

**ADS Electric Company and Local 702, International Brotherhood of Electrical Workers, AFL–CIO.**  
Case 14–CA–27016

August 14, 2003

DECISION AND ORDER

BY MEMBERS SCHAMBER, WALSH, AND ACOSTA

On February 14, 2003, Administrative Law Judge Margaret M. Kern issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief<sup>1</sup> 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, findings,<sup>2</sup> and conclusions and to adopt the recommended Order.<sup>3</sup>

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, ADS Electric, Vandalia, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> The General Counsel has moved to strike a portion of the Respondent's brief in support of the Respondent's exceptions. In light of our decision we find it unnecessary to pass on the General Counsel's motion.

<sup>2</sup> The 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.

<sup>3</sup> In view of evidence that employees Peterson and Seals misrepresented their work experience in their job applications or interviews with the Respondent, we will provide the Respondent with an opportunity in the compliance stage of this proceeding to establish when it became aware of the employees' asserted misconduct and to show whether this would have provided grounds for termination based on a preexisting, nondiscriminatory company policy. *Arrow Flint Electric Co.*, 321 NLRB 1208, 1210 (1996); *Escada (USA), Inc.*, 304 NLRB 845 fn. 4 (1991); *John Cuneo, Inc.*, 298 NLRB 856, 857 at fn. 7 (1990).

Although Member Walsh agrees that it is appropriate to allow the Respondent to litigate this remedial matter in the compliance stage of this proceeding, he notes that the type of misrepresentation that the discriminatees allegedly committed in this case may not be proper justification for their termination. See *Hartman Bros. Heating & Air Conditioning, Inc. v. NLRB*, 280 F.3d 1110, 1112–1113 (7th Cir. 2002).

*Kathy J. Talbott-Schehl, Esq.* and *John P. Hasman, Esq.*, for the General Counsel.

*Vance D. Miller, Esq.* and *Russell C. Riggan, Esq.*, for Respondent.

*James Singer, Esq.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me on October 17, 2002,<sup>1</sup> in St. Louis, Missouri. The complaint, which issued on August 29, was based on an unfair labor practice charge and amended charge filed on July 12 and August 29 by Local 702, International Brotherhood of Electrical Workers, AFL–CIO (the Union) against ADS Electric Company (Respondent). It is alleged that on April 29, Respondent laid off Dennis Peterson, and has since refused to recall him to work, because of his membership in and activities on behalf of the Union. It is further alleged that in or about the third week in June, Respondent laid off Ron Seals, and has since refused to recall him to work, for the same reason.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent stipulates and I find the union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

*A. Respondent's Business and the Union's Organizing Efforts*

Respondent is an electrical contractor that performs residential, commercial, and industrial work in and around Vandalia, Illinois. Daniel Stock is president and an owner. In December 2000, Bob Dorris, an organizer for the Union, first contacted Stock and spoke to him about Respondent becoming a union signatory contractor. Their discussions continued through 2001, during which time Dorris recruited two of Stock's employees to join the union's apprenticeship program. Both employees left Respondent's employ, the first in August 2001 and the second in October 2001. That same month, October 2001, Dorris accompanied union members to Respondent's office where they applied for jobs, and the Union conducted 3 days of picketing at one of Respondent's jobsites. Notwithstanding Dorris' organizing efforts, Stock declined to sign a collective-bargaining agreement with the Union. On March 15, however, Stock did sign a 2-year collective-bargaining agreement with a different union, the Congress of Independent Unions (CIU), covering a unit of all of Respondent's employees. At the time Stock signed this agreement, he employed four electricians: Jim

<sup>1</sup> All dates are in 2002 unless otherwise indicated.

