

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

A.M. ORTEGA CONSTRUCTION, INC.

and

Cases 21-CA-37055
21-CA-37167

SOUTHERN CALIFORNIA DISTRICT COUNCIL OF
LABORERS, AND ITS AFFILIATED LOCALS, LABORERS
INTERNATIONAL UNION OF NORTH AMERICA

A.M. ORTEGA CONSTRUCTION, INC.
Employer

and

Case 21-RC-20823

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 12;
UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF
THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED
STATES AND CANADA, LOCAL UNION 250; SOUTHERN
CALIFORNIA DISTRICT COUNCIL OF LABORERS, LABORERS'
INTERNATIONAL UNION OF NORTH AMERICA (LIUNA) AND ITS
AFFILIATED LOCALS; TEAMSTERS JOINT COUNCIL NO. 42,
AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF
TEAMSTERS; AND GENERAL TEAMSTERS AND FOOD
PROCESSING LOCAL 87, AFFILIATED WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS
Joint Petitioners

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL 47, AFL-CIO, CLC
Intervenor

Alan L. Wu, Esq., for the General Counsel and Regional Director.

Steven T. Nutter, Esq., (*Reich, Adell, Crost & Cvitan*)
of Los Angeles, California, and
David Koppelman, Esq., of Pasadena, California,
for the Charging Party and Joint Petitioners.

Bernhard Rorhbacher, Esq., (*Rothner, Segall, &
Greenstone*) of Pasadena, California, for the Intervenor.

*Richard M. Freeman, Esq., Carole M. Ross Esq.
and David Chidlaw, Esq. (Sheppard, Mullin, Richter
& Hampton LLP) of San Diego, California,
for Respondent and the Employer.*

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DECISION

Statement of the Case

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WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in San Diego, California, on June 26-28 and August 7, 2006. The charges were filed on October 18, 2005¹ and January 31, 2006, and the order consolidating cases, consolidated complaint and notice of hearing was issued on February 28, 2006. The complaint alleges that A.M. Ortega Construction, Inc. (herein Respondent) failed to recall Steven Pasos, Jr., from lay off and then terminated his employment because he engaged in union activity and because he testified in a representation case hearing, failed to recall George M. Marquez from lay off because he engaged in union activity, threatened an employee that the employee would be one of the first to be out of work if the International Brotherhood of Electrical Workers, Local 47, AFL-CIO, CLC (herein Local 47) won a representation election, told employees that if they supported the Joint Petitioners (sometimes herein Local 89) they should quit and go to work for a company whose workers were represented by those unions, and told employees it would be futile to support the Joint Petitioners because Respondent would never sign a collective-bargaining agreement with them, or it might take up to one year to sign a collective-bargaining agreement. Respondent filed an answer that denied the substantive allegations of the complaint.

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A representation case is consolidated with the complaint. The Joint Petitioners filed the petition on April 19, the parties signed a stipulated election agreement on August 17, and the election, held on September 21, showed that 17 employees voted for the Joint Petitioners, 21 employees voted for Local 47, and no employees voted against union representation. There were four challenged ballots, but at the hearing in this case the parties stipulated that one of the challenged voters, Oscar Ruvalcaba, was a supervisor and therefore the challenge to his ballot should be sustained. As a result, the number of challenged ballots is no longer determinative and the remaining challenges need not be resolved. The Joint Petitioners filed 17 separate objections to the conduct of the election. The Regional Director referred 14 of the 17 to hearing. In their brief the Joint Petitioners withdrew four more objections. Some of the objections mirror the allegations in the complaint. The remaining objections that warrant discussion concern a grant of substantial wage increases to unit employee a week before the election and granting Local 47 preferential access to employees on its property and on working time.

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On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent,² Joint Petitioners, and Local 47, I make the following.

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¹ All dates are in 2005 unless otherwise indicated.

² After briefs were received Respondent filed a motion to file a reply to the General Counsel's brief; the General Counsel filed an opposition to Respondent's motion. Reply briefs are not normally allowed at this stage in the proceedings, Section 102.42 of the Board's Rules and Regulations. Respondent has not pointed to any special need to deviate from the normal practice. Accordingly, Respondent's motion to file a reply brief is denied.

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Findings of Fact

I. Jurisdiction

5 Respondent, a corporation, performs dry underground utilities installation in the
construction industry from its facility in Lakeside, California, where it annually purchases and
receives goods valued in excess of \$50,000 directly from points outside the state of California.
Respondent admits and I find that it is an employer engaged in commerce within the meaning of
Section 2(2), (6), and (7) of the Act. I also find that the Joint Petitioners and Local 47 are labor
10 organizations within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices and Objectionable Conduct

A. Background

15 As indicated, Respondent is in the business of dry underground utilities installation and
has been in business for about 32 years. It has facilities in San Diego and Riverside and
employs laborers, equipment operators, and truck drivers in crews headed by a foreman. Local
47 and its predecessors have represented certain employees of Respondent since 1993. The
20 most recent contract between these parties runs from December 1, 2002, through
November 30, 2005. Since 2005, about 95 percent of the work Respondent does is conversion
work. This is work done on already developed land with existing roads and utilities. Conversion
work requires a higher skill level than developer work, which is done on undeveloped land. The
Riverside facility is a one-acre, fenced-in yard where the foremen may go on a daily basis to
25 pick up their trucks and material before they go to a jobsite. Most employees, however, go
directly to the jobsite. Maurice Ortega is acting president; he estimates projects and oversees
the operation of the San Diego facility. Jose Flores is vice president; he is involved in sales and
customer relations. Alberto Carrillo is superintendent; he assigns work, lay offs, and recalls
employees. David Hicksman is supervisor, and Oswald "Ozzie" Ruvalcaba is a foreman.
30 Ruvalcaba is Flores' son-in-law. All of these persons are admitted agents of Respondent.
Respondent employs several other foremen besides Ruvalcaba; all foremen expected to vote in
the election and employees knew this.

