

Wellstream Corporation and United Association of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 229. Cases 15-CA-11631, 15-CA-11650, 15-CA-11650-2, 15-CA-11650-3, and 15-CA-11650-4

June 13, 1996

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

On January 23, 1996, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed cross-exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondent's exceptions and the Respondent filed an answering brief to the Charging Party's cross-exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Wellstream Corporation, Panama City, Florida, its officers, agents, successors, and assigns shall pay Daniel Battistini \$53,994.38 as of the July 27, 1995 backpay hearing with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), with backpay and interest continuing to accrue until the date Battistini is reinstated or

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

²The Charging Party has excepted to the failure of the judge to impose certain additional remedies on the Respondent. To the extent that the Charging Party is seeking to expand the Board's underlying Order to include additional requirements, we deny the Charging Party's exceptions on the grounds that the Charging Party's request is untimely. To the extent that the Charging Party is seeking an award of litigation expenses for the litigation of the compliance proceeding, we deny its request as lacking in merit, on the grounds that the Respondent's defenses in the compliance proceeding were not clearly frivolous within the meaning of *Frontier Hotel & Casino*, 318 NLRB 857 (1995).

Although Member Cohen did not participate in *Frontier Hotel & Casino*, and does not necessarily agree with it, he concurs that the Charging Party's request for extraordinary remedies lacks merit.

is offered reinstatement and refuses, minus any tax withholding required by Federal and state laws.

Stacey M. Stein, Esq. and *Kathleen McKinney, Esq.*, for the General Counsel.

Michael S. Mitchell, Esq. and *Timothy H. Scott, Esq.* (*Fisher and Phillips*), of New Orleans, Louisiana, for the Respondent.

Brian A. Powers, Esq. (*O'Donoghue and O'Donoghue*), of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This is a backpay case that was heard before me on July 27 and 28, 1995, at Panama City, Florida. Prior to this I issued a decision in the underlying unfair labor practice case in Wellstream Corporation, Cases 15-CA-11631, 15-CA-116504, 15-CA-11650-2, 15-CA-11650-3, 15-CA-116504, and 15-RC-7620 on March 15, 1993, which decision was appealed to the National Labor Relations Board (the Board) that affirmed my decision as modified, 313 NLRB 117, 698, 709 (1994). In addition to a finding of a number of 8(a)(1) violations of the National Labor Relations Act (the Act) involving unlawful threats and interrogation, solicitation, policy changes, and other 8(a)(1) violations, I found violations of Section 8(a)(1) and (3) of the Act committed against union supporters including the unlawful warnings issued to its employee Daniel Battistini and its unlawful suspension of Battistini on October 31, 1991, and its discharge of him on November 6, 1991. My order as adopted by the Board provided in pertinent part that the Respondent rescind the unlawful warnings, suspension, and discharge of Battistini and offer him full reinstatement to his former position or to a substantially equivalent position if his former position no longer existed and that Battistini be made whole for all loss of pay and benefits including seniority and other rights and privileges sustained by him as a result of Respondent's unlawful suspension and discharge of him. On October 7, 1994, Respondent entered into a stipulation with the Acting Regional Director of Region 15 of the Board wherein it agreed to forgo its right to appeal the Board's Order issued on February 25, 1994, and provided for the submission of issues raised by the Respondent's refusal to reinstate Battistini and concerning the amount of backpay due for resolution by an administrative law judge. As of the date of the hearing, Respondent owed Battistini \$53,994.38 in backpay according to the calculation of backpay submitted by the General Counsel in an amended Specification and Notice filed by the General Counsel on July 27, 1995. Respondent did not challenge the method of calculating backpay utilized by the General Counsel nor the amount of backpay derived from those calculations and admitted the accuracy of the General Counsel's calculations of overtime pay owing to Battistini and that of a Christmas bonus given the employees in December 1994. However, Respondent contends that Battistini's backpay period was tolled effective December 31, 1991, which was the date through which it contends Battistini would have been paid as a result of a reduction in force by Respondent on November 25, 1991, as Respondent contends that Battistini

would have been laid off with three other maintenance department employees, who were laid off at that time. Respondent further contended at the hearing that Battistini willfully incurred a loss of employment by abandoning his first interim employment. In its brief it abandoned its earlier contention of an alleged failure of Battistini to diligently seek other interim employment to offset his loss of earnings. Thus the issues before me are:

1. Whether Respondent's obligation to reinstate Battistini and its backpay obligation should be tolled as of the November 25, 1991 reduction in force.

2. Whether Battistini willfully incurred a loss of earnings by abandoning interim employment with B & S Electric so as to toll Wellstream's backpay obligation to the extent of which the duration of that employment would have continued in the absence of the willful abandonment of this employment.

The answer to both of these issues is no.

