JD–69–06
Newark, NY

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

COLACINO INDUSTRIES, INC.

and Case 3-CA-25785

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, Local 840

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Of Buffalo, New York
For the General Counsel.

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For the Respondent.

# DECISION

## STATEMENT OF THE CASE

**WALLACE H. NATIONS**, Administrative Law Judge. This case was tried in Rochester, New York, on July 12, 2006. The original charge was filed March 7, 2006, and an amended charge was filed on May 24, 2006. Both were filed by International Brotherhood of Electrical Workers, Local 840 (herein Union). The Complaint and Notice of Hearing issued on May 31, 2006.[1] The Complaint alleges that Colacino Industries, Inc. (herein Respondent or Colacino) violated Section 8(a)(1) and (3) of the National Labor Relations Act (herein Act). Respondent filed a timely Answer wherein it admitted, inter alia, the jurisdictional allegations of the Complaint.

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

## Findings of Fact

### I. Jurisdiction

The Respondent, a corporation, has been engaged as an electrical contractor doing residential, commercial, and industrial construction. It maintains a place of business in Newark, New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are 2005 unless otherwise indicated.

## II. Alleged Unfair Labor Practices

### *A. Alleged Violations of the Act.*

Respondent is a small electrical contractor owned and managed by James Colacino. It employs about nine electricians and helpers who work on jobs in and around Newark, New York. Respondent has never been unionized. It does not have an employee handbook nor does it have a written solicitation policy. No verbal solicitation policy has been given to employees generally and specifically, to employee David Zaborowski. A typical work day is from 7 a.m. to 3:30 p.m., though it is not uncommon for employees to work to 6 p.m. or 7 p.m. during the Company's busy season. Respondent has no restrictions on employees talking among themselves during work hours, though Colacino would prefer they talk about the job at hand. The employees communicate about business with personal cell phones and are given a flat $35 per month for cell phone usage by Colacino. He does not require submission of phone records for this allowance.[2]

Respondent's former employee at the center of this proceeding is electrician David Zaborowski. As will be shown, during the summer of 2005, he engaged in some organizing work for the Union among Respondent's employees. The matter of Zaborowski's efforts in this regard came to a head in an employee meeting on September 9. It was Respondent's regular practice to hold an employee meeting at the beginning of each workday. At these meetings employees were given their daily job assignments and any outstanding issues were discussed. The Complaint alleges that Respondent violated the Act at such a meeting of Respondent's employees on the morning of September 9, by:

(a) James Colacino interrogating employees about their union activities and sympathies.[3]

(b) James Colacino impliedly threatening employees with closing the facility.

(c) James Colacino terminating the employment of David Zaborowski.

### *B. Events Leading up to the Meeting of September 9.*

1. The events of the summer of 2005

David Zaborowski worked for Colacino as an electrician from the spring of 2003 until his termination on September 9, 2005. His normal work hours were 7 a.m. to 3 p.m., unless a job went long or overtime was approved. At the time he was hired, he was a member of IBEW Local 86. Zaborowski was hired after several interviews with Colacino. During these interviews the

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[2] Colacino electrician Douglas Velte, called by Respondent, testified that he worked with Zaborowski for a period of time when Zaborowski first became employed by Colacino. On their drives together to and from work, they would freely talk about a variety of subjects, including girls, sports, and parties. Velte is the immediate past Chief of the local fire department and he testified that he would call the local fire department on his cell phone during the workday. Colacino testified that this was an accepted practice.

[3] The Complaint originally alleged only a single interrogation, but after evidence on the subject was adduced, General Counsel moved to amend the Complaint to allege plural interrogations. The motion to amend was granted.

subject of unions came up and was discussed. Zaborowski came away from these discussions with the opinion that Colacino would never be involved with a union. Prior to being hired by Colacino, Zaborowski resigned his union membership. Zaborowski testified that during the interview process and in later work reviews, Colacino had promised him a raise to a set hourly wage Zaborowski desired. For whatever reason, Zaborowski was never given this raise and it became an issue with him. Zaborowski testified that during his employment with Colacino, he had never been given verbal or written discipline.[4]

Michael L. Davis is an organizer for the Union. He knew Zaborowski when Zaborowski was a member of the Rochester, New York IBEW Local. As part of his duties as an organizer, Davis contacted Zaborowski in May to attempt to interest Zaborowski in aiding in organizing Respondent's employees. In this meeting, Zaborowski indicated to Davis that he was not interested at that time, but would keep an open mind. Davis indicated that Zaborowski believed that he was to get a raise and if that happened, he would not be in contact again with Davis.

Following this May meeting, Davis telephoned Zaborowski two or three more times during the summer of 2005. In turn, Zaborowski telephoned Davis twice. In August, Davis visited a jobsite where Respondent's employees were working. The first such meeting took place about the middle of August at Finger Lakes Race Track where Colacino employees Doug Velte and Lynn Smalt were working. Davis spoke to them briefly about the weather, the job and other things. This meeting lasted about 5 minutes.[5] Following this meeting, Davis prepared a letter to six or seven of Respondent's electricians and helpers, reading:

> "Just thought you may want some of this information. It's hard to convey the benefits of representation in a brief face to face.
>
> I have enclosed some information from off the internet. This information comes from a fellow electrician who has worked both Union and Open Shop. His views are similar to all of 840's organized members.
>
> If I can help or inform you in any way, please feel free to call me: (telephone number omitted).
>
> *Remember always be Proud of the trade you have chosen.*
>
> Looking forward to any response positive or negative.
>
> Thank you for your careful consideration.
>
> P.S. Remember, I like most tradesman am a father and family provider. My concerns are the same as yours. Let me help you meet you family's future needs."

This letter was accompanied by a fact sheet about Union benefits and other information about Union membership.

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[4] At some point in his employment with Colacino, Zaborowski failed a drug test. He was given a subsequent test and passed. No discipline was given him for the failed drug test.

[5] Davis testified that he stopped at the Racetrack because he had previously been the Racetrack's electrician and he had been asked to stop and discuss a problem with the track's current electrician. When he arrived, he saw Respondent's truck at the site.

Subsequent to Davis mailing this letter, Zaborowski telephoned Davis and then gave the phone to his fellow Colacino employee, Dave Greco. Zaborowski had been talking about the Union to Greco and Greco had shown interest. The phone call took place after 3:30 pm, the normal end of Respondent's workday. Davis and Greco talked at length and Greco indicated he wanted to meet personally with Davis at a place where they would not be recognized.[6]

After Davis talked with Greco, he visited a Colacino jobsite on September 8. This site was the Clifton Springs Hospital, and there Davis spoke again with Colacino employee Lynn Smalt. Davis testified that he had learned that Respondent was working on this jobsite from his International representative.

Zaborowski remembered being called by Davis in the early summer of 2005. They discussed their past relationship. Later in the summer, Davis again called him and they agreed to meet. They met at Parkers, a restaurant in Newark, NY. Following this meeting, Zaborowski spoke about the Union to fellow employees Lynn Smalt and David Greco. He spoke to Smalt at work while the two were walking to their vehicles to go to a job. This conversation lasted less than 5 minutes. Zaborowski spoke with Greco on a number of occasions.[7] According to Zaborowski, Greco was very interested in the Union and wanted to meet with someone from the Union.

Zaborowski testified that Davis's visits to the Colacino jobsites and his letter to employees were mentioned at one or two of the morning employee meetings. He testified that Colacino asked if Davis had stopped at the jobsites and also asked if all employees had received the letter sent by Davis.

As an offer of proof, General Counsel adduced the following testimony from Zaborowski. On September 8, Zaborowski received a call from Greco. According to Zaborowski, Greco, in an uncertain tone of voice, told him that Colacino knew that Zaborowski had put Greco in touch with Davis by calling him and giving the phone to Greco. Greco told him that he had not told Colacino and he suspected that Lynn Smalt had told Colacino. Greco said that Colacino had also told him that he could not handle the pressure and someone he knew that had gone through this (union organizing) had closed their doors. Colacino further stated that he was thinking seriously about closing his doors. Greco added that he did not know if Colacino was going to fire Zaborowski, but that Colacino said that it (Zaborowski's organizing) was the worst thing that had happened to him since his daughter was injured. Having reviewed the entire record, I accept this testimony. It is entirely consistent with admissions made at various places in Colacino's testimony. Greco was subpoenaed to testify by General Counsel, but he failed to honor the subpoena and appear at the hearing.

[6] Davis at this point, after timely objection by Respondent, gave hearsay testimony that Greco did not want to meet at the Union hall because he was afraid for his job. I allowed this testimony subject to Greco confirming it. Greco did not testify.

[7] According to Zaborowski, both Smalt and Greco were looking for other employment at the time.

*C. The employee meeting of September 9.*

1. Zaborowski's version of the meeting

At the employee meeting held at 7 a.m. on September 9, present were Owner James Colacino, his secretary Vickie Bliss, Zaborowski, Colacino's father, David Colacino, Doug Velte, Lynn Smalt, Dave Greco, Gary Brandish, Shawn McCormick, and two other employees, one named Scott and the other Ariel. They met in Colacino's office, which is approximately 12 feet by 15 feet in size. Colacino had a desk in the office and sat behind it and Zaborowski sat across from him. Most of the other attendees were standing. About 3 feet of desk separated Zaborowski and Colacino.

