of raises was given in November 2004 to all employees except for Hodge, Wencewicz, Gonzalez, and another employee named Herman Texeira. (Garay did not receive a raise because he had already been discharged. The employer noted that another employee named Urgiles also failed to get a raise, albeit Moskowitz did not testify about him.) Another round of raises was given in January, March and June 2005. Everyone got these raises except for Hodge and Gonzalez. (By January 2005, Garay and Wencewicz were no longer employed.)

Coincidentally, Hodge, Wencewicz, and Gonzalez, were three of the five or six employees who were spotted by Estamabil and Azic at the Local 3 IBEW meetings. Hodge was the observer for Local 3 at the election held on May 21, 2004, and Hodge along with Gonzalez, resumed soliciting authorization cards for Local 3, after Matros entered into a contract with Local 363.

In describing why he did not give the 2004 raises to the individuals listed above, Moskowitz testified that he didn't think that these people were as productive as the other workers who got raises. With respect to Wencewicz, Moskowitz also testified that there were several incidents where he broke objects in apartments but could only specify one situation where he broke a light fixture. With respect to Gonzalez, Moskowitz testified that he was already paying him $21.25 an hour and in light of his rather poor productivity, he didn't feel that Gonzalez deserved a raise. With respect to Hodge, Moskowitz testified that he was already receiving $25.50 an hour (higher than most of the other Matros employees), and that he was a very slow worker. He therefore testified that he didn't feel that Hodge's productivity warranted a raise. As to Herman Texeira, Moskowitz testified that he couldn't recall why he didn't give him a raise in 2004 and that he was a good worker. Texeira received raises in 2005.

Notwithstanding Moskowitz' assertion that Hodge was an exceedingly slow worker, he never issued any warning to Hodge regarding this alleged debility despite the evidence that shows that in the past, Moskowitz has issued warnings to other employees for poor productivity. See for example General Counsels' Exhibit 83 regarding employee Lindy Baptiste.

It is not my intention to substitute my judgment as to whether the employees who were denied pay increases deserved them based on an objective evaluation by me of their actual productivity during the years in question or for any other reason. What I am called upon to decide is whether I believe the reasons given by Moskowitz for his decisions or whether they were in fact, motivated by union considerations. I have already concluded that Moskowitz' testimony regarding several relevant aspects of this case was less than reliable. Moreover, as the evidence shows a substantial correlation between those individuals who actively supported Local 3 and the individuals who were denied pay increases, it is, in my opinion, more probable that these individuals were denied pay increases because of their sympathies and/or support for Local 3.[6]

III. ANALYSIS

Having already found that the Employer has violated the Act in various respects, I shall not repeat here the facts or my legal conclusions regarding those allegations.

A. The Members Only Contract Allegation

The complaint alleges that since December 2, 2003, Matros and Local 174/342 have had a practice of applying contractual wages and benefits only to those employees who had been selected by the Company to be members of that Union. This is alleged by the General Counsels to be a violation of Section 8(a)(1) and (3) of the Act.

One could wonder how the General Counsels picked this date, inasmuch as this practice began and had been going on since at 1997 when BTZ was created as a separate corporation from Matros. Obviously, the date is 6 months before the date that the charge in Case 2–CA–36296–1 was filed. But Moskowitz made no effort to conceal the practice that some of his employees were getting the wage and benefits of the union contract and others were not. I imagine that the General Counsels are claiming that that this is a violation despite the 10(b) statute of limitations on the theory that although the initial creation of the "member's only contract" took place in 1997, the violation is "continuing" and can survives a challenge from Section 10(b) of the Act.

I conclude, irrespective of the 10(b) defense, that the Respondent has not violated the Act in this respect.

There is no question but that Matros and BTZ constitute a single employer within the meaning of the Act. Moreover, had the incumbent union (Local 174), back in 1997 or even in 1998, contended by way of an arbitration proceeding or an unfair labor practice or a unit clarification petition, that the employees of BTZ should be considered as an "accretion" to the existing multiemployer bargaining unit to which the Matros employees belonged, it is probable that they would have been legally correct. But that didn't happen.

