Allstate Power Vac, Inc. *and* Laborers International Union of North America, Local 78. Cases 29–CA–28264, 29–CA–28351, 29–CA–28394, 29–CA–28556, 29–CA–28594, 29–CA–28637, 29–CA–28683, and 29–RC–11505

November 30, 2009

DECISION AND ORDER AND ORDER REMANDING

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On August 11, 2008, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board[1] has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below, to adopt the Order as modified and set forth in full below,[3] and to remand certain issues to the judge for further findings, analysis, and conclusions consistent with this decision.

I. REFUSAL-TO-HIRE AND REFUSAL-TO-CONSIDER ALLEGATIONS

The judge found that the Respondent did not violate Section 8(a)(3) and (1) of the Act by refusing to hire, or consider for hire, union applicants Edwin DeJesus, Fabian Derewiecki, Eli Kent, Manuel Ortiz, Jorge Roldan, Robert Rowek, and Krzysztof Walek. We adopt the judge's dismissal of these allegations for the reasons discussed below.

A. Factual Background

On March 21, 2007,[4] the Respondent placed a classified newspaper advertisement stating that it was hiring operators/drivers who had commercial driver's licenses (CDLs) and endorsements for hazardous materials handling (HAZMAT). The same day that the advertisement was placed in the newspaper, union coordinator Byron Silva sent union members Castillo and A. Rivera to apply for employment with the Respondent as covert salts; they were instructed not to reveal their union membership to the Respondent for the time being. Although neither Castillo nor A. Rivera had a CDL or a HAZMAT endorsement, they were allowed to fill out applications, and, at the Respondent's request, they produced driver's licenses and social security cards. Thereafter, they each spoke with Respondent's operations manager, Chris Baran. At the end of the process, arrangements were made for Castillo and A. Rivera to undergo a drug test and physical.

In April, a few weeks after they applied, Castillo and A. Rivera began working for the Respondent as field technicians, an unskilled labor position. The record does not establish the date on which the Respondent decided to hire Castillo and A. Rivera or the date on which Castillo and A. Rivera were officially notified that they had

[1] 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 *Narricot Industries, L.P. v. NLRB*,___F.3d___, 2009 WL 4016113 (4th Cir. Nov. 20, 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), petition for cert. filed 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), cert. granted ___S.Ct.___, 2009 WL 1468482 (U.S. Nov. 2, 2009); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), petition for cert. filed 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petition for cert. filed 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377).

[2] In the absence of exceptions, we adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by unlawfully prohibiting employees from wearing union stickers on their hardhats and from wearing other union insignia, and that the Respondent violated Sec. 8(a)(3) and (1) of the Act by unlawfully discharging Jose Castillo and A. Rivera and unlawfully laying off Jose Adames, Miguel Bisono, and Victor Vasquez.

Also, in the absence of exceptions, we adopt the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by threatening employees with the loss of bonuses and raises if they supported the Union.

[3] We have modified the judge's recommended Order to include a rescission remedy for the Respondent's unlawful prohibition on the wearing of union insignia.

We have further modified the recommended Order to include backpay and reinstatement remedies for the unlawful discharges of employees Castillo and A. Rivera on or about June 4, 2007. The judge found that Castillo and A. Rivera were not entitled to such remedies because they were covert salts. The judge stated:

> Both Rivera and Castillo were members of the Union and both before and immediately after their discharges on June 4, obtained other employment at substantially higher wage rates. There is no doubt that neither man intended to work for the Respondent on a permanent basis or even on an extended temporary basis. And after they were discharged they suffered no loss ofearnings or benefits.

We disagree with the judge's analysis and find that Castillo and A. Rivera are entitled to reinstatement and backpay remedies for their unlawful discharges. The issue of whether Castillo and A. Rivera actually suffered a loss of earnings or benefits properly is left to the compliance stage of this proceeding.

We have substituted a new notice to employees to comport with these findings.

[4] All dates are in 2007, unless otherwise noted.

been hired.[5] According to the Respondent's records, April 17 was the "hire date" of Castillo and A. Rivera.[6]

On the morning of April 13, union official Silva sent DeJesus, Derewiecki, Kent, Ortiz, Roldan, Rowek, Guian Rivera,[7] and Walek ("the overt salts") to apply for work at the Respondent as overt salts. The overt salts went to the Respondent's facility in pairs, wearing union clothing and carrying recording devices to record what was said during the application process.

When the overt salts entered the facility, they asked Respondent's receptionist, Nidia Delgado, for employment applications and advised Delgado that it was their intention to organize the Respondent.[8] Delgado responded that the Respondent was not interested in becoming a union shop, but informed the applicants that they could apply for one of the available driver positions. Delgado further informed them that, in order to apply for such positions, they would have to produce driver's licenses with CDLs and HAZMAT endorsements. Although some of the applicants indicated to Delgado that they possessed those licenses, it is undisputed that, in fact, none of them did. When none of the individuals were able to produce the required licenses, Delgado advised them that they could come back and fill out applications when they had obtained them.

One of the applicants then inquired whether he could fill out an application for a field technician position. Delgado told him that the Respondent did not have openings for field technicians at that time, but that he could complete an application and she would keep it on file. He did not, however, complete an application. None of the applicants returned to the Respondent after April 13, nor did they make any further attempt to apply for employment with the Respondent.

[5] The judge specifically found that Castillo and A. Rivera had been offered their positions before April 13 and that the Respondent had "committed itself to hiring these two people almost immediately after they applied for jobs on March 21, 2007." The judge also found that, as of April 13, the Respondent,"having recently [decided] to hire around four laborers," had no immediate need to hire field technicians. Because the judge did not indicate that these findings were based on credibility determinations, and because contradictory evidence exists, we do not rely on these findings.

[6] The record suggests that the Respondent hired four additional field technicians in April: Luis Perez Jr. and Delvis Vargas, both of whom had hire dates of April 3, and Freddy Cedeno Perez and Jose Peralta, both of whom had hire dates of April 17. The record does not establish when the Respondent made offers of employment to these individuals and/or committed to hiring them.

[7] Guian Rivera is not an alleged discriminatee in this case because, according to the General Counsel, he could not have taken a position with the Respondent if one was offered to him.

[8] A transcript of the relevant portions of the recorded conversations between the overt salt pairs and Delgado is reproduced in the judge's decision.

B. Refusal To Hire

In order to establish a refusal-to-hire violation under *FES,* 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002), the General Counsel must establish, by a preponderance of the evidence, the following elements:

> (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

Id. at 12 (footnotes omitted).

Once the General Counsel has met this initial burden, "the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation." Id. (footnote omitted).

Applying *FES* here, we find that the General Counsel has failed to meet his initial burden. At the time that the seven overt salts attempted to apply for employment, the Respondent was hiring drivers, a position that required a CDL and a HAZMAT endorsement. The General Counsel concedes, however, that the overt salts did not satisfy those requirements. Accordingly, it is clear that the General Counsel has failed to establish that the Respondent violated the Act for failing to hire the overt salts for the driver positions.

The General Counsel further contends that the Respondent unlawfully failed to hire the overt salts for field technician positions, for which they were qualified. Under *FES*, in order to prove this violation, the General Counsel must first establish that the Respondent was hiring field technicians, or had concrete plans to hire field technicians, on April 13, the date on which the overt salts visited the Respondent's facility. The General Counsel has failed to meet this burden.

The evidence in the record does not establish when, in relation to the time that the seven overt salts attempted to apply for employment, offers of employment were made to Castillo, A. Rivera, Cedeno Perez, and Jose Peralta, all of whom the Respondent hired in mid-April. Nor does the record establish when the Respondent committed to hiring them. Finally, the record does not establish that the Respondent had any additional field technician positions to fill after it had hired six individuals for that position in April. There is simply too much left unproved to find that the General Counsel has established that, at the

time in question, the Respondent was hiring for a field technician position for which the seven overt salts may have had the necessary experience or training.

In these circumstances, we find that the General Counsel has failed to meet his initial burden under *FES,* and on this ground we adopt the judge's dismissal of the allegation that the Respondent violated Section 8(a)(3) and (1) by refusing to hire overt salts DeJesus, Derewiecki, Kent, Ortiz, Roldan, Rowek, and Walek.[9]

C. Refusal To Consider

In order to establish a refusal-to-consider violation under *FES,* supra, 331 NLRB at 15, the General Counsel has the initial burden of showing "(1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment." If the General Counsel establishes this, the burden then shifts to the respondent "to show that it would not have considered the applicants even in the absence of their union activity or affiliation." Id.

To begin, we find, even assuming arguendo that (a) the General Counsel met his initial burden in establishing that the Respondent excluded the overt salts from a "hiring process" for the driver positions, and (b) antiunion animus contributed to that decision, the Respondent has met its burden to show that it would not have considered the applicants for the driver positions even in the absence of their union affiliation. Even had the Respondent allowed the overt salts to apply for driver positions, it is undisputed that drivers were required to possess CDLs and HAZMAT endorsements and that none of the overt salts had them. Accordingly, the Respondent has established that its failure to consider the overt salts for the driver positions was based on the overt salts' lack of required qualifications, rather than on their union affiliation.