Trible, Greg Tomlinson, Jim Beams, and Mark McElroy. Stock considered Tribble and Tomlinson to be experienced electricians, Beams as somewhat experienced, and McElroy as not experienced.<sup>2</sup>

In January, Respondent entered into an arrangement with Owens-Illinois to perform installation work at a plant in New Jersey. The assignment called for two employees to work 2 weeks at a time, beginning in late March and lasting 4 or 5 months. Stock surveyed his employees to see who was interested in going to New Jersey. Tomlinson and McElroy were willing to go, Tribble and Beams were not. None of these employees testified.

At the same time as the startup of the New Jersey project, Stock was committed to begin working on construction of a Taco Bell/Kentucky Fried Chicken store (KFC job). Stock testified he expected the KFC job to begin in May, and he wanted to get ahead on his service calls and get them cleaned up before the start of that job. He determined he needed to hire an electrician to work locally.

#### *B. The Hiring of Ron Seals*

Ron Seals has worked as an electrician for 10 years. In January, he submitted an employment application to Respondent but was not interviewed or hired at that time. In February, Seals joined the Union's apprenticeship program and he began working for a union signatory contractor. In March, Stock called Seals and said he had a job opening. Seals spoke to Dorris and they agreed that Seals would accept the offer. They also agreed that if Seals were hired, the Union would pay him the difference between the wages paid by Respondent and the Union's contractual wage rate. Dorris instructed Seals that if he were hired, he was to make notes of his conversations with Stock.

On March 22, Seals went to Respondent's office and Stock had him fill out a second application. The preprinted portion of the second application was identical to the first application Seals had filled out in January, but with the following additional language typewritten in: "I understand that this application is to be filled out in its entirety. I understand that this application is valid for 30 days only." During the ensuing interview, Stock said Seals would be working within a 50-mile radius of the Vandalia office doing service calls with another employee, Jim Beams. According to Seals, Stock mentioned that he had a crew working in New Jersey, but he did not ask Seals if he would be willing to travel to New Jersey. Stock, on the other hand, testified he did ask Seals about his willingness to go to New Jersey and that Seals' response was that "he didn't care to." Stock also made reference to the CIU during the interview. According to Seals, Stock said he was a member of the CIU which was a "scam" that allowed him to claim he was a union contractor. He said the CIU was there to keep the IBEW off his back and that the IBEW had picketed him in the past. Stock added that he would pay Seals' dues to the CIU for him. According to Stock, he told Seals he belonged to the CIU and that Seals could join if he wanted. Stock denied saying the

<sup>2</sup> Stock testified that when he hires electricians, he rates their experience on a three-tiered scale: experienced, somewhat experienced, and not experienced.

CIU was a scam union, or that the CIU enabled him to claim union contractor status.

Seals began working as a full-time employee on March 25.<sup>3</sup> All of the work he performed was in the Vandalia area, and the majority of the work was inside work. In April, Stock told Seals he was anticipating the start of the KFC job and he expected Seals would be the foreman on that job. Seals looked at the blueprints for the job and prepared time and materials estimates.

#### *C. The Hiring of Dennis Peterson*

Dennis Peterson has worked as an electrician for over 20 years. He has been a member of the Union for 23 years and he serves on the organizing and pension committees. He has at times been compensated by the Union for his organizing activities.

In early April, Seals recommended Peterson to Stock as someone he might want to hire. Seals testified that Stock asked him if Peterson would be willing to work part time and Seals said yes. On April 3, Peterson went to the office to fill out an application and Stock interviewed him.<sup>4</sup> Stock said he had factory work in New Jersey and that he usually sent two employees to work there in 2-week rotations. According to Peterson, Stock asked him if he would be willing to go to New Jersey and Peterson said yes. Stock, on the other hand, testified Peterson said he "did not care to go" to New Jersey. Stock also testified he told Peterson the only work he had was part time, on an as-needed basis.

On April 9, Stock told Peterson in a telephone conversation he could start working on April 11 on a part-time basis. According to Peterson, Stock said the job would soon lead into full-time employment. Stock denied making this statement, and testified he hired Peterson on a part-time, as-needed basis to catch up on service calls.

