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Galicks, Inc. and Sheet Metal Workers International Association, Local Union No. 33 of Northern Ohio, AFL-CIO. Cases 8-CA-36079, and 8-CA-36766

June 30, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The complaint alleges that the Respondent, Galicks, Inc., violated Section 8(a)(5) and (1) of the Act by unilaterally assigning bargaining-unit work to nonunit employees, by failing to furnish the Union requested relevant information, and by withdrawing recognition from the Union, and Section 8(a)(3) and (1) by failing to recall journeymen from layoff because they are represented by the Union. The judge dismissed the unilateral-assignment 8(a)(5) allegation as time-barred under Section 10(b), found the remaining 8(a)(5) violations, and dismissed the 8(a)(3) allegation.¹

The National Labor Relations Board² has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,³ and conclusions as modified herein

¹ On June 20, 2007, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions, the General Counsel and Sheet Metal Workers International Association, Local Union No. 33 of Northern Ohio, AFL-CIO (the Union) filed answering briefs, and the Respondent filed a reply brief. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

² Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, ___ F.3d ___, 2009 WL 1676116 (2d Cir. June 17, 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed ___ U.S.L.W. ___ (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for rehearing filed Nos. 08-1162, 08-1214 (May 27, 2009).

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

and to adopt the judge's recommended Order as modified and set forth in full below.

Facts

The Respondent is a sheet metal contractor. Beginning in 1979, the Respondent was signatory to successive Section 8(f) multi-employer Building Trades Agreements (BTAs), including an agreement expiring May 31, 2005. The BTAs allocated certain work exclusively to journeyman and apprentice sheet metal workers.⁴ The Respondent honored its contractual obligations under this work-jurisdiction provision until 1991, when its owner, Gregory Galigher, hired his nonjourneyman son, Ed Galigher (Ed), and began assigning him BTA-journeyman work. Galigher did likewise in 1996, when he hired another nonjourneyman son, Jake Galigher (Jake), and again in 1999, when he hired a third nonjourneyman, Randy Gray. The judge and the parties refer to Ed, Jake, and Gray as production employees.

In 1996, the Union's business agent, Thomas Crowther, asked Galigher to sign an agreement covering the Respondent's production employees. Galigher did so. In 2000, Galigher signed a successor production agreement, which ran concurrently with the BTA. Thus, both agreements would expire May 31, 2005. Under the production agreement, the Respondent's production employees could perform some, but by no means all, BTA-journeyman work. Production employees were contractually permitted to fabricate some items in the Respondent's shop; but in-shop fabrication of other items, and all on-site installation work, continued to be restricted to journeymen and apprentices under the BTA. Nonetheless, the judge credited Galigher's testimony that in 1996, Crowther expressed no concerns over the type of work the Respondent's production employees would perform.

From 2000 to 2005, production employees Ed, Jake, and Gray regularly performed work outside the scope of the production agreement and restricted to journeymen

⁴ The work-jurisdiction provision of the BTA assigns to journeyman and apprentice sheet metal workers

the manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all ferrous or nonferrous metal work, and all other materials used in lieu thereof and of all air-veyor systems and air handling systems, regardless of material used, including the setting of all equipment and all reinforcement in connection therewith; (b) all lagging over insulation and all ductlining; (c) testing, service, and balancing of all HVAC air-handling equipment and duct work; (d) the preparation of all shop and field sketches, whether manually drawn or computer assisted, used in fabrication and erection, including those taken from original architectural drawings or sketches, and (e) all other work included in the jurisdiction claims of Sheet Metal Workers' International Association.

and apprentices under the BTA (“journeyman-only work”). The Respondent also employed journeymen during those years. For a period of nearly 16 months, however—August 22, 2002, to December 11, 2003—the Respondent employed no journeymen.⁵

In August 2004, the Union discovered Gray doing journeyman-only work at a jobsite. In February 2005,⁶ the Union discovered Ed, Jake, and Gray doing journeyman-only work at another jobsite. Crediting the Respondent’s witnesses, the judge found that the Union did not confront either the production employees or Galigher concerning these discoveries. The judge also found that the Union knew well before August 2004, and perhaps as far back as 1996, that the Respondent’s production employees were doing journeyman-only work.⁷

In January, Ed, Jake, and Gray gave Galigher a union-disaffection petition. Galigher notified the Union that the Respondent was withdrawing recognition effective June 1. The following month, Galigher reiterated his intent to withdraw recognition effective June 1, and he also notified the Union that he had withdrawn authorization from the Akron/Canton/Mansfield Roofing and Sheet Metal Contractors’ Association (the Association) to act as the Respondent’s bargaining agent.

Receiving these communications, the Union contacted the Respondent’s one journeyman employee, Russell Cottis, and three other journeymen the Respondent had laid off in 2004. These four signed union authorization cards. On April 7, the Union presented these cards to Galigher and asked for voluntary recognition. Galigher declined, saying that he was looking at retiring and turning his business over to his sons, and that he was not interested in being union, and they were not interested in being union.⁸

⁵ Except for a brief period early in 2004, from December 11, 2003, until April 2005, the Respondent continuously employed at least one journeyman and sometimes as many as three.

⁶ Unless otherwise stated, all dates hereinafter are in 2005.

⁷ For the reasons stated by the judge, we affirm his finding that Sec. 10(b) time-bars the allegation that the Respondent violated Sec. 8(a)(5) by assigning bargaining-unit work to nonunit employees without affording the Union notice and an opportunity to bargain.

⁸ There is no credited evidence supporting the judge’s finding that Galigher said only that his sons were not interested in being union.

The judge avowedly based his finding on the testimony of Union agents Matthew Oakes and Jerry Durieux. But Oakes testified as stated above: on April 7, Galigher said that he was getting ready to retire and turn the business over to his sons, and he was not interested in being union, and they were not interested in being union. Durieux did not testify as to what Galigher said on April 7.

The statement the judge found that Galigher made on April 7 is what Durieux and Oakes testified that Galigher said at an *earlier* meeting in February, but the judge discredited their testimony and found that no such meeting took place.

On April 13, the Union filed a petition for an election in a journeyman/apprentice unit. The day the petition was filed, the Respondent laid off Cottis, its lone remaining journeyman. (The Respondent employed no apprentices.) Prior to his layoff, Cottis had been continuously employed by the Respondent for more than 11 months.

Later that month, the Respondent and the Union stipulated to an election in a journeyman/apprentice unit, excluding production employees, with laid-off employees eligible to vote in accordance with the *Steiny/Daniel* formula.⁹ The only voters were the four laid-off journeymen who had signed cards. They voted unanimously for the Union, which was certified as the 9(a) representative on June 3.

Meanwhile, the Union and the Association had entered into a successor BTA effective June 1. On June 9, the Union told the Respondent that it viewed the June 3 certification as having converted the successor BTA into a Section 9(a) agreement binding on the Respondent. The Respondent acknowledged its duty to bargain with the Union, but it rejected the Union’s 9(a)-conversion claim.

By letter dated August 12, the Union requested certain information “because of the current bargaining relationship and to ensure a smooth transition from the production agreement to the BTA.” The Union requested (1) a list of all work performed since June 1; (2) a current list of employees; (3) copies of all timecards and/or job sheets for these employees, and copies of all payroll checks paid to employees since June 1; and (4) a list of all current and future projects. The Respondent refused the request.

On August 22, the Union filed unfair labor practice charges, including an allegation that the Respondent had unlawfully repudiated the BTA. The Region dismissed that allegation on May 31, 2006, rejecting the Union’s claim that the Respondent was bound to the BTA. The Union’s appeal of the dismissal was denied on July 25, 2006.

The Union did not seek bargaining while its charges were under consideration. On August 23, 2006, the Union proposed to meet and bargain, requesting certain information to facilitate negotiations.¹⁰ On September 9,

Thus, the credited and uncontradicted evidence of what Galigher said in declining to voluntarily recognize the Union on April 7 was that neither he nor his sons were interested in being union.

⁹ *Steiny & Co.*, 308 NLRB 1323 (1992); *Daniel Construction Co.*, 167 NLRB 1078 (1967).

¹⁰ The Union asked for the following: (1) a list of current employees; (2) a copy of all current company personnel policies, practices, or procedures; (3) a statement and description of all such policies, practices, or procedures other than those mentioned in item 2; (4) a copy of all company fringe benefit plans not sponsored by the Union; (5) copies of company wage or salary plans; (6) a list of current projects, includ-

2006, the Respondent answered that it no longer recognized the Union. The Respondent asserted that the bargaining unit was a no-man (or, at best, a one-man) unit and that laid-off journeymen had no reasonable expectancy of recall. The Respondent also refused to furnish the requested information.

As stated, the Respondent's last journeyman employee, Cottis, was laid off April 13.¹¹ Galigher testified that Cottis was laid off due to lack of work. On May 23, the Respondent hired Drew Archer. Archer did not perform journeyman work. On June 6, the Respondent hired Curt Paternoster, laying off Archer soon thereafter. (Archer was reemployed for a month and a half in 2006.) Paternoster is not a journeyman. The judge found that Galigher "was vague, equivocal, and evasive about the exact nature of Paternoster's duties," and that "Respondent's records confirm that [Paternoster] has performed journeyman work." The judge also found that Galigher "strain[ed] . . . to minimize" the amount of work the Respondent has done since June 2005 that would be classified as journeyman under the BTA, and that "since June 2005 [the Respondent] has continued to perform a substantial quantum of [such] work." There are no exceptions to these findings. The Respondent's gross revenues increased, and it paid significant overtime to its employees, in 2005 and 2006.¹²

Analysis

1. The August 2005 information request

The judge found that the Respondent violated Section 8(a)(5) by its refusal to furnish the information the Union asked for in August 2005. Excepting, the Respondent contends that because the request was based on the Union's mistaken belief that the Respondent was bound to the BTA, information relative to a "smooth transition" to that agreement was not relevant to the Union's representative duties.