Further, insofar as the General Counsel argues that the Respondent unlawfully refused to consider the overt salts for field technician positions, we find that the General Counsel has failed to establish by a preponderance of the evidence that the Respondent excluded the overt salts from a "hiring process" involving those positions. As explained above, the General Counsel has established neither that, at the time the seven overt salts attempted to apply for employment on April 13, the Respondent was hiring field technicians, nor that the Respondent had a policy of accepting applications for positions for which it was not currently hiring.[10] Furthermore, the General Counsel has not established that the Respondent excluded the overt salts from applying for such positions in the first place; in fact, Delgado expressly informed one of the applicants that she *would* accept an application for a Field Technician position, even though the Respondent was not currently hiring for that position. None of the overt salts, however, actually submitted applications or pursued the matter further.

Accordingly, we adopt the judge's dismissal of the allegation that the Respondent violated Section 8(a)(3) and (1) by refusing to consider for hire overt salts DeJesus, Derewiecki, Kent, Ortiz, Roldan, Rowek, and Walek.

II. ADDITIONAL 8(a)(3) AND (1) ALLEGATIONS

The General Counsel has excepted to the judge's dismissal of several 8(a)(3) and (1) allegations in which the General Counsel accuses the Respondent of taking adverse actions against its employees based on their activities in support of the Union. Specifically, the General Counsel alleges that the Respondent subjected A. Rivera to more onerous working conditions; discharged Adames as a voluntary quit when he did not return to work as requested following an excused absence; discharged Rafael Bisono for failing to wear safety equipment; suspended William Dominich and Hector Soler for failing to wear safety equipment; and discharged Miguel Bisono for urinating into a coworker's drink bottle.[11]

Where, as here, an employer is charged with violating Section 8(a)(3) by taking adverse action against employees because of their support for, or activities on behalf of, a union, the Board applies the *Wright Line* test to determine whether the alleged violation has been established. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must first show by a preponderance of the evidence that union activity was a motivating factor in the employer's adverse action. Id. at 1089. If this is established, the burden shifts to the employer to show that it would have taken the same adverse action even in the absence of the union activity. Id.

Here, the judge, in analyzing the 8(a)(3) and (1) allegations described above, did not cite *Wright Line*, nor is it clear that he undertook the analysis required under that case. Although his analysis is suggestive of a *Wright Line*-type analysis, it is difficult to discern whether he

[9] In light of our disposition of this issue, we find it unnecessary to pass on the judge's apparent finding—using a *Toering Electric*-type analysis—that the Respondent did not unlawfully refuse to hire the seven overt salts because they were not genuine applicants for employment. See generally *Toering Electric Co.*, 351 NLRB 225 (2007).

[10] As cited below, Delgado indicated that she would accept a field technician application from one of the overt salts. This single instance, however, does not establish that imposition by the Respondent of a policy of not accepting applications for positions for which it was not currently hiring was a pretext for discrimination.

[11] The facts surrounding these allegations are fully set forth in the judge's decision.

decided to dismiss the allegations because the General Counsel had not met his initial burden or because the Respondent demonstrated that it would have taken the same employment actions even in the absence of protected activity. Nor is it clear that the judge considered all of the facts potentially relevant to a *Wright Line* analysis.

In view of these circumstances, we believe that it would be premature for us to consider the General Counsel's exceptions with respect to these allegations. We therefore sever the above-mentioned 8(a)(3) allegations and remand them to the judge for analysis applying the *Wright Line* framework. On remand, the judge should consider all of the evidence relevant to such an analysis; make any additional findings of fact and credibility determinations that may be necessary; and issue a supplemental decision setting forth his findings, analysis, and conclusions.[12]

ORDER

The National Labor Relations Board orders that the Respondent, Allstate Power Vac, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or laying off employees because of their membership in or support for Laborers International Union of North America, Local 78.

(b) Prohibiting employees from wearing union decals and other union insignia. This does not, however, preclude the employer from requiring its employees to wear appropriate protective clothing when necessitated by their work assignments.

(c) 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) Make Jose Adames, Miguel Bisono, and Victor Vasquez whole for any loss of earnings and other benefits they have suffered as a result of their unlawful layoffs on about June 4, 2007, computed on a quarterly basis from the date of their layoffs to the date of proper offers of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

(b) Within 14 days from the date of this Order, offer Jose Castillo and A. Rivera full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights previously enjoyed.

(c) Make Jose Castillo and A. Rivera whole for any loss of earnings and other benefits suffered as a result of their unlawful discharges on about June 4, 2007, computed on a quarterly basis from the date of their discharges, less any net interim earnings, as prescribed in *F.W. Woolworth Co.,* supra, plus interest as computed in *New Horizons for the Retarded,* supra.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs/discharges of Jose Adames, Miguel Bisono, Jose Castillo, A. Rivera, and Victor Vasquez and, within 3 days thereafter, notify them in writing that this has been done and that the unlawful layoffs/discharges will not be used against them in any way.

(e) Rescind its unlawful policy prohibiting employees from wearing union decals and other union insignia.

(f) 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.

(g) Within 14 days after service by the Region, post at its facilities in Brooklyn, New York, a copy of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees

[12] In analyzing these allegations under *Wright Line,* the judge should, where necessary, address the General Counsel's arguments that the Respondent deviated from past practice in taking the above alleged unlawful actions and/or treated the affected employees differently than it had treated other similarly situated employees in the past.

With regard to the allegation that the Respondent imposed more onerous working conditions on A. Rivera, the General Counsel was required to prove that an A. . Rivera's union activity was a motivating factor for the imposition of working conditions that were more onerous than those to which he would have been subject absent his union activity to establish his initial burden under *Wright Line.* We therefore disavow any implication in the judge's decision that the General Counsel was required to prove that the conditions were "particularly onerous." We also disavow the judge's conclusion that the remedy for A. Rivera's unlawful discharge would encompass any remedy that would relate to this conduct. The two violations are distinct, as is the appropriate remedy if a violation is found.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that 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 facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all employees and former employees employed by the Respondent at any time since May 30, 2007.

(h) 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.

IT IS FURTHER ORDERED that the allegations that the Respondent violated Section 8(a)(3) and (1) of the Act by subjecting A. Rivera to more onerous working conditions; discharging Jose Adames as a voluntary quit when he did not return to work as requested following an excused absence; discharging Rafael Bisono for failing to wear safety equipment; suspending William Dominich and Hector Soler for failing to wear safety equipment; and discharging Miguel Bisono for urinating into a coworker's drink bottle be severed and remanded to Administrative Law Judge Raymond P. Green for further action consistent with this decision.

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

Dated, Washington, D.C. November 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 discharge or lay off employees because of their membership in or support for Laborers International Union of North America, Local 78.

WE WILL NOT prohibit employees from wearing union decals and other union insignia. This does not, however, preclude us from requiring our employees to wear appropriate protective clothing when necessitated by their work assignments.

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

WE WILL make Jose Adames, Miguel Bisono, and Victor Vasquez whole for any loss of earnings and other benefits they have suffered as a result of their unlawful layoffs on about June 4, 2007, computed on a quarterly basis from the date of their layoffs to the date of proper offers of reinstatement, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of this Order, offer Jose Castillo and A. Rivera full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights previously enjoyed.

WE WILL make Jose Castillo and A. Rivera whole for any loss of earnings and other benefits they have suffered as a result of their unlawful layoffs/discharges on about June 4, 2007, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful layoffs/discharges of Jose Adames, Miguel Bisono, Jose Castillo, A. Rivera, and Victor Vasquez and, WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful layoffs/discharges will not be used against them in any way.

WE WILL rescind our unlawful policy prohibiting employees from wearing union decals and other union insignia.

ALLSTATE POWER VAC, INC.

Brent E. Childerhose, Esq. and *Linda Harris-Crovella, Esq.,* for the General Counsel.
Robert Ziskin, Esq. and *Richard Ziskin, Esq.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard these consolidated cases in Brooklyn, New York, on various dates in April and May 2008.

The Representation Case

The Union filed a petition in Case 29–RC–11505 on August 30, 2007, and pursuant to a Stipulated Election Agreement approved by the Regional Director on September 17, 2007, an election was conducted on October 5, among the employees in the following unit:

> All full-time and regular part-time field technicians, drivers, pump operators, mechanics and working supervisors employed by the Employer at its facilities located at 180 Varick Street, Brooklyn, New York and 1 North 12th Street, Brooklyn, New York, including field technicians and operators performing work for the new York city Department of Environmental Protection, but excluding all other employees, including office and temporary employees, guards and supervisors as defined in Section 2(11) of the Act.

A revised tally of ballots showed that of approximately 58 eligible voters, 28 cast ballots for the Union, 26 cast votes against unionization, and 4 cast challenged ballots. The challenges were therefore sufficient in number to affect the outcome of the election. Three of the challenges were made by the Union, these being challenges to the votes of Sean Burke, Donald Sekulski, and Abdool Sideik. One of the challenges was made by the Employer; that being to the vote cast by Jose Adames, whom the Employer claims was not employed as of the date of the election. The Union contends that he was illegally discharged because of his union activities and therefore was an eligible voter.