35 As indicated, the complaint case centers on allegations that Respondent unlawfully
failed to recall Marquez and Pasos from layoff. Respondent does not have a formal lay off or
recall policy. As work diminishes employees are laid off based on need and the skill level of
employees. The lay offs may range from a day or two to much longer periods of time. Likewise,
employees are called back to work based on Respondent's needs and the skill level of the
40 employees. Respondent is free to, and has, hired new employees rather than recall existing
employees from lay off. But as Carillo stated, he generally tries to recall all laid off employees.
Carillo has told laid off workers that the best way to get work is to show up in the morning
because often employees call in sick or a foreman forgets to tell him that another worker is
needed on the site. He testified that even after employees were terminated they remained
45 eligible to return to work. Respondent pays its employees a required minimum but grants raises
based on merit.

50 Respondent's main customer is San Diego Gas and Electric. On December 16, 2004,
the Public Utilities Commission of the State of California issued a ruling requiring utilities such
as SDG&E to ensure the payment of prevailing wages by their construction contractors such as

Respondent.³ One of the messages that Local 89 would later communicate to workers during the election campaign was that Respondent should be paying them the higher prevailing rates. On January 11, 2005, SDG&E sent a letter to Respondent and others advising that pursuant to the PUC decision contractors were required to pay employees who work on energy utility construction projects prevailing wages as set by the State of California Department of Industrial Relations. The letter directed the contractors to a DIR website for more information. But uncertainty remained about what the prevailing wages should be and SDG&E left it to the contractors like Respondent to resolve that matter. On about January 20, SDG&E sent Respondent an amendment to their existing contract that required Respondent to pay its employees prevailing wages. The amendment was to be effective December 16, 2004. Apparently Respondent reported to SDG&E that it never received the amendment, so on March 8 SDG&E sent another copy although Flores testified Respondent had received the amendment by February 15. The amendment was eventually signed by both parties, but it is undated. In an email message March 22, Flores conceded that Respondent was not paying the prevailing rates and that it needed to “re-submit rates based on published prevailing rates, i.e., Operating Engineer’s Rates; Laborers Local 89 Rates; Teamsters Local 5 Rates.” Meanwhile, Respondent continued to try and learn exactly what the prevailing rates were that it was expected to pay. For example, on July 28, Respondent sent a message to the California Department of Industrial Relations, Prevailing Wage Unit, seeking that information but it did not receive a reply. On September 12 Respondent’s counsel sent a letter to the Department of Industrial Relations. The letter disclosed that Respondent was dealing with a situation involving Local 47 and the Joint Petitioners and was attempting to ascertain the correct prevailing wages to pay its employees. The letter provided details of the work performed by Respondent and referred to a contract involving IBEW Local 569. The letter asked the DIR to confirm that the wages set in that contract were the prevailing wages; it indicated that Local 47 agreed that the Local 569 contract set forth the prevailing rates. The DIR responded on October 4 indicating that it would not enforce the PUC order but rather would leave it to the PUC to enforce its own order. In other words, the DIR said it would not set prevailing wage rates under the PUC ruling.

According to Ortega a number of employees had complained that they preferred Respondent’s old health insurance provided by Kaiser to the health insurance provided under the collective bargaining agreement with Local 47. In about December 2004 Ortega called Tom Brown, Local 47’s negotiator, and asked if Respondent could provide its own health care coverage. According to Ortega, Brown said that he thought that could be done and he would look into it. Ortega and Flores met with Brown in about January 2005. At that meeting Brown gave Ortega and Flores a draft proposed new contract to run from January 1, 2005 through December 31, 2007. It should be recalled that the parties already had an existing agreement through November 30. That draft proposal provided for substantial wage increases to be effective January 1, 2005. Brown explained that the new wage rates were more in line with the prevailing wage rates. The draft proposal was generally acceptable to Ortega and Flores except for the health insurance; they continued to insist on providing the unit employees with the Kaiser coverage. No final agreement was reached at that point. Ortega called Brown several times after the meeting to follow up on the health insurance issue. Brown was trying to get Local 47 to agree but the concern was that Respondent needed to spend the same amount on any replacement health insurance as it spent for the contractual health insurance or else pass on any savings to the employees.

³ On June 26, 2006, after the representation election in this case, the California Court of Appeals annulled that portion of the PUC’s ruling at issue in this case. In their brief the Joint Petitioners indicate that the California Supreme Court denied a request to review the lower court’s decision on September 13, 2006.

According to Ortega, the next meeting occurred at Respondent's counsel's office. Ortega, Flores, and Richard Freeman, Respondent's counsel, were present for Respondent; Brown and Pat Lavin, business manager, were present for Local 47. No agreement was reached at that time. At some point thereafter the Union agreed that Respondent could revert back to its Kaiser health insurance plan. There is some testimony that an agreement was signed in September between Respondent and Local 47 as a substitute for the existing contract, but no signed contract is in evidence and I am unable to conclude based on this record when or whether that contract was signed.

B. Events before the Election

Jonathan Osorno worked for Respondent as a laborer and pipe layer from August 2004 to mid June 2005 at which time he quit and started working for an employer whose employees were represented by Local 89. While still employed by Respondent, Osorno attended meetings held by Local 89 about once a week. Local 89 had invited the foremen to attend the meetings and Osorno saw Ruvalcaba at the meetings about four or five times. About a month before the election Ruvalcaba and he were driving together to a job site when Ruvalcaba said that the election was coming up and asked what union Osorno was supporting. Osorno replied that he was supporting Local 89. Ruvalcaba said that he was supporting Local 47. Ruvalcaba unconvincingly denied making these remarks. Osorno, on the other hand, impressed me as a credible witness in this instance and other instances described below.