Zaborowski testified that most of these morning meetings began with small talk about current events or what the employees had done the night before; then the talk turned to issues or job assignments. Zaborowski testified that Colacino usually kept the atmosphere of the meeting "nice." According to Zaborowski, on the 9th, the meeting began by Colacino stating, "I've done a lot of thinking, I've got something on my mind and my chest that's taking me a lot of time to think about. And I have to get it out in the open. As you guys know, I don't handle stress the same way as my father. It's been very hard." According to Zaborowski, Colacino then related the story of his relative going out of business because of the Union and told the employees that he was not sure if he wanted to keep going, if his business was going to be taken out from under him because he takes pride in the family business. Colacino told them that the pressure and stress of the union organizing was the worst thing that happened to him since his daughter was injured.

To this point, Colacino had been looking around the room, engaging all the employees there, but always returning to Zaborowski. According to Zaborowski, at this point, Colacino's voice became stressed and said, "I know there's somebody in here right now that's been trying to get my guys to organize." Colacino, who had been leaning back in his chair, sat up and pointed his finger at Zaborowski and said, " I want to know right now are you the one that's been using your cell phone to call the Union and hand it to another one of my employees?" Zaborowski did not answer right way and Colacino asked the question again, and then again.[8] Zaborowski then stood up to the side of his chair and responded, "This is fucking bullshit, I know my rights. I can talk about the Union to anybody. And whether you know it or not, right now there's two guys in your office that have been looking for jobs and have been talking to me about the Union. And all I'm trying to do is show them that there's opportunities there. And just guide them that they can better their careers and - - for themselves and their families. Provide them with information is all." Zaborowski testified that his voice became raised as he answered Colacino's question. Zaborowski also remembered that Colacino asked him if he had been giving Davis information about Colacino's jobsites or any other information. Zaborowski denied

[8] A written sworn statement of Vickie Bliss was submitted by Respondent in the Zaborowski's unemployment compensation case. Bliss is a company secretary and was present at the meeting. Inter alia, the statement reads, "Jim asked him again and he still would not answer the question, got very defensive and started raising his voice. Jim told him not to raise his voice to him, just answer the question asked." A statement submitted by Colacino's father, who was present, indicates that Colacino told Zaborowski six times not to raise his voice and answer the question. Respondent's position statement in this case indicates that Colacino told Zaborowski that he was going to give him one more chance to sit down, calm down and answer the question.

doing this, saying it was an organizer's job to find out this information. He added that organizers do not need him for this task.

Zaborowski testified that he then told Colacino that he had given him the benefit of the doubt, that he could have gone to the Union the first time Davis called him, but instead gave Colacino the benefit of the doubt about the raise that he had promised in his job interview.[9] Zaborowski said that "nobody has left you yet. Your employees haven't left you, I haven't left you. I've given – I've stood up for you actually to give you a chance. I told Mr. Davis that myself. I want to give the respect that you gave me in hiring me. I stood right there in your office with you sitting at the desk, pounding the desk saying, I'm a man of my word, Mr. Zaborowski, I'm a man of my word." At this point, Zaborowski testified that he mimicked Colacino and pounded the desk. Colacino stood up and starting coming around his desk. Colacino's father intervened and said that this is enough, just calm down. Zaborowski had finished talking and Colacino stopped and told Bliss to prepare Zaborowski's last check, saying "I can't take this no more. Today's his last day."

Zaborowski then went outside and got his personal belongings from the company truck. He then returned to the office and with an open hand, slammed the truck keys on the corner of Colacino's desk, saying "here's your keys." He then asked Bliss for his last cell phone check with his last payroll check. Zaborowski testified that Bliss was apologetic and said she would not be able to have his check ready until later in the day. Zaborowski returned either in the late morning or early afternoon and got both checks without incident.

Douglas Velte has been employed as an electrician by Colacino for 4-1/2 years. He is also a personal friend of James Colacino and they socialize outside of work. Velte testified about the meeting of September 9. He believed that the meeting started with assignments being given out. Then Colacino said he had something he had to bring up. Colacino started asking the employees if somebody had been talking about going to work for somebody else, or passing a cell phone off and talking to a union representative during company hours. According to Velte, Colacino just went around the room and wanted to know if anybody was talking with a union representative on company time. Velte testified that Colacino pointed at each employee and asked if they were the ones talking to the Union representative. No one answered. Velte testified that everybody knew who it was and that is when voices started being raised. Colacino asked Zaborowski if he was the one passing off the cell phone. He also asked Zaborowski if he knew how the Union got to the company jobsites. According to Velte, Zaborowski stood up, raised his voice and said, "That was Mike Davis's job." Colacino told Zaborowski to sit down and calm down, that he was just trying to talk with him. According to Velte, the arguing and voices kept getting louder. Colacino kept telling him to calm down. Velte said then it looked to him like Zaborowski was starting to lunge towards Colacino. However, Zaborowski did not lunge and the two men continued to exchange words back and forth. In an affidavit given prior to his testimony, Velte mentioned nothing about "lunging" and swore that Zaborowski merely leaned on the desk. The conversation ended when Zaborowski would not sit down and was fired.

Zaborowski denied raising his hand toward Colacino as if to strike him, denied leaning across the desk toward Colacino, and denied pointing his finger at Colacino. Zaborowski testified that both his voice and Colacino's voice were raised during the exchange of words. Zaborowski also testified that he did not sit down when told to do so by Colacino because "I felt

[9] Zaborowski testified that in the job interviews and subsequent job reviews, Colacino had promised him a raise after a certain period of time. According to Zaborowski, Colacino reneged on this promise.

humiliated. I felt like I had enough of being interrogated. And I didn't want to have him point his finger at me again and solo me out in front of all of the other employees. I felt embarrassed. And I was upset, yes. I knew my rights."

2. Colacino's version of this meeting

James Colacino gave sworn testimony about this meeting and the events leading up to meeting three times. The first was in a New York State Unemployment Compensation hearing following Zaborowski's discharge. The next time was in response to questions by General Counsel who called Colacino as an adverse witness as part of her case in chief. The last time was when Colacino's counsel called him for direct testimony as part of Respondent's case. I note this as Colacino's testimony varies on significant points depending on the forum or which attorney was examining him. In my opinion, these variations are important in determining Colacino's credibility and the motivation underlying Zaborowski's termination, and whether the alleged Section 8(a)(1) violations occurred.

In the instant proceeding, in response to General Counsel's questions, Colacino testified that he discharged Zaborowski for "insubordination" that occurred at the meeting on September 9. It was Colacino's testimony that, absent the manner in which Zaborowski conducted himself at that meeting, Zaborowski would not have been discharged. Colacino testified that on the morning of September 9, he was aware that the Union was trying to organize his employees. Upon questioning by General Counsel, Colacino admitted feeling pressure and stress because of the Union organizing effort. He testified, however, that this was an ongoing pressure because of efforts by the Union and his customers to either organize his work force or hire it away from him. For about 2 months before the meeting, he had had conversations with employees wherein the subject of the Union had been discussed. He had learned from his employees that Davis had visited two job sites and had spoken with employees. The employees who told him this were Smalt, Velte, and Greco. He said the employees made these disclosures when he spot-checked his jobsites and was told that he just missed seeing Davis. He believes his employees volunteered the information to him. Colacino testified that he did not mind Davis's visits except for the interruption of work they caused.

During examination by his counsel, Colacino testified that he did not believe Davis could have visited his Phelps Fire Station jobsite unless he had been told of its existence by one of Colacino's employees. When he asked the employees on the Clifton Springs Hospital jobsite about Davis's visit, they told him that Zaborowski had identified the jobsite to Davis and that Zaborowski was trying to get them to sign or to join the Union. Colacino quoted Smalt as saying, on September 7 or 8, "He's (Zaborowski) been driving us nuts. Every day, he wants to talk. He's telling us about the Union, wants us to call Mike Davis, give us the phone numbers. He even went so far as to dial the phone for Greco." Colacino then testified that Greco came in later that day and told Colacino the story about the phone call. Colacino believes Greco was urged to make this admission by Smalt. Colacino also testified that in this conversation, Greco told him that he did not want to join the Union, but Zaborowski would not leave him alone on the subject.

On the subject of Zaborowski's organizing efforts, Colacino testified: "I didn't necessarily want to believe that he (Zaborowski) would be trying to organize my guys after the long period of time he went without work. However, yeah I would say - - to answer your question the guys had mentioned to me prior to that that Dave (Zaborowski) had been talking of the Union, about his experience in the Union, and some of the benefits of being in the Union and the potential - - the earning potential in the Union. But it seemed like it was getting - - how can I word this? I didn't realize that - - just how strong David was pushing the Union until September 7th or 8th. Whenever it was at Clifton Hospital (a jobsite visited by Davis). And I was concerned that he

was spending company time trying to organize my guys. I would hope that company time would be spent on company - - something that's conducive to the benefit of my company, not the detriment of my company."