The Union filed a group of objections and the Regional Director, on January 8, 2008, issued a Report on Challenges and Objections and a Notice of Hearing. With respect to Objections 2, 3, 5 and 6, the Regional Director concluded that they had no merit and recommended that they should be dismissed. With respect to Objection 4, the Regional Director ordered that a hearing be conducted before a hearing officer. However, with respect to Objection 1, he ordered that this particular objection, which alleged the discriminatory discharge of Jose Adames, be consolidated with the hearing on the unfair labor practice cases described below.

Regarding the challenges, the Regional Director ordered that a hearing be conducted before a hearing officer on the issues of whether Sean Burke, Donald Sekulski, and Abdool Sideik were in the unit and therefore eligible voters whose ballots should be opened. However, as to the ballot of Jose Adames, the Regional Director ordered that a hearing on whether he was eligible to vote should be held before an administrative law judge because the resolution of his eligibility was dependent upon whether he was lawfully or unlawfully discharged on October 1, 2007.

On March 25, 2008, Rachel Mead Zwighaft issued a Hearing Officer's Report and Recommendations on Objections and Challenges. In this report, made after a hearing, she recommended that the challenges to the ballots of Sean Burke, Donald Sekulski, and Abdool Sideik be sustained on the grounds that these individuals were not employed in classifications included in the Stipulated Election Agreement. She concluded and recommended to the Board that the Union be certified as the collective-bargaining representative. Alternatively, she recommended that in the event that the Board did not agree with the eligibility findings, then the election should be set aside based on certain conduct by the Employer's agents that she found to be objectionable.

On July 16, 2008, the Board affirmed the hearing officer's recommendations and issued a Certification of Representative.

The Unfair Labor Practice Cases

The charge in Case 29–CA–28264 was filed on April 16, 2007. The charge in Case 29–CA–28351 was filed on June 20, 2007. The charge in Case 29–CA–28394 was filed on July 16, 2007. The charges in Cases 29–CA–28556, 29–CA–28594, 29–CA–28636, and 29–CA–28683 were filed respectively on October 9, 16 and 29, November 28, and December 13, 2007.

On August 27, 2007, the Regional Director issued an Order Consolidating Cases and a Consolidated Complaint that was amended on January 29, 2008. In substance, the unfair labor practice allegations are as follows:

1. That on or about April 13, 2007, the Respondent, for discriminatory reasons refused to consider for hire, Edwin DeJesus, Fabian Derewiecki, Eli Kent, Manuel Ortiz, Jorge Roldan, Robert Rowek, and Kryzsztof Walek.

2. That in early May 2007, the Respondent, by Glenn Burke, its general manager, threatened employees with loss of raises and bonuses if they continued to support or assist the Union.

3. That on or about May 30, 2007, the Respondent, for discriminatory reasons, subjected Angel Rivera to more onerous working conditions by assigning him the arduous and meaningless tasks of digging holes and of loading and unloading drums onto a truck in a heavy uniform.

4. That on or about May 30, 2007, the Respondent promulgated rules prohibiting employees from wearing union stickers on their hardhats and wearing union clothing with union insignia.

5. That on or about June 4, 2007, the Respondent for discriminatory reasons, discharged Jose Adames, Miguel Bisono, Jose Castillo, Angel Rivera, and Victor Vasquez.

6. That on or the following dates, the Respondent discharged the named employees for discriminatory reasons.

Jose Adames	October 1, 2007
Rafael Bisono	October 5, 2007
Miguel Bisono	December 12, 2007

7. That on or about October 5, 2007, the Respondent, for discriminatory reasons, suspended William Dominich and Hector Soler.

Based on the evidence as a whole, including my observation of the demeanor of the witnesses and after consideration of the briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Company is engaged in the business of removing or cleaning hazardous waste. Its home office is in Rahway, New Jersey, and it operates throughout the northeastern United States. In relation to its New York operations (consisting of two facilities), its principle customer is Consolidated Edison (Con Ed), for whom it contracts to change manhold covers and to flush and clean transformer vaults and manholes. Most of its New York employees fall into three categories; (1) field technicians who essentially are relatively unskilled laborers; (2) drivers and operators of trucks; and (3) field supervisors who go out into the field and are in charge of jobs. Drivers are people who drive trucks and equipment operators are people who operate the vacuum trucks that are used to suck out dirt from manholes. Both of these positions require commercial driving licenses. (CDL licenses). All parties agree that the people who are called field supervisors are employees and *not* supervisors within the meaning of Section 2(11) of the Act. In the Brooklyn operations there are about 8 to 12 field supervisors. They voted in the election.

In addition to a group of permanent employees who work on a regular basis (and who are assigned to the shop when no outside jobs are scheduled), the Company sometimes utilizes temporary workers who are referred by another related company located in New Jersey called Paragon. It appears that Paragon is owned by the same person that owns Allstate. The Stipulated Election Agreement excluded those temporary workers.

The person in charge of the New York operations is Glen Burke who is the general manager. He has substantial authority with respect to the New York employees and can hire and fire at his own discretion. He reports to management located in Rahway, New Jersey. Working as supervisors under Burke for the Brooklyn locations, are Chris Baran, the operations manager; Donald Zorgiski, a coordinator; and Al Guerrero who is the local health and safety manager.

The Union has been engaged in organizing two types of companies in the New York Metropolitan area. First, is a set of companies that deal with various types of hazardous materials such as Allstate. The second are a set of companies who are engaged in asbestos removal.

B. Covert Salting and Company Knowledge of Union Activities

By letter dated March 9, 2007, the Union sent a letter to the Respondent indicating (a) that it was commencing an organizing drive at Allstate; (b) that the NLRA precluded the employer from restraining or coercing its employees; and (c) that it would be distributing literature to Allstate employees at various projects.

On March 21, 2007, the Company placed a help wanted ad in the Daily News indicating that it was seeking to hire operators who had CDL licenses (commercial driving licenses) and H&T (hazardous material handling endorsements). Union Agent Byron Silva thereupon sent two members, Jose Castillo and Angel Rivera, who went to Allstate's Varick Street offices and filled out applications for jobs as field technicians. They could not apply for the operator/driver job because neither had the required commercial driver's license. They filled out the application forms in the office, showed their social security cards, driver's licenses, and were interviewed separately by Chris Baran. At the conclusion of the interviews, they both were told that they could have jobs and arrangements were made for them to get a drug test. Neither informed the Employer that they were members of a union or that they intended to organize employees on behalf of the Union. They were, as described by Silva, "covert" salts and were instructed to keep their union membership secret until the appropriate time. Castillo and Rivera were told by the Union that if they obtained jobs, the Union would make up the difference in the wage rate paid by the Employer and the wage rate that they had been getting from being employed as shop stewards at union employers. Also, the Union agreed to provide them with any benefits not provided by Allstate.

Castillo and Rivera did not hear anything until later in April 2007. Nevertheless, they started as field techs on April 16 or 17, 2007, and spent their first week in a training program held in Rahway, New Jersey. (In this regard, the evidence shows that the Employer typically amalgamates a class of new hires for a 40-hour training program.) Both Castillo and Rivera filled out new job applications on April 17, 2007. A summary of employees listed by hire dates (GC Exh. 20) shows that there were four other field techs also hired in April 2007. These were Luis Perez Jr., Delvis Vargas, Freddy Cedeno Perez, and Jose Peralta. This exhibit also shows that there were two equipment operators (Phillip Monastiriotis and Conrad Unthank), hired in early May 2007 and two other persons (David Nathanial and Victor Vasquez), listed as field techs who were hired respectively on May 8 and 23.[1]

As instructed, Castillo and Rivera engaged in no organizing activities during their initial period of employment and did not "come out" until the morning of May 30, 2007. However, as they joined the Union in handing out literature at the Company's premises on that date, the timing of their layoffs on June 4, strongly suggests that a motivation for this action was because the Company had become aware that they were union supporters.

According to Silva, in or about March 2007, either shortly before or shortly after Castillo and Rivera got their jobs, the Union managed to speak independently to some of the employ-

[1] The wage rate listed for David Nathanial is $15-per hour and this indicates to me that he was not hired as a field tech because his rate is almost 50-percent more than that for a field tech.

ees including Jose Adames, Felix Rodriguez, and Jose Arroyo. Silva testified that at one meeting held in March 2007, he obtained three authorization cards and that at a second meeting, he obtained another three cards. Employee Jose Adames testified that he first heard about the Union from Al Guerrero, who told him that he (Guerrero) thought that getting a union into the shop would be a good idea. (As noted above, the parties agree that Guerrero is a supervisor as defined in Sec. 2(11) of the Act).