Facts

In November 1991, Respondent had a substantial reduction in its work force according to the un rebutted testimony of Tim Hall, the former director of special projects for the Hillman Company, an investment holding company that was the majority stockholder of Wellstream in 1991. Hall testified that the reduction in force was necessitated by substantial losses and was carried out at the behest of Respondent's majority stockholder Hillman Company on the recommendation of Simmons & Company International, an oil and gas corporate finance consulting firm. Wellstream had posted a \$20 million loss on revenues of approximately \$9 million for the fiscal year ending June 10, 1991. According to Hall Respondent's dire financial straits brought the investment company to consider liquidation of Respondent as a possible alternative. Ultimately according to Hall it was decided to take other cost cutting measures including a reduction of personnel including management and hourly employees. According to the testimony of Hall the report issued by Simmons called for the reduction of three mechanics in the maintenance department not including Battistini who had already been suspended and was ultimately terminated in November 1991. Thus, no consideration was given to Battistini for retention in the reduction in force as he had already been terminated in November. Respondent contends that had he not been unlawfully terminated in November 1991, however, and had continued as an employee he would have nonetheless been laid off in what it contends was a permanent layoff for non-discriminatory reasons in November 1991, as a result of his alleged failings as an employee and as a result of a comparison of Battistini's job performance and skills as an employee with those of other mechanics and a helper in the maintenance department.

Former Plant Manager Ray Marlow testified as follows: He had ultimate authority to determine who would be laid off among the mechanics. If Battistini had still been employed by Respondent at the time of the reduction in force, Battistini would have been one of the employees permanently laid off. He noted that there were some instances in early November 1991 wherein Battistini:

had been working on some equipment which created some safety problems. Didn't follow through on some

work he was supposed to have been doing and a particular piece of equipment that had the safety problems.

And in addition to that I felt and the maintenance supervisor (Allan Saap) felt that we occasionally had to go check on his work when he was assigned a job to make sure it was done properly.

He tended to take the shortcuts. Instead of doing a job right the first time just doing it kind of half right, you might say and just didn't show a—the skills of a good tradesman.

Marlow testified further that he was not satisfied with the quality of Battistini's work. When asked by me what he based his opinion on that Battistini would not have been retained if he had still been employed at the time of the reduction in force in late November 1991, Marlow cited, "The degree of trust." When asked further by me if there was anything else on which he was basing his lack of trust in Battistini other than the three items he had testified about in the prior hearing (on which Battistini's unlawful suspension and discharge had been based), Marlow answered:

I had to trust Mr. Saap's judgment that he told me he had to go over that work that had been assigned to Battistini on previous occasions, and that in some cases it was not carried out satisfactory and he had to go back and redo it.

In my personal observation of the general work practices and the cleanliness and how they handle pieces of equipment while they're working on it.

JUDGE CULLEN: Anything specific?

MARLOW: Not that I could recall now

Marlow acknowledged that an August 6, and 10 appraisal of Battistini rated his job performance as "good" and "excellent." On cross-examination by the Charging Party Marlow was asked whether Battistini had any strengths as an employee and replied, "[H]e didn't gripe a lot sometimes when he was given nasty assignments, you know." Although it was established that Respondent is one of only two companies in the world making the flexible pipe for undersea transportation of oil and the General Counsel elicited un rebutted testimony from Battistini and other employee witnesses concerning numerous items of specialized machinery utilized in Respondent's operation on which Battistini had been working on for a year and a half prior to his discharge, Marlow continued throughout his testimony to disparage Battistini's experience by reference to his prior experience as a mechanic in the United States Navy. Marlow denied he was ever told to keep the best and the brightest employees as Hall testified he had directed be done but rather testified he was told to use his judgment on what he needed to run the shop. He testified the reason for the layoff was to cut costs.

Allen Saap who was a maintenance supervisor from early 1991 to about a year before the hearing testified as follows: He is currently a senior test technician in the engineering department, a position he has held for the last 6 months and was in special projects immediately prior to his present position. He has been at the plant for 17 years and has been with Wellstream since they took over the plant 6 years ago. Shortly before the layoffs in November 1991 (a matter of days), he was asked by Marlow to look at the personnel in the maintenance department under his supervision as there was

going to be a reduction in force. He was asked to make a list of the employees under his supervision according to their qualifications and the “real criteria to be used was to maintain the plant and the operation of the plant and the versatility of the people and the qualifications that they would have.” Seniority did not play a big part. He was not given any target numbers to reach and he came up with a handwritten list ranking employees in the maintenance department that he gave to Marlow. The employees who were laid off “basically” followed his list. Although Battistini was laid off in early November 1991, and the layoff occurred in late November 1991, he believes that Battistini was on the list although he is not certain whether Battistini’s name was on the list. When he became maintenance foreman in the spring of 1991, Battistini had already been promoted to maintenance mechanic. Battistini “had some basic electrical and electronic experience, had very little mechanical abilities,” and “[i]t seemed to me his work ethics were real light.” All he knew about Battistini’s prior experience was that he had some electronic experience from the Navy. Battistini could not work with little or no supervision. There were times when Battistini had to be followed up to see if he had done all the maintenance on his check list for the extruder line. He disagrees with the excellent ratings of Battistini made by former Supervisor James Wilson in 1990 based on his observation of Battistini’s work in 1991 and believes that even a 20-year maintenance mechanic in an industrial environment would not get such high marks. At Respondent’s attorney’s request he went through the lists of the 10 individuals in the maintenance department who were considered for layoff in making up his list and would have rated all of the employees above Battistini based on skills and abilities in November 1991.