For whatever reason, Local 174/342 allowed Moskowitz to operate a "double breasted" shop where the employees of one were covered by its labor contract and the employees of the other were allowed to perform electrical work as a nonunion shop. By December 2003, the bargaining history had, de facto, created two separate units within a single employer. *Land Equipment, Inc.,* 248 NLRB 685, 688 (1980).

It seems to me that there is a distinction between whether a collective-bargaining agreement may discriminate because it is applied only to members of a union and the situation where the collective-bargaining agreement is not applied to employees who are not members of the bargaining unit. The distinction is

[6] This is a civil case and therefore it is enough that the General Counsels prove, through circumstantial evidence and by a preponderance of the evidence (not beyond a reasonable doubt or by a clear and convincing standard), that the Employer's agent or agents was motivated by a belief that his employees were engaged in activities in support of a union or that they were engaged in protected concerted activities.

between whether a contract is not applied to employees because of their union membership *or* whether a contract is not applied to employees because of their unit membership. If the unit is unambiguous and those employees who are clearly members of the bargaining unit are not being paid the contract rates because of their lack of union membership, then the argument can be made that the employer is violating Section 8(a)(3). On the other hand, if certain employees are not being paid the contract rates, not because of their lack of union membership, but because the contracting parties have agreed or treated them as not being part of the collective-bargaining unit, then there is no 8(a)(3) violation.

In the present case, it is clear to me that since at least 1997 *and for at least seven more years*, Local 174 and its successor, Local 342, have treated the complement of Moskowitz employees who have been assigned to work on the BTZ payroll as a separate unit of employees who were not included in the bargaining unit. This may have been an oversight or it may have been intentional. But it nevertheless was the case. Therefore, those employees, to the extent that they did not receive contractual wages and benefits did not have the contractual benefits withheld because of their lack of union membership, but because of their lack of unit inclusion. I therefore, agree with the Employer's contentions on this issue and I think that its reliance on *Tabernacle Sand & Gravel Corp.*, 232 NLRB 957 (1977), is apposite.

B. The Recognition of Local 363 by Matros

Under Board law, an employer may voluntarily grant recognition to a union but it does so "at its peril" if a charge is later filed within the statutory limitations period and it turns out that the union did not represent an uncoerced majority of the employees in the recognized bargaining unit. *Ladies Garment Workers' (Berhard-Altman Texas Corp.) v. NLRB*, 366 U.S. 731 (1961). Moreover, under Section 8(f) of the Act, an employer that is engaged primarily in the construction industry may recognize a union on behalf of construction workers even if the Union does not represent a majority of the unit employees. In 8(f) situations, however, an employer can legally withdraw recognition for any reason after the contract expires and the collective-bargaining agreement cannot act as a contract bar to a petition filed by another union. *John Deklewa & Sons,* 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB,* 843 F.2d 770 (3d Cir. l988).

The law is equally clear that once notified that a valid representation petition has been filed, an employer, except where there is an incumbent union, must refrain from recognizing any of the set of rival unions and may not, without violating Section 8(a)(2) of the Act, enter into a collective-bargaining agreement with either of them. *Bruckner Nursing Home*, 262 NLRB 955, 957 (1982).[7] As pointed out by the General Counsels, a petition is considered pending while objections remain unresolved or during a time when the petition is held in abeyance. *Wackenhut Corp.,* 287 NLRB 374, 376 (1987), and *Haddon House Food Products*, 269 NLRB 338, 341 (1984).

As demonstrated by *RCA Del Caribe* and *Wackenhut*, there is a distinction between situations where there are two rival unions and the situation where there is a recognized incumbent union and a rival union that is seeking to displace the incumbent through the election process. In *Wackenhut*, the Board noted that in *Gulf & Western Mfg. Co*., 227 NLRB 696 (1977), an incumbent union had won an election and that while objections were pending, the employer and the incumbent executed a new agreement. It was noted that the objections eventually were overruled and the Board held that although the parties acted at their peril in negotiating the agreement during the pendency of the objections, they had accurately anticipated the disposition of the objections and therefore their actions did not violate the Act.