The evidence shows that the Company became aware that that the Union was interested in organizing its employees as early as March 9, 2007, because the Union's agents told them so. But did the Company become aware that any of its employees were interested before May 30? In this regard, the General Counsels offered the testimony of Jose Adames, an alleged discriminate, who testified that sometime in April or May 2007, he heard Burke tell a group of about eight employees that "anyone who wanted to be union wouldn't get bonuses or raises or anything." Adames testified that the group included Miguel Bisono, Felix Rodriguez, and Jose Arroyo. Although Miguel Bisono was called as a witness by the General Counsels, he did not corroborate Adames. Nor did the General Counsels offer any other corroboration of this story. Inasmuch as I conclude that Adames was not a reliable witness and absent any corroboration on this point, I shall not credit this assertion. I therefore recommend that the allegation of the complaint based on this testimony be dismissed.

C. Overt Salting

On the morning of April 13, 2007, Silva sent teams of union agents into the Company's office to apply for jobs. They were sent in pairs and they were given digital recorders to memorialize the conversations. When they entered the building, they wore union jackets so that they would be identified as coming from Local 78. They all talked to a receptionist in the office named Nidia who was not called by either side to testify in this proceeding. There was no evidence to suggest that this person had the authority to hire anyone or that she had the authority to consider anyone for hire. At most, the evidence shows that her functions included handing out job application forms and asking applicants to provide identification in the form of drivers' licenses and social security cards.

The evidence indicates that as of April 13, 2007, the Company having recently deciding to hire around four laborers (including union salts Jose Castillo and Angel Rivera), did not immediately need any field technicians.[2]

The recording of the visit by Krzysztof Walek and Manuel Ortiz is, in pertinent part, as follows:

MANUEL ORTIZ: —application—license 'cause we're —

OFFICE WOMAN: Okay, but—

MANUEL ORTIZ: —we can, you know, any special—

OFFICE WOMAN: No, we're not a union shop.

MANUEL ORTIZ: I'm sorry?

OFFICE WOMAN: We're not a union shop.

MANUEL ORTIZ: That's no problem. That's no problem. The only thing is when I come to work, you know, I expect to organize company.

OFFICE WOMAN: We're not interested in becoming a union.

KRZYSZTOF WALEK: You're not expecting to become —

MANUEL ORTIZ: Why not? Why?

OFFICE WOMAN: 'Cause we're not— we're not a union shop and we're not interested in becoming a union shop.

MANUEL ORTIZ: So that means you no—you cannot even take—

OFFICE WOMAN: Oh, we can—

MANUEL ORTIZ: You cannot give me any chance to work—

OFFICE WOMAN: If you want to sit down and fill out an application—driver's license and—

MANUEL ORTIZ: But you say—when you say that you no—you say that you don't expect to get union—

OFFICE WOMAN: Are you—do you have a driver's license?

KRZYSZTOF WALEK: Yeah, we do have.

OFFICE WOMAN: Then let me make a copy of it, I'll be happy to give you an application for—I need a CDL with a HAZMAT and tanker endorsement.

KRZYSZTOF WALEK: So you hire only with CDL and license?

OFFICE WOMAN: We're only hiring drivers right now. You have to have a CDL with HAZMAT and tanker endorsement on it.

KRZYSZTOF WALEK: Okay.

MANUEL ORTIZ: Okay. You don't send your workers for training?

OFFICE WOMAN: If you have your license—when we hire we hire them with CDL with HAZMAT and tanker—

MANUEL ORTIZ: Okay.

OFFICE WOMAN: —endorsements on it.

MANUEL ORTIZ: Okay.

OFFICE WOMAN: That's what we're hiring right now. You have to—

MANUEL ORTIZ: What if I didn't—I have it but I don't have it with me right now.

OFFICE WOMAN: Then when you come back and fill out—you bring me your license, I'll make a copy of it, bring your social security card—

KRZYSZTOF WALEK: I have everything. I have everything.

OFFICE WOMAN: Then I'll be happy to—

MANUEL ORTIZ: (Inaudible)—

OFFICE WOMAN: No, you have to fill it out right here.

MANUEL ORTIZ: —job for you?

OFFICE WOMAN: You have to have it here.

[2] Although the evidence is that Castillo and Rivera did not actually begin their training program until April 17, 2007, their testimony indicates to me that the Company committed itself to hiring these two people almost immediately after they applied for jobs on March 21, 2007. It seems probable to me that they were not immediately put on the payroll because the Company waited to assemble a class of new employees for training in New Jersey. This is a 40-hour training course.

MANUEL ORTIZ: There is nothing else we can work on, only driver's license?

OFFICE WOMAN: I have nothing else right now—

MANUEL ORTIZ: And only for—

OFFICE WOMAN: —only drivers and you have to know how to drive standard.

MANUEL ORTIZ: Okay. Well, thank you very much.

KRZYSZTOF WALEK: Thank you.

OFFICE WOMAN: You're welcome.

(END OF RECORDING)

The recording of the meeting involving union agents Edwin DeJesus and Robert Rowek was as follows:

ROBERT ROWEK: Good morning.

EDWIN DE JESUS: My name is Edwin; is it free to go apply for a job?

NIDIA: For?

EDWIN DE JESUS: For applications?

NIDIA: For what, a driver?

EDWIN DE JESUS: For worker, HAZMAT, whatever it is.

NIDIA: For driver is what we're accepting right now. With HAZMAT and tanker endorsements—

EDWIN DE JESUS: Okay. I'm from Local 78, I'm one of the organizers and this is Rob, we're looking for work. We want to organize the Company so we want to—

NIDIA: What do you mean you want to organize the Company?

EDWIN DE JESUS: We're from the Union.

ROBERT ROWEK: We are from Local 78.

EDWIN DE JESUS: Local 78, yeah.

NIDIA: Okay. Is someone expecting you?

EDWIN DE JESUS: No, no one is expecting—I want an application for a job. I want to work to organize the Company so you can come—I mean, the Company could become organized and become a union contractor.

NIDIA: Well, who said that we wanted—

EDWIN DE JESUS: I mean, I—I want to help you guys and you need me.

NIDIA: (Inaudible).

EDWIN DE JESUS: But can I get an application?

NIDIA: Yeah, absolutely you can get an application. There aren't many—but do you have HAZMAT and tanker endorsements?

EDWIN DE JESUS: Yeah, I have HAZMAT, I have all my licenses.

NIDIA: Okay. Can I see it, please?

EDWIN DE JESUS: I don't have it with me.

NIDIA: You don't have it with you? We have to know otherwise we—'cause that's the only thing we're hiring for.

EDWIN DE JESUS: But can I get the application so I can fill it out and—

NIDIA: (Inaudible).

ROBERT ROWEK: Yeah, if we can fill out the application and just—

NIDIA: Absolutely. Let me have your license and I'll make a copy of it and I'll give you an application, you can sit down and fill it out.

EDWIN DE JESUS: Okay.

NIDIA: Can I just—

EDWIN DE JESUS: I don't have it. Can I get—take this and fill it out?

NIDIA: No, you need to give me your license, I will make a copy of it—

EDWIN DE JESUS: You need the license?

NIDIA: And your social security card—

EDWIN DE JESUS: Okay.

NIDIA: —I will attach it to your application, you sit here and fill it out and I'll take you right out to take the test right away.

EDWIN DE JESUS: Okay.

NIDIA: Okay.

EDWIN DE JESUS: All right. Can I get—come back with (inaudible)—

NIDIA: Yes, HAZMAT and tanker, A or B CDL. You have to be able to drive standard.

EDWIN DE JESUS: Okay. Now, what about the hazardous waste workers; what are you—you hiring anybody for that?

NIDIA: No, not here. Field technicians? I have none.

EDWIN DE JESUS: No, not right now?

NIDIA: No.

EDWIN DE JESUS: Okay.

ROBERT ROWEK: (Inaudible.)

EDWIN DE JESUS: Sorry, what was your name?

NIDIA: Nidia.

ROBERT ROWEK: Is there a number to call? (Inaudible) can you give me application and I'll come back with all information, all different thing, my license, everything?

NIDIA: Bring your license, bring your social security card.

ROBERT ROWEK: Uh-huh.

NIDIA: And then—

ROBERT ROWEK: Copy or original, right?

NIDIA: I'm sorry?

ROBERT ROWEK: A copy? You want only original license?

NIDIA: I need your original license—

ROBERT ROWEK: All right.

NIDIA: —and I need your original social security card.

ROBERT ROWEK: No problem.

EDWIN DE JESUS: Okay.

ROBERT ROWEK: That's the office number; right?

NIDIA: This is the office number.

EDWIN DE JESUS: And your name, I'm sorry?

NIDIA: Nidia.

EDWIN DE JESUS: Nidia. Okay. Thank you very much.

(END OF RECORDING)

The recording of the meeting involving Eli Kent, the Union's director of organizing, and business agent Jorge Roldan is as follows:

ROLDAN: Good morning. My name is Jorge Roldan. Can I get an application?

OFFICE WOMAN: Do you have HAZMAT and tanker endorsement on your CDL?

ELI KENT: I got my HAZMAT—training, just regular license. I don't know what—

OFFICE WOMAN: We're taking applications for CDL drivers.