Herman Riley was the electronic technician. And also the lead mechanic. Herman [Riley] possessed the skills in electronics and in depth electrical experience. He had also several years of industrial experience in electronics and electrical.

He also had been involved in a lot of mechanical experiences previous years. I worked with Herman in previous years in the same facility in which he was a maintenance mechanic at that time.

He had worked on overhead cranes a lot. He had a lot of knowledge of the overhead crane, the facility itself, the chillers and boilers, total facility. He had a lot of knowledge and experience in all the outside power circuits and substations and all the transformers.

Arsenio Bacani was a maintenance mechanic which had a lot of electronic and electric experience. He also had some mechanical experience.

He was, basically, assigned into the facility maintenance, which he took care of all the air conditioner, the chillers, the boilers, all the air handlers, switch gear, and general facility maintenance.

And also worked on overhead cranes and helped out on the production equipment when needed.

Mr. Parker was a maintenance mechanic. Mr. Parker has a lot of experience in mechanical. He has a lot of experience in electrical. He has some experience in electronics.

Basically Mr. Parker was involved in the set up of the plant machinery and equipment.

Had a lot of experience on overhead cranes throughout the plant. Basically had been used in some of the facility maintenance also.

Ricky Cranford was a maintenance mechanic. He was very knowledgeable and had several years of industrial type, fabrication type, mechanical. Real good on gear boxes. Real good on general mechanical maintenance.

He had a basic background in electrical. He had worked a lot on the overhead cranes. He had been involved in some of the facility work, also. And he had been in on some of the set up of some of the equipment.

Mr. Roper was a maintenance mechanic. He had a strong background in electrical motors. He was used quite frequently on repairs of the overhead crane motors, electrical motors, a lot of the motors around the plant. He had a strong background in that.

He also had a mechanical background, several years of industrial type experience.

Mr. Snow was a helper at that time, which was—he had a background in electrical work. He came up through apprenticeship type program. And he showed good work ethics during that time.

And he had a strong, strong desire to learn and work.

Gerald Riley [who was laid off] was a maintenance mechanic. He had a real strong background in electrical and electronics. He had several years of experience in industrial maintenance, electrical maintenance.

And he was very heavily relied on during that period of time as to working on some of the equipment we had as far as the electrical and electronics.

Mr. Bert Greer [who was laid off] was a maintenance mechanic that had several years of—He was almost an expert in hydraulics. And he had some mechanical background. Very little electrical background.

He’d spent most of his time in the Service and had about ten years of industrial maintenance background.

Eric Clenny [who was laid off] was a maintenance mechanic. He had an electrical background. He was previously in the production area. He had acquired a lot of knowledge of the equipment, especially the carcass line and extrusion line, the functions. He understood how to work on them a lot better by knowing the equipment previously.

He had some mechanical abilities.

Since the 1991 layoffs none of the laid-off employees have been hired back except Supervisor James Wilson who was hired back as a maintenance mechanic. He has hired four or five new employees in addition to Wilson into the maintenance department since the reduction in force.

He became Battistini’s supervisor in the summer of 1991. On one occasion he found that Battistini had not done something on the extruder line although it had been checked off as having been done. He does not recall what it was. He does not recall the reason it was not done. On cross-examination by the General Counsel:

Q. What’s the second occasion you can recall having to correct Mr. Battistini or follow-up on his work?

A. Exact situations, you know, that would be just hearsay to say that. But there was other incidents throughout the time period.

And as far as exact situations, I'm not here to state those.

He recalls "counseling Battistini on occasions, at least two or three times with James Wilson present, also."

"Discussing his workmanship, his lack in showing up for work, his lack in tardiness, his lack in being on third shift and not coming in. These kind of things." No note was put in Battistini's file concerning the counseling about the failure to complete the work on the checklist for the extruder. He also recalls an incident concerning the use of improper tools and the jamming of the nozzle on the fuel hose, both of which incidents led to discipline in the underlying case and (which discipline was found unlawful by me). He did not write Battistini up for his alleged tardiness and attendance problems.

On further cross-examination of Saap by the General Counsel:

Q. But as far as violations of safety policies or procedures, the only ones you're aware of are the extruder line, the channel locks, the fuel nozzle, and what he eventually gets terminated for, the A-frame. Isn't that correct?

A. Those are the main ones, yes, that I'm aware of.

Q. I didn't ask you the main ones. I said those were the only ones you're aware of. Are you aware of others?

A. As far as detail, no.

Saap testified further that he believes Battistini's name was on the list he gave to Marlow and that Marlow adopted his recommendations. He gave the handwritten list to Marlow but is not 100 percent sure that Battistini's name was on the list. His list did not take into account any alleged tardiness or attendance problems of Battistini.