A "smooth transition to the BTA" was not, however, the only reason the Union invoked for its request. It also stated that the requested information was sought "because of the current bargaining relationship." Even if the basis of the Union's request was ambiguous, it was incumbent on the Respondent to "request clarification and/or comply with the request to the extent that it en-

ing shop and field work; (7) a list of all work completed since June 1, 2005; and (8) a list of all future projects.

¹¹ The judge inadvertently dated the layoff April 7.

¹² Invoices introduced into evidence showed that the Respondent's gross revenues increased from \$858,060 in 2004 to \$965,905 in 2005 and at least \$1,104,880 in 2006. Some invoices for 2006 were missing, so gross revenues for that year were likely higher. Aggregate overtime pay for the Respondent's production employees was \$15,757 in 2005 and \$13,006 in 2006.

compasse[d] necessary and relevant information."¹³ The Respondent did not do so. In addition, although the requested information concerned the identity of and work performed by the Respondent's employees as of June 1, none of whom were members of the bargaining unit, the information was relevant to the Union's representative role in "the current bargaining relationship" because, as the judge found, "it related to whether Respondent would have work for journeymen and clearly impacted their prospects for recall." See *United Graphics*, 281 NLRB 463, 465 (1986) (assuming arguendo that respondent's temporary employees were nonunit, the Board found requested information concerning temporary employees' performance of unit work relevant to union's duty to police the contract). For these reasons, we affirm the judge's 8(a)(5) finding.

2. The Respondent's failure to recall journeymen from layoff

The complaint does not allege that the Respondent violated the Act by laying off Cottis or any other journeyman. Rather, the General Counsel alleges that the Respondent's failure to recall journeymen from layoff after the Union's June 3 certification violated Section 8(a)(3). The judge dismissed this allegation. Applying *Wright Line*,¹⁴ the judge found Galigher's statement of disinterest in being union insufficient to show union animus, and he found no circumstances present that would raise an inference of discriminatory motive. The judge also found that, even assuming animus, the Respondent's failure to recall journeymen could not be shown to be based thereon, given its "longstanding practice of using lower-paid production employees to perform journeyman work." The General Counsel excepts to the dismissal of this allegation. We find merit in the exception.

Under *Wright Line*, supra, the General Counsel must first show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes that showing by demonstrating protected activity, employer knowledge of that activity, and animus against protected activity, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity.¹⁵ If, how-

¹³ *Pet Dairy*, 345 NLRB 1222, 1223 (2005) (quoting *Holiday Inn Coliseum*, 303 NLRB 367, 367 fn. 6 (1991)).

¹⁴ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

¹⁵ *United Rentals*, 350 NLRB 951 (2007) (citing *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004)). Member Schaumber observes that the Board and the circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between

ever, the evidence establishes that the reasons given for the employer's action are pretextual—that is, either false or not in fact relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the *Wright Line* analysis.¹⁶ Conduct violative of Section 8(a)(5) may evidence union animus.¹⁷ Unlawful motivation also may be inferred from circumstantial evidence, including timing¹⁸ and pretext.¹⁹

There is no dispute that the Respondent's laid-off journeymen engaged in union activity and that the Respondent knew as much. The journeymen signed union authorization cards, which the Union presented to Galigher when it requested voluntary recognition. The journeymen then voted in the election, and the vote was unanimous in favor of representation.

Contrary to the judge's decision, the evidence does show that the Respondent harbored union animus. When the Union sought voluntary recognition, Galigher responded that he was not interested in being union.²⁰ A week later, when the Union petitioned for an election in a journeyman unit, Galigher laid off Cottis, his sole remaining journeyman. The timing of this layoff is striking. Although the judge did not expressly discredit Galigher's claim that the layoff was due to lack of work, he observed that Paternoster was hired soon after Cottis's layoff and has performed journeyman work. Also indicative of pretext, and evidencing animus, were

the union animus and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer's Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation standard, Member Schaumber agrees with this addition to the formulation. In this case, he finds a causal nexus between the Respondent's union animus and its failure to recall journeymen from layoff.

¹⁶ *United Rentals*, supra at 951-952 (citing *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf. 705 F.2d 799 (6th Cir. 1982)).

¹⁷ *Overnite Transportation Co.*, 335 NLRB 372, 375 (2001). Member Schaumber did not participate in *Overnite Transportation*, and he notes that the Board in that case based its finding of animus on violations of Sec. 8(a)(1) and Sec. (3) as well as a violation of Sec. 8(a)(5). Although Member Schaumber would not find that a violation of Sec. 8(a)(5) provides evidence of animus in all cases, he agrees with his colleague, for the reasons discussed below, that the evidence here sufficiently demonstrates animus.

¹⁸ *Montgomery Ward & Co.*, 316 NLRB 1248, 1254 (1995), enf. mem. 97 F.3d 1448 (4th Cir. 1996).

¹⁹ *Whitesville Mill Service Co.*, 307 NLRB 937 (1992).

²⁰ Member Schaumber does not rely on this statement of Galigher's as evidence of the Respondent's union animus. He finds the evidence discussed below sufficient to support the General Counsel's *Wright Line* case as to animus. Chairman Liebman does rely on Galigher's statement that he was not interested in being union as evidence of his union animus. She agrees with Member Schaumber, however, that even disregarding that statement, the remaining evidence is sufficient to support an inference of unlawful motivation.

Galigher's discredited efforts to suggest that his failure to recall journeymen after Cottis's layoff was owing to reduced work. Again, there are no exceptions to the judge's findings that Galigher "strain[ed] to . . . minimize" the amount of journeyman work the Respondent continued to perform and that the Respondent continued to do a "substantial quantum" of such work after June 2005. Moreover, the Respondent's business increased in 2005 and 2006.

As stated above, the judge found that even assuming union animus, it could not be linked to the Respondent's failure to recall journeymen, given its "longstanding practice of using lower-paid production employees to perform journeyman work." The flaw with the judge's rationale is that the longstanding practice he cites has been challenged as unlawful. If anything, the diversion of work from higher-paid journeymen, in apparent violation of a collective-bargaining agreement, would tend to support, not rebut, the General Counsel's *Wright Line* case.²¹ At a minimum, the Respondent's practice permits an inference that, in failing to recall journeymen, it deliberately sought to preserve its custom of not awarding work to union-represented employees.

Moreover, the Respondent's postelection employment patterns were not consistent with its past conduct. During most of the period from January 2000 to April 2005, the Respondent employed both journeymen and production employees to perform journeyman work. Although there was a 16-month period from August 2002 to December 2003 when it employed only production employees, the Respondent hired no additional employees during that period; it employed only Ed, Jake, and Gray to do sheet metal work. After the journeymen selected the Union as their representative, by contrast, the Respondent hired Paternoster and assigned him journeyman work. Thus, preelection, when Galigher had more journeyman work on his hands than could be done by Ed, Jake, and Gray, he hired journeymen. Postelection, he hired nonjourneyman Paternoster.

The Respondent says that it lawfully assigned journeyman work to its production employees after June 1 because it was no longer bound to the BTA. The issue here, however, is whether a motivating factor in the Respondent's decision to assign *all* of its journeyman work

²¹ As explained, any claim that the Respondent's practice violated Sec. 8(a)(5) of the Act is time-barred by Sec. 10(b). Nevertheless, the practice "may be utilized to shed light on the true character of matters occurring within the limitations period." *Local Lodge No. 1424 v. NLRB (Bryan Mfg. Co.)*, 362 U.S. 411, 416 (1960). See, e.g., *Monongahela Power Co.*, 324 NLRB 214, 214 (1997). Our dismissal of the claim on limitations grounds, in turn, does not establish that the Respondent's practice was lawful, only that it is now immune from challenge under the Act.

to production employees was the fact that the journeymen were represented by the Union. For the reasons set forth above, we find that it was. Thus, we find that the General Counsel showed that animus against the journeymen's union status was a motivating factor in the Respondent's failure to recall them from layoff. The analysis ends there, as the Respondent's purported *Wright Line* rebuttal is that it had insufficient work to recall journeymen. That suggestion has been discredited and thus is pretextual, obviating the need to reach the second step of the *Wright Line* analysis.²² In sum, we reverse the judge's decision and find that the Respondent violated Section 8(a)(3) by failing to recall journeymen from layoff.

3. The Respondent's withdrawal of recognition from the Union

The judge found that the Respondent's September 2006 withdrawal of recognition violated Section 8(a)(5), reasoning as follows. By stipulating to an election in a unit of journeymen at a time when it employed no journeymen, the Respondent implicitly agreed that its journeymen had a reasonable expectancy of recall as of that time. Nothing relevantly changed between that time (April 2005) and the date it withdrew recognition: the nature of the Respondent's work did not change, and the volume of its business increased. Thus, reasoned the judge, the Respondent "is estopped from relying on its assertion that the layoffs have become permanent and, for that reason, it has one or no employees in the bargaining unit."

Excepting, the Respondent argues as follows. Even assuming laid-off journeymen had a reasonable expectancy of recall as of April 2005, the legally operative date was September 2006, when the Respondent withdrew recognition; and in the interim, the Respondent was under no obligation to maintain the journeyman unit. Respondent was not bound to the BTA and its provision preserving certain work for journeymen. Moreover, the Respondent had long assigned journeyman work to its production employees, and the General Counsel's claim that it did so unlawfully was time-barred. And even assuming all of Paternoster's 2005 and 2006 hours should have been assigned to a laid-off journeyman instead, those hours would not have supported hiring even one journeyman. At best, argues the Respondent, the bargaining unit as of September 2006 was a one-man unit, privileging withdrawal of recognition under *Foreign Car Center, Inc.*, 129 NLRB 319 (1960).

