

**Valentine Painting and Wallcovering, Inc. and
Ronald Caputo.** Case 29-CA-22752

July 28, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On March 27, 2000, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings, and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Valentine Painting & Wallcovering, Inc., Patchogue, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Richard Bock, Esq., for the General Counsel.
Tedd Blecher, Esq., of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed on May 25, 1999, by Ronald Caputo, an individual, a complaint was issued on September 21, 1999, against Valentine Painting & Wallcovering, Inc. (Respondent).¹

¹ The Respondent has excepted to the judge's rejection of its argument that the General Counsel used an inappropriate annual time period to evaluate its purchases in commerce. The General Counsel used the 12-month time period prior to the issuance of the complaint. The Respondent asserts that this is improper, as some of the purchases post-date the occurrence of the actual labor dispute. However, it is well established that the Board, when determining jurisdiction, may refer to purchase data from the 12-month period immediately preceding the complaint. See, e.g., *Continental Packaging Corp.*, 327 NLRB 400 (1998). Thus, the Respondent's contention is without merit.

² We find it unnecessary to pass on the Respondent's exception to the judge's conclusion that the Respondent violated Sec. 8(a)(3) and (1) of the Act by failing to hire Ronald Caputo because of his union activities and affiliation. The Respondent's exception to this conclusion does not meet the minimum requirements of Sec. 102.46(b)(2) of the Board's Rules and Regulations. The Respondent merely cites to the judge's conclusion and fails to allege either in its exceptions or its brief in support thereof the error it contends the judge committed in so concluding, or on what grounds it believes the judge's decision as to this violation should be overturned. In these circumstances, we find under Sec. 102.46(b)(2) that the Respondent's exception on this point may be disregarded. *Show Industries*, 312 NLRB 447, fn. 2 (1993).

¹ Respondent's answer denies knowledge or information concerning the filing and service of the charge. The charge states that it was filed in the Regional Office on May 25, 1999. GC Exh. 1, the formal papers,

The complaint alleges that on or about March 11 or 12, 1999, Respondent failed and refused to hire Caputo because he joined, supported, or assisted District Council 9, International Brotherhood of Painters & Allied Trades, AFL-CIO (the Union), and because of his concerted activities, in violation of Section 8(a)(1) and (3) of the Act.

Respondent filed an answer and an amended answer to the complaint, denying the material allegations of the complaint and on February 8, 2000, a hearing was held before me in Brooklyn, New York. Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses and after consideration of the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

A. Respondent's Refusal to Produce Evidence

The complaint asserts, and the answers deny that the Board has jurisdiction over Respondent. Jurisdiction is claimed over Respondent upon the doctrine set forth in *Tropicana Products, Inc.*, 122 NLRB 121, 123 (1958) which held that:

The Board has determined that it best effectuates the policies of the Act, and promotes the prompt handling of cases, to assert jurisdiction in any case in which an employer has refused, upon reasonable request by Board agents, to provide the Board or its agents with information relevant to the Board's jurisdictional determinations, where the record . . . demonstrates the Board's statutory jurisdiction, irrespective of whether the record demonstrates that the Employer's operations satisfy the Board's jurisdictional standards.

Section 10(a) of the Act empowers the Board "to prevent any person from engaging in any unfair labor practice affecting" interstate commerce. Such a broad sweep, referred to as the Board's "statutory jurisdiction" applies when an employer's business in interstate commerce is more than "de minimis." *NLRB v. Fainblatt*, 306 U.S. 601, 606 (1939). Although one respondent's defense is that it is a small business, "Congress has set no restrictions upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the volume of interstate commerce involved." *Fainblatt*, supra.

Because the exercise of its entire constitutionally mandated jurisdiction would result in an inability to decide any case thoroughly and promptly, in 1950 the Board adopted jurisdictional standards to limit the disputes it would hear to those employers whose operations met a designated volume of interstate commerce. *NLRB v. Pease Oil Co.*, 279 F.2d 135, 137 (2nd Cir. 1960). Under such standards, nonretail businesses such as Respondent's would have to purchase and receive \$50,000 in goods directly or indirectly from out of state sources.