An issue raised by the objections concerns whether Respondent granted Local 47 preferential access to its property to meet with employees on paid time. Brandon Jones worked as an operator for Respondent from January 2003 until mid June 2006. According to Osorno and Jones, their foremen told them that there would be a meeting held in Respondent's yard beginning at 7:00 a.m., the employees' normal starting time. The meeting occurred on August 26, unit employees attended this meeting, and it lasted about an hour. The employees were paid for this time. Representatives from Local 47 were there, including Business Manager Pat Lavin, Senior Assistant Business Manager Chet Bennett, and Organizer Richard Garcia. They told the employees of a contract that Local 47 and Respondent had agreed upon and that would be applied to them if they voted for Local 47 in the election. They handed out copies of a portion of the purported agreement. At that time Osorno was making \$17 per hour; according to the contract he would be getting \$21.33 per hour. Jones was making \$23 per hour; under the contract he would receive \$31. During the meeting the Local 47 representatives said that the health insurance would be switched back to Kaiser. This was viewed by employees as an improvement because there was dissatisfaction with their existing health care plan. As a result of the switch \$1.37 per hour was saved; the Local 47 representatives explained that the employees could choose to receive that as pay or apply it towards a vacation fund or a 401(k) plan. Flores was about 50 feet away from the meeting area.

The facts in the preceding paragraph are based on the credible and mutually corroborative testimony of Osorno and Jones. Ruvalcaba attended this meeting. Although Ruvalcaba recollection of the details of this meeting was hazy, he in general corroborated the testimony of Osorno and Jones except that he testified that the Local 47 representatives said that they would try and obtain the benefits for the employees rather than indicating that the employees would receive the benefits. Concerning the time of the meeting, Ruvalcaba initially testified that the meeting started somewhere around 7:00 a.m. But later when questioned by Respondent's counsel he testified that the meeting started between 6:00 a.m. and 7:00 a.m. and that it was before the workday started. I credit the testimony of Osorno and Jones when it conflicts with Ruvalcaba's shifting testimony concerning this meeting. Garcia testified that he

arrived at the facility around 5:45 a.m. He then said he arrived around 5:30 a.m. and that the meeting began around 6:00 a.m. after the employees arrived. Garcia testified that the meeting lasted about 30 minutes, but then said it lasted 35-40 minutes at the most and that all the Local 47 representatives left the yard before 7:00 a.m. Garcia denied that he or the other Local 47 representatives ever told the employees that Local 47 had a new signed contract with Respondent. When workers asked if the wages in the proposed contract would be the wages that the employees would receive, Garcia claims that they were told that it would be decided in negotiations with Respondent. But earlier in his testimony Garcia was asked whether the papers shown to employees represented what the employees would get if they voted for Local 47, Garcia answered "yes." Garcia impressed me as someone testifying in a manner consistent with a stated position rather than relating the facts; I give it little weight. Lavin testified that he told the employees that these were the types of benefits and wages that they were trying to get in a contract with Ortega. Ortega testified that he never allowed Local 47 to come on Respondent's property and meet with employees on working time. He claimed that Local 47 began its meeting with employees at the yard at 6 a.m., but when asked whether he saw Local 47 making a presentation to employees after 7:00 a.m. Ortega stated "I don't believe so." Vice President Flores testified that he arrived at the yard around 6:15 a.m. and the meeting between Local 47 and the employees had already begun. Flores testified that the meeting ended around 7:00 a.m. Neither Flores nor Ortega were convincing concerning the time the meeting began. Finally, David Vincent Hitzeman has worked for Respondent for 24 years; for the last 13 years he has worked as a foreman. Hitzeman testified concerning a meeting that started at 6:00 a.m. and lasted 15-20 minutes. He testified that he was not paid for this time. But Hitzeman testified that Garcia arrived there about 6:05 a.m., introduced himself as the new representative and gave out his business card. Hitzeman asked Garcia when they would start getting the prevailing wage and Garcia said he did not know but would get back to him. I conclude that Hitzeman testimony was not about the meeting described above but rather concerned another encounter with Garcia, who frequently visited the area near the facility in the morning.

After the meeting with Local 47 representatives described, Osorno was talking to his foreman when Vice President Flores joined them. After Osorno and his foreman finished their conversation, Flores said that if the workers wanted to go into Local 89 so badly, why did they not just quit the company and go to work for a company that had Local 89?. Osorno then took his tools and left for a jobsite. Flores testified that he did not know who Osorno was until shortly before the hearing. Flores did not recall speaking with Osorno about Osorno's preference for a particular labor organization. He also did not recall speaking with Osorno on the day of the meeting. I again credit Osorno's testimony; his testimony was specific in detail. Flores' testimony was uncertain and unconvincing.

Continuing on with the claim of unequal access, on August 25 Local 89 sent Respondent a letter indicating that it had learned that Local 47 had been granted access to Respondent's property to speak to employees during working and nonworking time. Local 89 requested the same access. On August 30 Respondent replied by letter claiming that it had allowed Local 47 access on August 26 from 6:00 a.m. to 7:00 a.m. "off the clock" to employees who voluntarily decided to attend. Respondent said that it would allow Local 89 the same access on September 2. On August 31 Local 89 wrote back that Respondent was incorrect in claiming that Local 47 had been granted access during nonworking time but that Local 89 would nonetheless meet with employees at the time offered in the earlier letter. Local 89 closed by stating that Respondent should notify its employees of the September 2 meeting as soon as possible. On September 2 Ortega testified that he arrived about 5:30 a.m. and noticed Cruz in the yard. He told Cruz not to come onto the property until 6:00 a.m. and to leave the property at 7:00 a.m. However, according to Juan Cruz, an organizer, after Local 89's representatives

arrived on September 2 Ortega told them that they needed to stay outside the property until 7:00 a.m. At 7:00 a.m. they went on the site and spoke to about 10-12 employees who were there. Moreover, Jones testified that this meeting too started at 7:00 a.m. and he was paid for the time. In sum, the letter and Ortega's testimony indicate that the meeting occurred before
5 working time, but the testimony from Local 89 and an employee supporter claim that they meeting occurred on working time! I explain my resolution of this issue below.