Saap testified that Watkins Engineering was brought on site to perform work formerly performed by the maintenance department employees. At one point there were close to 20 Watkins employees on the site and 10 of them were performing maintenance work. The Watkins employees were on site for about a year. They were brought in within a year after Battistini was terminated. On cross-examination he testified he was not using Watkins to screen for employees. When confronted with a memorandum dated March 1, 1993, however, from him to Don Lenz, who was then the operations manager, he acknowledged that he had written to Lenz, "I'll suggest at this time that we continue to use the Watkins contractor to add these personnel. This will allow us to review the personnel for further employment with Wellstream." He testified that at this point in time Watkins was being phased out and he needed to hire additional employees to replace them.

Herman Riley was called by Respondent to testify.¹ Riley was asked to compare Battistini's ability with several em-

ployees including Bacani, Parker, and Snow and consistently compared Battistini less favorably in terms of electrical skill or electronics work although he conceded that Battistini was a willing worker and he had previously recommended him for employment with Wellstream. Ultimately Riley conceded that he had not worked side-by-side with many of the mechanics in November 1991. "I don't know what any of these guys was actually working on in particular in 1991." He testified further:

Q. Okay. So my question again to you is, back in 1991 is it your testimony that this—other than you and Mr. Gerald Riley, everybody else was pretty much equal as far as their electronic abilities, if they did electronic work?

A. Yes.

With respect to the issue of whether Battistini had abandoned his interim job with B & S Electric so as to toll Respondent's liability for backpay, Respondent called Jack Russell who was the owner of B & S Electric in 1991, which was an electrical contractor hired for a 4 to 6 weeks job to work on a pipe laying machine that B & S was working on at Wellstream. B & S was a subcontractor working for Watkins Engineering that was the general contractor then performing work at Wellstream. The machine was located just outside of Wellstream's building. The project began the first or second week of November and was estimated to last 4 to 6 weeks. There were 10 electrical workers on B & S's payroll including Battistini. Battistini's last day of work was November 26, 1991, as he did not show up for work on November 27, although there was approximately 2 weeks more work. Battistini did not give him any indication that he would not be there on November 27. A week later either he or his wife or both came back to pick up his paycheck. At that time there was at least another week of work to be done. He does not know whether Battistini asked to return to work. Russell had Frank Alsobrook on the job as his general foreman who assigned the work. Russell did not have an office at the Wellstream jobsite but visited it once or twice a day. He does not know whether Battistini spoke with Alsobrook on his last day of work. Alsobrook no longer works for B & S Electric.

James Snow who began working as a general helper in the maintenance department in May 1990, and who was not included in the November 1991 layoff, testified that when he was hired he did not know much about the machinery that was sophisticated equipment. Snow assisted other mechanics for a time and was promoted to mechanic a year and a half to 2 years after his hire. He currently works in the maintenance department. He often assisted Battistini. Snow testified that in November 1991, Battistini had more electrical and electronic experience than he did and definitely more mechanical experience on the machines at Wellstream as Battistini had been there longer and had helped set up the machines. Snow testified further that Battistini was an outspoken and open union adherent whereas, he himself "don't say too much in here." He testified further that he was more skilled than Arsenio Bacani. He further testified that if Battistini had been working at the time of the reduction in

¹Riley is by all accounts the most experienced maintenance mechanic at Wellstream and particularly with respect to performing electrical and electronic work, which electronic work involves get-

ting into complex components of electrical equipment rather than limited to doing wiring and the like.

force, he would have laid off Arsenio Bacani if a fourth person were to be laid off.

Former employee Ricky Cranford who was employed at Wellstream as a maintenance mechanic from May 5, 1990, until February 10, 1995, when he was discharged by Respondent (a discharge that is the subject of a dismissed unfair labor practice charge filed by him presently pending on appeal), testified as follows: Prior to Wellstream he had worked on cranes and machinery, gear boxes, and had industrial mechanical experience. He testified that most of the machines at Wellstream were unique to Wellstream and that he had only worked with four of them prior to coming to Wellstream such as fork lifts, air compressors, big boilers, and cranes. Some of the machines unique to Wellstream were the carcass machine, the extruder line, the armor line, flexbox, bobbins, electric takeups, cortinovis, traverse stands, plastic welders, and Hauksan welders. He and Battistini both worked on all of these machines. Battistini was more skilled than Snow or Bacani, both of whom were helpers. Battistini was already employed when he was hired and had more experience on the machines than he did. He, as a maintenance mechanic, and Battistini, as an electrician, were often teamed up together and worked on the third shift when there was no maintenance supervisor on duty. Battistini worked unsupervised most of the time. Battistini was very versatile as a mechanic and could do electrical work that Cranford could not. Battistini could also do mechanical work. In November 1991 Snow was an electrician and had done wiring but Battistini could do electronic work. Cranford believes his mechanical experience was greater than that of Battistini. In November 1991, however, he would have put himself and Snow on the list to be laid off rather than Battistini.