According to Colacino, about a month before September 9, employee Smalt showed Colacino the fact sheet sent by Davis to Colacino's employees. Though Colacino on more than one occasion denied ever seeing the cover letter accompanying the fact sheet, he testified that when Smalt brought him the packet, he told him about the letter. Then he testified that Smalt "brought the letter in to me in the morning and showed me that he had gotten in the mail. Colacino later again denied seeing the letter before the instant hearing. Colacino also had a conversation with employee David Greco who told Colacino that Zaborowski was attempting to have the employees speak with Davis and join the Union. According to Colacino, Greco, on September 8, told him that Zaborowski would not leave the employees alone. Greco told him that on one occasion, while driving to or from a job, Zaborowski had called Davis and then handed the phone to Greco so he could speak with him. According to Colacino, Greco also indicated to him that he was not interested in the Union at that time. Colacino testified that he asked Greco why Zaborowski was attempting to organize the employees.

Colacino testified that he had a conversation with some of his employees wherein he related that a relative of his in the electrical contracting business just shut the business down permanently during a union organizing campaign. He also related that another contractor that had been successful as a nonunion contractor for 50 or 60 years, gave in and signed with the union after a number of lawsuits. According to Colacino, the business then failed within 24 months. Colacino also related that it was the union's inflexibility that caused the business to fail and put the employees out of work.

Colacino offered the following testimony about the meeting of September 9 in response to questions by General Counsel. He testified that he began the meeting by giving out job assignments. He then asked the employees in the room "is there anybody here that's trying to find other employment for their co-workers on my time?" He knew when he asked the question that Zaborowski had "spearheaded some of the (union) conversations with Mike Davis and my other employees." Colacino then asked Zaborowski whether he was trying to "find other employment opportunities for my employees on my time."[10] Colacino testified that this statement was a euphemism for organizing for the Union. Colacino then asked Zaborowski whether he had used his cell phone to put the Union in touch with his employees on his time. He also asked Zaborowski whether he had tried to organize his employees on company time. Colacino offered sworn testimony in a New York State Unemployment compensation proceeding. In that forum, Colacino swore that at this point in the meeting, Zaborowski became very defensive. In the instant proceeding, Colacino characterized Zaborowski as becoming very offensive. Colacino continued to question Zaborowski in an attempt to get to "the bottom of the issue." During this phase of the meeting, Colacino testified that he repeatedly asked Zaborowski to lower his voice and talk to him. At one point in his testimony, Colacino stated that in response to his questions, Zaborowski slammed his fist on Colacino's desk and answered, "That's fucking bullshit. That's his job. He's an organizer. You know that." Colacino testified that Zaborowski pointed to other employees and said, "Don't be blaming me, ask them." Colacino assumed that Zaborowski was trying to make the point that other employees were involved in the organizing effort. Colacino also testified that by answering in the fashion he did, Zaborowski was defending himself from Colacino's questioning about why Zaborowski was trying to

[10] At another point in his testimony, Colacino testified that he asked this question first to the entire assembled group of employees.

organize the employees on Colacino's time. Colacino admitted his employees are allowed to talk about any subject during worktime, so long as the employees remain productive. They are allowed to use their cell phones to make nonwork-related calls, so long as it does not interfere with their work. Colacino, in my opinion, failed to demonstrate why Zaborowski's calling Davis while driving to or from a jobsite, and then handing the phone to Greco in any way interfered with his work.

Colacino admitted that it was possible that he said to one or more employees that the Union organizing effort was the worst thing that had happened to him since a personal tragedy that his family suffered. He also told the employees at the September 9 meeting that he would not idly stand by and have his business stripped of talented employees and customers.

In this proceeding, Colacino testified that he felt physically threatened by Zaborowski in the employee meeting and believed that Zaborowski might try to hit him. In sworn testimony in the unemployment proceeding, Colacino stated that "David (Zaborowski), you know, didn't do anything that I would consider threatening, but he was very upset and the language and professionalism just wasn't there." Colacino testified that the language and the lack of professionalism were part of the reason for firing Zaborowski.

In testimony adduced by his attorney, Colacino testified that the meeting began with the passing out of job assignments. Then he told the employees that he had some issues that he wanted to talk about, some things that concerned him. He asked if any of his employees were actively pursuing other employment opportunities for their co-workers and his employees on his time. Colacino testified that when he asked that question he was looking around the room at all the employees. He testified that Zaborowski seemed agitated and upset at the question, banged his fist on the table, and said, "That's fucking bullshit!" According to Colacino, Zaborowski "had turned toward Dave Greco and Lynn Smalt and in substance tried to insinuate that they too were part of this organizing effort. And that they had some interest in leaving. So it wasn't just Dave Zaborowski. I think that's what his intention was. And, you know, he did make a comment that I'm not going to bring other names into it, but there's other people in this room. And he specifically looked at David and Lynn. . . That they were interested in leaving, but they just didn't have the intestinal fortitude. He didn't use those words, but 'the balls' to say anything."

Colacino testified that his intent was to find the deficiency in the Company that would cause his employees to want to leave their employment. He testified that the entire exchange between him and Zaborowski lasted 5 to 7 minutes. Colacino testified that Zaborowski was very upset and very angry during the exchange. With respect to Zaborowski's demeanor, Colacino testified that he said, "David, I'm talking to you. Please talk to me. Lower your voice. I'm talking to you. I'm just asking you a question. Are you trying to find other employment opportunities for my employees?"

Colacino testified that at this point, Zaborowski was looking around at the other employees trying to get them to intercede and take some of the heat off of him. Then Colacino asked Zaborowski, "David, I'm asking you a question. Are you the guy that's taking the cell phone and dialing the number for the organizer, for Mike Davis, and handing it to my employees on my time as you're driving down the road in my van?" Colacino testified that at this point Zaborowski was very irate and rose from his chair. Colacino then said, "David, I'm trying to talk to you. I'm not going to tell you again, I want to have a conversation. I want to get to the bottom of this. I want to find out what's going on. Why are you guys not happy here?" Colacino then testified that he could not get Zaborowski to calm down, though he asked him to calm down four or five times.

Colacino testified that on prior occasions he had had heated conversations with Zaborowski. He remembered one occasion when Zaborowski was inquiring what he could do to get a raise. Colacino testified that he told Zaborowski of a concern of Colacino, Zaborowski got defensive and said, "That's bullshit. Who told you that? I'll freaking . . . I'm going to get to the bottom of this." According to Colacino, Zaborowski was upset at who told Colacino about the alleged problem rather than with the problem. He testified that his goal was to help Zaborowski's earning potential. When asked by his counsel what was the difference between this occasion, where no discipline was issued, and September 9, when Zaborowski was fired, Colacino testified:

"Well first of all it's not my goal to reduce my employees, but rather grow my company. So certainly I would not want to reduce my staff, especially at that point in time. My goal is to try and work through problems. Problems are inevitable. And in the past, in the 39 years I have been around this business, we've always tried to work with our employees and counsel them, and try and make them better educated on our business. One how we can make it a better business. So the goal isn't to - - if I fired every - - fired someone every time I had a problem with them I'd have absolutely no employees. So in the past when I talked to David it was he asked a question; what can I do to make more money? I tried to talk to him about it. David, not unlike other people, sometimes has a hot temper. He has a very short fuse. But I never had felt threatened by David. On September 9th, he was so upset and so irate and the way he was addressing me that I actually felt threatened. I thought that a physical confrontation was very possible. And it's probably the straw that broke the camel's back that day in that I simply can't run a business where I feel threatened by my employees.[11] And I certainly can't be in a position when I can't talk to them about a concern. This case being the concern I brought up that morning is - - and what I wanted to get to. I never got to this point because I wasn't allowed the chance to ask it. But if the Union has benefits that are superior to what I can offer, why are you not working there? And what do I need to do - - what do I need to improve to make my place more [attractive]. I never got to ask that question. My goal that morning was to address the situation, talk to David. He - - optimally what would have happened is David could have sat down with me and said look it, I need to make more money. Am I going to be able to make more money here? And I could say when you accomplish these tasks, yes. But in the meantime, I don't think its fair to me to, behind the scenes, try and strip me of my talented employees. The reason is my business has zero value. I spent a lot of time and a lot of effort training my employees. The Union in the past has - - I've had organizers talk to my men for the 35 years I've been around this business - - 39 years. It's never been a problem for me. I just always hope that my operation - - my guys enjoy working there, and that they'll weigh out the pros and cons of them. "

Colacino then testified about the threat posed by Zaborowski. He testified that "I do not recall ever coming around the desk. I remember when David stood up and started to get - - he was very aggressive in his conversation with me and I stood up too, because, you know, only a fool would sit there and - - you know, I actually thought that David was going to take a swing at me, I really did. I mean he was very upset. And he was upset from the opening question that I had. It didn't really build up to it. It was just like and off on switch." He soon thereafter testified

[11] As an apparent afterthought for this hearing as it never surfaced before, Colacino pointed out some issues which he says contributed to the discharge. He alleged that Zaborowski "cat called" women from the company van, had a very short fuse with other contractors on jobsites, was confrontational with customers, had difficulties with co-workers, and would not take criticism. No proof of any of these alleged issues was given and I do not believe they played any role whatsoever in Zaborowski's discharge.

that "I can't have a hostile situation there where I feel threatened - - physically threatened. And it was never my intention to eliminate an employee that day." Colacino did not call the police this day or find it necessary to have Zaborowski escorted off the company premises.