About a week before the election Ruvalcaba asked Jones about the meeting the night before with Local 89. After Jones told him what had happened Ruvalcaba said it was the same stuff that Local 89 was always saying. Ruvalcaba said the Ortega would never sign a contract with Local 89 and that Ortega would rather close his doors than sign a contract with Local 89. He said that it could take up to a year before Ortega signed the contract. Ruvalcaba said that the employees should just take the contract that Ortega had already signed with Local 47. Ruvalcaba accused Jones of telling employees that Ruvalcaba was spreading misinformation concerning what Ortega would do; Jones denied that. Ruvalcaba then said that Jones would
10 "be one of the first fucking ones to go." Ruvalcaba was speaking loudly and appeared to be angry. Ruvalcaba testified that the employees, including Jones, were talking how they would make more money with Local 89 as their representative. Ruvalcaba claims that he told them if everyone would be making more money with Local 89 then Ortega would have to bid his jobs
15 higher because the employees were making more money and that the employees might be then sitting at home. Ruvalcaba testified that Jones became upset and started cursing and he did not continue to talk to Jones because Jones looked like he was getting aggressive. I credit Jones' testimony over Ruvalcaba's. Jones' demeanor was sincere; Ruvalcaba appeared to be calculating his testimony to avoid crossing the line into illegality.
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Normally employees receive their paychecks first thing Friday morning at the jobsites from the foremen. It will be recalled that Respondent was attempting to ascertain precisely what the prevailing wages were that it should pay its employees and had been meeting with Local 47 to discuss a new contract. That new contract was not to succeed the existing contract set to
25 expire November 30 but to supersede the existing contract. On September 14, a week before the election, Ortega accompanied by Flores and Albert Carillo visited the jobsites and delivered the paychecks to the employees. This was the first time that Ortega had gone to the jobsites to hand out paychecks. When they arrived at the site where Osorno was working they told the employees to take a break. Ortega explained that the reason there was a delay in handing out
30 the checks that day was because he had to get authorization to adjust the wage rates that the employees were getting. Ortega said that there was an election coming up and he had his reasons why he did not like Local 89 and why he was in favor of Local 47 and if the employees wanted to discuss it further with him they could go to his office and talk about it. Osorno's pay check showed that he received a pay increase from \$17 to \$21.33 per hour. Jones' wage rate
35 increased from \$23 to \$31 per hour. The other unit employees also received pay increases ranging from \$1.33 to \$11.33 per hour. Osorno asked Ortega if this was the scale they would be getting if they voted for Local 47 and Ortega said yes. Osorno asked if a vision plan was included in the health care package that they would be receiving; Ortega asked Flores who
40 answered yes. Ortega said that they would be switching health insurance carriers to Kaiser and that the \$1.37 per hour that Respondent saved from the switch could be put into a vacation fund or put into their paychecks. The foregoing facts are again based on the credible testimony of Osorno and Jones. Ruvalcaba admitted that Ortega and Flores came to the jobsite and delivered the paychecks, but he claimed he was unable to recall what they said because he was
45 too busy. His wage rate rose from about \$20 to about \$32 per hour. Ortega testified that after the new contract was signed with Local 89 he, Flores, and Carillo visited the job sites, handed out the paychecks and told the employees about the new contract. Ortega specifically told them about the new wage rates and the new health insurance plan reverted to Kaiser.
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At a meeting held the day before the election, Ruvalcaba told some employees that he did not want to go into Local 89 because he did not know how long it would take for Ortega to sign a contract and he did not want to be short of work, so he thought that Local 47 was the safest way to go for him. Ruvalcaba said that he wasn't sure if there would be work for at least a year. According to Osorno, Ruvalcaba was sitting at a table with a copy of a Local 89 contract and slammed his hand on the table and was speaking loudly. Ruvalcaba denied making these remarks or slamming his hands on the table. I again credit Osorno's testimony over Ruvalcaba's.

C. George Marquez and Steven Pasos

George Michael Marquez had worked for Respondent on and off since 2001. He was hired as a foreman but later worked as an operator. Most recently he made \$18 per hour, the lowest rate among Respondent's operators. Marquez attended four or five meetings held by Local 89 and spoke at these meetings about his failure to get health insurance and low wages. Respondent's foremen, including Ruvalcaba, attended those meetings. Marquez wore a Local 89 baseball cap at work. On about August 1, Marquez was laid off. Other employees were laid off at the same time and there is no contention that Marquez' lay off was unlawful. On August 5, Marquez began working for another employer at the rate of \$41 per hour. As explained below, an issue in this case is whether Marquez called Respondent after the layoff to seek work. Marquez testified that he called in regularly to see if there was work for him but he only was able to reach Carillo's voice recording so Marquez left messages. Carillo testified he did not recall getting voice messages from Marquez that indicated "a desire to work." Carillo's mobile telephone records do not show any calls from the telephone number Marquez listed as his on his employment application; all calls from Marquez to Carillo occurred only before his layoff. As Respondent points out in its brief, although Marquez was recalled by the General Counsel as a rebuttal witness, he made no effort to explain why his telephone number did not appear on Carillo's telephone records. In his brief the General Counsel points out that there are several possible explanations as to why Marquez's number appears on Carillo's phone records only before and not after the layoff. Indeed there are. But the point is that findings of fact need to be based on evidence and not speculation. In the absence of any explanation to the contrary, Marquez' telephone records were surely available to him and the General Counsel as a basis of confirming his testimony concerning the telephone calls. The failure to produce these records undermines Marquez' testimony.

Marquez testified that about two weeks after the election he did reach Carillo by telephone. Marquez claims he asked Carillo that since the "union stuff" was over could he come back to work. Carillo answered that he did not have any work. Carillo testified that he could not recall any telephone calls from Marquez after the election. Marquez' testimony is not credible. The likelihood that he would ask for his job back at Respondent and give up his job at \$41 per hour is remote at best. And Marquez' testimony that he was able to reach Carillo on this single occasion after having been unable to reach him on all his previous attempts rings hollow. I conclude that Marquez made little, if any, effort to get his old job back.