In my opinion, the granting of recognition by Matros to Local 363 (a nonincumbent union), at a time when an election proceeding was still pending, constituted a violation of Section 8(a)(1) and (2) of the Act on the part of the Employer and a violation of Section 8(b)(1)(A) on the part of Local 363. Accordingly, I need not decide whether Local 363 had obtained authorization cards from a majority of the employees in an appropriate unit as this question is irrelevant.

Further, as the collective-bargaining agreements executed between Matros and Local 363 contained union-security and dues-checkoff provisions, this constituted a violation of Section 8(a)(3) of the Act on the part of the Employer and a violation of Section 8(b)(2) of the Act on the part of Local 363. Finally, as I have concluded that the Matros/Local 363 contract is illegal under Section 8(a)(1), (2), and (3) and 8(b)(1)(A) and (2), I conclude that Local 363 by Shimkus violated Section 8(b)(1)(A) by telling Hodge that he would recommend to the Employer, that Hodge be discharged if he did not sign a Local 363 membership application.

C. The Recognition of Local 363 by BTZ

The allegations regarding the recognition of Local 363 by BTZ are a little more complicated.

Although Matros and BTZ constituted a single employer, I have also concluded that from about 1997, the employees on the payroll of each corporation have constituted separate bargaining units essentially because of the bargaining history with Local 174/342.

If I was called upon to decide, as an initial matter and in the absence of a bargaining history, whether the employees on the payroll of Matros and the employees on the payroll of BTZ could constitute separate appropriate units, the answer would be no. The evidence shows that there was common control, that there was common supervision and that there was substantial employee interchange between these two corporate entities. In many cases, employees who originally were placed on the BTZ payroll were moved over to the Matros payroll without any break in employment. The evidence shows that employees on the BTZ and Matros payrolls worked together as mixed crews on both rehabilitation and construction jobs in New York City. BTZ essentially obtained all of its work from Matros, for whom it worked as an exclusive subcontractor. Moskowitz makes all

[7] In *RCA Del Caribe*, 262 NLRB 963 (1982), the Board held that an employer may continue to recognize and bargain with an incumbent union in the face of a valid petition by a rival union. However, in the event that the rival union wins the election, any contract executed with the incumbent union would be null and void.

the managerial and many of the lesser supervisor decisions with respect to the employees who are on both payrolls. These include rates of pay, job classifications, raises, who shall be hired, who shall be fired and who shall be disciplined. In short, the evidence establishes that by 2004, *and but for the bargaining history*, the employees who were on the BTZ payroll did electrical work in the same category as the employees on the Matros payroll and were, in effect, substantially integrated into the work functions of the latter group. The Employer may describe the work of Matros as being more complicated than that of BTZ or that its projects were bigger in scope, but the evidence shows that by April 1, 2004, the nature of the work performed by each group was essentially the same and that the workers of each had overlapping skills.

But the evidence is also clear that by virtue of the actions (or inactions), of Local 174/342, the employees of BTZ were not part of the multiemployer bargaining unit that included the Matros' electrical workers. This existed up until April 1, 2004, albeit it was abundantly clear, even before that date that this was about to change.

Even under Section 8(f), which does not require majority support, in order for BTZ' recognition of Local 363 to be legal, this would require that the employees of BTZ, *at the time of recognition*, could exist as a separate appropriate bargaining unit. And in this respect, I conclude that what had previously existed as a separate unit, no longer existed.