We find it unnecessary to assess the merits of the judge's rationale in light of the Respondent's arguments.

²² *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

We have found above that the Respondent violated Section 8(a)(3) by failing to recall union-represented journeymen from layoff. The Respondent cannot unlawfully deny employment to journeymen because of their union status and then profit from its unlawful conduct by withdrawing recognition from the Union, claiming a no-man unit.²³

We also reject the Respondent's alternative argument that, at best, it would have recalled only one journeyman (instead of hiring Paternoster) and thus that its withdrawal of recognition was lawful based on a one-man unit. Given the Respondent's discriminatory motivation for failing to recall journeymen, we cannot be certain how many it would have recalled absent that unlawful motive, particularly in light of the overtime worked by Respondent's production employees in 2005 and 2006.

Moreover, even assuming *arguendo* that the Respondent's failure to recall journeymen did not violate Section 8(a)(3), it still failed to sustain its burden to prove a stable one-man unit,²⁴ taking into account that employment fluctuations are typical in the construction industry.²⁵ To prove a stable one-man unit, the Respondent relies on the 15 months it employed journeyman-substitute Paternoster before withdrawing recognition. But the Respondent employed no journeymen for almost 16 months between August 2002 and December 2003, and then subsequently employed as many as three journeymen at a time. Thus, the evidence the Respondent relies on fails to prove a stable one-man unit.

For the foregoing reasons, we affirm the judge's finding that the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union and thereafter failing and refusing to meet and bargain with the Union over the terms of a collective-bargaining agreement.

4. The August 2006 information request

The judge found that the Respondent unlawfully refused to furnish the Union with the information it requested in August 2006. The Respondent excepts on the sole ground that it lawfully withdrew recognition and therefore was not required to provide the Union information relevant to bargaining. Having found the Respondent's withdrawal of recognition unlawful, we necessarily find this exception without merit. We thus affirm the judge's 8(a)(5) finding.

AMENDED REMEDY

As stated above, the Respondent contends that even assuming it should have recalled a laid-off journeyman

²³ See *Oertle's*, 229 NLRB 354, 359-360 (1977), *enfd. sub nom. NLRB v. MFY Industries*, 573 F.2d 673 (10th Cir. 1978).

²⁴ *McDaniel Electric*, 313 NLRB 126, 127 (1993).

²⁵ *SAS Electrical Services*, 323 NLRB 1239, 1251 (1997).

instead of hiring Paternoster, Paternoster's hours in 2005 and 2006 would not have amounted to one full-time position. The judge's unexcepted-to findings show otherwise. A full-time equivalent (FTE) is roughly 2000 hours per year (40 hours a week times 50 weeks), or 167 hours per month. Paternoster was hired June 6; he worked just shy of 7 months in 2005. In that time, the judge found that he worked 1,206.5 hours—an average of 172 hours per month. In 2006, Paternoster worked 2,120 hours, or nearly 177 hours a month on average. Thus, beginning June 6, 2005, the Respondent had at least one full-time position that could have been filled by a member of the bargaining unit.

In addition, the judge found that Paternoster remained employed by the Respondent as of the date of the hearing. Unless Paternoster's position has been eliminated in the interim—something the Respondent will have an opportunity to show at compliance—the Respondent continues to have a full-time position that could be filled by a unit employee. We will thus order the Respondent to recall one laid-off journeyman to his former job or, if that job no longer exists, to a substantially equivalent position, dismissing, if necessary, Paternoster or any other nonjourneyman employee hired subsequently.²⁶ We will leave to compliance the task of identifying the journeyman to be recalled.²⁷ Accordingly, we will omit the usual 14-day deadline for the offer to be made.

In addition, we will order the Respondent to make that individual whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Galicks Inc., New Philadelphia, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to recall journeyman employees from layoff because of their activities on behalf of or support for Sheet Metal Workers International Association, Local

²⁶ See *Wilmington Fabricators, Inc.*, 332 NLRB 57, 65 (2000) (remedy for employee Estervina Sanchez, discriminatorily denied recall following layoff not itself alleged to be unlawful).

²⁷ The complaint did not allege that the Respondent unlawfully failed to recall any particular journeyman. It alleged and we have found that the Respondent unlawfully failed to recall unnamed journeymen from layoff.

Union No. 33 of Northern Ohio, AFL-CIO (the Union) or any other union.

(b) Withdrawing recognition from the Union as the certified collective-bargaining representative of a unit of building trades (siding/decking journeymen) and sheet metal journeymen and apprentices, and failing and refusing to meet and bargain with the Union over the terms of a collective-bargaining agreement.

(c) Failing to bargain in good faith with the Union by failing and refusing to furnish the Union with requested information that is necessary and relevant to the Union's performance of its function as representative of the unit employees.

(d) 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) Offer recall to one laid-off journeyman 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, in the manner set forth in the amended remedy section of this decision.

(b) Make whole the individual offered recall for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the Amended Remedy section of this decision.

(c) Recognize and, on request, bargain with the Union as the exclusive representative of employees in the above-described unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(d) Furnish to the Union in a timely manner the information requested by the Union in August 2005 and August 2006.

(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 facilities in New Philadelphia, Ohio, copies of the attached notice marked "Appendix."²⁸ Copies of the

²⁸ 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 Judge

notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 6, 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. June 30, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT fail to recall journeyman employees from layoff because of their activities on behalf of or

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

support for Sheet Metal Workers International Association, Local Union No. 33 of Northern Ohio, AFL-CIO (the Union) or any other union.

WE WILL NOT withdraw recognition from the Union as the certified collective-bargaining representative of a unit of building trades (siding/decking journeymen) and sheet metal journeymen and apprentices.

WE WILL NOT fail and refuse to meet and bargain with the Union, at its request, over the terms of a collective-bargaining agreement covering employees in the unit described above.

WE WILL NOT fail and refuse to provide the Union with information it requests that relates to the Union's role as the exclusive bargaining representative of employees in the unit described above.

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

WE WILL offer recall to one laid-off journeyman, to be identified at the compliance stage of the Board's proceeding, to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make whole the journeyman offered recall for any loss of earnings and other benefits resulting from our unlawful failure to recall him from layoff, less any net interim earnings, plus interest.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of employees in the unit described above concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL furnish to the Union in a timely manner the information requested by the Union in August 2005 and August 2006.

GALICKS, INC.

Cheryl Sizemore, Esq., for the General Counsel.
Thomas J. Wiencek, Esq. (Brouse & McDowell), for the Respondent.
Joseph Guarino, Esq. (Cosme, D'Angelo & Szollosi) & Matthew F. Oakes, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. The amended consolidated complaint stems from unfair labor practice (ULP) charges that Sheet Metal Workers International Association, Local Union No. 33 of Northern Ohio, AFL-CIO (the Union) filed against Galicks, Inc. (Galicks or Respondent), alleging violations of Section 8(a)(3), (5), and (1) of the National Labor Relations Act (the Act).

Pursuant to notice, I conducted a trial in Cleveland, Ohio, on January 23–25 and March 26 and 27, 2007, at which the parties had full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

All parties filed helpful posthearing briefs that I have duly considered. Respondent also filed a motion for leave to file a reply brief and a memorandum, alleging that the General Counsel's and the Union's posthearing briefs contain misstatements of fact. In response, the General Counsel filed a memorandum in opposition to Respondent's motion, and a motion to strike Respondent's memorandum. Inasmuch as Respondent's memorandum essentially reiterates the arguments already made in its brief, and any factual misstatements in the other briefs would be refuted by the record evidence, I conclude that Respondent's memorandum serves no purpose and is unnecessary for a determination of the merits of the allegations before me. See *High-Tech Cable Corp.*, 318 NLRB 280, 284 fn. 4 (1995). Accordingly, I deny Respondent's motion for leave to file a reply brief and will not consider its memorandum.

Issues

1. Since April 7, 2005, when the Union requested voluntary recognition as the representative of Respondent's journeymen, has Respondent failed and refused to recall laid-off journeymen because of their union activities?¹

2. After the Union's certification on June 3, 2005, as the collective-bargaining representative of Respondent's journeymen, did Respondent implement a unilateral change in working conditions by assigning to production workers (or production employees) work that journeymen had traditionally performed, without affording the Union prior notice and an opportunity to bargain?

3. Did Respondent unlawfully fail and refuse to provide the Union with necessary and relevant information in response to the Union's information requests dated August 12, 2005, and August 23, 2006?

4. Did Respondent, on about September 7, 2006, unlawfully withdraw recognition of the Union as the certified bargaining representative of its journeymen, and thereafter fail and refuse to meet and bargain with the Union over the terms of a collective-bargaining agreement?

Witnesses and Credibility

Witnesses for the General Counsel included union agents Alan Chermak, Jerry Durieux, and Matthew Oakes, and Gregory Griner, a former employee and journeyman. Tom Caruthers, the union business agent who serviced Galicks from the 1980's through July 2003, did not testify. The General Counsel represented that he was in Florida, and neither the General Counsel nor the Union subpoenaed him to appear. Accordingly, I draw an adverse inference against the General Counsel and the Union on any factual matters in the case about which he likely would have knowledge. See *Daikichi Sushi*

¹ There is no evidence of employer knowledge of any union activity by journeymen in 2005 prior to April 7. I do not see from the record why the General Counsel alleged February 22, 2005, as the operative date of this violation. See GC Exh. 1(w) par. 8(a). The date appears nowhere in either the General Counsel's or the Union's briefs.

Corp., 335 NLRB 622 (2001); *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem 861 F. 2d 720 (6th Cir. 1988); *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15 fn. 1 (1977).