ELI KENT: Only?

OFFICE WOMAN: Only if—

ELI KENT: Any other positions are open for that?

OFFICE WOMAN: No here. A and B—

ELI KENT: Okay.

OFFICE WOMAN: —CDL, HAZMAT and tanker. Come in and fill out an application.

ELI KENT: Okay. I—any time I can come back?

OFFICE WOMAN: Yeah, any time before 4:00.

ELI KENT: All right. We got—is it—or just for—union members?

OFFICE WOMAN: Oh, every one.

ELI KENT: Oh yeah?

OFFICE WOMAN: Everyone, look at our ad. Yeah.

ELI KENT: Any time?

OFFICE WOMAN: Any time before 4:00.

ELI KENT: All right.

OFFICE WOMAN: Bring your license with you and your social security card.

ELI KENT: Okay.

OFFICE WOMAN: And we'll test you.

ELI KENT: Uh-huh.

OFFICE WOMAN: You'll test right away so if you come early and we have a guy here to test you we'll be happy to take—you have to be able to drive standard.

ELI KENT: Oh, stick shift, okay.

OFFICE WOMAN: Yeah.

ELI KENT: This guy, I mean, he's got the licenses, he's got everything.

OFFICE WOMAN: You want to fill it out now? You got it?

ELI KENT: No, I don't have my license with me because I have to go back and bring it.

OFFICE WOMAN: Okay, go back and bring it—

ELI KENT: (Inaudible) also at the same time.

OFFICE WOMAN: Okay, go back, bring me your social, fill out the app, we'll have somebody test you. If I have a driver here I'll have somebody test you.

ELI KENT: Oh, okay.

OFFICE WOMAN: Okay?

ELI KENT: All right. Okay. I mean, that's how you—with everyone, though? They have to—you've got to come with all your material?

OFFICE WOMAN: Um-hmm.

ELI KENT: All your licenses?

OFFICE WOMAN: Absolutely. How am I supposed to know—

ELI KENT: And just make copy and give back; right?

OFFICE WOMAN: Yeah, I'm going to make a copy, back and front and give it right back.

ELI KENT: Okay. Can I fill out an application for any other positions you have?

OFFICE WOMAN: There's nothing open right now.

ELI KENT: No, what about in the future?

OFFICE WOMAN: Absolutely, just look to see—we run ads in the paper all the time.

ELI KENT: Okay. Then you won't—you don't keep applications on file or anything?

OFFICE WOMAN: Yeah—no. I mean, I can—I can take it if you would like to give it to me right now and I'll keep it on file but I'm not hiring for that.

ELI KENT: Yeah.

OFFICE WOMAN: For field technician if that's what you're looking for.

ELI KENT: Okay.

OFFICE WOMAN: Okay?

ELI KENT: All right.

OFFICE WOMAN: I would be happy to take the application and if we have a driver here take you out for test drive.

ELI KENT: I'll try to come back tomorrow then.

OFFICE WOMAN: Okay. Tomorrow's Saturday.

ELI KENT: Oh.

OFFICE WOMAN: Monday.

ELI KENT: (Inaudible.)

(END OF RECORDING)

The recording of the conversation involving union business agents Fabin Derewiecki and Guian Rivera is as follows:

GUIAN RIVERA: Hi, Good morning. How are you? We came to apply for a job.

OFFICE WOMAN: For driver?

GUIAN RIVERA: Any—anything that you have available.

OFFICE WOMAN: —HAZMAT driver.

GUIAN RIVERA: There's nothing else you got now for—what about if I went to the temp company—you think I'll be able to get it from Lydia Rivera at the company—do you think I have a chance there since I don't have any (inaudible)?

OFFICE WOMAN: What we're hiring right now is drivers.

GUIAN RIVERA: Drivers?

OFFICE WOMAN: (Inaudible).

GUIAN RIVERA: All right, I think I might be able to probably to get a license 'cause I'm union, I want—my purpose is to organize the company.

OFFICE WOMAN: We're not interested in (inaudible).

GUIAN RIVERA: Yeah? But your workers might be; right?

OFFICE WOMAN: No, we're not—

GUIAN RIVERA: You're not and because of that you're not hire me or something?

OFFICE WOMAN: No, (inaudible) is a social and a—

GUIAN RIVERA: If I have a—

OFFICE WOMAN: (Inaudible).

GUIAN RIVERA: All it has to be is CDL? Anything else you have like—

OFFICE WOMAN: That's all we're hiring for right now.

GUIAN RIVERA: And probably I can get something through—people; no? Or Lydia Rivera or something?
OFFICE WOMAN: I don't know who Lydia Rivera is.
Guian Rivera: I think that—
OFFICE WOMAN: (Inaudible)—
GUIAN RIVERA: —they the one who—that refer people to here so maybe I go there and apply or—
OFFICE WOMAN: You can try, I don't even know anything about—
GUIAN RIVERA: You think I can do that?
OFFICE WOMAN: You can—
GUIAN RIVERA: I will get—
OFFICE WOMAN: You've got a have—and a driver's license.
GUIAN RIVERA: That's all it takes?
OFFICE WOMAN: That's it.
GUIAN RIVERA: All right, I appreciate your time. Thanks.
OFFICE WOMAN: (Inaudible.)
GUIAN RIVERA: Bye-bye.
OFFICE WOMAN: Bye-bye.

(END OF RECORDING)

As noted above, all of these people who applied for employment were union business agents and/or organizers. In the case of Eli Kent, he was the Union's director of organizing and Derewiecki, in addition to being a business agent, had the job of dispatcher, which means that he refers members to jobs as they are called into the Union by contracting employers.

With respect to these "salts" there is evidence that they really were not looking for employment. All of these people had full-time jobs at the Union, either as business agents, organizers, or dispatchers. In Eli Kent's case, he was the Union's director of organizing and was then involved in an organizing campaign involving companies in another industry. They were asked to participate in this event on April 13 or a few days before and no arrangements were made to have their job functions covered by others in the event that they were hired. Indeed, Silva testified that he did not expect that any would be hired. When they were invited by the office person to submit applications for nondriver jobs, accompanied by their social security cards and driver licenses, they never followed up on this invitation and not one made any further attempt to apply for employment with Allstate.

I also note that as of April 13 when they applied for work, the jobs then available required CDL licenses with hazmat endorsements and not one of these people had those qualifications. Put simply, they were not qualified for the jobs advertised and they did not apply for jobs for which they were qualified, but which were not immediately available. (Although GC Exh. 20 indicates that that there were four people hired as field techs on April 17, 2007, including Jose Castillo and Angel Rivera, the evidence and particularly the testimony of Castillo and Rivera, indicates that April 17 was the starting date of their training in New Jersey and that they had been interviewed and offered employment before April 13.)

It is further noted that although some of these salts testified that they were willing to work "for as long as it takes" to organize the Company, the testimony of Silva, who was responsible for organizing this event, was that if they got jobs, it was intended that they work only between 2 and 4 weeks. This was because the Union was going to subsidize the salts for the difference between their normal pay and benefits as union employees and the pay and benefits they would receive as Allstate employees. He testified that the Union could only afford to subsidize these people for a short period of time.

Based on the evidence presented in this case, I conclude that the allegations that the Company refused to offer employment or consider for employment this group of people, has no merit and should be dismissed.

D. Prohibition on Wearing Union Clothing and Using Union Decals on Hardhats

On May 30, 2007, starting at about 5 a.m., Castillo and Rivera, wearing union jackets, engaged in leafleting to incoming employees at the Respondent's Varick street facility. Before this date, Castillo and Rivera had kept their union membership quiet and there is no evidence to show that the Company was aware that they were union "salts." There is also no credible evidence to establish that the Company was aware that the other three persons selected for layoff (Jose Adames, Miguel Bisono, and Victor Vasquez), were union supporters.

According to Rivera and Castillo, after they went into the shop, they were told by Chris Baran that they could not wear union T-shirts and jackets. Baran gave them shirts that had the company name on them. Although Castillo went out to the field on his regular assignment, Rivera, along with a number of other field techs was assigned to the shop. (In this regard, the evidence indicates that when field work is slow, the Company has typically assigned field employees to do various tasks in the shop such as cleaning, arranging tools, etc.)

Castillo testified that when he returned to the shop on May 30, he had a conversation with Glen Burke about wearing union clothing and putting union decals on his hardhat. A recording of this conversation is as follows:

> You cannot have that jacket on.
>
> Yes sir. Alright
>
> You have defaced health and safety items, which we have given to you. It is against company policy. I am writing you up for that.
>
> For what?
>
> Well for occurrences of any of the following violations because of its seriousness may result in immediate dismissal without warning. Willful violation of security or safety rules or failing to observe safety rules or AllState Power Vac safety practices, failure to wear required safety equipment tampering with AllState equipment or safety equipment, which you have done. You cannot do that because if something was to happen to you, these manholes, they may look at that thin, the AllState Power Vac, they may go to Local 78 and you can die.
>
> Why?
>
> Because it was taught to you in our health and safety class.
>
> Because it's a sticker on the hardhat I will die?
>
> You cannot have a sticker on the hardhat.
>
> . . . .