The only way that the employees on the BTZ payroll could constitute a separate bargaining unit was because of the bargaining history wherein that group was excluded from the larger, multiemployer bargaining unit. Otherwise, the degree to which the employees on both the BTZ and Matros employees were integrated would not allow for separate units except by virtue of the bargaining history. But by April 1, 2004, the multiemployer bargaining unit no longer existed and the bargaining history no longer was relevant. Further, Moskowitz was clearly aware that the incumbent union, Local 342, was intending to transfer its representational rights to Local 3 and to assist Local 3 in becoming its replacement. This is shown in the memorandum that Moskowitz delivered to his employees on March 23, 2004. It therefore is obvious to me that Moskowitz was well aware that Local 342 was going to disclaim any interest in representing the Matros employees. And this is, in fact, what did happen after Local 3 filed its petitions to represent the employees of the various companies that had previously been members of the now defunct employer association.

Given the fact that the multiemployer association had been dissolved no later than April 1, 2004, and the correctly anticipated fact that Local 342 was no longer interested in representing the employees on the Matros payroll, the bargaining history that had previously separated the Matros employees from the BTZ employees was no longer in effect and therefore was no longer relevant or operative.[8] I therefore conclude that as of April 1, 2004, when BTZ recognized Local 363 as the collective-bargaining representative of the electrical employees on the BTZ payroll, such a unit no longer could be deemed to be an appropriate unit; the only appropriate unit being one that included all of the electrical employees who were on the combined payrolls of Matros and BTZ.[9]

I therefore conclude that the Respondent violated Section 8(a)(1), (2), and (3) when it recognized Local 363 as the bargaining representative of the employees who were on the BTZ payroll and entered into collective-bargaining agreements that contained union-security and dues-checkoff provisions. I also conclude that Local 363 violated Section 8(b)(1)(A) and (2) by accepting recognition in an inappropriate unit and by executing collective-bargaining agreements containing the aforementioned clauses.

This conclusion is not affected by the fact that Local 3 IBEW, on April 30, 2004, entered into a Consent Election Agreement wherein the vote was to be held among the Matros employees. (The agreement did not, by its terms, either include or exclude the BTZ employees.) In the circumstances, the agreement by Local 3 to have a consent election amongst the employees on the Matros payroll cannot be viewed as being tantamount to an ex post facto waiver that the people on the BTZ payroll should exist as a separate unit. At the time of the agreement, Local 3 representatives, although being aware that there was some kind of a relationship between BTZ and Matros, did not have full knowledge of the detailed relationship between the two corporate entities. Also, they were in the midst of a group of election petitions involving Matros and eleven other companies and had to make a choice between having a quick election and having to go through a litigation on the issue of whether the employees on the Matros and BTZ payrolls constituted the only appropriate unit.

Inasmuch the evidence points to the conclusion that the previously defined multiemployer unit no longer existed, the fact that Local 342 disclaimed interest in representing the employees in that unit, and the evidence showing that the only appropriate unit would have been a combined unit of Matros/BTZ employees, I would think that appropriate course for the Regional Director would be to declare the election a nullity and reopen the representation case to determine what unions should be on the ballot and what employees should be eligible to vote.

[8] In its brief, Local 363 asserts that an administrative law judge has no authority to make unit determinations. I don't where that argument comes from. Although bargaining unit determinations are normally made by Regional Directors and the Board in representation cases, it is not unusual for an ALJ to make unit determinations when required in an unfair labor practice case. For example in *Gissell* type cases, where it is alleged that an employer should be ordered to bargain with a union because its conduct has made a fair election impossible, the ALJ will often be called upon to determine the appropriate unit and who belongs in the unit in order to determine whether the union represented a majority of the employees within that unit at a relevant point in time. In certain 8(a)(2) cases, a contention may be made that a company extended an already existing contract to a new group of employees and the question is whether that group should be a separate appropriate unit or whether those employees should be "accreted" to the existing bargaining unit.

[9] Since the BTZ payroll had fewer employees than the Matros payroll, Local 363 could not have represented a majority if there was only one combined unit. On the other hand, Sec. 8(f) allows a company primarily in the construction industry to recognize a union for construction workers irrespective of majority status.