However, as set forth above, pursuant to *Tropicana*, the Board may assert jurisdiction over an employer who has re-

includes the affidavit of a Board agent who certified that on May 26, 1999, she served the charge by postpaid mail on the Respondent at 113-8 Bay Avenue, Patchogue, New York 11772. Respondent's answer admits that its sole office and place of business is located at 113-8 Bay Avenue, Patchogue, New York. The Board agent's signed and sworn affidavit, as to which there is no evidence disputing its authenticity, is sufficient by itself to establish service of the charge. *United States Service Industries*, 324 NLRB 834 (1997).

fused to provide the Board with information relevant to the Board's jurisdictional determinations. Respondent is such an employer.

Respondent's answer to the charge, dated July 15, 1999, denied that it is engaged in commerce or affecting commerce and stated that the Board lacked jurisdiction over it.

Thereafter, on August 17, a subpoena duces tecum was served upon the Respondent's vice president, George DaLoia, directing him to appear on August 25 and to produce certain documents relevant to Respondent's claim that the Board lacked jurisdiction over it.

On August 25, Board Attorney Richard Bok wrote to Respondent's attorney, Richard Tedd Blecher, advising that Blecher's request for additional time to respond to the subpoena was granted and the new return date was extended to September 1.

On August 27, Blecher wrote to Bok advising that his client received the subpoena by certified mail, and that he was "rejecting" the subpoena, inter alia, because: (a) inasmuch as the "Board lacks subject matter jurisdiction, it lacks subject matter jurisdiction to issue a subpoena even to ascertain if it has subject matter jurisdiction;" (b) the subpoena was not requested by a party; (c) no witness or mileage fees were tendered at the time of service; and (d) the subpoena was not properly served.

On September 21, the instant complaint was issued, alleging that the Board has jurisdiction over Respondent. The relevant allegations state:

During the past calendar year, Respondent, in the course and conduct of its business operations referred to above in paragraph 2, purchased and received at its Patchogue facility, goods, products, and materials amounting to more than de minimis, directly from enterprises located within the State of New York, which enterprises had received said products, goods, and materials directly from points outside the State of New York.

At all material times, Respondent has been an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

In its answers to the complaint, Respondent asserted that the Board issued an "illegal and improper subpoena requiring almost immediate compliance," reasserted the defenses set forth in its answer to the charge, and contended that the Board did not cure those alleged defects or attempt proper service and did not tender witness or mileage fees.

The answers further alleged that the Board "has made no good faith effort to ascertain if it has subject matter jurisdiction of this Complaint and that the issuance of said subpoena constituted an abuse of process." The answers specifically denied the jurisdictional allegation of the complaint set forth above and "respectfully refers all questions of law to a court with jurisdiction to decide same." The answers further referred to the Board's alleged "improper conduct, illegal issuance and abuse of process or writ, all of which was done to obtain an improper legal advantage on the issue of subject matter jurisdiction [and] has tainted this proceeding and this court should not assist the Board."

Respondent's objections to the subpoena are without merit. It does not specify in what way the subpoena is illegal or improper. The subpoena was issued on the authority of Section 11(1) of the Act, which provides that an investigative subpoena may be issued requiring the production of evidence. It was

issued by the Regional Director's office, a "party" to this proceeding. Board's Rule Section 102.8. Its assertion that service was improper is contradicted by Blecher's own statement that his client received it by certified mail, a proper method of service. Board's Rule Section 102.113(c). Witness and mileage fees need not be paid in advance. As set forth on the face of the subpoena, such fees are paid upon the presentation of a voucher.