Colacino, when asked by his counsel, clearly seeking a straightforward denial, whether he had threatened employees with closing the facility at the September 9 meeting, answered, "Not in the context you are saying it." Colacino then stated "that there are many days, many times I've thought about closing my business." When asked whether he had voiced that sentiment to employees, he answered, "Probably." He then qualified his answer saying it would not have been a threat, and that many reasons other than union organizing would have caused him to say that.[12]

In the meeting, Colacino told the employees that he was under a lot of stress in his business, caused by, inter alia, the Union organizing.[13] Going into the meeting, Colacino was determined to address and find the reasons why employees would want to leave his organization. As there was no showing that any other reason for leaving was discussed, one must conclude he was seeking to learn why his employees would want to join the Union. Colacino also testified that he told the employees that he was not going to let someone destroy the business he had worked hard for. He then testified that it was a concern to him why Zaborowski was trying organize a union. Colacino deemed personally hurtful that an employee would want to leave. He considered Zaborowski's organizing efforts to be a "manageable problem."

Having carefully considered the evidence adduced through Zaborowski, Velte, and Colacino, I credit the testimony of Zaborowski wherever it conflicts with that offered by the other two men. Both Velte and Colacino offered testimony adverse to Zaborowski that conflicts with other sworn testimony given by them. In Velte's case, there was a conflict between his testimony in the instant case and in his affidavit. In Colacino's case there are conflicts in his testimony herein and in the sworn testimony given in the unemployment case. Moreover, there are numerous internal conflicts in the testimony given by Colacino in the instant proceeding. At one point or another, Colacino virtually admits what Zaborowski testified he said.

In sworn testimony in evidence, Colacino characterizes Zaborowski's manner in the September 9 meeting as defensive and then as offensive. He swore in the unemployment hearing that he never felt threatened and then in this hearing, he testified that he did feel threatened and feared that Zaborowski would hit him. I believe that the truth lies in Zaborowski's testimony and that Colacino and Velte have stretched the truth or avoided it altogether to bolster Respondent's case.

*D. Discussion and Conclusions.*

1. Was Colacino's implied threat to close the business unlawful?

As the Supreme Court concluded in *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), [a]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not

[12] Colacino testified that subsequent to Zaborowski's termination, he had employed two Union electricians on a job without incident and would hire them again.

[13] Velte testified that in the meeting Colacino never impliedly threatened employees with closing his business.

contain a "threat of reprisal or force or promise of benefit." He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to the demonstrably probable consequences beyond his control. If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessity and known only to him, the statement is no longer a reasonable prediction based on facts but a threat of retaliation based on misrepresentation and coercion. "[C]onveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof . . ." [A]n employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control," and not "threats of economic reprisal to be taken solely on his own volition." *NLRB v. Gissel Packing Co.,* supra at 618-619.

Applying these standards, it is clear that Colacino overstepped the bounds of permissible speech and threatened employees with reprisals at the September 9 meeting and on other occasions during that time period. On direct examination, Respondent's counsel read verbatim the Complaint allegation on this point, and asked Colacino if he ever "impliedly threatened employees with closing the facility." Colacino replied "not in the context in which you're saying it, no." Such a evasive answer conflicts with Colacino's admission in other testimony that he sent the message to employees more than once that if they unionized, he could, or would, close his business.

Zaborowski testified that at the September 9 meeting, as Colacino began to talk to the assembled employees, he described the pressure and stress he felt about the Union. He told employees he wasn't sure he wanted to stay in business if his business was going to be taken out from under him because of the pride he had in the family business. Thus, Colacino more than just implied that he could close the business, which is unlawful, but plainly told employees, he may or may not take such action solely on his own initiative for reasons known only to him and unrelated to economic necessity. The statement is a clear threat. Colacino connected the stress from the union to his uncle, who had a similar experience with the union. Colacino admits telling employees two stories about unions. One story described his uncle's experience as follows: "Similarly my uncle was pressured into – he found that his employees were organizing – trying to organize each other into a union. He had made a decision that he, at the stage of his life he was in, didn't want the additional pressures and the inflexibility that will come long with it. So he had opted that if they formed a union that he would probably retire and close the business." Colacino also told a story about an electrical contractor who was successfully in business for 50-60 years. Colacino told employees that the contractor was pressured by continual lawsuits from the union into signing, and then went out of business. He told employees the inflexibility of the union is what put that contractor out of business. The stories were clearly a scare tactic, not based on demonstrable fact. Colacino admits telling employees that "I won't sit idly by and let someone destroy my business."

Colacino admits he probably made that threat to employees on the same day he talked about his uncle, probably on September 9, and probably more than once. There is no possible purpose for him to tell those stories, other than to send the clear message to employees that if they organized, he would, or could, close. These stories and statements were more than general references to possibilities. They were detailed with names and consequences, but not based on the required demonstrable underlying premise. The overall effect of Colacino's statements that "he would not stand idly by and let someone destroy his business" taken together with his stories about the unsubstantiated adversity experience by friends and

relatives, whose businesses were unionized, would cause employees reasonably to equate unionizing with closing, in violation of Section 8(a)(1) of the Act. *Iplli, Inc.,* 321 NLRB 463 (1996).

2. Was Colacino's interrogation of Zaborowski unlawful?

In determining whether a supervisor's questions to an employee constitutes an unlawful interrogation, the Board examines whether under all the circumstances, the questioning tends to interfere with, restrain, or coerce employees in the exercise of Section 7 rights. *Rossmore House,* 269 NLRB 1176 (1984). In making this assessment, the Board reviews various factors, including whether the employee is an open union supporter, the employer's background (whether there is a history of employer hostility and discrimination), the nature of the information sought (whether the interrogator appeared to be seeking information on which to base action against individual employees), the identity of the questioner, the place and method of the interrogation, and the truthfulness of the reply. *Heartshare Human Services of New York,* 339 NLRB 842 (2003). Applying these factors to Colacino's questioning on September 9 establishes that Colacino questioned Zaborowski in violation of Section 8(a)(1) of the Act. First and foremost, the interrogator, Colacino, is president and sole owner of the Company. His admitted motive in questioning Zaborowski on September 9 was to "get to the bottom" of the union organizing. He testified in the unemployment hearing:

"I had had some complaints from other employees that David was trying to find other employment opportunities – specifically trying to organize my employees into the local union out of Geneva. What had happened was I was questioned David about it in our morning meeting and when questioned he flew off the handle and got very defensive. We tried to have a conversation with him so we could get to the bottom of you know was he trying to find other employment opportunities for my guys."

While Colacino knew Zaborowski was in the Union when he sought employment at the Company, and that he kept in contact with the Union, Zaborowski, after discussing the matter with Colacino, resigned his membership with the Union before he started working at the Company. Colacino admits that while he knew Zaborowski kept ties with the Union, he "didn't realize just how strong David was pushing the Union" until September 7 or 8, a day or two before he fired him. At the September 9 meeting, Colacino sought information about Zaborowski's union organizing activities, and his manner, tone, and the tenor of the questioning was coercive. Before he began interrogating Zaborowski, Colacino told employees he was under stress from the Union, and that he wasn't sure if he wanted to stay in business if his business was going to be taken out from under him. He also told employees that it was the worst thing that had happened to him since his daughter was injured. Although he knew that it was Zaborowski who made the cell phone call to the union organizer, Colacino nonetheless made a showing of going around the room, and asking employees if they were the ones talking to the Union representative. During this questioning of employees, he stared at Zaborowski and said, "I know there is somebody in here right now that's been trying to get my guys to organize." See *Sea Breeze Health Care Center, Inc.,* 331 NLRB 1131, 1131-1132 (2000) (manager called an employee meeting and asked employees if they knew anything about union trying to get in; in finding violation, the Board found "the group dynamic of the questioning only heightened the likely coerciveness of the questioning").

Colacino's overall approach was intentionally intimidating. He turned his chair to directly face Zaborowski, leaned forward toward Zaborowski, pointed his finger at him, and demanded to know, "right now", if he was the one passing your cell phone to employees to talk to the Union. Zaborowski did not reply at first. Colacino did not relent, demanding again and again that Zaborowski answer his question. "I want to know right now are you the one using your cell

phone to call the union and hand it to one of my employees?" It is particularly telling that Colacino interrogated each assembled employee individually before targeting Zaborowski, when he admittedly knew going into the meeting that it was Zaborowski who had made the cell phone call. Colacino's only conceivable purpose in interrogating everyone at the meeting, then focusing individually on Zaborowski, was to heighten the employees' anxiety and to send a message to them of his disapproval of union organizing. He would have reasonably foreseen the chilling effect such a meeting would have on his employees. Employee witness Velte testified that the room fell silent as Colacino asked each employee if somebody has been talking about going to work for somebody else or passing a cell phone off and talking to a Union representative.