But that is only a suggestion. It is not my role to make findings in the representation case that is not before me.

D. Other Assistance

The complaint alleges that in April and May 2004, Moskowitz illegally assisted Local 363 by orchestrating three meetings during working hours, requiring employees to attend these meetings and attending the meeting held on May 20, 2004.

The record indicates that it was employee DeVaynes who was most instrumental in supporting Local 363 and who was the one who arranged for the meetings with Local 363 representatives. I cannot state, based on this record that his actions were taken either pursuant to the direction of Moskowitz. At most, it appears that DeVaynes, through Supervisor Joe Estamabil, set up meetings on an unoccupied floor in the building in which the Company rents space and that he held and conducted another meetings at a jobsite. (That is, the meetings were *not* held on company property.) In each instance, the evidence shows that employees were told of these meetings by communication with the office receptionist and that they went to the meetings during worktime for which they were paid. The meetings held at 29th Street were essentially conducted by Local 363 representatives, although there was evidence that at least some supervisors, who kept quiet, were present at the first two meetings. At the last meeting, held on May 20, 2004, Moskowitz spoke and I have already concluded that his remarks violated Section 8(a)(1) of the Act.

In a situation where there are rival unions, neither of which is an incumbent, an employer, once a representation petition has been filed, is obligated to maintain neutrality in the sense that it cannot recognize one of the competing unions. *Bruckner Nursing Home*, supra. But this does not mean that the employer cannot express his opinion as to which union he would prefer so long as this is done in a non-coercive manner. *Tecumseh Corrugated Box Co.,* 333 NLRB 1 (2001); *Alley Construction Co.*, 210 NLRB 999 (1974); *Plymouth Shoe Co*., 182 NLRB 1 (1970). Nor can it be said that an employer violates the Act merely because it allows union representatives to meet its employees on company premises and company time. *Tecumseh Corrugated Box Co.*, supra; *Coamo Knitting Mills, Inc.*, 150 NLRB 579 (1964).

In my opinion, the assistance given here to Local 363 went beyond what was permissible under the Act. I have already concluded that in addition to helping arrange for the employees to meet with Local 363 representatives and paying for their time, supervisors attended and remained at a couple of these meetings even though they did not talk. More significantly, the evidence shows that Moskowitz, at the May 20 meeting, did more than merely express his views opposing Local 3 and favoring Local 363. He told the employees that if Local 3 won the election, he would never sign a contract and that he would rather close the business and move to Miami.

CONCLUSIONS OF LAW

1. By recognizing and entering into successive collective-bargaining agreements with Local 363, such contracts containing union-security and dues-checkoff clauses, the Respondent Matros/BTZ has violated Section 8(a)(1), (2), and (3) of the Act.

2. By interrogating employees about their sympathies or activities on behalf of Local 3, IBEW, the Respondent has violated Section 8(a)(1) of the Act.

3. By promising employees promotions and other benefits in order to dissuade them from voting for Local 3, IBEW, the Respondent has violated Section 8(a)(1) of the Act.

4. By threatening employees that it would shut down the business, the Respondent has violated Section 8(a)(1) of the Act.

5. By telling employees that even if Local 3, IBEW won the election, it would never sign a contact with that labor organization, the Respondent has violated Section 8(a)(1) of the Act.

6. By discharging Aparicio Garay because of his activities and support for Local 3, IBEW, the Respondent has violated Section 8(a)(1) and (3) of the Act.

7. By failing to recall from a temporary layoff and therefore discharging Jaroslaw Wencewicz because of his activities and support for Local 3, IBEW, the Respondent has violated Section 8(a)(1) of the Act.

8. By failing to give raises to Hodge, Wencewicz, and Gonzalez because of their activities and support for Local 3, IBEW, the Respondent has violated Section 8(a)(1) of the Act.