John C. Parker, a maintenance mechanic, testified as follows: He was hired by Wellstream as a maintenance mechanic on December 4, 1989, and continues as an employee there. He has never been laid off or fired from Wellstream. Prior to working at Wellstream he had no industrial experience in mechanical or electrical or electronic work. In November 1991 at the time of the layoff, Herman Riley had the most electronic experience among the mechanics and Gerald Riley and Battistini would follow him in terms of most electronic experience. With respect to electrical skills, he would have placed Herman Riley first again and next would be Gerald Riley and then Eric Clenny and Snow and just below them Battistini and then himself and then A. J. Roper, Bacani, and then Bert Greer in terms of electrical experience. In terms of mechanical experience Cranford was the best and following him would be Battistini and Roper and then Greer, Herman Riley, Gerald Riley, Clenny, and Snow. Greer had the most hydraulic experience by far and Cranford was next and then Battistini and the rest of the mechanics were "pretty green" in this area. Cranford had the most pneumatic skill followed by Battistini, Roper, and Gerald Riley and the rest did not have pneumatic experience except probably Greer. In November 1991 Parker was not able to work on all of the machines at Wellstream as he had no formal training or skills and was still learning. Battistini was definitely able to work on more machines than he was in November 1991. On some occasions he called on Battistini to help him when he was unable to determine how to fix the machines by himself. As a helper Arsenio Bacani was used most often of all the employees in the maintenance department to run errands for the

department and help move office furniture and employees' personal belongings and hang pictures and assist others as required.

Parker testified further that shortly after Battistini's layoff, Battistini had lost an appeal for unemployment compensation and Marlow came looking for Parker at the end of the shift and "was very happy and telling me that Daniel had lost his final appeal." Marlow followed Parker to his locker and told him to remove Battistini's name from his locker and said, "Daniel Battistini will never work for Wellstream again." Subsequently, in a meeting between Parker and Hall held at Parker's request in September 1992 (almost a year after Battistini's discharge) to discuss continuing harassment of Parker by Marlow, Hall told Parker that Battistini would never work for Wellstream again. In response to questions on cross-examination by the Charging Party, Parker testified that Gerald Riley, Bert Greer, and Eric Clenny who were laid off were all very open and outspoken supporters of the Union and were some of the most highly skilled of the maintenance mechanics. Gerald Riley was brought back as a temporary employee working for a contractor but was not rehired by Wellstream although Wellstream has since hired new employees for the maintenance department. In response to an inquiry on cross-examination by the Respondent's counsel, Parker testified that if he had determined whom of the maintenance employees should be laid off in the reduction in force of four employees in November 1991, he would have laid off Bacani, Snow, Roper, and himself as the remaining employees were able to do the work on their own ("without a burden.")

The General Counsel called Jon Eric Clenny who testified as follows: He was employed by Wellstream about a year and a half. He started as an operator but transferred from the extruder line to be a mechanic and electrician in the maintenance department until the layoff. Prior to working at Wellstream he "had a couple years as a millwright apprentice, and then approximately 8 to 10 years as an electrician." He did both commercial and industrial electrical work prior to his employment at Wellstream. He sought employment with B & S Electric at the Wellstream jobsite "probably within the first week or so after leaving Wellstream." He spoke with the B & S Electric foreman named Frank, who informed him they were not hiring as the job was ending and they were laying off and had just laid Battistini off. Frank told him to go to the office and put his application in as they would be hiring at a later date. Clenny testified he could not assess the quality of Battistini's work and "I really can't be specific. That's been 4 years. I really don't remember." He also testified that in the instance when he applied at B & S he saw Battistini that day who had his check from B & S and said he had been laid off. On cross-examination Clenny was asked on the basis of job skills whether he would have laid Battistini off if he were making the decision that four employees to lay off in the maintenance department and answered, "General job skills, probably." He also testified on redirect "Dan was a good worker, as far as I know."

The General Counsel also called Barbara Callahan who testified she worked at Wellstream from November 1990 to January 1995. She was a personnel administrative assistant and reported to Director of Human Resources Larry Davis who reported to the president of Wellstream, Bob Miller. She handled screening and interviewing of employees, applica-

tions, maintenance of files, and keying in personnel information. She worked almost the entire day with Davis and they had adjoining offices. She typed 95 percent of the antiunion literature during the 1991 union organizing campaign at Wellstream that she received from Davis and Respondent's outside counsel. She pulled the list of employees from Respondent's data base for a list of employees to be laid off that was sent by Davis to Hillman and they received the list back from Hillman. Davis then met with supervisors and directors in different departments and changes were made and a second list was developed by Davis and ultimately a third list was developed. Davis and President Miller were responsible for the final selection of employees for layoff. During the month or so that the layoff list was being prepared he commented concerning union supporters "that he would like to get rid of the Battistini's, and Parkers and Cranfords and several names," and "he would like to get rid of the Ricky Cranfords, the Battistinis, and the Greers, of the union members." "I remember him saying that he had to be careful and not lay off too many union members because then it was going to be obvious of what he was doing." During this preparation period for the layoff Davis talked with Respondent's counsel on numerous occasions and also with Miller and Marlow. She recalls that the focus was on maintenance because "there were a lot of union supporters in maintenance." During this period Davis discussed disciplining union supporters and writing them up for walking in the aisles without safety glasses and other infractions. She also recalls Davis saying after Battistini was terminated that if Battistini were on fire he would not "piss on him to put him out." After the union campaign began Davis would not interview any applicants who indicated their union membership on their application because "He didn't want to add additional fuel to the fire" (by adding union members or supporters to the Respondent's work force.) Callahan was terminated by Respondent for "lack of secretarial skills."

