

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

FERGUSON ENTERPRISES, INC.

and

Case 7-CA-52306

JOSEPH LAPHAM, An Individual

Darlene Haas Awada, Esq.
for the General Counsel
Stanley C. Moore III and
Gary W. Francis Esqs.
(Plunkett Cooney)
of Bloomfield Hills, MI for the Respondent

DECISION

Statement of the Case

MARK CARISSIMI, Administrative Law Judge. This case was tried in Detroit, Michigan, on December 7-10, 2009. The charge was filed on August 10, 2009,¹ an amended charge was filed on September 29, 2009 and the complaint was issued September 30, 2009.

The complaint alleges that Respondent on May 26, 2009, suspended employees Joseph Lapham, David Hall, William Lewis, George Cook and Miles Reynolds, Jr. and on June 5, 2009 indefinitely laid off the above-named employees in violation of Section 8 (a)(1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses², and after considering the briefs filed by the parties, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, with an office and place of business in Detroit, Michigan, has been engaged in providing non-residential building and construction services, including demolition services and replacement of underground water and sewer lines for commercial and governmental entities. Annually, the Respondent derives gross revenues in excess of \$100,000 and provides services valued in excess of \$50,000 for the city of Detroit, Michigan an enterprise

¹ All dates are in 2009, unless otherwise indicated.

² In making my findings regarding the credibility of witnesses, I have considered their demeanor, the content of their testimony and the inherent probabilities, based on the record as a whole. In certain instances, I have credited some, but not all, of what a witness said. I note, in this regard, that "[N]othing is more common in all kinds of judicial decisions than to believe some and not all" of a witness' testimony. *Jerry Ryce Builders*, 352 NLRB 1262, fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F. 2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U. S. 474 (1951).

directly engaged in interstate commerce. 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.

II. Alleged Unfair Labor Practices

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A. Background

The Respondent performs underground utility work, demolition work and provides water meter reading services. Its largest customer is the city of Detroit. This case involves employees who worked in the underground utility division. The record establishes that the Respondent, when repairing or replacing water lines or other underground utilities in the city of Detroit, often has to excavate a portion of the roadway, replace or repair water pipes, and restore the road to its original condition. When performing work on public roadways, the Respondent is responsible for controlling traffic. In May 2009, the Respondent employed a total of approximately 100 employees in all of its divisions.

At the times material to this case, Bobby Ferguson was Respondent's president and Al White was the project executive, reporting directly to the president. The field superintendents were Miles Reynolds Sr., Fred Erdman and Cara Woods. Sherrie Kay Bonds was the Respondent's accounting/office manager and Gwendolyn Young was the human resources director.³

The Respondent performs its underground utility work through the use of crews numbering approximately 5 to 6 employees. The field superintendents assign and responsibly direct the work of the various crews. A nonsupervisory foreman is a conduit between the field superintendent and the remaining members of the crew. The foreman also has responsibility for preparing production reports on a daily basis reflecting the type of work a crew performed and what was accomplished. While the record establishes that several of the Respondent's employees are members of various unions, there is no evidence that the employees involved in this case performed their work under the terms of a collective-bargaining agreement between the Respondent and a union.

B. The Prevailing Wage Claim

Charging Party Lapham testified that he began working for the Respondent in January 2007, as an operating engineer in the underground utilities division repairing and replacing water mains. After approximately 3 weeks, Lapham was assigned to the crew of foreman Miles Reynolds, Jr. The other members of this crew in May 2009, were William Lewis, David Hall and George Cook.⁴ Hall became a member of this crew in approximately May 2008 and Cook joined the crew in December 2008.

When Lapham was first hired his pay stubs reflected that he was being paid vacation and holiday pay. After being employed approximately 3 months, Lapham received a phone call from Reynolds Senior who told him that because he was not in a union, holiday and vacation

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³ I find that all of the individuals named above are supervisors of the Respondent within the meaning of Section 2 (11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act. The complaint alleges, and the answer admits, that Ferguson, White, Reynolds Sr., Erdman and Young are supervisors and agents of the Respondent within the meaning of the Act. The record establishes the supervisory authority of Woods and Bonds.