9. By giving assistance to Local 363, the Respondent has violated Section 8(a)(1) and (2) of the Act.

10. By accepting recognition from Matros/BTZ as the representative of its employees and by entering into collective-bargaining agreements containing union-security and dues-checkoff clauses, the Respondent, Local 363, has violated Section 8(b)(1)(A) and (2) of the Act.

11. By threatening to cause the discharge of an employee if he refused to sign a Local 363 membership application, the Respondent, Local 363, has violated Section 8(b)(1)(A) of the Act.

12. The aforesaid unfair labor practices affect commerce within the meaning of the Act.

13. The Respondents have not violated the Act in any other manner encompassed by the complaint.

REMEDY

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

It is recommended that the employer be ordered to withdraw and withhold recognition from Local 363 for the employees on the Matros and BTZ payrolls and to cease and desist from giving force or effect to any collective-bargaining agreements covering those employees, unless and until that Union is certified by the Board as the collective-bargaining representative of the employees at that location. However, nothing herein shall be construed to require the employer to vary any wage or other substantive terms or condition of employment that has been established in the performance of the contract.

It is further recommended that Local 363 be ordered to cease and desist from acting as the bargaining representative of the aforesaid employees or giving effect to its contracts with the

employer unless and until it is certified by the Board as the collective-bargaining representative of the employees at that location.

It is additionally recommended that the employer and Local 363 be ordered, jointly and severally, to reimburse all present and former employees who joined Local 363 for all initiation fees, dues, and other moneys which may have been exacted from them together with interest thereon as set forth in *Florida Steel Corp*., 231 NLRB 651 (1977).

As I have concluded that the Respondent illegally discharged Aparicio Garay and Jaroslaw Wencewicz, it must offer them reinstatement to their former positions of employment or if those positions are no longer available, to substantially equivalent positions of employment and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of such refusal 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).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

A. The Respondent, Matros Automated Electrical Construction Corp. and BTZ Electrical Corp., New York, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Recognizing and entering into successive collective-bargaining agreements with Local 363, and cease giving affect to the union-security and dues-checkoff clauses of those contracts, unless and until that labor organization is certified by the Board as the collective-bargaining representative of such employees.

(b) Interrogating employees about their sympathies or activities on behalf of Local 3, IBEW.

(c) Promising employees promotions and other benefits in order to dissuade them from voting for Local 3, IBEW.

(d) Threatening employees that it would shut down the business.

(e) Telling employees that even if Local 3, IBEW won the election, it would never sign a contact with that labor organization.

(f) Discharging Aparicio Garay and Jaroslaw Wencewicz because of their activities and support for Local 3, IBEW.

(g) Failing to give raises or retroactive payments to Joseph Hodge, Jaroslaw Wencewicz, and Gilberto Gonzalez because of their activities and support for Local 3, IBEW.

(h) Giving illegal assistance to Local 363 United Electrical Workers of America, IUJHAT.

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

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

(a) Withhold recognition from Local 363 United Electrical Workers of America, IUJHAT as the representative of its employees unless and until that Union has been certified by the Board as their exclusive collective-bargaining representative.

(b) Jointly and severally with Local 363 United Electrical Workers of America, IUJHAT, reimburse all former and present employees employed for all initiation fees, dues, and other moneys which may have been exacted from them with interest thereon in the manner provided in the remedy section of this decision.

(c) Within 14 days from the date of this Order, offer Garay Aparicio and Jaroslaw Wencewicz, 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 and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(d) Make whole, with interest, Joseph Hodge, Jaroslaw Wencewicz, and Gilberto Gonzalez for the loss of earnings they suffered as a result of the failure of the Respondent to give them raises or other payments given to its other employees.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against Garay Aparicio and Jaroslaw Wencewicz and within 3 days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.

(f) 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.

(g) Within 14 days after service by the Region, post at its facilities in New York, New York, copies of the attached notice marked "Appendix A."[11] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent Employer's authorized representative, shall be posted by the Respondent Employer 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 Employer 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 Employer has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Respondent Employer shall duplicate and

[10] 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.