On September 14 Carillo signed a form indicating that Marquez was terminated. The form indicated that Marquez last worked August 1 and was terminated because of "Lack of work. Also no call & no show." Thereafter Marquez voted without challenge at the election on September 21.

Carillo testified that he terminated Marquez because at that time there was no work on the horizon and that considering the new wage rates he would not be able to employ Marquez

at those rates. Carillo conceded that after he terminated Marquez, he hired Eric Sanchez as an operator; Sanchez was referred to Carillo by a foreman he had recently hired. Carillo tested Sanchez' work for about an hour and concluded Sanchez did extremely well. In early 2006, Carillo hired another operator, Ernie Tripp. Carillo had worked with Tripp 15 years earlier and knew him to be an experienced, good operator.

On February 7, 2006, Carillo called Marquez and offered him work. Marquez said that he was doing a side job for his brother but he would come in on February 9 to discuss the job offer. Marquez called on February 9 and said that he was still working on the side job and the soonest he could be in was February 13. On the 13th Marquez did appear at the facility. Marquez told Carillo that he had been working as an excavator earning \$41 per hour. Carillo explained that he did not have an operator's position available but was offering Marquez a position as a laborer. Marquez declined the offer. About two or three weeks later Marquez called and told Carillo that he wanted to accept the offer of employment as a laborer. Carillo replied that they did not need help at that time but Marquez was free to submit an application and Carillo would review it. Marquez then did complete an employment application on March 8, 2006, seeking work as an operator. The facts in this paragraph are based on Carillo's credible and largely uncontested testimony.

At the hearing Respondent presented evidence that Marquez was a poor employee and that was a reason why he was not called back to work. Ruvalcaba claimed that Marquez' performance was not very good. He pointed to an instance when Marquez was working as an operator lifting a two-ton trench plate and Marquez dropped the plate from a height of six feet and "almost killed somebody." Marquez admitted he dropped a plate, but claimed it was from a height of about two feet and no one was endangered by the drop. Ruvalcaba also claimed that Marquez had a hard time wearing his hard hat and safety vest and that he swung his bucket too quickly and almost injured someone a couple of times. Again, Ruvalcaba's testimony strikes me as exaggerated. David Vincent Hitzeman has worked for Respondent for 24 years; for the last 13 years he has worked as a foreman. Hitzeman worked with Marquez three or four times. Hitzeman testified that he watched the way Marquez operated the backhoe and move plates and concluded it was a hazard and that he would rather do the task himself. Hitzeman testified that Marquez rarely lasted more than a day on his crew. He claimed that Marquez could not load a truck, was slow digging, and always had to be told what to do. Hitzeman told Carillo of his problems with Marquez' work performance. Carillo testified that Marquez was used on simpler jobs because he could not operate as expected on more difficult jobs such as street conversions. Carillo testified that Hitzeman reported to him that Marquez was not very safe when transporting steel plates and Marquez was slow in trenching on street conversion jobs. Ruvalcaba also complained about Marquez' work to Carillo. According to Carillo, foreman Jeff Garrison repeatedly asked if he could get another operator to replace Marquez on his crew. Carillo told Garrison that he did not have a replacement and that Garrison had to work with what he had. According to Marquez, no supervisor ever told him that they did not like his work, but he later admitted that in 2004 he was reprimanded for failing to wear a hardhat on a jobsite.

Steven Pasos, Jr., began working for Respondent as a laborer in June 2003: he had also worked there years earlier. Pasos attended about 12-13 meetings sponsored by Local 89. From 5-6 to 10-13 employees attended these meetings. Pasos asked questions at these meetings about what benefits the employees would receive if Local 89 was selected. But Pasos did not publicly reveal at these meetings how he intended to vote. As indicated, Ruvalcaba and other foremen also attended some of these meetings.

On about August 8, Carillo told Pasos that work was slowing and thereafter Pasos did not receive any more work assignments. As with Marquez, there is no contention that Pasos'

lay off was unlawful. Pasos testified that he called Carillo the following work day and asked if there was work, but Carillo again said things were slow. Pasos claimed that he called several times that week and received the same response, so he asked Carillo to call him if any work came in. However, Carillo's mobile telephone records indicate that while Pasos called Carillo before his lay off he did not call during the days after his lay off. In this regard the records show that earlier Pasos was temporarily off due to lack of work but called Carillo on July 21 and 22; Pasos returned to work the following Monday.

On about August 11 Carillo called Pasos and asked if he wanted to attend a flagging class. A flagger is a person who does traffic control and Respondent was contemplating a bid on some flagging work with SDG&E. Carillo called Pasos because he thought it was a good opportunity for Pasos to continue to work for Respondent. Pasos and other employees attended the class. Ultimately, Respondent did not get the flagging contract. According to Carillo, after he spoke to Pasos about the flagging training he never heard from Pasos again until after the election.

Pasos was subpoenaed by Local 89 to appear at a hearing on August 17 in the representation case; Pasos appeared as required but the hearing was not held because the parties stipulated to an election. Pasos sat in the back of the crowded hearing room with other employees; Ortega sat in the front at a table with his back to Pasos and the other employees. Ortega testified that he noticed only two employees from Respondent at the hearing, Bruce Dobbs and Kyle Keil. Keil was an open supporter of Local 89 and told Ortega of this. Keil continued to work for Respondent throughout this period. I credit Ortega's testimony that he did not observe Pasos in the crowded room.

On September 14 Carillo signed a form indicating that Pasos was terminated. The form indicated that Pasos last worked August 8 and was terminated because of "Lack of work. Also no call & no show." Carillo explained that he had not heard from Pasos for over a month and other laborers were coming in and checking if there was work.

Pasos was an observer on behalf of Local 89 and voted without challenge at the election on September 21.