Peterson began working on Thursday, April 11 and he was partnered with Seals. Peterson testified that on the morning of April 12, he asked Stock if he would need him the following week, and Stock said yes. Stock said he also needed Peterson to work that weekend, and Peterson worked on April 13 and April 14. Peterson testified he overheard Stock telling Seals he had just picked up a lighting job and that he was soon going to be looking to hire two or three more electricians. Seals testified that on April 13, Stock told him he liked Peterson's work and that he would have more work for both of them.

#### *D. Events of April 15*

On Monday, April 15, Dorris and two job applicants went to Respondent's office wearing union T-shirts. Dorris introduced the applicants, described their experience, and said they were

<sup>3</sup> Beams was discharged on March 28, bringing Respondent's complement of employees back to four electricians.

<sup>4</sup> That same day, Seals inquired of Stock about the kind of representation he could expect from the CIU. Stock told Seals to direct his inquiry to the CIU. On April 30, Seals sent a letter to the CIU requesting information about meetings and dues, and requesting a copy of the collective-bargaining agreement with Respondent. On May 3, Stock received a letter from the CIU disclaiming interest in representing Respondent's employees. Stock testified he called the CIU, but was not given an explanation for the CIU's action. There is no direct evidence that Stock was aware of Seals' April 30 letter.

willing to accept any position at any salary. Stock said he was not hiring at that time but agreed to give the two individuals job applications. As this conversation was taking place, Seals and Peterson entered the office. Dorris advised Stock that Seals and Peterson were union members, and as he did so, Seals and Peterson took off their jackets exposing union T-shirts. According to the General Counsel's witnesses, Stock's response was, "I don't appreciate this, guys." Stock testified he said, "Thanks a lot, guys." Stock gave the applicants copies of their applications and Seals and Peterson went back to work.

Peterson testified that later that day, Stock told him to work the next 2 days, April 16 and 17, but that he would have to see whether he would have work for him on Thursday, April 18. Stock did not testify about this conversation.

#### *E. Peterson's Layoff*

On the afternoon of April 17, Stock told Peterson there was no more work for him. Peterson reminded Stock that on the previous Friday, Stock had told him there would be work for him all week, and he hoped that the work hadn't dried up because of his union T-shirt. Stock said he had no complaints with Peterson and that he was pleased with his work, but that the lack of work was due to weather-related delays. He asked Peterson if he wanted to be recalled and Peterson said yes. Stock said he might recall him the following Monday, April 22. Stock did not testify about this conversation with Peterson.

On April 19, Peterson received a message to report to work on Monday, April 22. Peterson worked a full day on April 22 and 23. On the afternoon of April 23, Stock told Peterson he had no more work for him and didn't know when he might need Peterson next. Stock testified Peterson said he wanted to return to work, and Stock admitted he told Peterson he would "have to see how the work load went." Peterson did not work for Respondent after April 23. All of the work he performed, with the exception of several hours spent at one location, was inside work not affected by weather.

On April 29, Peterson called and asked Stock if he needed him that week and Stock said no. On May 14, Peterson left a message for Stock that he was still interested in working, and on June 27, Peterson went to see Stock at the shop. He told Stock he still considered himself an employee with recall rights and he asked if Stock agreed with that statement. Peterson testified Stock said, "[O]kay." Stock testified he remained silent because he did not want anything he said to be misunderstood. Stock testified he made the decision to lay off Peterson on April 23 because he and Seals had caught up on the service calls.

#### *F. Seals' Injury*

Seals continued to work until May 8 when he suffered a crush injury to two fingers while working on his car at home. He advised Stock that his doctor estimated he would be out of work from 6 to 12 weeks, and he told Stock he wanted to return to work when he was able. According to Seals, Stock said if he brought in a doctor's note, there would be work for him when he returned. A short time later, Seals saw Stock in the local Wal-Mart, and he reiterated his desire to return to work. Stock told him there would be work for him, provided he had a doctor's release.