It is well recognized that an employee's failure to respond to an employer's questions, indicates that an employee felt coerced. *Waste Management de Puerto Rico,* 339 NLRB 262 (2003); *Sea Breeze Heath Care Center,* 331 NLRB 1131 (2000); *LaGloria Oil and Gas,* 337 NLRB 1120, 1122-1123( 2000); *Medicare Associates,* 330 NLRB 935, 941 (2000). The manner of interrogation inspired fear and intimidation among employees, as indicated by the silence of the employees. Zaborowski also testified during the interrogation that: "I felt humiliated. I felt like I had enough of being interrogated. And I didn't want to have him point his finger at me again and solo me out in front of all of the other employees. I felt embarrassed. And I was upset, yes. I knew my rights." There is no question but that the interrogation was unlawfully coercive.

For all intents and purposes, Colacino admits that his purpose for the questioning was unlawful. He conceded that he wanted to question Zaborowski, who in his words "spearheaded" the organizing, to get to the bottom of it. Colacino admits that during the meeting he told employees he would not stand idly by and let his business be destroyed, and that his voice was raised. Colacino leaned forward toward Zaborowski and pointed his finger at him. Colacino testified that as he questioned Zaborowski, he would not answer the question directly and kept turning toward the other employees to say something so "it's take a little bit of the heat off David." Colacino persisted and warned Zaborowski: "I'm trying to talk to you. I'm not going to tell you again I want to have a conversation, I want to get to the bottom of this." Colacino testified, "I asked him, 'David, I'm asking you a question. Are you the guy that's taking the cell phones and dialing the number for the organizer, for Mike Davis, and handing it to my employees, on my time, as you're driving down the road in my van?'" Zaborowski was clearly the victim of a well-planned, highly coercive interrogation on September 9 and under each and every *Rossmore House* factor, Colacino violated Section 8(a)(1) of the Act.

3. Was Colacino's interrogation of other employees at the September 9 meeting unlawful?

Colacino admits that at the September 9 meeting, he looked around the room and asked if anybody in his presence was pursuing other employment opportunities for co-workers and employees on my time. Employee Velte testified that at the meeting, Colacino surveyed the room of assembled employees and asked if anybody was talking to a union representative on company time. Velte testified that Colacino went around the room, and pointed toward each employee, asking if they were the ones talking to the Union representative. According to Velte, the room was silent; no one responded to Colacino's questioning. The employees remained silent as they knew who Colacino was referring to. *LaGloria Oil and Gas Co.,* 337 NLRB 1120 (2000) (silence is indicative of coerciveness). Colacino directly interrogated Zaborowski. Colacino's questions were not confined to overt union supporters. Even if it is true that certain employees may have been openly antiunion, the room was filled with all of the company employees, and there is no evidence as to which, if any, were for or against unionizing. Colacino questioned the captive employees, who were intimidated into silence, knowing that

Zaborowski was the target of the interrogation. All of the company employees witnessed the interrogation and discharge of Zaborowski. Colacino admits that he knew going into the meeting that it was Zaborowski who was contacting the Union. Nonetheless, he chose to interrogate everyone, and Zaborowski individually, and to discharge Zaborowski in front of everyone, undoubtedly to send a message to employees about the consequences of organizing. I find that Colacino's interrogation of the employees other than Zaborowski to be an independent violation of Section 8(a)(1) of the Act.

4. Was Zaborowski's discharge unlawful?

a. Was the discharge unlawful under a *Wright Line* analysis?

The Board traditionally determines whether a discharge is unlawful under the guidelines set out in *Wright Line, A Division of Wright Line, Inc.,* 251 NLRB 1083 (1980). To establish a violation under *Wright Line,* the General Counsel has the burden to prove that an employer's actions were the result of its animus toward union or protected activity. Once the General Counsel has met this burden, the Board will find a violation unless the employer proves that it would have taken the same action even in the absence of the protected activity.

General Counsel has clearly met her burden in this case. Colacino's animus toward the union is obvious. He admitted the union organizing effort contributed to his stress and admitted that the organizing effort was the worst thing that happened to him since his daughter was injured. He told the employees of other employers who had closed their business either because they became unionized or because they would not become unionized. Colacino clearly threatened his employees that he might well close his business if it became unionized. He admitted telling employees that he would not stand idly by and have his business stripped of talented employees. His actions in the meeting of September 9 showed that this animus was directed at Zaborowski solely because of Zaborowski's activities on behalf of the Union. Zaborowski, inter alia, solicited employees Greco and Smalt on behalf of the Union and put Greco in touch with Davis by calling Davis and handing the phone to Greco. Colacino learned of these clearly protected Union activities within 2 days of the September 9 meeting. At the meeting, he confronted Zaborowski by asking him if he had done these things, all the while knowing that Zaborowski had done them. I believe it is clear that Colacino's motivation in terminating Zaborowski was his union animus and animus toward Zaborowski's activity on behalf of the Union, and nothing else. As noted above, Colacino admitted he would not stand idly by and let his employees be taken by the Union. Given this mindset, I find that Colacino went into the meeting of September 9 intending to discharge Zaborowski and send a message to the other employees of the consequences of engaging in union activities. To stop the organizing effort, he had no other option. He could not lawfully tell Zaborowski to cease his organizing efforts. I believe and find that Colacino would have discharged Zaborowski on September 9 even if Zaborowski had simply never answered Colacino's unlawful questions.

Respondent has totally failed to meet its burden of showing that it would have discharged Zaborowski even if Zaborowski had not engaged in Union activities. That Zaborowski became angry and cursed in the meeting does not justify his termination. Zaborowski was goaded into anger by Colacino's repeated and unlawful questions to him about his union activity. Colacino knew from past confrontations with Zaborowski that Zaborowski could be goaded into anger and could be provoked into an outburst. By Colacino's own admission, he and Zaborowski had had earlier heated arguments, with Zaborowski responding much as he did on September 9, with no discipline resulting. The only difference between the earlier confrontations and the one on September 9 is that the earlier ones did not involve any

Union activity by Zaborowski. Respondent had tolerated Zaborowski's alleged "short fuse" and profanity until he engaged in union activities. Profanity is not uncommon at employee morning meetings and no one had been discipline for the use of profanity at such meetings until Zaborowski said "f-----g bullshit" in defense of his protected conduct. Respondent routinely allows employees to use their cell phones on company time for any reason, save and except for union business. It had no rule against solicitation of any kind until Zaborowski solicited on behalf of the Union. At the hearing, Respondent for the first time offered some unproven allegations of misconduct by Zaborowski that allegedly played a part in the discharge. These allegations, even if true and I question that, did not matter enough for Colacino to even counsel Zaborowski about them. Such evidence demonstrates that Respondent has not shown it would have discharged Zaborowski absent his Union activity. See, *Sunbelt Mfg.,* 308 NLRB 780 (1992); *Burle Industries,* 300 NLRB 498 (1990); *Palagonia Bakery Co., Inc.,* 339 NLRB 515 (2003). The record is clear that prior instances of profanity, heated discussions, and cell phone use were never a problem before the onset of Zaborowski's organizing activity. I believe the record fully supports a finding that Zaborowski's termination was unlawful under a *Wright Line* analysis.

*b. Was the discharge unlawful under the Board's holding in Atlantic Steel?*

In addition to proving an unlawful discharge under a *Wright Line* analysis, General Counsel asserts that the discharge is also unlawful under standards enunciated in *Atlantic Steel,* 245 NLRB 814 (1979). Although under the circumstances of this case, given the provocation of Zaborowski by Respondent's unlawful interrogation, I do not believe that it is necessary to analyze the case under *Atlantic Steel,* I will do so in an abundance of caution. I agree with General Counsel's thorough analysis and adopt her reasoning with modifications.

In *Atlantic Steel,* the Board set out four factors to consider in making a determination whether an employee engaged in protected activity loses the protection of the Act by opprobrious conduct. These factors are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel* requires the Board to "carefully balance" the above factors.

Applying the four-factored balancing test to this case establishes that Colacino unlawfully discharged Zaborowski. Three of the factors – the place of the discussion, the subject matter of the discussion, and the provocation of the outburst, weigh heavily in favor of the Act's protection. While the nature of Zaborowski's outburst may not weigh in favor of protection, it also does not weigh against the protection of the Act. The outburst, which was within the acceptable parameters of Board law, and provoked by Respondent's unfair labor practice, is, by itself, insufficient to cost Zaborowski the protection of the Act, and overcome the other three factors weighing heavily in favor of protection. Thus even if it is determined that Zaborowski's outburst crossed the line, which it did not, his discharge still violated the Act, by virtue of the other three factors. *Felix Industries,* 339 NLRB 195, 197 (2003).