You cannot have a sticker on the hardhat. . . . I am writing you up and giving you a safety violation for this. You cannot wear this stuff during working yours, you cannot. If you take it off right now. . . .

Yeah I'll take it off . . . no problem.

Just take it off and I won't even write you—how, how's that? Take it off then.

. . . .

. . . . [Y]ou cannot wear this stuff during working hours. You want to wear that jacket to and from work, be my guest. Do I need to give you a sweatshirt to keep you warm during work hours? I will give you one.

(Discussion of his size)

It's a policy here. . . . Here's what happens. If you last here long enough, you can go through certain types of training around here that you'll be given stickers for. You may go to certain plants that you're allowed in and that just interferes with what you may get down the line and it cannot be on that hard hat because it's false information. We are not members of Local 78 here and that's what you're doing. Do you understand what I'm saying?

I'm a member of Local 78

Well . . . we're not.

Well I am.

Alllstate Power Vac is not.

I am.

Well that's you. Allstate Power Vac is not

Alright.

And even if we were that still would not be allowed on a hard hat. Understand what I'm saying?

All right.

Let me get you a hat. You can wear these to your heart's desire. All right my friend?

No problem.

Before and after hours, you can wear whatever the hell you want around here.

All right. Anything else?

That's it

All right cool. See you around man.

On June 1, 2007 the Company issued the following memorandum to its employees:

> Effective immediately any authorized decals worn on company safety equipment including hardhats are not authorized. Only training decals issued by our customer and company certification can be worn. Violation of defacing and tampering with company safety equipment is covered under Allstate Power Vac standards of conduct. Any question concerning any work or safety rule, please see your manager for explanation.

Rivera testified that on the morning of June 4, 2007, he was told by management to take a union sticker off his hardhat and that he could lose his job if he didn't do so. In light of the above, I have no doubt that this conversation occurred as described by Rivera. Rivera received a notice of safety violation for this incident.

With respect to the above, I conclude that the Respondent violated Section 8(a)(1) of the Act. Absent special circumstances, prohibitions on employees from wearing union insignia at work, violate the Act. Moreover, the burden of proof is on the Employer to justify such a prohibition. *Albertson's, Inc.,* 319 NLRB 93, 102 (1995); *Mack's Supermarkets,* 288 NLRB 1082, 1092 (1988).

Burke testified that the placing of what were removable union decals on the company issued hardhats constituted a safety issue. He opined that if an employee was hurt on the job, any person who found him might be confused as to who the injured man was or who he worked for. To me, this explanation simply makes no sense and I fail to see how the placement of a union decal on a hardhat could conceivably be construed as a safety issue. (Presumably there would be other ways to identify the person, such as the contents of his wallet.)

By the same token, the Company's attempt to prohibit Rivera and Castillo and other employees from wearing clothing with union logos in the shop, coupled with threatened discharge or discipline, is not justified. Even if such union clothing was worn out in the field, the evidence is that when performing work in the field, the employees, for the most part, wear either full or partial protective clothing that would largely obscure anything worn beneath. In short, in the absence of evidence showing that the union insignia mocked or adversely portrayed the Employer's product, I conclude that the Respondent has not demonstrated that prohibiting either the union decals on hardhats or the union logoed T-shirts, caps or jackets, was justified by "special circumstances." Cf. *Noah's New York Bagels,* 324 NLRB 266, 275 (1997), and *Pathmark Stores, Inc.,* 342 NLRB 378 (2004).

E. Other Events Between May 30 to June 4, 2007

Between May 30 and June 4, A. Rivera was involved in a number of other incidents, some of which the General Counsels allege to be unlawful conduct by the Employer.

Rivera testified that on May 30, while working in the shop, he was told to first load and then unload large plastic drums on a truck. He further states that he was then told to load and unload these drums on two other occasions. The General Counsels contend that this heavy and useless work was designed to harass Rivera who had just declared himself as a union supporter. Burke, for his part, claims that this series of transactions occurred because a customer kept changing its mind about a job in the field.

The General Counsels also contend that the Respondent, in order to harass Rivera had him dig, refill and then re-dig two holes in the yard. In this regard, Baran testified that the Company had just ordered a new air-conditioning unit that was going to be placed in the yard outside the building and that he wanted to build a barrier to prevent trucks from banging into it. To this end, Baran states that he had Rivera dig the holes to put some poles but that since Con Edison called in emergency jobs, he told Rivera to cover the holes until the emergency jobs were finished.

Rivera testified that later in the day, he answered his cell phone and was told by Burke that he couldn't use his cell phone in the shop because there were chemicals there that could cause an explosion. As a consequence, Burke took Rivera's cell phone and told him that he could retrieve it at the end of the

day. Burke concedes that he took away Rivera's cell phone but explains that because there are chemicals in the shop, the Company has a policy that requires employees to use what they call "intrinsically safe phones," which apparently are phones sufficiently insulated to prevent sparking. While initially skeptical of this assertion, I note that Rivera conceded that at the training session he attended before commencing work, he was told that cell phones could produce electrical discharges that could cause explosions with the chemicals that the employees worked with.

On or about Thursday, May 31, Rivera was told by Baran not to smoke and persisted until told to punch out and go home. He received a warning for this. There seems to be some confusion as to whether Rivera was smoking inside or outside the shop. (In New York, it is illegal to smoke inside a workplace.) Castillo testified that he witnessed the event and that Rivera was smoking next to the time clock in the shop. Baran, on the other hand, testified that Rivera was smoking in the yard and that he told him to stop smoking and get back to work.

On June 4, Rivera arrived at work unshaven. He was told by the Company's regional safety manager, Kurtis Ross, that this was a violation of the Company's safety rules and Rivera was suspended after stating that because he was working in the shop, he didn't have to shave. In this regard, the Company does have a rule that required field workers to be clean shaven so that a respirator will fit snugly on one's face. Although Rivera asserted that he didn't have to be shaven because he was assigned to the shop, the fact is that people assigned to the shop may have to go out on emergency calls. Given that situation, enforcing a rule that requires employees, even those assigned to the shop, to be clean shaven is not unreasonable.

The General Counsels, in their brief allege *only* that the Employer violated the Act by making Rivera load and unload barrels, making him dig holes, and temporarily taking away his cell phone. They do not allege that the Respondent violated the Act in relation to the smoking and the facial hair warnings.

One could easily conclude based in large measure on the fact that the alleged illegal events occurred the day after Rivera revealed that he was a union supporter that these actions were motivated by antiunion considerations. On the other hand, the Employer had explanations for each action, albeit reasons that were not particularly persuasive to me.

Nevertheless, the fact is that the three charged incidents affecting Rivera, all occurred on a single day and were not particularly onerous. Moreover, as I am going to conclude that the Employer illegally discharged Rivera on June 4, 2007, the remedy for that conduct will encompass any remedy that would relate to this conduct. Given the somewhat ambiguous evidence regarding the motivation for these relatively minor actions on May 30, I am not going to conclude that the Respondent violated the Act in these respects.

F. The June 4 Layoffs and Discharges

On June 4, 2007, the Company sent identical letters to Rivera, Castillo, Miguel Bisono, Victor Vasquez, and Jose Adames. This read:

> Due to a temporary reduction in the workforce your employment will terminate today, June 4, 2007. If you are enrolled in our medical plan we will continue your coverage through July 31, 2007, providing that you continue to remit your current weekly portion of the premium. If you are not recalled within the next two months, you may elect to continue your coverage per the COBRA law.[3]

By June 4, Castillo and Rivera had been employed for about 1-1/2 months and Victor Vasquez had been employed for about 7 days. However, Miguel Bisono and Jose Adames had been employed as field techs since 2005. In the context of this Company, which has a high degree of turnover, Bisono and Adames were long-term employees. And in this regard, Burke testified that because the tech jobs are hard, dirty, and not particularly well paid, anyone who manages to last is highly valued.

The Company argues that these layoffs were required because Con Ed, its largest customer, notified it that it was going to suspend a certain job until the fall. The Company does not assert that the individuals were laid off because of their job performance. Simply put, the Respondent asserts that they were laid off for lack of work and had Con Ed not given notice, these employees would have continued working.

Miguel Bisono, Victor Vasquez, and Jose Adames were all recalled to work on July 24, 2007. Rivera and Castillo were not.

Although Burke asserted that he had received notice from Con Ed about a week or two before June 4, 2007, there is nothing in writing to corroborate this assertion and there was no corroborating witness called by the Respondent to substantiate this claim.[4] Nor is there any evidence to show that the Company, prior to June 4, notified any employees, including Chris Baran, that layoffs were either possible or immanent. In the latter regard, I particularly note that Baran, as the operations manager who was in charge of daily scheduling, had a job that required that he know who was or was not going to be available for work.

Burke concedes that during the entire 5-year period that he has been the manager, there has never been a layoff. Thus, notwithstanding the assertion that this particular Con Ed project was postponed because of the summer's hot weather, there is nothing to show that similar layoffs had occurred during any previous summers.