Respondent's witnesses were owner Gregory Galigher, production workers Ed and Jason (Jake) Galigher (his sons) and Randy Gray, and secretary/bookkeeper Nancy Pearch. Normally, I do not refer to individuals by first names, but for purposes of brevity and avoiding confusion in identity, I will hereinafter refer to Gregory Galigher as "Galigher" and to his sons as "Ed" and "Jake."

Credibility is often pivotal in making findings of fact, especially when, as here, the testimony of the General Counsel's witnesses and Respondent's witnesses on certain matters was wholly irreconcilable. In the arena of credibility, the Board has held that witnesses may be found partially credible, as the mere fact that a witness is discredited in one instance does not necessarily mean that the witness must be discredited in all respects. *Daikichi Sushi Corp.*, *ibid*; *Golden Hours Convalescent Hospitals*, 182 NLRB 796, 799 (1970). Rather, it is appropriate to weigh the witness' testimony for consistency throughout with the evidence as a whole. *Golden Hours Convalescent Hospitals*, *supra* at 798–799. See also *MEM Electronic Materials*, 342 NLRB 1172, 1200 fn. 13 (2004), citing *American Pine Lodge Nursing*, 325 NLRB 98, 99 fn. 1 (1997) (a trier of fact is not required to accept a witness' testimony in its entirety but may believe only some of what he or she says); *Excel Containers, Inc.*, 325 NLRB 17 fn. 1 (1997) (it is quite common for judges to believe some, but not all, of a witness' testimony).

In this regard, I have found neither Galigher nor Durieux and Oakes fully credible, although I have credited them on certain matters. The former's testimony on some subjects was contradictory, tentative, and/or vague, and he struck me as clearly evasive when describing the nature of Respondent's business since June 2005 and the work employee Curt Paternoster has performed since his hire that month. On the other hand, portions of the latter's testimony struck me as scripted and implausible and, hence, not believable. The General Counsel and the Union argue that an adverse inference should be drawn against Galigher for failing to produce, pursuant to subpoena, certain kinds of records that would establish more definitively the volume of journeyman and other work that his employees have performed. Galigher testified that he does thousands of jobs a year but only maintains for any length of time detailed records of work performed when a job is strung out for a long period such as several months. Further, although he keeps track of employees' hours on a job, and employees write down their hours, he does not keep those records after payroll is prepared. Inasmuch as Galigher operates a one-shop business and has usually employed no more than several employees at any particular time, I do not find his testimony implausible. Nor do I find suspicious his claim that he lost a handful of invoices vis-à-vis the hundreds that he produced.

The General Counsel and the Union further contend that the credibility of Ed, Jake, and Gray is undermined by the fact that although they testified they worked with journeymen on job-sites on over 100 occasions, they could recall only a few specific examples. However, I do not find their testimony suspect

in light of the number of years they have worked for Respondent (approximately 16, 11, and 8, respectively), and the understandable difficulty of remembering names, without the opportunity of refreshment, when so many years and jobs are involved. I have taken into account the natural tendency Ed and Jake would have to testify in favor of their father's position, but their familial relationship to him does not ipso facto render them unreliable as witnesses.

Ed and Jake seemed candid, albeit understandably nervous, which I attribute to their unfamiliarity with testifying in legal proceedings rather than to any discomfort at not being truthful. Significantly, their testimony on certain points was neither entirely the same nor identical to their father's. Thus, Jake stated that Ed was present at an important conversation Caruthers had with Galigher in 1996, but Ed, on the other hand, stated that he had a one-on-one conversation with Caruthers at which no one else was present. In addition, although Ed corroborated a significant statement Galigher attributed to Caruthers (that Ed and Jake could continue performing the same work they were doing), Jake did not. Moreover, although Jake recalled that Durieux came to two jobsites at which Jake was working with Ed, Ed did not recollect seeing Durieux at those locations. Nor did Ed and Jake give matching responses as to what percent of their work has been architectural and sheet metal. For these reasons, I conclude that Ed's and Jake's answers were not coordinated or deliberately slanted in their father's behalf. Their testimony was also generally quite consistent with that of employee Gray, who similarly seemed candid and not to skew his testimony in Respondent's favor.

On one matter, I do not accept their testimony: that their duties have remained constant since the start of their employment. Thus, they all also testified that they traditionally went out on jobsites with journeymen. Since Respondent had but one journeyman still employed after July 2004, I cannot believe that their job duties had not changed, at least in degree, by then. However, I do credit their testimony that their work duties did not change after June 2005, since Respondent employed no journeymen by that time.

Griner worked for Galicks for only a little over 2 months, between May and July 2004, and his tenure was therefore limited. No journeymen with longer employment with Respondent were called as witnesses. I credit his testimony that he called Durieux concerning Gray's status. However, when asked why he did so, he replied, "I didn't know him. I was just curious of what he was. I seen[sic] him in the shop working . . . on aluminum truck parts,"² testimony I find unsatisfactory. There had to be a more substantial reason why he was concerned about Gray's status, and I logically have to conclude that it was because he observed or suspected that Gray was performing what he considered to be journeyman work. I note that on some subjects, his testimony comported with that of Ed, Jake, and Gray.

Facts

Based on the entire record, including the testimony of witnesses and my observations of their demeanor; documents; and

² Tr. 95.

the parties' stipulations, I make the following findings of fact.

Respondent at all times material has had an office and place of business in New Philadelphia, Ohio, where it has engaged in the fabrication and installation of industrial and architectural sheet metal in the construction industry. Jurisdiction has been admitted, and I so find. Respondent's employees have performed work both in the shop and also at jobsites at various locations, all in the State of Ohio.

Building Trades Agreements (BTA's)

Galigher has owned the business since 1979, at which time he became signatory to the master collective-bargaining agreement between the Union and the Akron/Canton/Mansfield Roofing and Sheet Metal Contractors' Association (the association), of which Respondent was a member. Respondent continued to be signatory to a series of subsequent association-union master agreements (BTA's), the most recent of which was effective from June 1, 2000, until May 31, 2005.³ Articles 1 and III section 1 thereof detail work that shall be done only by journeymen and apprentice sheet metal workers:

[T]he manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing of all ferrous or nonferrous metal work, and all other materials used in lieu thereof and of all air-veyor systems and air handling systems, regardless of material used, including the setting of all equipment and all reinforcement in connection therewith; (b) all lagging over insulation and all duct-lining; (c) testing, service, and balancing of all HVAC air-handling equipment and duct work; (d) the preparation of all shop and field sketches, whether manually drawn or computer assisted, used in fabrication and erection, including those taken from original architectural drawings or sketches, and (e) all other work included in the jurisdiction claims of Sheet Metal Workers' International Association.

I note that although Respondent has had employees classified as "siding/decking journeymen," as distinct from (sheet metal) journeymen, I could find no specific mention of siding/decking in the agreement. Durieux testified without controversy, and I find that siding/decking employees can be journeymen, apprentices, or production; it is a classification that pays less in wages and fringe benefits than work classified as sheet metal; and sheet metal journeymen can, at their option, "work down" as siding/decking journeymen. For purposes of this decision, I need not distinguish between sheet metal and siding/decking journeymen but will simply refer to both as "journeymen." Respondent has not hired any employees in the "apprentice" classification.

Journeymen and Production Employees

Prior to 1991, Galigher employed only journeymen to perform sheet metal work. This changed when he hired his son Ed in 1991, his son Jake in 1996, and Gray in 1999, none of whom were journeymen or union members. I credit the testimony of all three that, since their employment began, they have done work stipulated by the parties in Joint Exhibit 32 to constitute

³ Jt. Exhs. 29 & 30.

journeyman work.

Galigher contradicted himself on when he began using the term “production worker.” At one point, he testified that when Ed came to work in 1991, his classification was production; later, however, he testified that he started using this classification only when he signed a production agreement in 1996, before that designating such employees as “sheet metal workers.”⁴

Respondent paid both journeymen and production workers time-and-a-half for overtime, but only the latter received paid vacations.

1996 and 2000 Supplemental or Production Agreements

Galigher testified without controversion that in 1996, business agent Caruthers came to his shop and asked him to sign a supplemental or production agreement so that his sons would be signed up and pay union dues. Caruthers stated nothing about any restrictions being placed on the work they did. In fact, when Respondent’s counsel asked Galigher why he signed the production agreement that (by its terms) limited the work his sons could do, he replied: “Because [Caruthers] said he didn’t care what I did with my guys. He didn’t care what I did, or what . . . kind of work they did. He just wanted them signed up in something and paying dues. That’s exactly what he told me.”⁵

Ed and Jake partially corroborated this testimony. Thus, Jake testified that he was present in Galigher’s office in 1996, with his father, Caruthers, and Ed, when Galigher agreed to sign a production agreement and that his sons would join the Union. Ed recalled a one-on-one conversation with Caruthers in that office, in which Caruthers stated that the purpose of the production agreement was “in order to get us into the union and so we could continue on about our work.”⁶

According, I credit Galigher’s testimony and find that Caruthers initiated the signing of the production agreement, stated that its purpose was that Galigher’s sons would join the Union and pay dues, and expressed no concerns over the type of work they would be performing. Nothing attributed to Caruthers directly reflects knowledge that Ed and Jake were doing work that the BTA called to be performed by journeymen. Whether or not such knowledge might be inferred, his statements clearly demonstrated the Union’s lack of interest in the matter.

Pursuant to Caruthers’ request, Galigher in June 1996 signed a supplemental or production agreement, with a successor agreement negotiated in June 2000, effective through May 31, 2005.⁷ They allowed Respondent to hire production workers at lower wages and benefits to perform certain work that typically would otherwise fall under the scope of the BTA and require the use of journeymen or apprentices. Both of these production agreements were concurrent with the existing BTA and stated, in article 1 (scope of work):

SECTION 1. This Agreement covers the rates of pay and

⁴ Contrast Tr. 491 with Tr. 598–590, 602.