In *Felix Industries,* the Board, on remand from the District of Columbia Circuit Court, faced the question of whether the third factor, the "nature of the outburst" (which had been determined by the Circuit Court to be unprotected) outweighed the other three *Atlantic Steel* factors that did not weigh in favor of loss of protection. The Board, in deciding whether the nature of the outburst outweighed the other three factors, held that in order to evaluate the nature of the outburst, it was required to look at the fourth factor, provocation, which provides the context for the outburst. In that regard, the Board held: "We have determined that substantial weight must be given to the circumstances that provoked [the discriminatee's] outburst." *Felix Industries,* 339 NLRB at 196. The Board concluded that, although the nature of

the outburst weighed in favor of the employee losing the protection of the Act, it did not outweigh the other three factors favoring the protections afforded to the employee under the Act. See also, *Stanford Hotel,* 344 NLRB No. 69 (2005) (the factors of place, subject matter, and provocation favor protection, while only the factor of the nature of the employee's conduct does not; Board found that the employee did not lose the protection of the Act by his conduct.)

1. The first factor – place of the discussion

Colacino provoked a confrontation with Zaborowski at the daily morning meeting before the workday began. While the fact that the conduct took place in the presence of other employees is an important element in determining whether conduct loses it protection,[14] it is generally outweighed when, as here, the conduct is provoked by the employer. *Palagonia Bakery Co., Inc.,* supra at 533. The critical fact in the analysis of this factor is that it was Colacino who chose the time, place, and manner for the confrontational questioning. This fact was recognized in *Noble Metal Processing,* 346 NLRB No. 78 (March 31, 2006), where the Board weighed the four *Atlantic Steel* factors in favor of the employee's protection under the Act. In *Noble Metal,* the Board found that the employer violated the Act when it disciplined an employee for his behavior at a group meeting with employees, protesting certain employer conduct. Member Batista found the first factor weighed in favor of protection even though the conduct at issue occurred in the presence of employees. Member Batista observed that the place of the discussion, an employee meeting, was an appropriate forum where employees could be expected to express their views, and added:

> "I note that in addition to the judge's finding that Dowell's conduct did not take place in a work area and thus was not disruptive of the work process, *his conduct occurred at an employee meeting called by Respondent to announce impending changes. . .*[emphasis added]. 346 NLRB No. 78, slip op. at 2.

Similarly, here, while Zaborowski's behavior occurred in the presence of other employees, as noted above, Colacino chose the time, place and setting in which to confront Zaborowski. It did not occur while employees were in their work area and it is not alleged to have disrupted the work process. After the meeting ended, employees went about their daily activities with no interruption.

In analyzing this first factor, where the focus is on the employee's actions in front of other employees, it is important to note that it was Colacino who turned the meeting into a coercively disturbing experience for his employees. He unlawfully interrogated his employees before singling out Zaborowski. In *Palagonia Bakery Co., Inc.,* supra, the Board affirmed in full the ALJ's decision, applying the *Atlantic Steel* factors, that an employee's outburst in the presence of other employees, provoked by Respondent, was protected. The judge reasoned that the employer caused its own problem as follows:

"It is significant in this respect, that it was Palagonia who started the confrontation on the shop floor in the presence of other employees, Respondent can hardly complain about the public nature of the discussion. *Southwestern Bell,* [694 F.2d 974, 978 (5th Cir. 1982)]; *Brunswick Food & Drug,* [284 NLRB 663, 665 (1987), enfd. mem. 859 F.2d 927 (11th Cir. 1988)] (employer selected the setting for the confrontation, and thus is hardly in a position to object that customers were drawn into it). 339 NLRB at 533 (bracketed inserts added).

[14] *Piper Realty Company,* 313 NLRB 1289 (1994).

Finally, where, as here, Zaborowski's conduct in defending his right to talk to the Union and other employees is protected concerted activity, the fact that the conduct occurred at a group meeting is not a detriment to protection. The Board has consistently held that "employee questions and comments concerning working conditions raised at a group meeting by an employee clearly come within the definition of concerted activity under Board precedent." *Neff Perkins,* 315 NLRB 1229, n.1 (1994), citing *United Enviro Systems,* 301 NLRB 942 (1991) and *Whittaker Corp.,* 289 NLRB 933 (1988). See also, *Cibao Meat Products,* 338 NLRB 934 (2003) (Board found that employee's conduct at an employee meeting was protected concerted activity, not insubordinate as argued by the employer.)

Colacino alone made the decision to "get to the bottom" of the Union activity at the regular morning meeting in front of all the employees. There is no contention that Zaborowski initiated the discussion at the meeting, or attempted to take over the meeting, or purposefully tried to disrupt the meeting by seeking a confrontation with Colacino. Colacino chose to interrogate Zaborowski, in front of the other employees, in an aggressive, attacking manner, repeatedly demanding answers to his unlawful questions, with, I believe, the intent to send a message to the other employees about the consequences of Union activity. Under the circumstances that occurred on September 9, this factor weighs in favor of protection.

2. The second factor – subject matter of the discussion

There can be no dispute that Colacino questioned Zaborowski about his fundamental Section 7 right to talk to the Union and to talk to other employees about the Union. The subject matter of the September 9 meeting was the Union's organizing of Respondent's employees, and Zaborowski's role in that effort. Accordingly, the subject matter at the meeting concerned employees' fundamental Section 7 right to organize. Colacino interrogated Zaborowski about talking to employees about the Union and talking to the Union about where jobsites were located. Zaborowski was engaged in protected conduct when he defended himself by asserting his Section 7 rights. *Fairfax Hospital,* 310 NLRB 299, 300 (1993); *Brunswick Food & Drug,* 284 NLRB 663 (1978); *Palagonia Bakery Co., Inc.,* supra. As set out earlier in my fact findings, in response to Colacino's interrogation, Zaborowski responded: "I know my rights, I can talk about the Union to anybody. And whether you know it or not, right now there's two guys in your office that have been looking for jobs and have been talking about the union. And all I'm trying to do is show them that there's opportunities there. And just guide them that they can better their careers for themselves and their families. Provide them with information is all."

Respondent cannot credibly argue that the subject matter of the conversation does not weigh in favor of protection. Like the employee in *Stanford Hotel,* 344 NLRB No. 69 (2005), Zaborowski's "conduct occurred in the context of his attempted assertion of a fundamental right under the Act," here, the right to talk to the union and his fellow employees about the Union, and this "weighs strongly in favor of a finding that [his] remarks were protected." *Stanford*, supra at 2.

3. The third factor – nature of the outburst

The fact that an activity is protected and concerted does not necessarily mean that the employee can engage in any type of activity. When an employee is discharged for conduct that is part of the "res gestae" of protected concerted activities, the pertinent question is whether the conduct is sufficiently egregious to remove it from the protection of the Act. *Aluminum Company of America,* 338 NLRB 20 (2002). Here, Colacino's interrogation provoked an outburst from Zaborowski, and the two men engaged in an escalating argument, each raising their voices, and each using profanity. Zaborowski admits that as Colacino interrogated him, he raised his voice,

stood up and said, “this if f-----g bullshit.” Zaborowski also admits that during the confrontation he pounded his fist on the table imitating Colacino, who had done the same on prior performance reviews, telling Zaborowski that he was “a man of his word.” Colacino admitted that, in prior discussions with Zaborowski, he had banged his fists on a desk and said, “I am a man of my word.” Both Zaborowski and Colacino admit raising their voices, and using profanity as the argument escalated and Colacino persisted in his questioning. Zaborowski admits that he would not sit down during the interrogation because he felt humiliated, was tired of the interrogation, and felt he was being singled out. Colacino also stood up from his chair and started to come around the desk. Soon thereafter, Colacino discharged Zaborowski. Zaborowski left, then returned shortly thereafter and returned the Company’s truck keys, admittedly slamming them on the desk. He then left without incident. I have heretofore found that Zaborowski did not lean across the table toward Colacino, and never pointed his finger at Colacino, as Colacino had done to Zaborowski.

I have found that there was no threat of physical violence during the outburst. For reasons set forth in my fact findings, I have discredited Colacino’s and Velte’s assertions in this regard as being in conflict with earlier sworn statements by both men. Support for such a finding can be found in the fact that Zaborowski left the premises without incident, and without Colacino calling the police or having Zaborowski escorted from the premises. As noted earlier, Zaborowski was allowed to return to Respondent’s facility later in the day to pick up his check. See *CKS Tool & Engineering, Inc.,* 332 NLRB 1578, 1583-1584 (2000) (Board upheld ALJ’s finding that an employee was discharged unlawfully, even though at employee meeting, he banged on the table after he was told to leave, was loud and profane; there was nothing in employee’s body language or posture to warrant perception of fear that he was out of control or acting in a threatening manner; ALJ concluded that he angrily got up and slapped or banged the table after he was told to leave, but there was no menacing behavior by employee. ALJ found that the employee had not engaged in any physically intimidating conduct to cause any reasonable fear of harm prior to being ordered to leave – he simply got up and departed – employee did nothing to arouse any reasonable fear of assault even if he did strike the table top with his hand).