#### *G. Respondent's Subsequent Hiring*

Following Peterson's lay off and Seals' injury, sometime in May, Tomlinson allegedly told Stock that he no longer wanted to work in New Jersey. Stock hired Rick Carroll on May 14 to replace Tomlinson in New Jersey.<sup>5</sup> Stock considered him an experienced electrician with foreman experience. Stock testified he considered Peterson for the New Jersey job, but rejected the idea for two reasons: first, Peterson's application did not indicate any type of lead man or foreman experience, and second, because Peterson had told Stock during his initial interview that he did not care to go to New Jersey.

On June 21, Tribble, who had never been assigned to New Jersey and who had worked exclusively in the local Vandalia area, gave Stock 2 weeks' notice of his intention to leave the Company. Stock testified Tribble was his most senior employee, he had not had any plans to lay him off, and his resignation had come as a surprise. That same day, Seals delivered to Stock a note from his doctor stating he could return to work immediately without restrictions. Notwithstanding Tribble's departure, Stock told Seals he had no work for him. When Seals pressed the issue that he needed work, Stock told him to get out of his office. Stock testified he made the decision not to replace Tribble based upon his current and projected workload.

At the same time that Tribble announced he was leaving, McElroy, who did the New Jersey rotation, also announced his intent to leave. McElroy's last day of employment was on July 2. On July 6, Stock hired Jerry Brummett, who had no previous experience as an electrician, to replace McElroy. In explaining why he did not use Seals or Peterson to replace McElroy, Stock testified that for the entire period of the New Jersey job, from March to September, he never employed more than two employees on the job at any given time, and that an experienced employee was always paired with a nonexperienced employee. Since McElroy was not experienced, and functioned as a helper on the New Jersey job, Stock did not consider it appropriate to send either Peterson or Seals to New Jersey because they were both experienced electricians. Stock also relied on the fact that both Peterson and Seals had told him they did not care to work in New Jersey.

Respondent's records show that from April to September, employees worked 75 days in New Jersey. On 13 of those days, three employees worked in New Jersey at the same time: Tomlinson (experienced), Carroll (experienced), and McElroy (not experienced). On 15 days, Carroll worked alone. On 6 days, Tomlinson and Carroll worked together without a nonexperienced employee.<sup>6</sup>

Respondent maintains a log of residential and commercial service calls. When a call comes in, it is entered into the log, and when the job is completed, it is crossed off. From March to September, Respondent had a monthly average of 27, 23, 20,

<sup>5</sup> Notwithstanding the fact that Carroll was hired on May 14 to take Tomlinson's place in New Jersey, Tomlinson continued working in New Jersey until June 15.

<sup>6</sup> McElroy, Tomlinson, and Carroll worked together from May 14 to 19, and from May 26 to June 1. Carroll worked alone on June 9, 17, and 26, July 29 to August 7, and September 2 and 3. Tomlinson and Carroll worked together from June 10 to 15.

25, 26, 34, and 44 active service calls. Respondent's records further show that Respondent's employees worked the following amounts of overtime in total from March to September: 5 hours in March, 90 hours in April, 116 hours in May, 145 hours in June, 116 hours in July, 148 hours in August, and 95 hours in September. Respondent has not employed more than three electricians since July 2, Tribble's last day of employment. From July 29 to August 16, Tomlinson was on vacation and only Carroll and Brummett were working.

Stock testified he did not consider laying off Carroll at the end of the New Jersey job in order to recall Seals because he does not have a recall policy for laid-off employees and he has never in the past laid off an otherwise competent employee to recall an equally competent but previously laid-off employee. Stock testified at the hearing that Seals and Peterson had no recall rights and he would not employ them unless they filled out new job applications. If reemployed, he would consider them new hires, not recalled employees.

#### IV. ANALYSIS

##### A. *Wright Line*

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding cases turning on employer motivation. The General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The elements commonly required to support a finding of discriminatory motivation under Section 8(a)(3) are union activity, employer knowledge, and employer animus. *Sears, Roebuck & Co.*, 337 NLRB 443 (2002) and cases cited.