⁵ Tr. 561. His testimony at Tr. 603 was consistent with this (“I could use them however I liked.”)

⁶ Tr. 670.

⁷ GC Exhs.12 & 2; see also Jt. Exh. 29, relating to the latter.

conditions of employment of all employees of the Employer engaged in the manufacture, fabrication, assembling, handling, altering and repairing of all ferrous and nonferrous metals, including other materials, and in lieu thereof, as required for installation within the confines of an industrial, processing or manufacturing jobsite and defined in Section 2 of this Article.

SECTION 2. Section 1 of this Article relates to the fabrication only, of air pollution control systems, noise abatement materials and all other industrial work excluding air conditioning, heating and ventilating systems installed in building enclosures to provide human comfort and all architectural sheet metal work .

Under this agreement, production workers were permitted to fabricate certain items in Respondent’s shop. They could not fabricate human comfort, architectural, or other excluded sheet metal products, which journeymen were to continue to do. Moreover, their work was to be performed only in the shop itself, not at customers’ jobsites. Thus, all installation work out of the shop was to stay with journeymen.

Work of Production Employees After the 1996 Agreement

Galigher testified several times as an adverse witness under Section 611(c) that during the period June 1, 2000, through June 2005, fabrication and installation of architectural sheet metal (as defined in Joint Exhibit 32(a), paragraph 1) was performed by both journeymen and production employees. The General Counsel showed him his September 26, 2006 affidavit to the Region, in which he stated that non-production sheet metal work historically, and between June 1, 2000, and June 1, 2005, included the following work performed off site: “a. Fabrication and installation of metal trim; b. Duct/dust collection work; c. Heating and air conditioning duct work; d. Siding and decking; and e. Installation of form, stack, or fascia systems.”⁸ After reviewing the affidavit, Galigher explained that during this period, he used production workers to help out the journeymen who installed at jobsites, testimony not necessarily inconsistent with his affidavit or with the testimony of Ed, Jason, and Gray, described below.

This was also consistent with his testimony that prior to April 2005, production employees on installation jobs worked with a journeyman if he had one employed at the time, and he used production employees to do “small jobs” at customers’ sites.⁹ However, he later contradicted himself by testifying that after the execution of the 1996 production agreement; “almost all” of the production employees’ work was performed at Respondent’s facility, as opposed to off site.¹⁰ He did concede that, traditionally, he tried to use mainly the journeymen on off-site work and that after 1996, and continuing after June 2005, they spent about 80 percent of their time installing at jobsites, and 20 percent fabricating materials in the shop.

I credit Galigher’s testimony on the nature of production employees’ work to the extent that it was consistent with the testimony of Ed, Jake, and Gray. Their testimony on this was

⁸ GC Exh. 27 at 1.

⁹ Tr. 523.

¹⁰ Tr. 504.

substantially consistent, and partially corroborated by journeyman Griner, who testified for the General Counsel. Accordingly, I credit their testimony regarding their work and find the following facts.

Both before and after execution of the 1996 production agreement, Ed and Jake performed work in all three categories of work in which Respondent engaged, as stipulated by the parties in Joint Exhibit 32(a): “architectural,” “sheet metal,” and “stock.” In this regard, Ed estimated that about 20–30 percent of his work was “architectural,” and Jake gave his percentage as approximately 25–30. After his hire in 1999, Gray performed work for Respondent in all three categories, with about 30 percent of his work being architectural. The percentages they gave for “sheet metal” work were as follows: Ed—60–70 percent; Jake—80 percent (his breakdowns came to over 100 percent); and Gray—30 percent.

Both before and after the execution of said agreement, Ed and Jake worked with journeymen employed by Respondent on over 100 customers’ jobsites, performing installation work that was reserved for journeymen and apprentices under the BTA. Gray testified similarly concerning his work after his hire in 1999. In this regard, I note Griner’s testimony that, prior to his layoff in July 2004, he worked on installing gutters and downspouts at a jobsite (House of Jacob) with journeyman Russell Cottis and also with Ed and Jake, whom he believed were journeymen. During this same time period, he recalled, Ed also worked with him in installing gutters at a church in Bathlisk.

Accordingly, I find that both before and after the execution of the production agreement in 1996, Ed and Jake, and Gray starting in 1999, performed work at jobsites that was journeyman work under the BTA, and that the traditional practice was that they assisted journeymen perform installation at such jobsites.

Union Knowledge of Production Employees Performing Journeymen Work Prior to April 7, 2005

In July 2003, Durieux took over from Caruthers as the business agent servicing Galicks. At the time, Caruthers said nothing to Durieux about having problems with Respondent. Thereafter, Durieux visited the shop over a dozen times and talked to Galigher on five or six occasions when Galigher called to request either journeymen or production employees.

Chermak testified that when he was union president and business manager from 1993–2003, he had no knowledge that Respondent’s production workers were performing work on a regular basis that was outside the scope of the production agreement, or he would have filed a grievance.

Turning to specific incidents alleged in 2004 and 2005, credibility resolution is critical because Durieux and Oakes testified about certain conversations, which Galigher, Ed, and Gray testified did not take place at all, and Jason recalled differently.

I will start with Durieux’s and Oakes’ versions. In approximately August 2004, journeyman John Vesper reported to the Union that a nonjourneyman was also working for Respondent on a jobsite (Dollar Store, New Philadelphia). Durieux and Oakes went there. The nonjourneyman was Gray, whose monthly union dues receipt showed that he was a production worker. Durieux told him he was not permitted to work out of

the shop. Durieux called Galigher the next day and said the same thing. Galigher replied not to worry, that Gray would not be there again, and journeymen would finish the work. Durieux testified he did not file a grievance because he believed Galigher. At around the time of this incident, Oakes checked remittance forms submitted by Respondent and ascertained that Ed and Jake were also production workers.

Griner, who was employed from May – July 2004, testified that on one occasion he called Durieux concerning Gray’s status, and Durieux replied that Gray was a production employee. I credit this testimony but believe that Griner called because he thought Gray was performing journeyman work.

In approximately February 2005,¹¹ the Union received a report from one of Respondent’s journeymen that the HVAC on a job (Wal-Mart, Coshocton) was a nonunion contractor. Durieux and Oakes went to the site, where they encountered Gray, Ed, and Jake. Durieux and Oakes told them they were not allowed to work there.

A day or two later, Durieux and Oakes met with Galigher in his office. They repeated that he was not allowed to use production workers at jobsites. He replied that he was getting too old for this and was going to turn over the business to his sons, who did not want to be union. He also complained that the Union could not supply him with qualified people and that employees he had trained when he started the business had quit and gone to work for another signatory sheet metal contractor.

In contrast, Gray denied having any conversations with Durieux or that anyone from the Union ever told him he could not do installation work at jobsites. Ed denied having a conversation with Durieux at the Wal-Mart, Coshocton jobsite. Jake recalled such a conversation but testified that Durieux only asked who was running the HVAC and said nothing about his working there. He also recalled a conversation with Durieux at the Dollar Tree, New Philadelphia jobsite, in which Durieux again only asked what company was running the HVAC on the job. Galigher denied having the conversations alleged by Durieux and Oakes following the above jobsite incidents. In fact, he testified that he did not meet Oakes until April 2005, when they discussed voluntary recognition.

Several factors lead me to credit Respondent’s witnesses over Durieux and Oakes. First, I find implausible the latter’s testimony about their rather low-key responses when they purportedly encountered nonjourneymen performing journeyman work on jobsites. I also find implausible Durieux’s testimony that in August 2004, he accepted at face value Galigher’s statements that he would stop using Gray to perform journeyman work and therefore took no further action. Second, Durieux’ and Oakes’ versions about their alleged conversation with Galigher in February 2005 were too consistent, almost identical, considering the event occurred over 2 years ago, lead-

¹¹ The precise date is unclear from the record. I base this date on Oakes’ testimony that he made a trust fund audit request in February or March 2005, “within a day or two after [Durieux] and I had our discussion with Mr. Galigher” concerning the Wal-Mart, Coshocton job. Tr. 409. In initially testifying about this incident, both Durieux and Oakes stated it occurred in the winter of 2005. However, Durieux later testified that a subsequent incident occurred “in the fall of 2005” (Tr. 354–355), an inherent inconsistency.

ing me to believe that their testimony was “canned.” Third, Oakes testified that at the meeting he and Durieux had with Galigher on April 7, 2005, requesting voluntary recognition of the Union as the representative of nonproduction employees, Galigher said he was looking at retirement and turning the business over to his sons, who were not interested in being union—strikingly similar language to what Oakes testified Galigher purportedly said during their February conversation. I find it difficult to believe that Galigher would have repeated such statements in April had he already made them in February. Fourth, as discussed below, I believe that the Union knew much earlier than August 2004 that Respondent was using production employees to perform journeyman work.

Finally, and what I find most damaging to Durieux’ and Oakes’ credibility here is the fact that, by letter dated January 19, 2005, described below in more detail, Galigher notified the Union that he was withdrawing recognition relating to the production workers. According to both Durieux and Oakes, their reason for initiating the purported February conversation with Galigher was to protest his using production workers to perform journeyman work. Neither one testified that they wanted to talk to Galigher about the January 19 letter, and neither testified that anything was said in the conversation about his withdrawing recognition—certainly, a subject of grave concern to the Union. This strains believability.

For the above reasons, crediting Respondent’s witnesses, I find that the Union did not tell either production employees or Galigher in August 2004 or in February 2005 that production employees could not perform journeyman work.