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⁴ Miles Reynolds, Sr. is the father of Miles Reynolds, Jr. and the stepfather of David Hall.

pay would no longer be reflected in his check. Thereafter, Lapham's checks no longer reflected that he was receiving vacation or holiday pay. According to Lapham, before these payments stopped, his paychecks reflected approximately \$1700 in such payments.

5 While the record does not indicate Lapham ever worked under the provisions of a collective-bargaining agreement while he was working for the Respondent, the Respondent apparently paid holiday, vacation pay, and health insurance and pension benefits to employees who were members of a union. Lapham testified he was not a member of a union. Hall was also a nonunion employee, while Reynolds Junior, Lewis and Cook were union members.

10 Lapham testified that since 2007 he had discussed on numerous occasions whether he was being paid correctly and the fact that he was not receiving payments for fringe benefits with other employees of the Respondent, including Reynolds Junior, Lewis and Hall.⁵

15 At the end of February 2009 Lapham undertook a Google search regarding whether there was a prevailing wage for work performed for the Detroit water department. On the department's website he saw information that appeared to him to indicate that work performed under contracts with the city of Detroit was to be paid in accordance with the Davis-Bacon Act prevailing wage provisions. Lapham called the Detroit water department and was directed to the
20 contracts and grants department. Lapham was informed that employees working on jobs performed for the Detroit water department were to be paid the prevailing wage by their employer.

25 After obtaining this information, Lapham spoke to Hall Lapham knew from previous discussions with Hall that he was also not a union member and was also not being paid wages and benefits that employees who were union members were receiving. Lapham asked Hall if he was interested in filing a prevailing wage claim against the Respondent and Hall indicated that he was. Lapham and Hall then called the Detroit water department and were told that in order to start an investigation they needed to come to the office with pay stubs and the names of the
30 streets that they had worked on. The individual they spoke to indicated that after obtaining this information, the water department would then start an investigation.

35 That same day, Lapham had a phone conversation with Reynolds Senior and informed him of "my intentions to pursue prevailing wage claims" (Tr. 26). Reynolds Senior asked him to hold off filing a claim. Reynolds Senior told Lapham that he wanted to see if there was a way a representative of the water department could independently come to a jobsite and investigate how employees were being paid so that "no one would have to stick their necks (sic) out to start a claim" (Tr. 25,). Lapham did not accede to this request.⁶

40 On March 2, 2009, Lapham and Hall met with Daniel Edwards, the construction contracts manager for the Detroit water and sewage department, and Gerald Moore, an analyst

45 ⁵ Lapham's testimony on this point is corroborated by Lewis. Lewis testified that he is a member of a Laborers Union and that the Respondent paid him fringe benefits, including health insurance and pension benefits through the Union's plan. Lewis testified that in late 2007 or early 2008 Lapham began to have numerous conversations with him, Hall and Reynolds Junior regarding the fact that Lapham felt that nonunion employees like himself should be receiving a specified wage rate (Tr. 100-103).

50 ⁶ Lapham's testimony regarding this conversation is uncontroverted as Reynolds Senior was not called as a witness by the Respondent.

in charge of construction contracts. Lapham and Hall brought paycheck stubs and the name of the streets that they had worked on for the Respondent.⁷

5 At the hearing, Edwards testified that he handles all prevailing wage claims for the Detroit water and sewage department. He indicated that Detroit has a prevailing wage ordinance covering all public projects. He explained that the prevailing wage ordinance requires that an employer working on a public project must pay both a specified hourly rate and fringe benefit payments established by the State of Michigan. There is a schedule prepared by the State indicating the wage rate for numerous job classifications. The employer must pay the specified rates regardless of whether the employees are represented by a union. Edwards indicated that as part of the prevailing wage the employer must pay a specified amount of money attributable to fringe benefits such as retirement, health insurance and vacation pay. While the employer does not have to provide a retirement plan or health benefits, it must pay the specified amounts for fringe benefit payments to the employees. Edwards indicated that the underlying premise behind such a program is that an employee can then purchase such benefits as an individual.