In determining whether the General Counsel has met his initial burden of proving that an employee's protected activity was a motivating factor in an employer's decision to discharge the employee, the Board has held that motive may be inferred from the total circumstances proved. A judge may infer unlawful motivation when the proffered reasons for an action are false, even in the absence of direct evidence of motivation. *Williams Contracting*, 309 NLRB 433 fn. 2 (1992). A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

The General Counsel does not argue that there is direct evidence of animus in this case.<sup>7</sup> Rather, as set forth in her brief, counsel for the General Counsel premises liability on the fact

that the reasons proffered by Stock for his layoff and failure to recall Peterson and Seals were pretextual. Respondent, on the other hand, contends that Peterson and Seals were laid off and not recalled due to lack of work. For the reasons set forth herein, I agree with the General Counsel.

##### B. *Credibility*

Notwithstanding Stock's equanimous demeanor, his testimony does not withstand critical examination. Stock testified that for the entire period of the New Jersey job, from March to September, he never employed more than two employees on that job at any given time, and he always paired an experienced employee with a nonexperienced employee. This testimony was essential to Respondent's defense that it maintained a consistent staffing pattern and that Peterson and Seals did not fit into that pattern. The objective evidence, however, proves otherwise. A careful analysis of the daytime cards of Respondent's employees shows that on 13 workdays, Stock assigned three employees to work together in New Jersey, on 15 workdays an experienced employee worked alone, and on 6 workdays, two experienced employees were paired without a nonexperienced employee. Stock's testimony that he never varied from his staffing pattern was directly contradicted by his own records.

Stock testified that his decisions to lay off and not recall Peterson and Seals were based on lack of work. The objective evidence, however, contradicts Stock's claim. Respondent's job log shows that when Peterson started working on April 11, Respondent had 15 outstanding service calls. On April 22, the day before Peterson's layoff, Respondent had 25 outstanding service calls. On April 26, 3 days after Peterson's layoff, Respondent had 24 outstanding service calls. On June 14, the week before Seals presented his medical clearance, Respondent had 27 outstanding service calls. On June 24, 3 days after Seals was able to return to work, Respondent had 24 outstanding service calls. Stock's testimony that the backlog of service calls had been eliminated at the time of Peterson's layoff was plainly false. Not only did the number of outstanding service calls not diminish, it grew at a rapid rate. Respondent averaged 20 open service calls in May, 25 in June, 26 in July, 33 in August, and 44 in September, a 120-percent increase in 4 months.

Stock testified he has never had a policy or practice of recalling laid-off employees. Yet, in this case, Stock had five opportunities to inform Seals and Peterson of that policy: on April 17 when Stock told Peterson there was no more work for him, on April 23 when he laid Peterson off, on April 29 when Peterson called Stock, on June 21 when Seals presented his medical clearance to work, and on June 27 when Peterson confronted Stock face to face. On none of these occasions did Stock tell Peterson or Seals that he did not have a recall policy. To the contrary, I credit the testimony that Stock made commitments to both Peterson and Seals that they would be reemployed if there was sufficient work.

<sup>7</sup> I credit the testimony of the General Counsel's witnesses that when confronted with the fact of Seals' and Peterson's union membership, Stock said he did not appreciate it. Stock also testified he felt Seals and Peterson had lied to him by not earlier disclosing their union affiliation. Since the General Counsel does not contend that this evidence constitutes direct evidence of animus, I make no such finding.

For these reasons, as well as my observations of Stock's demeanor and taking into consideration all of his testimony, I found Stock to be a less than candid witness and I credit his testimony only where indicated.

The General Counsel's witnesses were more credible than Stock. Peterson was a smart witness who wisely admitted misrepresenting his work experience on his application and during his interview with Stock. He was nonconfrontational, but equally sharp, on both direct and cross-examination. His testimony was also consistent with other evidence in the case. Peterson's testimony that Stock told him he had sufficient work for him to keep him employed was corroborated by Respondent's payroll records, employee timecards, and job logs, all of which showed Respondent had more than enough work to keep Peterson employed. I credit Peterson's testimony in all respects.