Respondent argues that the Board must go through the exercise of having its subpoena enforced before it is obligated to provide the information. I disagree. Numerous cases have applied *Tropicana* to unfair labor practice cases in which a subpoena had not been enforced. *J.E.L. Painting & Decorating*, 303 NLRB 1029, 1030 (1991); *Charles Parker Co.*, 285 NLRB 56, 60 (1987).

Respondent further argues that it has not refused to comply with the Board's requests for jurisdictional information, stating that it completed a commerce questionnaire. Although that document was not received in evidence, it is apparent that Respondent denied that it was engaged in interstate commerce therein which prompted the service of the subpoena.

It is clear that Respondent has refused, on reasonable request by Board agents to provide jurisdictional information. *Tropicana*, supra. Thus, the subpoena calling for jurisdictional information was served on August 17 providing for a return date of August 25. Respondent's request for additional time was granted, the new return date being set for September 1. Respondent's answers establish that it has refused to provide jurisdictional information. It "rejected" the subpoena and stated that the Board lacks jurisdiction to issue a subpoena to determine if it has jurisdiction. Respondent has refused to comply with the subpoena lawfully issued and served, and I find that *Tropicana* applies to this case.

B. The Board has Jurisdiction Over Respondent

Henry Schurman testified in behalf of the General Counsel. He has been employed by the Sherwin-Williams Company for 10 years and was the manager at its Patchogue store, which sold paint and other products to Respondent.

Records of Respondent's purchases established that during the period August 1998 through August 1999, it purchased a total of \$35,181.94 from the Sherwin-Williams Company. Of that sum, purchases totaling \$29,488.61 consisted of Sherwin-Williams' products manufactured at its Fredericksburg, Pennsylvania facility and shipped to New York.²

In finding that the Board has jurisdiction over Respondent, I do not rely on the evidence concerning its work at a public school. James Rogers, an organizer of the Union, testified that in the summer of 1997, he photographed Respondent's employees while they worked at the John W. Dodd Junior High School in Freeport, New York. Rogers stated that Respondent performed the work for Northridge Construction. The photographs depict men painting a mural on the outside of a building. No authenticated evidence of the amount of the contract was presented. This evidence is too limited to be relied upon.

The Board has held that \$1500 in out-of-state activities "is more than the trifle or matter of a few dollars, which the courts have characterized as de minimis." *Marty Levitt*, 171 NLRB 739 (1968). Clearly, the purchase and receipt by Respondent of

² Those products were categorized as architectural products, industrial maintenance, and brushes and rollers.

more than \$29,000 in products which originated outside New York State is more than de minimis.

I reject Respondent's argument that the period in which the purchases were made, August 1998 to August 1999, may not be considered since the complaint, issued in September 1999, refers to purchases made during the "past calendar year", which according to Respondent would be January 1 to December 31, 1998.

In order to properly evaluate an employer's operations an annual period is used. Regardless of whether that annual period is the past calendar year or the last annual period immediately preceding the issuance of the complaint, the important consideration is that a 1-year period may be expected to be representative of the employer's operations. Accordingly, the record of purchases for the period August 1998 to August 1999, was properly selected by the General Counsel in order to prove jurisdiction over Respondent, and was accordingly appropriate. In addition, that period encompasses the time within which the unfair labor practice occurred, March 11, 1999. The earlier period suggested by Respondent would have ended 3 months prior to the refusal to hire Caputo.

As set forth above, where Respondent has refused to provide information relevant to the Board's jurisdictional determination, only statutory jurisdiction need be proven for the General Counsel to establish a sufficient basis for the assertion of jurisdiction. *Continental Packaging Corp.*, 327 NLRB 400 (1998). It is clear that Respondent has refused to provide jurisdictional information.

I find and conclude that the General Counsel has established that Respondent's operations satisfy the Board's statutory jurisdiction. I accordingly conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent's answer denied knowledge or information concerning the labor organization status of the Union.