Finally, it is noted that, even if, contrary to what he testified at the unemployment hearing, Colacino felt threatened by Zaborowski, much more serious conduct, including physical assaults, if found to have been provoked by the employer, precludes the employer from relying on such misconduct to justify discharge. *Palagonia Baker,* supra at 532, citing, e.g., *Caterpillar, Inc.,* 322 NLRB 674, 676 (1996) (employee called supervisor “motherf---ing liar,” threatened to deal with him on the outside, and struck supervisor with his finger); *Tubari, Ltd.,* 287 NLRB 1273, 1285 (1988) (employee threw gloves on floor, angrily headed towards company president, screaming and another employee had to stop him); *NLRB v. Vought Co.,* 788 F.2d 1378 (8th Cir. 1986) (employee’s abusive, profane, and threatening language toward supervisor provoked by repeated company violations of his rights); *E. I. DuPont & Co.,* 263 NLRB 159 (1982) (open-palmed push of supervisor insufficient to justify discharge).

As to the profanity, Board case law holds that employees can use profanity while engaged in protected concerted activity and not lose the protection of the Act. See, e.g. *Morton International, Inc.,* 315 NLRB 564, 567 (1994); *Severance Tool Industries, Inc.,* 301 NLRB 1166, 1170 (1991); *Marion Steel Company,* 278 NLRB 897 (1986). The extent of Zaborowski’s profanity was to say “This (or That) is f-----g bullshit.” There is no question that Zaborowski’s use of profanity was in reference to the interrogation he was subjected to and defending. There is no contention that the profanity was directed at or used to describe another employee, Colacino, or other member of management. *Wal-Mart Stores,* 341 NLRB 796, 807 (2004). Zaborowski use of “this” or “that” was a reference to the unlawful interrogation. Compare, *Aluminum Company of*

*America,* 338 NLRB 20 (2002) (repeated sustained ad hominem profanity, referring to supervisors as "those motherf---ers" and asking how the supervisor was going to "f--- us now," removed employee from protection of the Act). Lastly, Colacino admitted that during the exchange he probably used profanity, which is not uncommon at the Company.

Colacino testified that he fired Zaborowski for alleged insubordination during the meeting. I find that Zaborowski's conduct, under the circumstance, was not so insubordinate as to cost him the protection of the Act. In *F.W. Woolworth,* 251 NLRB 1111, 1112-1113 (1980), the Board found conduct protected despite the fact that an employee refused to sit down after being directed to do so by the general manager, and after being told he was out of order, which resulted in "escalating temperament" on the part of both. As the Board noted in *F.W. Woolworth* at 1114:

"The turbulence inherent in union activity arises from rivalry and division likely to provoke even the docile to petulant behavior. For that reason – whether in the context of an economic strike, grievance presentation or organizational activity – emotional excess manifested by employers in resisting management is not committed under this law to the absolute judgment of employers. Indeed, congressional guarantees embodied in Section 7 of the Act would be jeopardized if every act of disrespect or insubordination emerging from a protected dispute which divides management from its workforce, renders the employee as fair game for discipline."

Similarly here, both Colacino and Zaborowski raised their voices. While Zaborowski refused to sit down when Colacino told him to, this was a result of Colacino's relentless interrogation – telling Zaborowski to "sit down, calm down, and answer the question." As noted earlier, Zaborowski testified that he would not sit down because he "felt humiliated. I felt like I had enough of being interrogated. And I didn't want him to point his finger at me again and solo me out in front of all the other employees. I felt embarrassed. And I was upset, yes. I knew my rights."

There is no evidence that Zaborowski's behavior constituted a "public undermining" of Colacino's authority in front of employees. As Zaborowski defended himself against Colacino's interrogation, Zaborowski told Colacino he had given him the benefit of the doubt with the Union, and explained that neither he nor any other employees had left his employment, that he has stood up for Colacino to Davis, and told Colacino in front of the other employees, "I want to give you the respect that you gave me in hiring me." When Colacino told Zaborowski to leave, Zaborowski immediately complied. Zaborowski's conduct was clearly within acceptable bounds. Although he used profanity, it was not directed at Colacino. Any insubordination was justified by the interrogation, and there is no credible evidence of a physical threat. *Key Food,* 336 NLRB 111 (2001) (Board overruled ALJ and found that verbal dispute involving a challenge to supervisor's authority, resulting in the employee poking the supervisor, was protected because the employer provoked the employee). Compare, *Stanford Hotel,* supra (employee called supervisor a "f---ing son of a bitch" while angrily pointing finger at him – even though conduct weighed against protection, the discharge was still found unlawful because the other three *Atlantic Steel* factors favored protection).

4. Factor four – provocation by unfair labor practice

The Board has long held that an employer cannot provoke an employee to the point where he commits acts of misconduct including insubordination, profanity, threats, or even at times physical assaults, and then rely on such acts to discipline employees. See *Palagonia Bakery Co., Inc.,* supra at 531 (2003), and cases cited therein. In *Consumer Power Co.,* 282

NLRB 130, 132 (1986), the Board held that when an employee is disciplined for conduct that is part of the "res gestae" of protected concerted activities, the relevant question is "whether the conduct is so egregious as to take it outside the protection of the Act, or of such a character as to render the employee unfit for further services." Clearly, Zaborowski's conduct was not so unreasonable as to cost him the protection of the Act. See e.g., *Key Food,* supra (employee's abusive and profane tirade not so unreasonable in relation to employer's provocation as to justify discharge).

Respondent cites the recent case of *Waste Management of Arizona,* 345 NLRB 114 (2005) for the proposition that Zaborowski's conduct removed him from the protection of the Act. I do not agree and find that the facts of *Waste Management* are significantly different from the instant case. In *Waste Management,* an employee who supported the union in that case and who had been the target of earlier Section 8(a)(1) violations by the employer, was fired after a tirade directed against his supervisor, whose name was Rush. The confrontation began when the employee received his weekly paycheck and believed it to be a lesser amount than he was owed. He sought out his supervisor and voiced his complaint. The supervisor explained how the paycheck had been calculated, but the employee did not accept the explanation. Instead he believed that the employer had reduced his check in retaliation for the employee's Union support. [15]The employee then launched into a tirade. In the tirade the employee became belligerent by screaming at his supervisor: "this is f------ bullshit"; "you're f------ with me because we're for the Union"; this isn't f------ Rush Management." Rush in response, repeatedly asked the employee to come into his office to discuss the matter, but each time, the employee refused and cursed more loudly. Then the employee clocked out and left and was terminated.

After citing *Atlantic Steel* and looking at the factors dictated by that case, the Board concluded that the tirade lost the protection of the Act and was a lawful reason to terminate the employee. The Board, in reaching this decision, found that the tirade was caused by the dispute over the reduced pay, which was not an unfair labor practice. Further the Board found that the Respondent's reaction to the tirade did not constitute disparate treatment noting that General Counsel did not show that the Respondent tolerated behavior comparable to the employee's conduct in question. The reverse is true in the instant case. I have already found that Colacino's unfair labor practice, that is, the coercive interrogation of Zaborowski, was the direct and immediate cause of Zaborowski's outburst. And, here, the General Counsel demonstrated that Colacino had tolerated similar outbursts by Zaborowski in the past, noting that the previous outbursts were not over Union-related matters.

Colacino testified that on a few occasions prior to September 9, he had engaged in heated discussions with Zaborowski. On those few prior occasions, Colacino acknowledges that he took absolutely no disciplinary action against Zaborowski about any alleged problem. The record fails to support any inference that Zaborowski was a problem employee who Colacino could no longer tolerate. Further, if Colacino knew Zaborowski had a "short fuse," he would have known he could provoke Zaborowski into an outburst, or act of misconduct. See *Consolidated Freightways Corporation of Delaware,* 264 NLRB 541, 543 (1982) ("when an employee's verbal outburst is a direct, and in this case foreseeable, consequence of the respondent's unlawful conduct, any resulting formal reprimand violates Section 8(a)(1) of the Act."

[15] Though the reduction in the employee's pay was alleged to have been a violation of Section 8(a)(3) and (1) of the Act, the ALJ and the Board dismissed this allegation.

Finally, in assessing the issue of provocation, it is appropriate to compare the seriousness of Respondent's conduct with the level of an employee's reaction. *Palagonia Bakery Co., Inc.,* supra. Here, the interrogation was egregious, and establishes that Colacino violated Section 8(a)(1) by his interrogation and Section 8(a)(1) and (3) by discharging Zaborowski, as alleged.

5. Did Respondent promulgate an unlawful restriction on solicitation?

Colacino admitted interrogating Zaborowski about his union organizing efforts. He defended his actions by stating that he qualified his interrogation by using the phrase "my time" or "company time." Even if Colacino did limit his interrogation to "my time" or "company time," the "on my time" prohibition violates Section 8(a)(1) of the Act. *Shrewsbury Nursing Home,* 227 NLRB 47 (1976); *Alert Medical Transport,* 276 NLRB 631 (1985) (prohibition and discharge violates 8(a)(1), in absence of evidence that the company ever previously had such a rule); *Churchill's Restaurant,* 276 NLRB 775 (1985) (manager violated Section 8(a)(1) when he interrogated an employee at a meeting with employees as to whether the employee was distributing union cards on "Churchill's time").