Seals was a somewhat less credible witness. I found unpersuasive Seals' attribution to Stock of his use of the word "scam" on two separate occasions when he referred to the CIU. First, Seals was instructed by Dorris to keep a diary of his conversations with Stock and nowhere in that diary did Seals record any such reference by Stock. Second, Stock knew he was the subject of a sustained organizing effort by the union at the time of his conversations with Seals. He had already encountered union job applicants coming to his office accompanied by Dorris, and he had lost two employees to the union apprenticeship program. Between the time of Seals' first and second applications, Stock had signed a collective-bargaining agreement with the CIU and had amended his hiring policies to include a statement on Respondent's job application that the application was only valid for 30 days. Stock was surely sophisticated enough in the methodology of union salting not to "confide" in a job applicant. I have therefore credited portions of Seals' testimony and discredited others.

#### C. *The Layoff and Failure to Recall Seals*

On June 21, Seals presented Stock with medical clearance to return to work. That same day, Tribble advised Stock he was resigning in 2 weeks. Both Tribble and Seals had the same level of experience, and both had worked exclusively in the Vandalia area. Seals was therefore indistinguishable from Tribble in terms of his employability. Stock testified he based his decision not to replace Tribble with Seals on his current and projected workloads. The objective evidence, however, shows that Stock had more than enough work to recall Seals. First, Stock admitted that he had no intention of laying off Tribble and had enough work to keep him employed. If he had enough work to keep Tribble employed, he had enough work to keep Seals employed when Tribble left. Second, Respondent had an average of 25 open service calls in June and that number increased significantly in the following months. At the same time, Respondent's employees were working significant amounts of overtime at this time. In March, the total number of overtime hours worked by all employees was 5. By June that number had jumped to 145 hours. Third, Stock had promised to make Seals the foreman of the KFC job and in June the bulk of that work had yet to be performed.

Stock attempted to rationalize hiring Brummett instead of recalling Seals in two ways: first, that Seals was unwilling to go

to New Jersey, and second, that Seals was overly qualified to fill the helper position that had been vacated by McElroy. Contrary to Stock's assertion, I credit Seals' testimony that Stock never asked him if he were willing to go to New Jersey and, as previously discussed, Stock did not consistently assign an experienced employee to work with a nonexperienced employee in New Jersey.

The General Counsel has satisfied the *Wright Line* burden in the case of Seals. Respondent had knowledge of Seals' union membership on April 15. Seals was injured on May 8, and the credible evidence is that Stock said he would reemploy Seals if and when he was medically cleared to work. Seals presented that medical clearance on June 21, but Stock refused to reemploy him for reasons that have been proven to be false and pretextual. The inference of wrongful motive remains intact and by failing to recall Seals since June 21, Respondent has violated Section 8(a)(1) and (3) of the Act.<sup>8</sup>

#### D. *The Layoff and Failure to Recall Peterson*

I credit Peterson's testimony that he was hired as a part-time employee and was told that the job would become full time. On April 12, Stock told Peterson he needed him to work over the weekend and the entire following week. Stock said that he had more work coming in, that he liked Peterson's work, and that he was soon going to hire two or three more electricians. On April 15, Peterson disclosed he was a member of the Union. That afternoon Stock told Peterson he did not know if he would have enough work for him to finish out the week. Such timing between the exercise of protected conduct in relation to an adverse employment decision is strong evidence of an unlawful motive. *Grand Central Partnership*, 327 NLRB 966 (1999); *Trader Horn of New Jersey, Inc.*, 316 NLRB 194, 198 (1995).

Stock's reason for laying Peterson off was false and pretextual and constitutes further evidence of unlawful motivation. Stock's testimony was clear and unequivocal: he hired Peterson to do service calls and he laid him off because the backlog of service calls had been substantially eliminated. This was simply not true. As discussed previously, the number of active service calls more than doubled after Peterson's layoff.