The General Counsel also called John Sessions who was employed by Watkins Engineering from 1990 until 1993 as their general foreman. He was sent in November 1992, by Watkins, to Wellstream to oversee a maintenance contract they had with Wellstream wherein they were performing general plant maintenance for Wellstream. He was responsible for the hiring and firing of employees for the Wellstream jobsite. His employees needed to be cleared with a fellow named Kipp Alstaetter at Wellstream and did the same maintenance work of the Wellstream employees but were under the direction of Allen Saap. Sessions did "an overall plant evaluation of what they needed to do at the plant to upgrade it or to just get their maintenance back up on—up to par." The plant maintenance was "very lax," including safety hazards for electrocution. The day (in mid-November 1992) he came to Wellstream he had a meeting with Davis and Marlow. Davis told him that Wellstream "had had a lot of Union trouble, and that they were—they had just had a vote a year or so before and the vote was—they had beat the vote and they were in court—had a hearing in court and they were still fighting labor—I mean, they were still fighting the Union." Davis gave him "a list of eight or nine employees of people that he said he did not want hired back." The list was given verbally and he recalls, "A [Eric] Clenny fellow was on it. Eric [Gerald] Riley, and a Dan Battistini, were three names that stood out, because Mr. Davis was very

adamant about Battistini." Davis said, "He would not piss on Mr. Battistini if he was on fire." They told him in that meeting that he was to screen out union applicants and after he had screened them, "Kipp" of Wellstream was to review them and approve them before he hired them. He was told at that meeting with Davis that Clenny, Riley, and Battistini were not to be hired because they were for the Union.

Kelly Battistini, the wife of Daniel Battistini testified as follows: She is a human resource analyst with Panama City, Florida. She handles all applications for the entire city. She recruits applicants, briefly reviews the applications, sends them to departments and maintains the applications. When the various city departments, decide to fill a position, she pulls the active applications and sends them to the department for interviews. When the department decides to hire, she checks their references by telephone utilizing forms asking for dates of employment, salary, work record, and reason for leaving. Her husband, Daniel Battistini, has applied to Panama City for various positions. As part of her duties she checked the references of Daniel Battistini for a position he applied for after his termination after checking with her supervisor because of her relationship as Battistini's wife. Her supervisor told her to handle it. She telephoned Jack Russell of B & S Electric for a reference and wrote down his response on the reference form she uses for telephone reference checks. (G.C. Exh. 23.) The response of Russell rated Daniel Battistini's work as "very good" and gave as the reason for his leaving, "Laid off," and in answer to the inquiry about whether he would reemploy Battistini, Russell stated, "Yes definitely if I had the opportunity." There were no other reasons given for Daniel Battistini leaving employment with B & S Electric.

Daniel Battistini testified as follows: With respect to his job with B & S Electric, he was laid off from this job on November 29, 1991, by Frank Alsobrook who told him the job was ending. When he was hired by B & S Electric he was told the job would only last about 4 weeks. While he worked at B & S, Thanksgiving was approaching and he and his wife had made arrangements to visit her grandparents in Tampa, Florida. He had worked at B & S about a week and a week before Thanksgiving, he asked Frank Alsobrook, the general foreman, if he could take a few days off for the Thanksgiving weekend. Alsobrook told him he had no problem with this but on his return Alsobrook would tell him whether he needed him anymore as the job was winding down. When he returned Alsobrook said he didn't need him anymore and he was laid off on that Monday, November 29, 1991. He did not talk with Jack Russell concerning the Thanksgiving trip or his layoff.

While Battistini was working at B & S Electric he saw Parker and went into the Wellstream plant and said hello to his former coworkers from Wellstream and had lunch and took breaks with Parker. When he was hired by B & S nothing was said about going into the plant. The next day, however, Alsobrook told him that no one on the jobsite could go in the plant from then on and that he could not associate with the Wellstream employees.

With respect to his job skills and ability while working at Wellstream in November 1991, Battistini testified his qualifications as a maintenance employee at Wellstream "were as good as any employee there and better than some." As far as tracking down wiring problems on the machinery he was