Ronald Caputo has been a full-time paid organizer for the Union since October 1998. His duties are to recruit new members and contractors and to educate the membership regarding the benefits of the Union. Caputo testified that the Union has members and exists in whole or in part for the purpose of engaging in collective bargaining with employers concerning wages and other terms and conditions of employment.

Based on the above, I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

James Rogers, a union organizer, testified that in the summer of 1997, four employees of Respondent asked the Union for help in obtaining proper wages for certain work they were performing.

Eugene Tonissen testified that he worked for about 5 weeks in May 1998, as a painter for Respondent. At that time he was a union "salt" becoming employed by nonunion employers in an effort to organize them.

Tonissen stated that on May 8, he met with Respondent's vice president, George DaLoia, in the kitchen of DaLoia's home. He told DaLoia that he would like an "opportunity" to

speak on nonwork time with his coworkers in order to organize the shop. DaLoia told him that he was fired and demanded that he leave.

Tonissen did not work for Respondent thereafter. Prior to their May 8 conversation, Tonissen did not tell DaLoia that he was organizing for the Union.

Caputo has about 15 years experience in the painting industry. He has performed such work as painting, plastering, taping, spackling, drywall finishing, and skim glazing. He sought to organize Respondent's employees.

The following evidence is based on Caputo's uncontradicted testimony, DaLoia not having appeared as a witness. An advertisement appeared in the September 30, 1998 issue of *Newsday*, a Long Island newspaper. The ad stated:

PAINTER – IMMEDIATE

10 yrs. Must have own transportation. Benefits. 516-289-5100

The following day, October 1, Caputo called in response to the ad. He testified that DaLoia answered the phone and asked him to come to his office and complete an application. The next day Caputo met with DaLoia and filled out an application and was given a written test. Of the 20 or 25 questions, he answered only one wrong. DaLoia asked about his experience, gave him a list of company rules, and told him that he would let him know.

The list, which is titled "1995–1996 Shop Rules" is on the letterhead of Peter R. Valentine Painting-Wallcovering. It contained working hours, lunch, and breaktimes, required tools, paydays, a statement that employees receive one week's paid vacation after 1 year of service, a list of paid holidays, a rule that the employee must call if he is expected to be absent from work, and the "possibility" of a Christmas bonus if the company is "financially sound."

The following day, October 2, DaLoia called and told Caputo that he was hired for a full-time position at a salary of \$14 per hour. He was told to report to work on Monday, October 5 at 7 a.m. at a specific jobsite to which DaLoia gave him directions.

On October 5 as Caputo was preparing to leave home to go to the job, he received a phone call from DaLoia who told him not to report to work, and that he (DaLoia) would call him later. That afternoon, not having heard from DaLoia, Caputo called him and left a message. DaLoia did not return his call that day.

The following day, October 6, Caputo again called and left a message but DaLoia did not call back. At lunchtime that day, Caputo visited Respondent's office and was told by DaLoia that there was no work. In the following week, Caputo called DaLoia and left a message but his call was not returned.

In November 1998, Caputo called DaLoia and left a message. DaLoia called back. Caputo asked why he was not being put to work and DaLoia told him that he did not want to discuss with him then why he would not use him. Caputo asked "what's going on? You hired me. Now you're not using me. What's the story?" DaLoia replied that he would not discuss it with him.

From November 1998 through January 1999, Caputo did not contact Respondent since the painting industry is typically slow in the winter.

An advertisement was placed in the February 28, 1999 *Newsday*, which was identical to the previous one except this one added that the position was fulltime.

In response to the ad, Caputo visited Respondent's office in early March and spoke with DaLoia. A specific date of the meeting was not testified to. The complaint alleges that it occurred on March 11 or 12, and no evidence was offered in contradiction of such dates. Accordingly, I find that the conversation occurred on March 11. Caputo recorded the conversation.³

DaLoia told him "Ron, sit down. Listen, I'm not going to use you because I heard that you're involved with union organizing." Caputo admitted that he was a union painter and that he was involved with organizing. DaLoia then said that he did not want to be organized, and that he could not "have a guy on my crew like that." Caputo replied that he would not let his union activities interfere with his work and that he would be very productive and was a good mechanic. DaLoia said that he agreed with that and believed that Caputo would probably be one of his most productive workers, but that "it did not make any difference" and that he would not use him "just for the sole reason of union organizing."