After several weeks Pasos still had not received his certification card for the flagging class. He called Carillo who said the certification card was in the office, so Pasos went to the facility to pick it up. While at the facility Pasos noticed that other employees who had been laid off with him had returned to work. While he was there Pasos spoke to Flores; Pasos and Flores disagree as to what was said. According to Pasos he asked Flores whether he still was an employee with Ortega, and Flores assured him that he was. Flores told Pasos that he should wait a job or two. Flores, however, testified that Pasos asked if he still had a job. Flores told Pasos that he had to talk with Carillo. Pasos exclaimed "Well, that's how it's going to be?" Flores replied that he did not know what Pasos was talking about but that Pasos needed to get with Carillo. Flores explained at the hearing that Carillo handled the dispatching of the work force and that he, Flores, did not get involved. I conclude that Flores' testimony is more probable than Pasos' and I credit it. Four or five days later Pasos called Carillo and asked when he was going back to work. Carillo replied that he was not going back to work, that Carillo had written him off. Pasos asked why and Carillo replied because Pasos never called him. Pasos then hung up the phone.

On February 7, 2006, Carillo called Pasos and asked if Pasos was working. Pasos said that he was, and that it was with an employer who recognized Local 89. Carillo said that Respondent had work and offered Pasos employment, but he declined. On February 13 Pasos

called Respondent and claimed that he had been laid off on February 8 and now wanted to return to work. Carillo asked Pasos to report to work on February 15. On February 14 Pasos called and asked what the pay rate would be; he was told it would be \$16.37 per hour compared to the \$15 he was making before his lay off. The new rate was for the same position Pasos held before the layoff. Pasos then said he would not work at that rate and did not appear for work. These events were set forth in a letter that Carillo sent to Pasos on about February 15; Pasos never disputed the contents of the letter. I credit the letter and Carillo's testimony about these events over Pasos' incomplete description.

Ruvalcaba testified that in his opinion Pasos' work performance was less than average. He claimed that Pasos would mix up the pipe that was being laid so he would have Pasos sweep the streets and organize the yard. Pasos admitted that on a couple of occasions he made mistakes in handling conduit and Ruvalcaba spoke to him about it. He remembered another occasion where Ruvalcaba told him that he was messing up. Pasos related an incident in April, before the organizational campaign began, when he asked Carillo for a raise. Carillo answered, in a sarcastic tone "oh yeah, I'll think about it." Pasos took this as a negative comment on his work performance. From time to time Hitzeman has been foreman of crews that included Pasos. Hitzeman testified that he thought Pasos was lazy, did not really have knowledge of the industry, and was difficult to keep busy. Hitzeman testified that Pasos did not know the difference between pipes, why they were working there or what they were doing, so Hitzeman kept Pasos busy doing simple tasks. Hitzeman also asked Carillo to move Pasos from his crew to other sites. Carillo testified that when work got slow and the foremen began to select who they wanted to work with Pasos was rarely selected. The foremen explained to Carillo that Pasos' skill level was not up to the level of other laborers. They frequently used Pasos to sweep around the work site, performing flagging, or act as a gopher. Neither Pasos nor Marquez received merit pay increases that other workers received above the minimum.

As indicated, Respondent presented testimony purporting to show that Marquez and Pasos were not recalled from lay off because they were poor performers. But in a statement of position submitted during the investigation of these cases Respondent stated that Marquez and Pasos "did not regularly contact the company to express their interest in returning to work if business picked up. As a result, they were not recalled." There is no mention of poor performance.

Respondent did not give any written reprimands to Pasos for his alleged poor work and, except for the instance of not wearing a hardhat; Respondent did not give written reprimands to Marquez either. Respondent, however, did give written reprimands to other employees. For example, on July 20, 2004, Respondent gave Jesse Chairez a written reprimand and a one-day suspension for failing to lock an air compressor. On July 11, 2003, Respondent gave Chairez a written reprimand and three-day suspension for "not exposing wire by hand and hitting 6" PE with backhoe." On April 18, 2005, Jeff Garrison received a written warning for leaving an air compressor on a job site resulting in the loss of the compressor at a cost of \$13,500. Garrison received a three-day suspension on February 22, 2006, for a safety infraction involving his failure to shore up a trench. On November 17, 2005, Ray Gutierrez received a written warning for hitting a water line. Wade Koons received a written warning for making a bad gas fit. On July 5, 2004, Ruvalcaba received a written warning not wearing a hardhat. Other similar instances of discipline for poor work are documented in the record. There is no evidence that Respondent failed to recall any of these employees from lay off as a result of their poor work performance.

Concerning the availability of work after the layoffs, Carillo keeps a list of employees who are off from work, including those who are off because of lack of work. By September 19

no employees remained on Carillo’s off list due to lack of work although thereafter there were times when employees were of due to lack of work. By the final quarter in 2005, three new names appear as employees in laborer positions – Gonzalo Martinez, Tyler Marino, and Omar Martinez. I conclude that the lack of work that led to the early August layoffs ended on about
5 September 19.

Carillo testified that he was unaware of the union sympathies of either Marquez or Pasos when he laid them off and later terminated their employment.

10 III. Analysis

As described above, about a month before the election Ruvalcaba and Osorno were driving together to a job site when Ruvalcaba said that the election was coming up and what union did Osorno supporting. Osorno replied that he was supporting Local 89. Ruvalcaba said that he was supporting Local 47. The General Counsel and the Joint Petitioners contend that
15 these remarks were an unlawful interrogation. In determining whether questioning of an employee concerning the employee’s union sympathies violates the Act, the Board examines all relevant circumstances surrounding the questioning. *Rossmore House*, 269 NLRB 1176 (1984),
20 enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Here, the questioning was conducted by a low level supervisor. In fact, Ruvalcaba had been invited to attend the Local 89 meetings and did so. He and the other foremen expected to vote in the election and the employees knew this. The questioning occurred in a truck as Osorno and Ruvalcaba were driving to a job site. Osorno, an open supporter of Local 89, honestly answered Ruvalcaba’s question and then
25 Ruvalcaba volunteered his support for Local 47. The discussion then ended. Under these circumstances I conclude that the questioning was not coercive and did not violate the Act or constitute objectionable conduct.