20 Edwards testified that when he met with Lapham and Hall on March 2, 2009, they had the pay stubs that they had been requested to bring. He explained to them that he would obtain certified payroll records from the Respondent and undertake an investigation to determine whether they had been properly paid. He indicated that after the investigation was complete, letters would be sent to Lapham, Hall and the Respondent notifying them of the results of the investigation. Lapham and Hall expressed concerned about their jobs being jeopardized because they were filing a claim. Edwards indicated to them that their identity would not be disclosed to the Respondent until a letter was issued to explain the results of the investigation.

30 After meeting with Lapham and Hall, Edwards obtain certified payroll records from the Respondent in late March. A review of the payroll records established that both Lapham and Hall were underpaid pursuant to the provisions of the prevailing wage ordinance.

35 Lapham testified that on May 15, 2009, he received a phone call from an individual at the Detroit water and sewer department. Lapham was informed that the director of the water and sewer department had signed a letter regarding his prevailing wage claim and that he could come to pick it up. Lapham met Hall at the water and sewer department office. A former employee of the Respondent, John Laginess, who independently filed a prevailing wage claim was also present. At the meeting, Lapham was given a letter dated May 13, 2009, signed by the interim director of the Detroit water and sewage department, regarding the investigation into his claim. The letter indicated that the investigation revealed that, using the correct prevailing wage rate for 2007 and 2008, Lapham was owed \$71,490.28 (GC Exh. 4). On the same date a letter Hall was also given a similar letter dated May 13, 2009 informing him that using the correct prevailing wage rates for 2005, 2006, 2007 and 2008, he was owed \$56,235.93 (GC Exh.5). The individual that Lapham and Hall met with informed them that the Respondent would be called on Monday, May 18 to pick up its letter.

45 On May 14, 2009 the interim director of the Detroit water and sewer department signed a letter addressed to Bobby Ferguson, the Respondent's president, and Nafa Khalaf, Detroit

50 ⁷ I credit the uncontradicted testimony of Lapham with respect to his discussions with other employees about the issue of prevailing wages and the filing of the prevailing wage claim. His demeanor and the record as a whole convince me he was truthful. David Hall was not called as a witness by the General Counsel.

Program Management JV Team, LLC. ⁸The letter indicated in relevant part:

5 The Detroit Water and Sewerage Department (DWSD) has completed an investigation into claims that Ferguson Enterprises, Inc. (FEI) is not paying three (3) employees prevailing wage rates as required in the above mentioned construction contracts. DWSD has determined that the assertion is correct based on the information submitted with the claims. A copy of the prevailing wage breakdown spreadsheets and pay stubs in question for David Hall, John Laginess, and Joseph Lapham, employees for FEI, are attached for your information and review.

10 The attached spread sheets reconcile the paystub hours for regular and overtime (time and a half). Using the correct prevailing wage rate for 2005, 2006 2007 and 2008 yields a total prior to deductions and taxes of \$56,235.93 for David Hall. Using the correct prevailing wage rate for 2006, 2007 and 2008 yields a total amount owed prior to deductions and taxes of \$ 33,607.80 for John Laginess. Last, utilizing the correct prevailing wage rate for 2007 and 2008 yields a total amount owed prior to deduction and taxes of \$71,490.28 for Joseph Lapham.

20 DWSD will be withholding further payments on all of the above-mentioned contracts until FEI and DPM come into compliance with the terms and conditions of the contract by paying the employees in question, all other laborers, and all other classifications of laborers the correct prevailing wage rates and retroactive pay for previous years when FEI and DPM and/or its subcontractors did not fulfill its obligations.

25 DWSD anticipates that all wages paid from this date forward will be the Prevailing Wage Rates. Please provide DWSD with a signed waiver and copies of checks and related check stubs issued to all affected employees demonstrating payment of previous(retroactive) prevailing rates of, and copies of current checks and related check stubs with the correct hourly wage rate shall. When this document is received and verified, payments(s) will be released. (Jt. Exh. 1)

30 Edwards testified that the Respondent received this letter on May 18, 2009 when it was picked up from him by Bernard Parker, the Respondent's business development person.⁹

C. The Accident on May 15, 2009

40 On May 15, 2009, a crew composed of foreman Miles Reynolds Jr, Lapham, Hall, Lewis and Cook (herein referred to as the Reynolds Junior crew) was working at a jobsite on Livernois Avenue in Detroit. According to Lapham's credible testimony, the Reynolds Junior crew had been working on that site for approximately 2 weeks. On May 15 there was also a concrete crew assigned to this project whose foreman was James Lauderdale. According to the production sheet signed by Lauderdale on that date, the other members of his crew were J. Herrod, W. Chastang, A. Robinson and David Robinson (GC Exh. 17).