Another advertisement was placed in the April 25, 1999 *Newsday*. This ad was identical to the September ad. On April 30, Caputo visited DaLoia in Respondent's office and recorded their conversation. A tape and transcript of the recording were provided to Respondent's attorney at the hearing. He reviewed both and stated that the transcript substantially conforms to the tape recording.⁴ In addition, Caputo's testimony as to the meeting essentially corroborated the contents of the transcript.

A synopsis of the relevant parts of the conversation as set forth in the transcript follows:

Caputo told DaLoia that he saw an ad in the newspaper and asked whether he would put him to work, referring to the fact that he had been hired in October, DaLoia was going to put him to work but then called him on the morning of the job and said he could not use him. DaLoia told Caputo that he (Caputo) was already told that he would not be used and had also been told the reason. The verbatim transcript continues as follows:⁵

Ron: Why? Just cause of the union?

George: Because of the union, because, not just because you're a union painter, I've had union painters before but because you're gonna try to organize me.

Ron: Well sure man everybody you want everybody to organize.

George: I don't want anybody in my shop like that, I already had someone in my shop like that, its already cost me money, I'm not gonna put you to work here. I don't have any doubts that you're a good painter, I got no doubts.

Ron: Oh, I'm an excellent painter, I'm a great mechanic.

George: I got no doubts.

Ron: I got fourteen years behind me. I have all my own tools, I'm qualified.

George: I know we've been through this and I believe you are but I'm not gonna put you on my payroll.

³ Neither the tape of that conversation nor the transcript were offered in evidence.

⁴ The original tape was received at the hearing. Following the close of the hearing, by letter and enclosure dated February 29, 2000 copies of the tape were served upon me and Respondent's attorney.

⁵ In the verbatim part of the transcript which follows, "Ron" refers to Caputo and "George" refers to DaLoia. The asterisks are in the original transcript.

Ron: I need some f***** work man. I need to get back to painting, you're not gonna use me?

George: I'm not gonna use you Ron.

Ron: Just because of union organizing?

George: Ya.

Ron: I can't believe this.

George: If you're working for me and you start that sh** I can't fire you it costs me money to do that. You know, I don't have enough guys in my shop to have someone come in and start trying to organize I don't make that kind of money I don't interfere with union work that they need to organize me. You know.

Ron: (sigh) alright, see ya, there's no chance, so I shouldn't bother you anytime you put an ad in the paper.

George: Pretty much.

Ron: There's no way in hell you'll ever use me.

George: I think you're a nice guy, you know and I sure you're a good painter I talk to ya.

Ron: I am, I am a good guy I love it I love painting.

George: (laugh) I bet you do.

Ron: I mean you talked to Louie right? He told you I'm a decent mechanic, right?

George: Yea

Ron: And I can run a crew.

Ron: But because of the union I'm out and that's it cut and dry.

George: Cut and dry. I ain't bullshitting you I'm not gonna beat around the bush and give you any kind of excuse this is why I'm not, this is, this is it.

Ron: I'll see ya.

Ron: Hey George, have you ever talked to any of the business agents over at the local?

George: No.

Ron: I mean like to try to develop a good relationship to see if there is any kind of contracts that they negotiate for your kind of work. Or you're not just interested in organizing all together.

George: I'm not interested.

Ron: F***, it ahh man alright.

George: I got enough problems.

Caputo testified that he last worked in the trade actively as a painter in November 1999. Prior to that time he worked part-time as a painter and also as a union organizer. He testified that he could work full-time for Respondent and at the same time as a paid union organizer.

B. Analysis and Discussion

The complaint alleges that Respondent unlawfully failed and refused to hire Caputo.