On the other hand, I am convinced that the Union knew of this practice much before August 2004, perhaps as far back as 1996, when Caruthers solicited Galigher to sign the production agreement. Significantly, remittance forms that Respondent submitted for its employees on a monthly basis showed the kind of work those employees were performing, since they reflected different rates of pay for different classifications. Therefore, the Union could determine if employees such as Ed and Jake were classified as production workers. In fact, Oakes admittedly did so in approximately August 2004. Moreover, union members’ dues-receipt records and employees’ pension statements reflected their classifications, since the amounts contained therein were different for journeymen (and journeymen who performed siding/decking) and production workers. I cannot believe that between the availability of these types of documents, reports from journeymen who were employed on Respondent’s jobsites, and other sources of information, the Union did not learn before August 2004 that Respondent employed production employees to do work that was journeyman under the BTA. I conclude, therefore, that at some point prior to August 2004, the Union had actual knowledge of this.

It is undisputed that the Union never filed a grievance or ULP charges on the subject of production employees performing journeyman work, prior to the charges before me. Oakes testified that after the alleged February 2005 conversation with Galigher, the Union did not file a grievance because of uncertainty over how much journeyman work the production employees were performing. To obtain such information, the Union, within a day or two of meeting with Galigher, requested a

trust fund administrator audit of Respondent’s fringe-benefit records. However, Respondent’s attorneys refused to allow the audit, and the Union filed ULP charges that have led to the instant proceeding and resulted in the audit being put on hold.

Withdrawal of Recognition in January 2005 and Aftermath¹²

Ed, Jake, and Gray signed a petition dated January 17, stating that they no longer wished union representation and were resigning their memberships. By letter of the same date, Galigher forward the petition to the Union and stated that he was therefore withdrawing recognition from the Union after the contract expired on June 1.¹³

By letter dated February 9 to the Union, Galigher confirmed that he was withdrawing recognition after the contract expired on June 1.¹⁴ He further stated that he had advised the association that he was immediately withdrawing his authorization that it act as his agent for collective-bargaining purposes.

After receipt of the second letter, the Union talked to Respondent’s journeymen, including Russell Cottis, Greg Griner, Bill Keenan, and John Vesper. Only Cottis was still working for Respondent at the time, the other three having been put on layoff status in May and July 2004. All four stated that they wished to continue to be union and signed cards to that effect.

On April 7, Oakes and Durieux took the cards to Galigher and requested voluntary recognition. According to Oakes and Durieux, he responded that he would not recognize the Union, further stating that he was looking at retirement and turning the business over to his sons, who were not interested in being union. Galigher did not deny making such statements, and I find that he did so at this April 7 meeting.

On April 13, the Union filed a petition with the Region, and on April 28, Respondent signed a Stipulated Election Agreement that set out “the appropriate collective-bargaining unit” as all full-time and regular-part time building trades (siding/decking journeymen) and sheet metal journeymen and apprentices, excluding, *inter alia*, production employees.¹⁵ In the agreement, “temporarily laid off” employees were designated eligible to vote. At the election conducted on May 23, the four laid-off journeymen named above were the only voters, Respondent did not challenge their eligibility, and they voted unanimously for the Union.¹⁶ A certification was issued on June 3.¹⁷

Union Actions Following Certification

After the election, Durieux called Galigher on one occasion and asked if he wanted to sit down and negotiate; Galigher responded ambiguously. By letter of June 9 to Respondent, Oakes stated that the recent certification had resulted in the successful conversion of the current collective-bargaining

¹² All dates in this and the following section occurred in 2005 unless otherwise specified.

¹³ GC Exh. 3.

¹⁴ GC Exh. 4.

¹⁵ Jt. Exh. 14.

¹⁶ See GC Exh. 5.

¹⁷ GC Exh. 6.

agreement into a 9(a) agreement.¹⁸ With cover letter dated June 14, Thomas Wiencek, Respondent's attorney, sent the Union a proposed agreement encompassing employees in the certified unit.¹⁹ The proposal was for a residential contract, and Oakes told Wiencek that it was "a slap in the face."²⁰

In the June to July time period, Oakes drove by the facility on several occasions and observed fabricated architectural metal products, journeyman work under both the BTA and production agreements. By this time, Respondent had laid off the last of its journeymen, Cottis. Oakes did not speak to any employees or see anyone working on the products.

In August or September, Oakes heard that Respondent had been awarded the architectural sheet metal work for the Super Wal-Mart job in St. Clairsville. He and Durieux visited the jobsite, where they observed large sections of gutters and downspouts that appeared to be journeyman work. They did not witness anyone installing the materials. The project manager confirmed that Respondent had been awarded the contract for the gutters and downspouts and that Galigher's sons were doing the work.

By letter dated August 12 to Respondent, Oakes referenced Respondent's earlier representation that its production workers had resigned from the Union.²¹ He went on to state that since Respondent had terminated the production agreement, all work it covered reverted to coverage under the BTA (and was to be performed by journeymen and apprentices, rather than production employees). Oakes then said that because of the current bargaining relationship, and to ensure a smooth transition from the production agreement to the BTA, he was requesting certain information:

1. A list of all work performed since June 1.
2. A current list of employees.
3. A copy of all time cards and/or job sheets for each of those employees, as well as copies of payroll checks paid to employees since June 1.
4. A list of all future projects, including any current projects that Respondent may have had prior to June 1 that would have been performed under the production agreement.

Galigher responded by letter dated August 12.²² He referred to the Board certification that excluded production employees and stated that the Union had no jurisdiction over them. In addition, he and his sons were performing most of the production work, and they were not considered employees under the Act. Therefore, he would not provide the requested information.

The Union filed ULP charges on August 22. Oakes testified that the Union did not pursue negotiations for two reasons: first, it wanted resolution of the charges; second, it understood that Respondent remained covered under the new BTA agreement that had gone into effect on June 1. There is nothing in the

record to suggest that the Union acted in bad faith in taking this position.

The Region, however, rejected the Union's contention that Respondent was bound to the new BTA, and issued a partial dismissal letter on May 31, 2006.²³ The Region determined that the Union's conduct, including its filing of a petition and its stipulating to a single-employer unit, amounted to its consent to Respondent's withdrawal from the association and creation of a single-employer relationship. Accordingly, Respondent ceased being bound to the BTA once it expired on June 1, 2005.

The Office of Appeals upheld the Region's determination on July 25.²⁴ By letter to Respondent dated August 23, Oakes referenced the denial of the Union's appeal and requested to meet for bargaining over a new agreement.²⁵ In addition to proposing alternative dates for a first session, he requested the following information in connection with facilitating negotiations:

1. A list of current employees.
2. A copy of all current company personnel policies, practices, or procedures.
3. A statement and description of all such policies, practices, or procedures other than those mentioned in item 2.
4. A copy of all company fringe benefit plans not sponsored by the Union.
5. Copies of company wage or salary plans.
6. A list of current projects, including shop and field work.
7. A list of all work completed since June 1, 2005.
8. A list of all future projects.

By letter dated September 7 to Wiencek, Oakes referred to a conversation they had on August 30, in which Wiencek said he would notify Oakes by September 8 of Respondent's intentions with respect to negotiations.²⁶ Oakes asked in the letter that he receive a response to his August 23 letter by close of business on September 8; otherwise, he would assume that Respondent was refusing to supply the requested information and to meet and negotiate.

Wiencek replied by letter dated September 7, stating that Respondent no longer recognized the Union as the representative of the certified unit.²⁷ He went on to say that at present, and since the certification on June 3, 2005, the only employees that Respondent continuously employed were production employees excluded from the unit, naming Ed and Jake, Gray, and Curt Paternoster, in addition to Galigher. Further, any sheet metal work performed since the certification date was de minimis and would not support a one-man bargaining unit. Additionally, none of the journeymen who had been laid off had any reasonable expectancy of recall in the near future. Finally, even if the Union believed the production work was covered by the Un-

¹⁸ Jt. Exh. 16.

¹⁹ Jt. Exh. 17.

²⁰ Tr. 226.

²¹ GC Exh. 7.

²² GC Exh. 8.

²³ Jt. Exh. 21. All further dates in this section occurred in 2006.

²⁴ Jt. Exh. 22.

²⁵ GC Exh. 9.

²⁶ GC Exh. 10.

²⁷ Jt. Exh. 23.

ion's jurisdiction, recognition could still legally be withdrawn because Galigher and his sons were not employees within the meaning of the Act, and the remaining two (Gray and Paternoster) had repeatedly objected to union representation. Wienczek concluded by stating that Respondent would neither bargain with the Union nor provide the information requested in the August 23 letter.

Respondent's Work after June 2005

Galigher's testimony in this area was often hesitant and ambiguous, did not seem to be borne out by documents that Respondent provided, and at times was contradictory or evasive. He seemed to strain to try to distinguish the work he has done since June 2005 from prior work, in an effort to minimize the amount that would be classified as journeyman under the BTA. Accordingly, I accord such testimony only limited weight and give more credence to what Respondent's records show or imply.

Cottis, who had been hired in March 2004, was laid off on April 7, 2005. Galigher testified it was due to lack of work. The Region did not issue complaint on the allegation that the layoff itself was unlawful.²⁸ Respondent has employed no journeymen since. Galigher testified that Cottis was not later recalled because there were only short, nonconsecutive 2–3 day installation jobs, and he normally did not call the Union for a journeyman for a job under 3 weeks or so. He also testified more than once that since Cottis was laid off, only production workers have performed journeyman work.