Moreover, the documentary evidence (GC Exh. 21) shows that on June 12 there were five temporary workers assigned to the Varick Street facility and that on June 14, there were three temporary employees working out of this location. Thus, although the Company may not have hired new permanent field technicians to replace the people laid off on June 4, the evidence shows that it brought in a number of people after that

[3] It is noted that the note does not explain why there was as temporary reduction in work.

[4] The Respondent offered into evidence an e-mail to Burke from George Jacobi from Con Ed that was sent in 2008. This asserted that there would be a postponement in June 2008 and that "just like the prior years, we will be suspending the Transformer cleaning program for the Months of June, July and August." This document, which was sent a year after the June 4, 2007 layoffs is not contemporaneous with those layoffs and constitutes, in my opinion, nothing more than uncorroborated hearsay regarding the 2007 events.

date. (Actually, the temporary workers came from New Jersey and were employed by a related company that has the same ownership as Allstate.)

Recalling that when the Union began its overt organizing campaign at the facility on May 30, 2007, that Rivera and Castillo handed out leaflets during that morning, and the fact that the layoffs took place only 4 days later, this strongly suggests that the Company decided to engage in these layoffs in order to get rid Rivera and Castillo and to put the fear of retaliation into the remainder of the employees. *Masland Industries,* 311 NLRB 184 (1993); *Detroit Paneling Systems, Inc.,* 330 NLRB 1170, 1171 (2000). Whether or not the Respondent was aware that the other three employees were also involved in union activities is irrelevant if, as concluded herein, the Company's motivation in making the decision to lay off employees on June 4 was to prevent its employees from joining or supporting the Union. *Professional Eye Care,* 289 NLRB 1376, 1989–1990 (1988).

Based on the above, it is my conclusion that the layoffs of Miguel Bisono, Victor Vasquez, and Jose Adames violated Section 8(a)(1) and (3) of the Act. I also conclude that Rivera and Castillo were discharged (not laid off), and that their discharges violated Section 8(a)(1) and (3) of the Act.

G. The Discharge of Jose Adames on October 1, 2007

As noted above, Jose Adames was a relatively long-term employee who worked as a field tech, a nonskilled laborers job. Adames had been one of the five people laid off on June 4, 2007, and he testified that he participated in handing out union literature after that date. He was recalled on July 24, 2007.

In the meantime, the Union managed to obtain authorization cards from more employees and this is shown by the fact that on August 30, 2007, it filed a representation petition. Also by this time, and certainly no later than June 6, 2007, the Company retained labor counsel.

On September 17, 2007, the Company and the Union entered into a Stipulated Election Agreement and an election was scheduled for October 5, 2007. In anticipation of the election, company managers and supervisors were advised to be cautious in dealing with the employees. Between June 4 and October 1, 2007, things seemed to be calm.

On September 7, 2007, Adames was given a company sponsored physical and was told that he had high blood pressure. Adames was advised to see a doctor and on or about September 14, 2007, he presented a doctor's note in conjunction with a request for a 5-day leave of absence. This was approved by Glen Burke and Adames received permission to take off from September 17 to 21. Adames was scheduled to return to work on Monday, September 24.

According to Adames, on Sunday, September 16 (the day before his scheduled time off), he received a phone call from the Dominican Republic informing him that his grandmother had died. Adames states that he had his wife call Burke on the same day to explain the situation and he claims that Burke told his wife that he could take as much time off as he needed. (Burke denies this and Adames' wife did not testify.) According to Adames, he purchased a ticket and left on Monday, September 17, 2007.

Adames testified that when he arrived in the Dominican Republic he found out that his grandmother had not died, but that she was gravely ill. He states that he decided to stay in that country until after the expected funeral. He did not return to the United States until September 30, 2007.

Notwithstanding his testimony that he remained in telephone contact with his wife during the time that he was in the Dominican Republic, neither Adames nor his wife initiated any contact with the Company to report on his whereabouts or when he expected to return.

On the other hand, Burke testified that after not hearing from Adames, he called his home on September 23 and 26 in order to ascertain when Adames was going to return to work. Burke testified that in both instances, Adames' wife said that she did not know where Adames was or when he was returning to the United States. She did not testify.

By letter dated September 25, 2007, Linda Attridge notified Adames that: "[I]f you do not report to work by Thursday, September 27, 2007, we will terminate your emplacement as a voluntary resignation."

On Monday, October 1, 2007, Adames showed up at the Company and was told that there was no work for him. On the following day, Adames again appeared and tried to proffer a death certificate that had been faxed to him from the Dominican Republic on October 2. (This stated that the date of death was September 21.) This was rejected by Burke and Company President Galasso who told Adames that he should submit the death certificate to the human resources department in New Jersey. At one point, Galasso told Adames that unless he left the premises, he would call the police. Adames did not send the death certificate to New Jersey and made no further efforts to explain why he had not come back to work on September 24.

I suspect that Adames was caught up in a situation that he didn't fully understand and that his failure to notify the Company as to his whereabouts was a result of confusion on his part. But, from the Company's point of view, it had given Adames permission to leave and expected him to return to work on September 24. When it became apparent to Burke and Attridge that Adames could not be found and that the Company could not ascertain when he would return to work, it was not unreasonable for them to consider that Adames had quit and that a replacement would have to be found. This was not inconsistent with past practice and the record shows that another employee, Michael Young, was also terminated in 2005, after having failed to respond to Attrdige's request to contact her regarding his absence. (See GC Exh. 39.)

On the basis of this record, I cannot conclude that the discharge of Adames was motivated by his union activities or as a means to threaten other employees in anticipation of the election that was scheduled to take place on October 5, 2007. Unfortunately for Adames, he failed to contact the Company regarding his inability to return to work on time and the Company, as it had done in the past, chose to terminate his employment for this reason. (Although no longer really relevant, this conclusion would mean that Adames was not eligible to vote on October 5, 2007.)

H. The Transformer Event on October 5 the Discharge of Rafael Bisono and the Suspensions of William Dominich and Hector Soler

The principal client of the Respondent is Con Ed. And one of the principal jobs that the Respondent does for Con Ed is to clean transformers. Transformers are electrical devices that convert high voltage electricity to lower voltage that is transmitted into homes and businesses. There are thousands of these transformers throughout New York City and they are contained in underground vaults accessed by manholes. They must be cleaned from time to time and to this end, Con Ed contracts with the Respondent, which sends crews, usually consisting of a crew foreman, a vacuum truck operator and a field technician. (The parties agree that although the crew foremen do some work direction, they are not supervisors within the meaning of Sec. 2(11) of the Act.)

Apart from being dirty work, there is a very remote, but real possibility that upon removing the manhole cover and raising the cage entrance to the vault, this could generate an electric spark that can maim or kill an individual standing at the open manhole or in the immediate vicinity. Because of this possibility, both Con Ed crews and Respondent's crews who do this type of work are issued and required to wear protective gear that consists of hardhats, steel toed shoes, long-sleeved shirts and pants, protective gloves, a fire retardant outer garment, and safety glasses.[5] Additionally, to protect the public, the crew is required to put up cones and tape so as to cordon off the area being accessed. These safety measures are regularly monitored by both Con Ed people and by the Respondent's managers.

On October 4, 2007 (the day before the election), Rafael Bisono, William Dominich, and Hector Soler were assigned to clean a transformer vault that was located a few blocks away from the Company's Varick Street facility. When they first arrived at this location, the crew members all donned protective clothing and started working. For some irrelevant reason, there came a time during the morning when the crew went to check a second vault located on the same block. Two of them opened the vault and raised the cage above ground. Then all three stood around the open manhole and did so without putting on *any* protective gear or clothing. At that point, the three were caught standing by the opened transformer vault by Chris Baran who happened to be passing by and who took some photographs. The pictures show the three men standing around the open vault without any protection. Upon taking the photographs, Baran retuned to the shop and reported the incident to his superiors.[6] Later in the day, the three men were told that they were being suspended until further notice. According to Bisono, he and Domenich were shown copies of the photographs by Al Guerrero when they returned to the shop.

Burke reported the incident to the Company's regional safety director, Kurtis Ross, and he conducted a set of interviews with the three employees about a week after the election was held. Soler was called in first, Dominich second, and Rafael Bisono was called in last. According to Dominich, when Bisono came out, he appeared to be very frustrated and didn't want to talk.

Dominich and Soler were called back to work on October 15, 2007, having been suspended without pay since October 5. On the other hand, Bisono was discharged. With respect to the difference, the Company asserts that during the interview, Bisono insisted that he had done nothing wrong and that he didn't need to be told how to do his job.

There is no question in my mind that the three employees breached safety procedures by opening a transformer vault and standing around it without protective gear or clothing. Unfortunately for them, they were captured by a camera and therefore had no means to deny that they had transgressed company policy. The fact is that by being careless, the three employees ran a remote but real risk of serious injury or death. Therefore, the Company's discipline for this was eminently reasonable and would have occurred in the absence of any union activity. The suspensions of Dominich and Soler were, in my opinion, justified by the circumstances and cannot be said to have been motivated by union considerations.[7] Similarly, while Bisono was treated more harshly, he indicated to the Company that he was not going to change his ways.