[11] 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."

mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since April 1, 2004.

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

B. The Respondent, Local 363, United Electrical Workers of America, IUJHAT, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Acting as the collective-bargaining representative of the employees of Matros Automated Electrical Construction Corp. and BTZ Electrical Corp., unless and until it is certified by the Board as the collective-bargaining representative of such employees.

(b) Maintaining or giving any force or effect to any collective-bargaining agreement between it and Matros Automated Electrical Construction Corp. and BTZ Electrical Corp., until it is certified by the Board as the collective-bargaining representative of such employees.

(c) Threatening employees that it would cause their discharge if they did not sign applications to become members of Local 363.

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

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

(a) Jointly and severally with Matros Automated Electrical Construction Corp. and BTZ Electrical Corp., reimburse all former and present employees for all initiation fees, dues, and other moneys which may have been exacted from them with interest thereon in the manner provided in the remedy section of this decision.

(b) Within 14 days after service by the Region, post at its offices and meeting halls, copies of the attached notice marked "Appendix B."[12] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent Local 363's authorized representative, shall be posted by Local 363 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 Local 363 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 Employer has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, Local 363 shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since April 1, 2004.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Matros Automated Electrical Construction Corp. and BTZ Electrical Corp., at all places where notices to employees are customarily posted.

(d) 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.

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

Dated, Washington, D.C., September 1, 2006.

APPENDIX A

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

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

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT recognize or enter into collective-bargaining agreements with Local 363, and cease giving affect to the union-security and dues-checkoff clauses of those contracts, unless and until that labor organization is certified by the Board as the collective-bargaining representative of such employees.

WE WILL NOT discharge employees, withhold wage increases or other benefits, or otherwise retaliate against any of our employees because of their membership or support for Local 3, International Brotherhood of Electrical Workers.

WE WILL NOT interrogate employees about their sympathies or activities on behalf of Local 3, IBEW.

WE WILL NOT promise our employees promotions and other benefits in order to dissuade them from voting for Local 3, IBEW.

WE WILL NOT threaten our employees that we would shut down the business if Local 3, IBEW won the election or became the bargaining representative.

WE WILL NOT tell our employees that even if Local 3, IBEW won an election, we would never sign a contact with that labor organization.

WE WILL NOT give illegal assistance to Local 363, United Electrical Workers of America, IUJHAT.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL withhold recognition from Local 363, United Electrical Workers of America, IUJHAT as the representative of our employees unless and until that Union has been certified by the Board as their exclusive collective-bargaining representative.

WE WILL jointly and severally with Local 363, United Electrical Workers of America, IUJHAT reimburse all former and present employees for all initiation fees, dues, and other mon-

[12] See fn. 11, supra.

eys which may have been exacted from them with interest thereon.

WE WILL offer Aparicio Garay and Jaroslaw Wencewicz who have been found to have been illegally discharged, immediate and 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, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL make whole Aparicio Garay, Jaroslaw Wencewicz, Gilberto Gonzalez, and Joseph Hodge for the loss of earnings they suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful discharges that have been concluded to be unlawful and notify the employees in writing that this has been done and that these actions will not be used against them in any way.

MATROS AUTOMATED ELECTRICAL CONSTRUCTION CORP. AND BTZ ELECTRICAL CORP.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
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To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT act as the collective-bargaining representative of the employees of Matros Automated Electrical Construction Corp. and BTZ Electrical Corp., unless and until we are certified by the Board as the collective-bargaining representative of such employees.

WE WILL NOT maintain or give any force or effect to any collective bargaining agreement between us and the above-named employer, unless and until we are certified by the Board as the collective-bargaining representative of such employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL jointly and severally with the employer, reimburse all former and present employees for all initiation fees, dues, and other moneys which may have been exacted from them with interest thereon in the manner provided in the remedy section of this decision.

LOCAL 363, UNITED ELECTRICAL WORKERS OF AMERICA, IUJHAT