I have described above how on August 26 Flores said that if the workers wanted to join
30 Local 89 so badly, why they didn’t just quit the company and go to work for a company that had Local 89. The complaint alleges that Flores’ comments violated Section 8(a) (1). The Board has long held that such statements threaten employees in the exercise of their rights guaranteed by Section 7 of the Act. *Stoody Co.*, 312 NLRB 1175, 1181-82 (1993) and cases cited therein. By telling employees that they should quit if they supported the Joint Petitioners,
35 Respondent violated Section 8(a)(1) of the Act.

The Joint Petitioners claim that Respondent engaged in objectionable conduct by granting Local 47 preferential access to employees on its property and on working time. I have
40 concluded above that Respondent did grant Local 47 access to employees on August 26 during working time. I have also concluded that Respondent granted the Joint Petitioners access to its property on September 2. But there is conflicting testimony concerning when the meeting on September 2 actually began. The Joint Petitioners bear the burden of persuading that objectionable conduct has occurred sufficient to affect the election results. *Progress Industries*,
45 285 NLRB 694, 700 (1987). In this instance the testimony of the Joint Petitioners’ agent and the testimony of an employee supporter is that the Joint Petitioners did get access on September 2 during working time. Under these circumstances I conclude that the Joint Petitioners have failed to meet their burden on this issue. Next, the Joint Petitioners contend that the Respondent’s “grant of a *noticed* meeting during work time” (emphasis added) to Local 47 while
50 denying the same to the Joint Petitioners improperly affected the election outcome. They rely on the testimony of Osorno and Jones that they learned of the meeting with Local 47 from their foremen. But there is no stipulation or proof that all foremen are supervisors or agents of Respondent. And even if the foremen are supervisors, the evidence shows that they were

invited to meetings with Local 89 and Local 47 and expected to vote in election. So I decline to infer that Osorno's and Jones' foremen learned of the meeting from Respondent as opposed to from Local 47 or other employees. In sum, this objection should be overruled.

5 The complaint alleges Respondent unlawfully threatened to discharge Jones. I have
found above that about a week before the election Ruvalcaba angrily told Jones that he would
be one of the first to go. In the context of that discussion, this was a threat to fire Jones
because he supported Local 89. This statement violates Section 8(a)(1). *Electric Hose and*
10 *Rubber Co.*, 262 NLRB 186, 201. Ruvalcaba also said that Ortega would never sign a contract
with Local 89. This statement signals employees that it would be futile to support the Joint
Petitioners; it also violates Section 8(a)(1). *Baby Watson Cheesecake, Inc.*, 320 NLRB 779,
785 (1996). Although the complaint alleges that Ruvalcaba made that statement on or about
September 21 and I have concluded that the statement occurred on about September 14, I find
15 that the complaint allegation is broad enough to cover this violation. Finally, Ruvalcaba said
that Ortega would close its doors rather than sign a contract with Local 89. This threat of plant
closure if the employees selected Local 89 as their collective bargaining representative violates
the Act. *DeCasper Corp.*, 278 NLRB 143, 146 (1986). The last violation was not alleged in the
complaint. However, it was part of the same conversation as the other violations which were
20 alleged in the complaint. They are all closely related and were fully litigated. Under these
circumstances it proper to find the additional violation. *Pergament United States*, 296 NLRB
333, 334 (1989), enf. 920 F. 2d 130 (2d Cir. 1990).

Joint Petitioners argue that the general wage increase improperly affected the elections
results. A grant of new or enhanced benefits to employees for the purpose of influencing how
25 the employees vote in an election is unlawful. *NLRB v. Exchange Parts Co.*, 375 U.S. 405
(1964). Here, a week before the election Respondent granted wage increases to its unit
employees. Absent explanation, the timing alone is sufficient to warrant an inference that the
wage increases were designed to affect the election results. The raises given to employees
were substantial if not unprecedented; they ranged \$1.33 to \$11.33 per hour with a promise of
30 an additional \$1.37 per hour to come later. The manner in which the raises were announced –
Respondent's top officials visited the job sites to personally distribute the paychecks with the
raises – indicates that something out of the ordinary was happening. In sum, the timing,
magnitude, and manner of announcement of the wage increases together provide a compelling
case against Respondent.

35 I turn now to examine the reasons proffered by Respondent to explain the raises. First,
as Joint Petitioners point on in their brief, Respondent initially took the position in response to
the objections that it was under an "already existing duty to comply with obligations imposed by
its customer . . . that were previously set to become effective on September 1, 2005," pursuant
40 to PUC order of December 16, 2004. But the evidence adduced at the hearing does not support
the contention that there was any such duty to act by September 1. Indeed, in its brief
Respondent no longer makes this argument. The very fact that Respondent asserts a
justification and then abandons it indicates to me that Respondent is still searching for a lawful
explanation. Respondent argues that it was required to grant the wage increases pursuant to
45 the PUC's ruling and as required by the SDG&E. However, those requirements were imposed
in late 2004 and early 2005; the wage increases were given in mid-September. Moreover, the
directives from the PUC and SDG&E were imprecise concerning the amount of increases that
Respondent was required to give to the employees. Indeed, as pointed out above, on
September 12, two days before it granted the wage increases, Respondent's counsel sent a
50 letter asking the DIR for information concerning the prevailing rates. Nothing from the PUC or
from the SDG&E explains the magnitude or timing of the wage increases. Respondent cites
Tinius Olsen Testing Machine Co., 329 NLRB 351 (1999). In that case the employer negotiated

a new successor collective-bargaining agreement with the incumbent union that provided for retroactive wages increases. The employer paid the employees the retroactive wage increases the first payroll period after the new contract was ratified. The Board held that the grant of wage increases did not improperly affect the results of the election. Here, there is no evidence
5 whatsoever that the wage increases were granted pursuant to a successor collective-bargaining agreement. Rather, the discussion between Respondent and Local 47 centered on a contract to supersede the existing contract before it expired. Respondent certainly had no legal requirement to do that. Moreover, Respondent never established that even a superseding contract was entered into. Respondent did not place in evidence a signed copy of that
10 agreement and I decline to find one existed based solely on the self-serving statements of the parties with a stake in this litigation. I conclude that *Tinius* is not on point. Having rejected the reasons proffered by Respondent, I conclude that Respondent's grant of the wage increases on September 14 was improperly designed to, and did, affect the results of the election.