It is General Counsel's initial burden to prove that the union activities of Caputo was a motivating factor in the alleged refusal to hire him. *Wright Line*, 251 NLRB 1083 (1980). Once this has been proven, the burden shifts to Respondent to establish that it would have refused to hire him even in the absence of such activities. *Wright Line*, supra.

The evidence establishes and I find that Caputo was an organizer for the Union, that he sought employment by Respondent and was hired, and thereafter he was refused hire and employment by Respondent because it believed that he was a Union organizer.

Thus, in late September 1998, Caputo responded to an advertisement for employment by Respondent, was interviewed, and

1 day later was hired by DaLoia, and was told to report to work. Immediately prior to leaving his home for work Caputo was told by DaLoia not to report. Thereafter, DaLoia avoided Caputo, not returning his calls and refusing to discuss the reason for his refusal to employ Caputo. Finally on March 11 and on April 30, 1999, DaLoia told Caputo the real reason for not putting him to work.

In both conversations, DaLoia admitted that he believed that Caputo was a union organizer, that he did not want Respondent to be organized and could not have a union organizer on his crew. DaLoia also conceded that he believed that Caputo would be a productive worker, and notwithstanding he had just placed advertisements for experienced painters he refused to employ Caputo.

Animus toward the Union is amply supplied in DaLoia's admission that he believed that Caputo was a union organizer, he would not hire a union organizer, would not tolerate union organizing, and his refusal to hire Caputo in retaliation for his union activities. *Stark Electric*, 327 NLRB 518 fn. 2 (1999). A refusal to hire union organizers violates the Act. *Brown & Root USA, Inc.*, 319 NLRB 1009 (1995). See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995). Animus is further established in Respondent's discharge of Tonnison for asking to speak to employees in an effort to organize them.

I accordingly find and conclude that Caputo's union activities and affiliation was a motivating factor in Respondent's refusal to hire him. *Wright Line*, supra.

Having made such a finding, the burden shifts to Respondent to prove that it would have refused to hire Caputo even in the absence of his union activities or affiliation. *Wright Line*, supra.

Following the close of the General Counsel's case, Respondent rested without presenting any witnesses or evidence. The General Counsel stated at the hearing that he had subpoenaed Respondent's vice president DaLoia to appear at the hearing. Respondent's attorney stated that he told DaLoia to "be on call" and "be available." Accordingly, DaLoia ignored the subpoena. His attorney advised him not to come in, but to "be on call." Respondent's attorney's attempts to contact DaLoia were unsuccessful.

Respondent cannot complain about its failure to present a defense. DaLoia ignored the subpoena and did not see fit to be present at the hearing or contact his attorney. Respondent made no request for postponement to permit DaLoia to be present, and following the close of the hearing, no motion to reopen was made. Respondent's attorney's only request at the hearing was that he sought to have his client listen to the tape recording. This presumably was accomplished by General Counsel's mailing the tape to the attorney on February 29. I received a copy of the tape on March 1 with a notation that a copy of the tape was sent to Blecher on the same date. Presumably, Respondent received it at about the same time. I received no motion that the tape was inaccurate. Respondent's brief, filed 2 weeks after the tape was sent, was solely concerned with the jurisdictional issue. It did not address the merits of the alleged unfair labor practice.

Accordingly, Respondent presented no defense at the hearing concerning its reasons for refusing to hire Caputo. However, its answer to the charge set forth the defense that Respondent did not hire Caputo because it "has a small business consisting of three employees and because of personality differences perceived or felt by the principal" of the Respondent.

The fact that Respondent may be a small business is not a defense to a violation of the Act. With respect to the alleged personality differences between DaLoia and Caputo, the only personal contact between them was three meetings. Immediately after the first, Caputo was hired. The next two consisted of DaLoia's explaining that he was refusing to hire Caputo because of his Union activities.