In short, I conclude that neither the suspensions of Dominich and Soler, nor the discharge of Rafael Bisono were motivated by antiunion considerations. I therefore recommend that these allegations of the complaint be dismissed.

I. The Discharge of Miguel Bisono on December 12, 2007

Miguel Bisono is the brother of Rafael Bisono and he began his employment in January 2005 as a field technician. He testified that he first heard about the Union from Al Guerrero who told him that Allstate needed a union. At some point, Miguel Bisono attended a couple of union meetings and after his layoff on June 4, 2007, he was active in supporting the Union. He states that he obtained about 13 or 14 authorization cards from other employees. Although the evidence doesn't tend to show that the Employer was aware of Miguel Bisono's union activity

[5] During the hearing, I suggested that either party could bring in an expert witness to give testimony about the alleged dangers of doing work in or around a transformer vault. Both sides had plenty of time to do this and ultimately, the Respondent brought in Matthew McFarland, a safety manager for Con Ed. He confirmed that Con Ed crews and contractor crews are required to wear protective gear and clothing when they opened a transformer vault because there was the danger of death or serious burn injuries resulting from an electric spark. He testified that such people are required to wear protective clothing and gear if they are in the immediate vicinity of an opened vault even if they were not going down into the vault to do cleaning. Upon being shown the photographs taken by Baran, he opined that the three men depicted were clearly breaching safety requirements, irrespective of why they opened the vault or what they were going to do in it. In my opinion, McFarland's testimony was credible and convincing.

[6] Baran testified that the reason he did not immediately confront these men was because the election was to be held the next day and he wanted to be extra cautious.

[7] The Company's records indicates that in the past and prior to any union activity, other employees have received disciplinary warnings, and in one case a suspension, for failing to wear protective gear. The employees receiving such disciplines are Bill Kowalski, Narcizo Ailaca, Francisco Amarante, Ruby Bratini, and Charles Gervin. The records memorializing these disciplines are contained in GC Exhs. 56 and 59.

before May 30, 2007, there is little doubt that it was aware that he was a union supporter after June 4, 2007. As noted above, Miguel Bisono was recalled to work on July 24, 2007.

On December 12, 2007, Miguel Bisono was discharged and the Company asserts that the reason related only to an event that occurred on December 6.

On December 6, 2007, Miguel Bisono, along with a group of other employees, was assigned to work at a Con Ed generating station in Queens, New York. At about 11 a.m. the employees went on a break and Bisono testified that he had to relieve himself. He states that he returned to the truck, took an almost empty bottle from under one of the seats, urinated into it, and returned it to where it had been originally placed. Although acknowledging that he was aware that there were bathroom facilities at the Con Ed plant (no more than 90 to 100 feet away), he nevertheless chose to pee in the bottle. He explains that the bathroom was farther away than the truck and that he had to unzip his protective outer garment. (Presumably, he had to unzip the garment whether he went to the bathroom or to the truck.)

In any event, it turns out that bottle happened to belong to Melvin Brown and it was not quite empty when he left it under the seat. And when Brown returned to the truck and attempted to get a drink, he discovered that there was urine in his bottle and he became very angry. Brown confronted Bisono and employees Cesar and Arroyo and stated that whoever did this was "going to have a problem with me right now." All three denied that they had anything to do with Brown's bottle. Brown then reported the incident to Field Supervisor Michael Rademaker, who in turn reported it to the office. Brown did not return to the office in the same truck as the other employees.

According to Bisono, he first spoke to Guerrero when he returned to the office and he asserts that he met with Al Guerrero and Chris Baran. According to Bisono, when questioned about the incident, he told Guerrero, in Spanish, that he was the one who urinated in the bottle and that Guerrero told him not to say anything and wait till the investigation was finished. In any event, Bisono, through Guerrero told Baran that he did not urinate in Melvin Brown's bottle.

On the following day, Kurtis Ross arrived at the facility to conduct an investigation. He conducted interviews with Brown, Bisono, Arroyo, and Bratini. Although Ross did not make recordings of these interviews, he did make extensive notes.

When Bisono was interviewed, he denied to Ross that he peed in the bottle. He also testified that during the meeting, Baran asked if he was using his cell phone to record the meeting and Ross said that if he was, that it didn't matter.

When Bratini was interviewed, he was asked who urinated in the bottle and Bratini fingered Bisono.

At the conclusion of the interviews, Bisono was told to go home and call in to see if he was assigned to any work. He did so on Monday, Tuesday, and Wednesday. He was not assigned and on Wednesday, he was told by Guerrero that the Company no longer needed him. On December 12, 2007, the Company sent a letter to Bisono stating: "Effective December 12, 2007, your position with Allstate . . . has been terminated for gross misconduct. . . ."

The bottom line is that Bisono admittedly urinated into the juice bottle of another employee who got upset and reported this to management. When confronted with this by Chris Baran and later by Kurtis Ross, Bisono denied that he had done so. Notwithstanding his denials, Bratini told Ross that Bisono was the culprit and Ross decided to discharge Bisono for this conduct.

Notwithstanding the General Counsel's attempt to minimize this incident, it is my opinion that Bisono, for whatever reason, engaged in what can only be described as disgusting conduct that outraged a fellow employee. Given these facts, I cannot conclude that his discharge was motivated by union considerations and I conclude that he was discharged for cause.

CONCLUSIONS OF LAW

1. By discharging Jose Castillo and Angel Rivera because of their membership in Laborers International Union of North America, Local 78, the Respondent has violated Section 8(a)(1) and (3) of the Act.

2. By laying off Jose Adames, Miguel Bisono, and Victor Vasquez in order to discourage employees from joining or supporting Laborers International Union of North America, Local 78, the Respondent has violated Section 8(a)(1) and (3) of the Act.

3. By prohibiting employees from wearing union decals on their hardhats or wearing union T-shirts, hats, or jackets, the Respondent has violated Section 8(a)(1) of the Act.

The Respondent has not violated the Act in any other manner encompassed by the complaint.

REMEDY

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

I have concluded that the Respondent illegally laid off Jose Adames, Miguel Bisono, and Victor Vasquez. However, as they were recalled to work on July 24, 2007, I shall not require the Respondent to reoffer them reinstatement. To the extent that they suffered any loss of earnings during the period of their layoffs, I shall recommend that they be made whole, for any loss of earnings and other benefits, computed on a quarterly basis from the date of their layoffs, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).[8]

In the case of Angel Rivera and Jose Castillo, I shall recommend that no reinstatement order be issued. I also conclude that neither would be entitled to any backpay. At the time these individuals were hired, the intent of the Union, as expressed by Silva, was that any "salts" hired would work only for a period of 2 to 4 weeks. Both Rivera and Castillo were members of the Union and both before and immediately after their discharges on June 4, obtained other employment at substantially higher

[8] According to Miguel Bisono, he was paid by the Union at $22 per hour plus health insurance benefits during the period of his layoff. I assume that the Union made the same arrangement with the other people who were laid off.

wage rates. There is no doubt that neither man intended to work for the Respondent on a permanent basis or even on an extended temporary basis. And after they were discharged they suffered no loss of earnings or benefits.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Allstate Power Vac, Inc., Brooklyn, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging or laying off employees because of their membership in or support for Laborers International Union of North America, Local 78.

(b) Prohibiting employees from using or wearing union decals on their hardhats or wearing union T-shirts, hats, or jackets. However, this does not preclude the employer from requiring its employees to wear appropriate protective clothing when necessitated by their work assignments.

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

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

(a) Within 14 days from the date of this Order, offer make whole Jose Adames, Miguel Bisono, and Victor Vasquez for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful layoffs and discharges of Jose Adames, Miguel Bisono, Victor Vasquez, Angel Rivera, and Jose Castillo and within 3 days thereafter, notify them in writing, that this has been done and that the layoffs will not be used against them in any way.

(c) 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.

(d) Within 14 days after service by the Region, post at its facilities in Brooklyn, New York, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, 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 Respondents at any time since May 30, 2007.

(e) 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.

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

Dated, Washington, D.C. August 11, 2008

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or layoff employees because of their membership or support for Laborers International Union of North America, Local 7or any other labor organization.

WE WILL NOT prohibit our employees from using or wearing union decals on their hardhats or wearing union T-shirts, hats, or jackets. However, this does not preclude the employer from requiring employees to wear appropriate protective clothing, including long-sleeved shirts, when necessitated by their work assignments.

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

WE WILL make whole Jose Adames, Miguel Bisono, and Victor Vasquez, for any loss of earnings they may have suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful layoffs and discharges of Jose Adames, Miguel Bisono, Victor Vasquez, Angel Rivera, and Jose Castillo and notify them in writing that this has been done and that these actions will not be used against them in any way.

ALLSTATE POWER VAC, INC.

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

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."