Almost exactly 2 months later, on June 6, 2005, Respondent hired Curt Paternoster. Although Wienczek's September 7, 2006 letter, above, referred to him as a production employee, Galigher testified that he has been a laborer or construction worker, performing clean-up work and odd jobs. In this regard, Galigher was vague, equivocal, and evasive about the exact nature of Paternoster's duties. Galigher did admit that on certain occasions Paternoster has performed journeyman work, saying this occurred when he helped one of the production workers²⁹—again inconsistent with the representation made in Wienczek's letter that he is a production employee. In any event, Respondent's records confirm that he has performed journeyman work. For example, in late 2005 and early 2006, he worked a total of 60-1/4 hours on the fabrication and installation of architectural sheet metal project at the Wal-Mart job in St. Clairsville.³⁰ Paternoster, who started as a temporary full-time employee but was later made permanent, worked 1,206-1/2 hours at \$7 an hour in 2005, and 2,120-1/4 hours at \$9 an hour in 2006, not taking into account time-and-a-half overtime pay.³¹ Respondent still employs him.

Joint Exhibits 35–37 are stipulated summaries of Respondent's customer invoices that were submitted at my request following the conclusion of the trial, indicating for the years 2004–2006 the type of work involved. Joint Exhibit 32(g) con-

tains invoices broken down by type of work for Hicks Roofing for 2005 and 2006, and Joint Exhibit 34 contains the same information for Commercial Roofing, both major customers of Respondent. These documents establish that throughout 2004–2006, Respondent performed work classified as “architectural” or “sheet metal”—journeyman work under the BTA that was traditionally performed by Galick's journeymen. Moreover, Durieux and Oakes testified that various other documents Respondent submitted reflect that Respondent's employees performed journeyman work under the BTA after June 2005, and many would have required at least two employees.³² Galigher conceded that additional documents he submitted indicate the performance of BTA journeyman work (architectural) after that time.³³

Thus, since June 2005, Respondent has continued to perform all types of sheet metal fabricating and installation and to sell sheet metal product “out of the door,” including product that comes under the definition of “architectural.” As an example, it currently fabricates architectural sheet metal for Hicks Roofing, one of Galick's biggest customers in June 2005.

Joint Exhibits 35–37 further show that the total dollar amount of Respondent's business increased from \$858,060 in 2004 to \$965,905 in 2005 and to at least \$1,104,880 in 2006.³⁴ Respondent's Exhibit 1, compiled from Joint Exhibit 15, shows that direct labor costs for all employees, excluding Galigher and secretary-bookkeeper Pearch, were \$203,334 in 2004, \$179,281 in 2005, and \$193,864 in 2006. Payroll records contained in Joint Exhibit 15 reflect the following combined overtime pay for Ed, Jake, Gray, and Paternoster: \$2,998³⁵ in 2003, \$12,644 in 2004, \$15,757 in 2005, and \$13,006 in 2006.

Based on the above, I find that Respondent since June 2005 has continued to perform a substantial quantum of work that was classified as journeyman under the BTA and which its journeymen performed in the past.

Analysis and Conclusions

Failure to Recall Journeymen Because of Their Union Activities

The framework for analysis of allegations of discrimination under Section 8(a) (3) is *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a *prima facie* showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must demonstrate, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

The big problem with this allegation is that prior to April 7,

²⁸ See GC Exh. 1(e), second amended charge, filed on November 23, 2005. This allegation was not included in the third amended charge, filed on December 28, 2005 (GC Exh. 1(f)).

²⁹ Tr. 626.

³⁰ See Jt. Exh. 6.

³¹ Jt. Exh. 15u & g.

³² See, e.g., Jt. Exhs. 11(b) & (c), 24, 25 (a) & (c), 31(c), (d), (g), (h), & (p).

³³ Jt. Exhs. 6(g), 8, 9, 10, & 32(a).

³⁴ Respondent could not locate several invoices for 2006.

³⁵ Gray's overtime amount in 2003 was based on adding the fourth quarter to the first three, because the year-end total given for him was inaccurate. See Jt. Exh. 15j.

2005, when the journeymen's support of the Union was made known to Respondent, three of the four of them had already been laid off, and no ULP charges or grievances were ever filed concerning their layoffs. Furthermore, as to Cottis, who was laid off on April 7, 2005, the General Counsel has not alleged his layoff to be unlawful.

Galigher's statements that he would be turning over the business to his sons and that they did not wish to be union were not alleged to violate Section 8(a) (1), and I conclude that they failed to rise to the level of establishing animus. I note that after Galigher made those statements, he entered into a stipulated election agreement. No other express animus has been averred, nor are circumstances present that would raise an inference of discriminatory motive. Even assuming animus, it cannot be established that Respondent's actions were based thereon since, as discussed below, Respondent had a longstanding practice of using lower-paid production employees to perform journeyman work.

I conclude, therefore, that the General Counsel has not made out a prima facie case of discriminatory failure to recall journeymen. Accordingly, I recommend dismissal of this allegation.

Unilateral Change in Working Conditions

The General Counsel alleges that since on about June 3, 2005, Respondent violated Section 8(a)(5) and (1) by assigning bargaining unit (journeyman) work to nonbargaining unit (production) employees, without affording the Union notice and an opportunity to bargain. I conclude that this allegation is barred by Section 10(b) of the Act, which precludes the finding of a violation based on alleged misconduct that occurred over 6 months prior to the filing of a charge.

The 6-month statute of limitations begins to run when a party has clear and unequivocal notice of a violation of the Act, which notice may be actual or constructive. *St. George Warehouse, Inc.*, 341 NLRB 904, 905 (2004); *CAB Associates*, 340 NLRB 1391, 1392 (2003). In determining whether a party was on constructive notice, the inquiry is whether the party should have become aware of a violation in the exercise of reasonable diligence. *St. George Warehouse, Inc.*, id.; *CAB Associates*, id. Failure to exercise such diligence results in a 10(b) bar. *Transit Union Local 1433 (Phoenix Transit System)*, 335 NLRB 1263 fn. 2 (2001); *Mathews-Carlsen Body Works, Inc.*, 325 NLRB 661 fn. 2 (1998); *Moeller Bros. Body Shop*, 306 NLRB 191, 192 (1992).

I conclude that the Union was on constructive notice of Respondent's practice of using production workers to perform journeyman work. Galigher filed with the Union monthly reports on employees' compensation, which showed pay based on employee classification. Moreover, there were union members' dues receipt records and pension statements that also reflected classification. Indeed, in approximately August 2004, Oakes admittedly ascertained that Ed and Jake were production employees by checking Respondent's monthly report records in the Union's possession. In May and July 2004, three of Respondent's remaining journeymen were laid off, leaving Respondent with three production employees and only one journeyman. The monthly reports that Respondent provided to the

Union reflected such layoffs and certainly should have been a red flag triggering further investigation of Respondent's operations. The situation is analogous to that in *Courier-Journal*, 342 NLRB 1093 (2004) (Courier-Journal I). Therein, the Board found constructive notice to the union when, although the employer did not give the union official notice of increased health insurance premiums, the change was reflected in the greater amounts withheld for health insurance on the pay stubs of union employees.

This is not a situation where Respondent attempted to conceal or deceive the Union concerning its use of production employees to perform journeyman work starting in 1991. Rather, "mere observation" of Respondent's operations by the Union would have revealed years before 2005 that Respondent was engaging in this practice. See *Moeller Brothers Body Shop*, supra at 192; contrast, *Nursing Center at Vineland*, 318 NLRB 33337, 339 (1995).

In sum, by exercising reasonable diligence, the Union would have known far before August 2004 that Respondent was using production employees to perform journeyman work. However, I need not rely on constructive notice alone to find a 10(b) bar. Thus, the Union admittedly had actual notice of this by around August 2004, approximately a year before the original charge in Case 8-CA-36070 was filed on August 22, 2005.

Significantly, the Union's stated objection all along has been to Respondent's production employees performing any journeyman work, even if they worked on jobsites with journeymen. Thus, it is immaterial that the production employees in earlier years did journeyman work together with journeymen and later performed such work more and more on their own. By August 2004, a year before the original charge was filed, only one journeyman was still employed, with production employees performing independently the remainder of journeyman work. In essence, the unilateral change of using production workers to perform journeyman work had already ripened outside the 10(b) period into an existing term and condition of employment for journeymen. See *Courier-Journal*, 342 NLRB 1148 (2004) (Courier-Journal II).

For the above reasons, I conclude that the allegation of unilateral change should be dismissed under Section 10(b), as untimely filed.

August 2005 Information Request

An employer is obliged to supply information requested by a collective-bargaining representative that is necessary and relevant to the latter's performance of its responsibilities to the employees it represents. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

Although an employer need not automatically comply with a union's information request, with its duty to provide such turning on the circumstances of the particular case, *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314 (1979), requested information that relates directly to the terms and conditions of represented employees is presumptively relevant. *Beverly Health & Rehabilitation Services*, 328 NLRB 885, 888 (1999); *Samaritan Medical Center*, 319 NLRB 392, 397 (1995). The Board applies a liberal, discovery-type standard in determining what requests for information must be honored. *Raley's Supermar-*

ket, 349 NLRB 26, 27 (2007); *Postal Service*, 337 NLRB 820, 822 (2002); *Brazos Electric Power Cooperative, Inc.*, 241 NLRB 1016, 1018 (1979). Thus, the requested information need only be potentially relevant to the issues for which it is sought. *Pennsylvania Power Co.*, 301 NLRB 1104, 1104–1105 (1991); *Conrock Co.*, 263 NLRB 1293, 1294 (1982).

A union is not required to make a specific showing of relevance unless Respondent had rebutted the presumption of such. See *Southern California Gas Co.*, 346 NLRB 449 (2006); *Mathews Readymix, Inc.*, 324 NLRB 1005, 1009 (1997), enfd. in relevant part, 165 F.3d 74 (D.C. Cir. 1999); *Ohio Power Co.*, 216 NLRB 987, 991 (1975), enfd. 531 F.2d 1381 (6th Cir. 1976).