I agree with Respondent that DaLoia "perceived or felt" a personality difference between himself and Caputo. Caputo's personality drove him to organize Respondent's employees. DaLoia's personality led him to be unlawfully opposed to such an effort. Even assuming a personality difference, the Board has found "an alleged 'personality conflict' to be an insufficient reason for not hiring a job applicant where the evidence otherwise shows unlawful discrimination." *Queen Mary*, 317 NLRB 1303, 1310 (1995) citing *Brownsville Garment Co.*, 298 NLRB 507, 508 (1990). Here, of course, compelling evidence of unlawful discrimination has been established.

In addition, Respondent's answers to the complaint set forth certain affirmative defenses including that Caputo: (a) did not apply for a job with Respondent in good faith and had no sincere intention of working full-time for Respondent; (b) lacked the skills and experience to be a competent painter/and or wallcoverer to be hired, and if hired would be promptly terminated; and (c) failed to mitigate his damages by actively seeking employment elsewhere.

None of these defenses have merit. The Supreme Court has held that a paid union organizer is an "employee" within the meaning of the Act. *NLRB v. Town & Country*, supra. There is no evidence that Caputo did not apply for work in good faith. In fact, he was prepared to report to a job when he was called and told not to do so. He also testified that he could work full time for Respondent while working as a paid organizer. *Ferguson Electric Co.*, 330 NLRB 514 (2000). Contrary to Respondent's answer that Caputo did not possess the skills to be hired, Caputo was in fact hired in early October after describing his experience to DaLoia. In addition, DaLoia told Caputo he had no doubt that he was a good painter, had confirmed that with reference Louie, and stated that Caputo would be one of his most productive workers. The issue of Caputo's obtaining interim employment and mitigating his damages is a compliance matter and is not relevant to this proceeding.

Respondent's answer admits that DaLoia is its vice president, and "has been an agent thereof while acting lawfully on its behalf and that any illegal acts were outside the scope of his agency and authority." The evidence establishes that DaLoia hired and fired employees and is a supervisor within the meaning of Section 2(11) of the Act. His acts, whether legal or illegal, are binding upon Respondent. *Springfield Air Center*, 311 NLRB 1151 (1993).

Accordingly, I find that Respondent has not met its burden of proving that it would have refused to hire Caputo even in the absence of his Union activities or affiliation. *Wright Line*, supra.

CONCLUSIONS OF LAW

1. Respondent, Valentine Painting & Wallcovering, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. District Council 9, International Brotherhood of Painters & Allied Trades, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to hire Ronald Caputo on March 11, 1999, because of his union activities and affiliation, Respondent violated Section 8(a)(3) and (1) of the Act.

REMEDY

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

The Respondent having discriminatorily refused to hire Ronald Caputo, it must offer to hire him, and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Valentine Painting & Wallcovering, Inc., Patchogue, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing or refusing to hire applicants for employment because they are members of a union or because they are union organizers for District Council 9, International Brotherhood of Painters & Allied Trades, AFL-CIO, or any other union.

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

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

(a) Within 14 days from the date of this Order, offer Ronald Caputo a job for which he was denied employment, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Ronald Caputo whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

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

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

(e) Within 14 days after service by the Region, post at its facility in Patchogue, New York, copies of the attached notice

⁶ 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.

marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 11, 1999.

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

APPENDIX

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

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

WE WILL NOT fail or refuse to hire applicants for employment because they are members of a union or because they are union organizers for District Council 9, International Brotherhood of Painters & Allied Trades, AFL-CIO, or any other union.

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

WE WILL within 14 days from the date of this Order, offer Ronald Caputo a job for which he was denied employment, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Ronald Caputo whole for any loss of earnings and other benefits suffered as a result of the discrimination against.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful refusal to hire, and within 3 days thereafter notify Ronald Caputo in writing that this has been done and that the refusal to hire will not be used against him in any way.

VALENTINE PAINTING & WALLCOVERING, INC.

⁷ 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."