better than most and was also qualified to work on hydraulic systems and pneumatic systems on the machinery, and to work on facility repairs. He had a basic knowledge of electronics and traced the wiring down to the component level. Herman Riley was the only official electronics technician. In November 1991, he had more experience on the machinery than James Snow, A. J. Roper, Bert Greer, Eric Clenny, and Arsenio Bacani. James Snow was a helper at that time. Bert Greer primarily worked on hydraulics. Bacani was the least experienced maintenance employee in the department on the equipment. Whenever Battistini worked on weekends or second or third shift at Wellstream he worked unsupervised as there was no supervisor on duty. He repaired equipment when it broke down. Bacani worked as a trainee under him from time to time. Battistini worked on all of the unique equipment at Wellstream as required and helped build and modify almost all of these machines. At the time of his testimony he had helped build or modify more machines at Wellstream than anyone except Supervisor James Wilson, Herman, and Gerald Riley, and Parker. While at Wellstream he performed pneumatic work, hydraulic work, mechanical work, electrical work, and with respect to electronic work, he would troubleshoot to an electronic component and change that component out or bring it to Herman Riley for repair. Gerald Riley could also troubleshoot to the components. None of the other employees could do this. Battistini's electronic skills were equal or above anyone of the other maintenance personnel except Herman Riley who was the electronic repairman and Gerald Riley.

Battistini testified further he was never advised of any attendance problem at Wellstream although there was 1 day when his vehicle broke down and he was unable to get to work and called Allen Saap and the next day Saap told him it should not have taken that long to change a brake line. On one other occasion he took sick leave shortly before his marriage and was counseled by Saap concerning this in May 1990. He was never written up for attendance problems.

The General Counsel introduced another appraisal of Battistini that had been located and that was made on November 26, 1990, by James Wilson who rated Battistini as excellent in four categories of job performance and good in two categories of job performance. Wilson also commented, "Dan has gained a lot of experience in troubleshooting and solving machine problems. He is always looking for a better and cheaper way to accomplish his goal."

Analysis

In a backpay proceeding the General Counsel has the initial burden of going forward and demonstrating the employees' right to reinstatement and calculating the amount of backpay. In the underlying case the Respondent was ordered to reinstate the discriminatee Battistini with backpay. The Respondent has not reinstated the discriminatee. The General Counsel has calculated the backpay due to the date of the hearing in the backpay case held on July 27 and 28, 1995. The Respondent does not dispute the calculations of backpay with the exception of the issues concerning the general reduction in force in November 1991, and the alleged abandonment of the job at B & S Construction by Battistini. The burden of proof thus shifts to Respondent and the burden of proof is a heavy one wherein any uncertainty concerning the appropriate amount of backpay is to be weighed against the

wrongdoer *Brown & Root*, 311 F.2d 447 (8th Cir. 1963); *Colorado Forge Corp.*, 285 NLRB 530 (1987). In the instant case I find that the Respondent has failed to meet its burden of proof in rebutting the case established by the General Counsel. Initially, assuming *arguendo* that a reduction in force was in order for Respondent as a result of its economic straits, Respondent admittedly did not consider Battistini for retention as an employee as he had been terminated unlawfully as found in the underlying case. Further as contended by the General Counsel and counsel for the Charging Party in their briefs, the most heavily hit area of Respondent's operation by the layoff was the maintenance department as demonstrated by the layoff of three of the nine remaining maintenance employees after the termination of Battistini. Respondent contends that in any event it would have been necessary to lay off four mechanics in the event that Battistini had not been previously terminated. The evidence established that the maintenance department was the most heavily prounion department in the facility and was targeted for a 40-percent reduction in force. As established by the testimony of employee John Chris Parker and Watkins Engineering former General Foreman John Sessions, which I credit, this left a substantial gap in Respondent's ability to adequately perform maintenance work of the facility that required a high level of maintenance work as a result of the unique nature of much of the equipment that must be modified to be utilized in the production of Respondent's product. To this end Respondent responded by bringing in Watkins Engineering to perform the work that had formerly been handled by Respondent's maintenance department. I credit the testimony of Sessions that Respondent utilized the outside contractor to screen out prounion employees in continuation of its unlawful campaign against the Union as found in the underlying case and that Respondent made it abundantly clear that Battistini was not welcome in the plant and that he and other prounion employees were not to be hired. The comments made by Respondent's personnel manager, Davis, as testified to by both Sessions and former personnel assistant Barbara Callahan, both of whose testimony I credit in its entirety, that Davis "would not piss on Battistini if he were on fire" amply demonstrates the continuing hostility of Respondent's management toward Battistini and its determination that he would not return as an employee. Under these circumstances it is clear and I find that Respondent has wholly failed to show that it could have, would have, or did consider Battistini for retention as an employee at the time of the layoff. Further, I do not credit the testimony of Marlow, Sapp, and Herman Riley concerning their low opinion of Battistini's capabilities as they were obviously tainted by the same bias against Battistini that led to his unlawful suspension and discharge initially. In this regard I find particularly noteworthy Marlowe and Sapp's inability to specify exactly what Battistini's shortcomings were except for the reasons put forward by Respondent in the underlying case and found pretextual in that case. It is clear that Marlow and Sapp harbor continued animus toward Battistini and were pivotal in making the selection for layoff from the maintenance department in conjunction with the Personnel Manager Davis whose bias against Battistini and whose comments concerning the union supporters in the maintenance department make clear that he could not, would not, and did not fairly consider Battistini for retention even in the absence of