15 Next, the General Counsel contends that on the day before the election Ruvalcaba again unlawfully threatened that Ortega would not sign a contract with Local 89 or that it might take a year to do so. I have already found that Ruvalcaba made such an unlawful statement on about September 14. Moreover, in this instance Ruvalcaba told employees that he did not want to go into a labor union because he did not know how long it would take for Ortega to sign a contract
20 and he did not want to be short of work, so he thought that Local 47 was the safest way to go for him and he did not know how long it would take Ortega to sign the contract. So Ruvalcaba's statements this time were more ambiguous. In any event I need not resolve this contention because it will not affect the remedy.

25 In determining whether Respondent unlawfully failed to recall Marquez and Pasos from lay off I use the analytical framework described in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 800 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management*, 462 U.S. 393 (1983). Generally, the General Counsel must show that the alleged discriminatees engaged in union activity, the employer knew of the activity, and the employer
30 was hostile to union activity. Here, both Marquez and Pasos attended meetings on behalf of Local 89 and spoke at those meetings, but so did many other employees who were recalled from layoff. Marquez wore a cap with Local 89's name on it, but there is no evidence that anyone spoke to him about the cap or otherwise noticed the name on the cap. While Pasos attended the representation case hearing, he was part of a crowded room and I have
35 determined that Ortega did not see him there. In other words, the union activities of Marquez and Pasos were minimal. Carillo testified that he was unaware of the union sympathies of either Marquez or Pasos when he laid them off and later terminated them. I credit that testimony. I do so not only based on my observation of Carillo's demeanor, but also because the inherent probabilities support that conclusion. I have already noted that Marquez and Pasos' union
40 activities were minimal and not of a nature to have them stand out as Local 89 supporters. Also, I think it is highly significant that Carillo called Pasos in the days following his layoff to encourage Pasos to take a flagging class; this is hardly consistent with someone set on a path to discriminate against Pasos. While there is evidence that Ruvalcaba also attended some of the Local 89 meetings it does not always follow as a matter of law that I must infer that Carillo
45 learned of this directly or indirectly from Carillo. *Music Express East*, 340 NLRB 1063 (2004); *Dr. Phillip Megdad, D.D.S.*, 267 NLRB 82 (1983).

In concluding that the General Counsel has not met his burden under *Wright Line* I have
50 considered the argument that Respondent gave shifting explanations concerning its failure to recall Pasos and Marquez. Respondent contends that Marquez and Pasos were marginal employees and therefore were not recalled. But this reason did not appear on the termination form or in Respondent's statement of position. And while it appears that Pasos and Marquez

were not among the best of employees, other employees had received discipline for poor work yet continued to work. I conclude that this contention was made up after the fact. Also, on the termination forms dated September 14, Respondent refers to lack of work. But I have concluded that work began to pick up by September 19 and all other laid off employees had returned to work. So this justification is simply false. Normally these findings would support a conclusion of discriminatory conduct. But the fact remains that on the termination form, in its statement of position, in its comments to Pasos, and at the hearing Respondent has consistently maintained that a reason for failing to recall Pasos and Marquez is that they failed to show an interest in returning to work by failing to call in. I have concluded above that Pasos and Marquez made little effort, if any, to return to work. So this is not a case where Respondent has gone from one justification to the next; rather, although Respondent has added on justifications, it has consistently provided the same reason for its failure to recall the two employees. Under these circumstances I decline to infer discriminatory motive from the multiple explanations. I dismiss these allegations. Because I have concluded that Carillo did not see Pasos at the representation hearing I dismiss the Section 8(a)(4) allegation also.

Conclusions of Law

1. By the following conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

- (a) Telling employees that they should quit if they supported the Joint Petitioners.
- (b) Telling employees that it would be futile for them to support the Joint Petitioners.
- (c) Threatening to fire employees because they support the Joint Petitioners.
- (d) Threatening to close its doors rather than sign a contract with the Joint Petitioners.

2. Respondent's grant of the wage increases on September 14 was improperly designed to, and did, affect the results of the election.

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.⁴

ORDER

The Respondent, A.M. Ortega Construction, Inc., Lakeside, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁴ 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.

(a) Telling employees that they should quit if they supported the Joint Petitioners.

5 (b) Telling employees that it would be futile for them to support the Joint Petitioners.

(c) Threatening to fire employees because they support the Joint Petitioners.

10 (d) Threatening to close its doors rather than sign a contract with the Joint Petitioners.

(e) 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.

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

20 (a) Within 14 days after service by the Region, post at its facility in Riverside, California, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 26, 2005.

30 (b) 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.

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

40 I have concluded above that Respondent repeatedly violated the Act during the critical period. I have also concluded that Respondent engaged in objectionable conduct by granting the wage increases to all unit employees. The combination of this conduct prevented a free and fair election. Accordingly,

45 IT IS FURTHER ORDERED that a second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those

50 ⁵ 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."

employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements, *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or have been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented by Local 47, the Joint Petitioners, or neither.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C.

William G. Kocol
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities

WE WILL NOT tell employees that they should quit if they supported the Joint Petitioners.

WE WILL NOT tell employees that it would be futile for them to support the Joint Petitioners.

WE WILL NOT threaten to fire employees because they support the Joint Petitioners.

WE WILL NOT threaten to close our doors rather than sign a contract with the Joint Petitioners.

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

A.M. ORTEGA CONSTRUCTION, INC.,

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

888 South Figueroa Street, 9th Floor
Los Angeles, California 90017-5449
Hours: 8:30 a.m. to 5 p.m.
213-894-5200

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 213-894-5229.