I credit Peterson's testimony that from April 29 to June 27, he repeatedly asked Stock to recall him to work. During that same period of time, Stock hired Rick Carroll and Jerry Brummett instead of reemploying Peterson. Stock attempted to justify this decision in three ways: first, that Peterson had said he did not care to work in New Jersey; second, that when he hired Carroll to replace Tomlinson, he needed to replace a foreman with a foreman; and third, that when he hired Brummett to replace McElvoy, Peterson was too qualified. All of these reasons were proved false. First, I credit Peterson's testimony that he told Stock he was willing to travel to New Jersey. Second, Tomlinson had only worked as an electrician for a year when he was sent to New Jersey and had no foreman experience. In any event, Stock knew that Peterson had 20 years' experience

<sup>8</sup> At the hearing, the General Counsel advanced the theory that an additional motivation for Stock's refusal to reemploy Seals was because Seals had sent the request for information to the CIU on April 30. There is no evidence that Stock was aware that Seals sent that letter, and I reject the General Counsel's theory.

as an electrician and on all the occasions that Peterson asked to go back to work, Stock never once asked him if he had foreman experience. Third, as previously stated, there were significant periods of time when Stock had either experienced electricians working together in New Jersey without a nonexperienced electrician, or an experienced electrician working alone.

The General Counsel has satisfied the *Wright Line* burden in the case of Peterson. The timing of Peterson's layoff, and the pretextual reasons proffered for his layoff and for the failure to recall him, establish Respondent's unlawful motivation in making these decisions. But for Respondent's discrimination against him, Peterson would have, at a minimum, continued to work on a part-time basis until May 14 when he would have been hired as a full-time employee instead of Rick Carroll. By engaging in this conduct, Respondent has violated Section 8(a)(1) and (3) of the Act.

#### CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(3) and (1) of the Act since April 23, 2002, by laying off Dennis Peterson and failing to recall him to work.

4. Respondent has violated Section 8(a)(3) and (1) since June 21, 2002, by laying off Ron Seals and failing to recall him to work.

#### 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.

Respondent, having discriminatorily laid off and failed to recall Dennis Peterson and Ron Seals, must offer to them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the 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 recommended<sup>9</sup>

#### ORDER

Respondent, ADS Electric Company, Vandalia, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off, failing to recall, or otherwise discriminating against employees because they support or engage in union activities.

(b) In any like or related manner interfering with, restraining, or coercing its 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 to Dennis Peterson full reinstatement to a full-time position or, if that job does not exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order, offer to Ron Seals full reinstatement to his former job 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.

(c) Make Dennis Peterson and Ron Seals whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of this Order, remove from their files any reference to the layoff and failure to recall Dennis Peterson and Ron Seals, and within 3 days thereafter, notify them in writing that this has been done and that their layoff and failure to be recalled will not be used against them in any way.

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

(f) Within 14 days after service by the Region, post at its facility in Vandalia, Illinois, copies of the attached notice marked "Appendix."<sup>10</sup> Copies of the notice, on forms provided by the Regional Director for Region 14, 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 April 23, 2002.

<sup>9</sup> 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.

<sup>10</sup> 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."

## 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 lay off, fail to recall, or otherwise discriminate against any of you for supporting Local 702, International Brotherhood of Electrical Workers, ALF-CIO, or any other union.

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.

WE WILL, within 14 days from the date of the Board's Order, offer Dennis Peterson full reinstatement to a full-time position, or, if that job does not exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer Ron Seals full reinstatement to his former job 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 Dennis Peterson and Ron Seals whole for any loss of earnings and other benefits resulting from their layoff and failure to be recalled, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful layoff and failure to recall Dennis Peterson and Ron Seals, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that their layoff and failure to be recalled will not be used against them in any way.

ADS ELECTRIC COMPANY