the unlawful suspension and discharge. With respect to the testimony of Herman Riley it was clear that he was a reluctant witness who is now in a leadership position and who felt compelled to disparage Battistini's capabilities. It was clear, however, that he was not able to adequately compare the capabilities of all of the mechanics as he admittedly did not work frequently with them and was unable to place their relative capabilities in the November 1991 timeframe. In the case of Clenny, I found his position that Battistini would have been one of the mechanics laid off as highly subjective as are any of the comparisons made in this case absent specific evidence to support them. In the case of the testimony by James Snow, John C. Parker, and Ricky Cranford, however, I found their testimony was supported by specific objective facts lending support to their testimony that Battistini was a capable employee who should have been retained notwithstanding the layoff and I credit their testimony. Each of these employees sacrificed their own ego in contending that Battistini should have been retained as a mechanic rather than themselves in the layoff. Moreover I once again found Battistini to be a credible witness who testified in a straightforward manner and did not attempt to embellish his testimony but freely admitted his limitations with electronic work. I have also considered the Respondent's contentions that the prounion employees who testified in this case were disparaging the work of employee Arsenio Bacani because he was the lone nonprounion advocate in the maintenance department. As counsel for the General Counsel points out in her brief, however, Bacani was a relatively new employee classified as a helper and earned significantly less than Battistini who had rapidly advanced in pay to a permanent position with excellent to good ratings by his supervisor, James Wilson, following his hire by Respondent.

In summary I find that the Respondent has wholly failed to demonstrate that it would have laid off Battistini in the absence of his engagement in protected activities in the event that he had not been previously unlawfully terminated. I find that the taint of Respondent's engagement in unfair labor practices as well as the lack of credible testimony serving to bolster its position fails to meet Respondent's burden of proof. Moreover the testimony of current employees Snow and Parker who remain employed by Respondent as well as Cranford whom I also credit, clearly demonstrates that Respondent has failed to carry its burden of proof in this case. At a minimum it is clear that there are significant doubts and uncertainties remaining about whether Respondent would have laid off Battistini in its reduction in force and those doubts and uncertainties must be resolved against Respondent as the wrongdoer in this case who created those doubts by its unlawful suspension and discharge of Battistini, *Fruin-Colton Corp.*, 244 NLRB 510, 512 (1979); *Boland Marine & Mfg. Co.*, 280 NLRB 454, 461 (1986); *Chem Fab Corp.*, 275 NLRB 21, 24 (1985).

With regard to the issue of Battistini's alleged abandonment of his job at B & S Electric, I find the Respondent has also failed to establish that Battistini abandoned this job. I credit Battistini's un rebutted testimony that he apprised Foreman Alsobrook, who was not called by Respondent, that he wished to leave town for Thanksgiving and did so with Alsobrook's acquiescence and was told by Alsobrook to check to see if the job was still ongoing when he returned and that on his return he was laid off by Alsobrook because

of lack of work. This testimony was also bolstered by Clenny who testified that when he contacted the foreman (Alsobrook) of this job, that he was told the job was finished (winding down), and that Battistini had been laid off. I also credit the un rebutted testimony of Battistini's wife, Kelly Battistini that when she contacted Russell (the owner of B & S Electric) concerning a reference, that she was informed that Battistini was laid off and was eligible for rehire. I find that Russell's testimony that Battistini had quit the job was undoubtedly the result of a breakdown in communication with his foreman, Alsobrook. I accordingly find that Respondent has also failed to establish that Battistini willfully abandoned this job so as to toll any of his backpay. Respondent's motion to file reply brief is granted and has been read and considered as well as the General Counsel's motion to strike and argument contained therein.

CONCLUSIONS OF LAW

I find that the General Counsel has established the gross backpay due Battistini to the date of the hearing and that the Respondent has failed to establish its affirmative defenses and that the backpay specification as amended correctly states the backpay due Battistini as of the date of the backpay hearing.

I find that Respondent's obligation as to backpay will be discharged by its reinstatement of Battistini to his former position or to a substantially equivalent position with full seniority and all the rights and privileges derived therefrom as set out in the underlying decision in this case and by the payment of \$53,994.38, which was the amount of backpay due Battistini as of the time of the backpay hearing plus interest as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), with backpay and interest continuing to accrue until the date Battistini is reinstated or is offered reinstatement and refuses, minus any tax withholding required by Federal and state laws. *Lord Jim's*, 277 NLRB 1514 (1998).

On the basis of the foregoing findings and conclusions, and on the entire record, I issue the following recommended²

ORDER

The Respondent, Wellstream Corporation, its officers, agents, successors, and assigns, shall satisfy its obligation by reinstating Daniel Battistini to his former position with full seniority and all the rights and privileges and benefits, with interest as set out in the underlying decision in this proceeding and by payment to him of backpay in the amount of \$53,994.38 as of July 27, 1995, the date of the backpay hearing plus interest, with backpay and interest continuing to accrue until such time as Respondent complies with the order in the underlying decision by reinstating Battistini to his former position or as of the time Battistini is offered reinstatement and refuses reinstatement, plus interest as set forth in the underlying decision and in the conclusions section of this decision.

²If 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.