The Board has long viewed rules on prohibiting union solicitation or activities on "company time" or during "working hours" as overly broad and presumptively invalid because they could reasonably be construed as prohibiting solicitation at any time including an employee's break times or other nonwork periods. See, *Our Way, Inc.,* 268 NLRB 394 (1983); *Krystal Enterprises, Inc.,* 345 NLRB No. 15 (2005); *A.P. Painting & Improvements,* 339 NLRB 1206, 1207 (2003); *KB Specialty Foods Co.,* 339 NLRB 740, 742 (2003); *Becker Group, Inc.,* 329 NLRB 103 (1999).

While an employer may overcome a presumption by showing that the rule was communicated to employees in such a way as to convey clearly an intent to permit solicitation during periods and in places where employees are not actually working, Respondent has made no such showing here. Colacino admits he has no written or even informal solicitation policy, there are no restrictions on what employees can talk about on the job, or while traveling to and from jobs. Colacino admits he never communicated any solicitation policy to Zaborowski. Despite his interrogation of Zaborowski concerning use of his personal cell phone to call the Union, Colacino admits the cell phones (which are personally owned by the employees) can be used without restriction, to call family or other organizations such as the local fire department. All of the evidence on this issue reflects a complete freedom to discuss any subject or to use cell phones in any manner the employee wants, at any time, unless the discussion or call relates to the Union. Respondent clearly violated Section 8(a)(1) and (3) by discharging or threatening discharge because Zaborowski talked to the Union on Colacino's time. *Kelly Brothers Sheet Metal, Inc.,* 342 NLRB No. 9 (2004) (violation to tell an employee he could not talk about the union on "my time" and discharge him); *All Season's Construction,* 336 NLRB 994 (2001) (unlawful to tell employees they could talk about the union "on your time," but "not on my time," where there was no evidence of a nondiscriminatory rule). Thus, Colacino's insistence that he only used the phrase "my time" is not only no defense, it independently violates the Act.

6. Did Respondent violate the requirements of *Johnnie's Poultry*?

Velte testified that Respondent's counsel asked him to be at the shop on a certain day to give a statement of what happened at the September 9 meeting. Velte arrived and gave a statement to Respondent's counsel in Colacino's conference room. He was asked by counsel to give in his words what happened at that meeting. The statement was for use in this unfair labor practice case. Respondent's counsel did not tell Velte the purpose of the affidavit. Respondent's

counsel also did not tell Velte that there would be no reprisals. Thus, Respondent, through counsel, violated Section 8(a)(1) of the Act by failing to provide the proper and required assurances.

The Board permits an employee to exercise the privilege of interrogating employees on matters involving their Section 7 rights without incurring a violation of Section 8(a)(1) of the Act, by requiring that the employer maintain strict compliance with the safeguards set forth in *Johnnie's Poultry,* 146 NLRB 770 (1964). See e.g., *Pratt Towers,* 339 NLRB 157 (2003). Respondent, though admitting Velte's affidavit was taken for use in this proceeding, contends that the affidavit does not touch on any Section 7 rights. I have no way of knowing whether this is true or false. I did not read the affidavit and it is not in evidence. The testimony on this issue was miniscule and I do not know what questions Respondent's counsel put to Velte. Therefore I reject this contention. The Board has consistently required an employer to administer three warnings to each employee it interviews in preparation for an unfair labor practice proceeding, instructing him of the purpose of the questioning, assuring him that no reprisals will take place, and obtaining his permission on a voluntary basis. *Johnnies Poultry,* supra. It has been held that the safeguards are not unduly onerous or hampering and provide employers with clear guidance on how to avoid unfair labor practice liability in pursuing the legitimate interest of preparing an unfair labor practice defense; the benefits of this clarity outweighs any inconvenience to the employer, especially in view of the significant Section 7 rights the Board is seeking to protect. *Bill Scott Oldsmobile,* 282 NLRB 1073, 1075 (1987). Respondent's counsel's interview with employee witness Velte, in preparation for the unfair labor practice case, without giving any explanation as to the purpose of the interview or assuring Velte that there would be no reprisals resulting from the interview, was conducted in violation of these strictures. The failure to administer even one of the safeguards is sufficient to find a violation of Section 8(a)(1). *Bill Scott Oldsmobile,* supra (violation when employer's counsel failed to give two out of three assurances). See also, *Mathis Electric Co.,* 314 NLRB 258, 264 (1994); *Le Bus,* 324 NLRB 588 (1997); *Standard-Coosa-Thatcher,* 257 NLRB 304 (1981) (employer's counsel violated the Act when he gave all but 1 of 70 employees, all three warnings; the partial warning fell short of the protections required). The violation here is more obvious, as the entire atmosphere under which Velte was asked to give a statement and was questioned was permeated by unremedied unlawful interrogations of employees, threats of plant closure, and the discharge of Zaborowski, which occurred right in front of Velte. I find that Respondent, through counsel, violated Section 8(a)(1) of the Act by its pretrial interview of employee Velte. See, *HMY Roomstore, Inc.,* 344 NLRB No. 119 (2005); *Switchcraft,* 241 NLRB 985 (1979); *Palagonia Bakery Co.,* supra.

## Conclusions of Law

1. Respondent, Colacino Industries, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local 840, is a labor organization within the meaning of Section 2(5) of the Act.

3. By terminating the employment of David Zaborowski on September 9, 2005, Respondent violated Section 8(a)(1) and (3) of the Act.

4. By interrogating employees about their union activities, Respondent violated Section 8(a)(1) of the Act.

5. By promulgating an overly broad and restrictive no-solicitation rule, Respondent violated Section 8(a)(1) of the Act.[16]

6. By threatening employees with closing the business because of the Union, Respondent violated Section 8(a)(1) of the Act.

7. By interviewing an employee in preparation for the instant unfair labor practice hearing without informing him of the purpose of the interview and without advising him that no reprisal would take place, Respondent violated Section 8(a)(1) of the Act.

8. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) 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 discharged its employee David Zaborowski, it must offer him reinstatement 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).

Respondent shall rescind the overly broad and restrictive no-solicitation rule it promulgated on September 9, 2005.

Respondent shall remove from its files any reference to the unlawful discharge of David Zaborowski and, within 3 days thereafter, notify David Zaborowski that this has been done and that the discharge will not be used against him in any way. Respondent shall also post an appropriate notice to employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

## ORDER

The Respondent, Colacino Industries Inc., Newark, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

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[16] Though Respondent's promulgation of an overly broad no-solicitation rule on September 9 is not alleged to be a violation of the Act in the Complaint, it is an integral part of Respondent's unlawful interrogation and discharge of Zaborowski and should be remedied.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Interrogating employees about their union activities, membership and sympathies.

(b) Threatening to close the business because of employees' union activities.

(c) Discharging employees because they engage in protected concerted activities and because of their union activities.

(d) Interviewing employees in preparation for defense of unfair labor practice proceedings without first informing them of the purpose of the interview and without first informing them that no reprisals will take place.

(e) Promulgating an overly broad no-solicitation rule.

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

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

(a) Within 14 days from the date of the Board's Order, offer David Zaborowski 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.

(b) Make David Zaborowski 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 the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Within 14 days from the date of the Board's Order, rescind the overly broad no-solicitation rule it promulgated on September 9, 2005.

(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 Newark, New York, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered,

[18] 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."

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 September 9, 2005.

(g) 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.

Dated, Washington, D.C. September 21, 2006

_____
Wallace H. Nations
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

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

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

WE WILL NOT impliedly threaten to close the business if you elect to be represented by a union.

WE WILL NOT question you about your union activities.

WE WILL NOT interview any of you in preparation for defense of unfair labor practice proceedings without first informing you of the purpose of the interviews and without advising you that no reprisal will take place.

WE WILL NOT promulgate and overly broad no-solicitation rule.

WE WILL NOT terminate your employment because of your union or other protected concerted activities.

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

WE WILL rescind the overly broad no-solicitation rule we promulgated.

WE WILL make David Zaborowski whole for any loss of earnings or other benefits suffered as a result of his termination, less any interim earnings, plus interest.

WE WILL offer David Zaborowski reinstatement to his former position with no loss of seniority or other privilege or to a substantially equivalent position if his job no longer exists.

WE WILL remove from our files any reference to the termination of David Zaborowski, and WE WILL, within three days thereafter, notify him in writing that this has been done and assure him that the termination will not be used against him in any way.

COLACINO INDUSTRIES, INC

(Employer)

Dated _____ By _____

(Representative) (Title)

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

111 West Huron Street, Federal Building, Room 901

Buffalo, New York 14202-2387

Hours: 8:30 a.m. to 5 p.m.

716-551-4931.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.