Oakes' August 12, 2005 information request was premised on the mistaken but good faith belief that since Respondent had terminated the production agreement, all work covered thereunder reverted to coverage under the BTA (and was to be performed by journeymen, rather than by production employees). In order to effectuate "a smooth transition from the production agreement to the BTA," he requested information relating to work performed since June 1, current employees, and future projects.

Regardless of Oakes' error, the Union, pursuant to a Stipulated Election Agreement, had been certified as the collective-bargaining representative of what were at the time laid-off journeymen. The information he sought about current employees and current and future work certainly was presumptively relevant, since it related to whether Respondent would have work for journeymen and clearly impacted their prospects for recall.

Mid-States Construction, 270 NLRB 847, 849 (1984), cited by Respondent, is distinguishable. The Board held therein that an employer was not required to comply with a union's information request when the request was premised on the erroneous assumption that the employer had adopted a multi-employer association agreement with the union. However, nothing in the decision indicates that the union had been certified as the collective-bargaining representative of the employer's employees, in contrast to the situation here.

Therefore, aside from any connection to the BTA, the information request was relevant to the Union's representation of bargaining-unit employees who might be recalled in the future.

Accordingly, by failing and refusing to provide the Union with the requested information, Respondent violated Section 8(a) (5) and (1) of the Act.

Withdrawal of Recognition and August 2006 Information Request

I will first address Respondent's withdrawal of recognition. Respondent contends that it was free to withdraw recognition because the unit consisted of one or no employee, the laid-off journeymen having no reasonable expectancy of recall because of lack of journeyman work. Respondent has also asserted that the Union somehow waived its right to further bargaining in 2006 by not taking any steps to negotiate after August 2005.

The argument that there is no viable unit for the Union to represent fails. By signing the election agreement, Respondent stipulated that a unit including building trades journeymen was

appropriate, and it implicitly agreed that at the time its four laid-off journeymen had a reasonable expectancy of recall—the Boards' longstanding test for determining whether employees on layoff status are eligible to vote. See, e.g., *Laneco Construction Systems, Inc.*, 339 NLRB 1048, 1049 (2003); *Apex Paper Box Co.*, 302 NLRB 67, 68 (1991). Respondent confirmed this when it did not challenge their ballots.

The Board has adopted the principle that when parties stipulate the unit in which an election is held, they are held to their agreements, as any other party is held to an agreement. See *Premier Living Center*, 331 NLRB 123 (2000) (in earlier proceeding, "The Board specifically relied on the hearing officer's finding that the Employer is bound by the Stipulated Election Agreement"); *Prudential Insurance Co. of America*, 246 NLRB 547, 548 (1979); *Graham Ford, Inc.*, 224 NLRB 927, 927–928 (1976). In agreeing with this precept, the Fifth Court of Appeals aptly stated in *Shore Line Enterprises of America v. NLRB*, 262 F.2d 933, 943 (1959):

[A] company and a union must be held to their agreements, as any other party is held to an agreement. In cases involving a pre-election resolution of eligibility, issues between a company and a union it is especially important to hold the parties to their contract. To permit either to repudiate a pre-election agreement and redefine the eligible members of a bargaining unit, after an election has been held, would enfeeble the consent election procedure The company cannot play fast and loose with a pre-election agreement and a stipulated eligibility list.

Respondent cannot rely on alleged lack of work for journeyman to justify retracting its earlier agreement that the layoffs were only temporary in nature and that journeymen had a reasonable possibility of recall. Its own records do not demonstrate that there has been any decline in the volume of its business or significant change in the nature of its work since.

On the contrary, invoice summaries contained in Joint Exhibits 32(g), 34, and 35–37, as well as other records that Respondent submitted, reflect increasing business from 2005 to 2006. In this regard, Respondent's direct labor costs for employees other than Galigher and his secretary-bookkeeper rose from 2005 to 2006. Respondent's three production workers hired before 2005 (Ed, Jake, and Gray) have continued to perform work that was journeyman work under the BTA. Moreover, Respondent hired at least one additional employee, Paternoster who, Respondent admitted, has also performed such. It is noteworthy that Paternoster was hired as a temporary employee but was later made permanent and that he worked over 900 hours more in 2006 (at \$9/hour) than he did in 2005 (at \$7/hour), not even considering his overtime pay.

I therefore conclude that Respondent is estopped from relying on its assertion that the layoffs have become permanent and, for that reason, it has one or no employees in the bargaining unit.

I further note that in evaluating whether a respondent has unlawfully withdrawn recognition, the Board requires that the respondent show that the union had lost its majority status at the time that it withdrew recognition. *Highlands Regional Medical Center*, 347 NLRB No. 120 (2006), citing *Levitz Fur-*

niture Co. of the Pacific, 333 NLRB 717 (2001). Respondent has proffered no such evidence at any time.

Respondent's waiver argument also lacks merit. There is no showing that the Union acted in bad faith in taking the position that Respondent was bound to the successor BTA, in filing a charge contending such, or in exercising its legal right to have the issue adjudicated first by the Region and then by the Office of Appeals. Significantly, less than a month after the Union received the denial of its appeal, affirming the Region's decision that Respondent had withdrawn from the multi-employer association, it requested that Galicks engage in negotiating a single-employer agreement.

For the above reasons, I conclude that Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition of the Union as the bargaining representative of a unit of journeymen on September 7, 2006, and thereafter failing and refusing to meet and bargain with the Union over the terms of a collective-bargaining agreement.

Turning to the Union's August 23, 2006 request for information, I set out above the law on the subject. In this request, Oakes asked for the following for the purpose of negotiating a single-employer agreement, as per the General Counsel's determination: a list of current employees; current company personal policies, practices, or procedures; a statement of company fringe benefit plans not sponsored by the Union; copies of company wage or salary plans; current projects, including shop and field work; a list of all work completed since June 1, 2005; and a list of all future projects.

For the reasons previously stated with regard to the August 2005 information request, I conclude that the information requested in August 2006 was necessary and relevant to the Union's representation of the unit of journeymen and that Respondent violated Section 8(a)(5) and (1) by failing and refusing to provide it.

CONCLUSIONS OF LAW

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

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

3. By the following conduct, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a) (5) and (1) of the Act:

(a) Failed and refused to provide the Union with information the Union requested that was necessary and relevant to the Union's representation of unit employees.

(b) Withdrew recognition from the Union as the representative of unit employees and thereafter failed and refused to meet and bargain with it over the terms of a collective-bargaining agreement.

REMEDY

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

Respondent stipulated that a unit including *building trades* journeymen was appropriate, and it did not challenge the eligi-

bility of the four laid-off journeymen to vote. By such conduct, Respondent conceded that it engaged in, or had a reasonable expectation that it would engage in, work considered journeyman under the BTA. Indeed, Respondent has continuously done such work since June 2005—having four nonjourneymen, rather than journeymen, perform it. The stipulation essentially defined journeyman work independently of any prospective collective-bargaining agreement that Respondent and the Union might later negotiate. In this particular set of circumstances, I deem it appropriate to order the following: Respondent shall set up a preferential hiring list of the laid-off journeymen who voted in the election and recall them in order of seniority should Respondent have enough building trades journeyman work to warrant hiring new employees to perform it, unless and until Respondent reaches a contrary agreement with the Union.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended³⁶

ORDER

Respondent, Galicks, Inc., New Philadelphia, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide the Union with information the Union requests that is necessary and relevant to its role as the certified collective-bargaining representative of unit employees.

(b) Withdrawing recognition from the Union as the certified collective-bargaining representative of unit employees, and failing and refusing to meet and bargain with it over the terms of a collective-bargaining agreement covering those employees.

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

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

(a) Recognize the Union as the exclusive collective-bargaining representative of unit employees and, on request, meet and negotiate with the Union over the terms of a collective-bargaining agreement covering those employees.

(b) Furnish the Union with the information it requested about current jobs and employees, future jobs, company wages and fringe benefits, and company personnel policies.

(b) Establish a preferential hiring list of laid-off journeymen and recall them in order of seniority should Respondent have enough building trades journeyman work to warrant hiring new employees to perform it, unless and until Respondent reaches a contrary agreement with the Union.

(c) Within 14 days after service by the Region, post at its facilities in New Philadelphia, Ohio, copies of the attached notice marked "Appendix."³⁷ Copies of the notice, on forms provided

³⁶ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

³⁷ 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 Judge-

by the Regional Director for Region 8, after being signed by Respondent's authorized representative, shall be posted by 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 12, 2005.

(d) 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 Respondent has taken to comply.

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

Dated, Washington, D.C. June 20, 2007.

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

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

Choose not to engage in any of these protected activities

Sheet Metal Workers International Association, Local Union No. 33 of Northern Ohio, AFL-CIO (the Union) is the certified bargaining representative of a unit of building trades (siding/decking journeymen) and sheet metal journeymen and apprentices employees (the unit).

WE WILL NOT withdraw recognition from the Union as the collective-bargaining representative of unit employees, unless a majority of those employees tell us they no longer wish representation.

WE WILL NOT fail and refuse to meet and bargain with the Union, on its request, over the terms of a collective-bargaining agreement covering unit employees.

WE WILL NOT fail and refuse to provide the Union with information it requests that relates to its ability to negotiate a collective-bargaining agreement concerning unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the National Labor Relations Act, as set forth at the top of this notice.

WE WILL recognize the Union as the exclusive collective-bargaining representative of unit employees, and WE WILL, on its request, meet and bargain with it over the terms of a collective-bargaining agreement covering unit employees.

WE WILL furnish the Union with the information it requested about our current work and employees, future work, company wages and fringe benefits, and company personnel policies, since such information relates to the Union's ability to negotiate an agreement concerning unit employees.

WE WILL establish a preferential hiring list of our laid-off journeymen and recall them in order of seniority should we have enough building trades journeyman work to warrant hiring new employees to perform it, unless and until we reach a contrary agreement with the Union.

GALICKS, INC.