⁸ The record does not indicate Khalaf's role with the Respondent.

50 ⁹ Lapham testified that he received a phone call from the water department on May 18 informing him that a representative from Ferguson had picked up the "paperwork" on the prevailing wage claims.

Livernois Avenue runs in a north and south direction. In the area where the work was being performed, there are three lanes in each direction with a middle turning lane (Jt. Exh. 14). Prior to May 15, the Respondent's employees had dug three trenches (sometimes referred to as cuts) across Livernois Avenue, replaced water pipes and placed backfill into the cut so that traffic flow could be restored. The cuts were approximately 10 inches deep and 5 to 6 feet wide. The length of the cuts varied.

The work that was to be performed on May 15 involved first removing backfill from the 3 cuts that had previously been dug across Livernois Avenue. Steel rebar was then to be inserted into the trenches to give the cement the necessary strength and the trenches would then be filled with concrete. Finally, metal plates would be placed over the trenches. The metal plates allow traffic flow to be restored and protect the concrete until it cures.

At approximately 7:00 a.m. on the morning of May 15, Superintendent Fred Erdman met with foremen Reynolds Junior and Lauderdale to discuss how traffic control was to be set up that day. According to the credited testimony of Reynolds Junior, Erdman was sitting in his truck and Reynolds and Lauderdale were standing next to it. Erdman directed Reynolds Junior and Lauderdale as to how he wanted the traffic barrels set up. Erdman directed them to place directional signs at each end of the approximately 2000 foot-long project. He indicated that the traffic barrels were to be placed in such a way as to "taper" the traffic into the lane closest to the curb in each direction. In this way the two crews could work on the middle section of the road first¹⁰

Reynolds Junior testified that he told Erdman that there were not enough barrels to set up the traffic flow. Erdman replied that there were enough and this is how he wanted to do it (Tr. 233). Reynolds Junior then gave directions to the crews as to how the barrels were to be placed. Lapham, Reynolds Junior and Lewis all testified without contradiction that the concrete crew worked together with their crew in setting up the barrels.

Respondent's safety representative Boyer testified that he was involved in setting up the traffic control on May 15 at the Livernois jobsite. He testified that Andre Robinson and David Robinson were the two "flaggers" ¹¹ assigned to the jobsite that day. Boyer testified that he placed David Robinson at an intersection of Livernois and a side street where a substantial amount of truck traffic was located. The other flagger, Andre Robinson, was not given a specific assignment by him.

¹⁰ I do not credit Erdman's testimony that he gave directions only to Reynolds Junior on the morning of May 15. I find Reynolds Junior's version of this conversation to be the more credible one. The testimony of Reynolds Junior that Erdman gave directions regarding the traffic control to both himself and Lauderdale is corroborated by the testimony of William Lewis and George Cook. Both Lewis (Tr. 112) and Cook (Tr. 146) testified that they saw Erdman speaking to both Reynolds Junior and Lauderdale early in the morning before the job started. Lauderdale did not testify at the trial. I note that throughout his testimony, Erdman appeared to overstate the involvement of Reynolds Junior and his crew and diminish the involvement of Lauderdale and his crew in the accident that occurred on May 15. In addition, Erdman's claim that he gave a sketch of the traffic control pattern he wished to establish that day to Reynolds Junior is contrary to the testimony of Isaac Boyer, the Respondent's safety representative. Boyer testified that he was present when Erdman met with the crews and that Erdman did not give a sketch to them (Tr. 579).

¹¹ As the title denotes, flaggers are employees whose primary duty is to direct traffic.

After the barrels were set up both crews started working at the north end of the jobsite. They finished filling in the two cuts in the middle of the road. It is undisputed that later in the morning Erdman and Boyer returned to the jobsite. After reviewing the traffic flow set up, Erdmann told Reynolds Junior that it looked good.

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After lunch, the third cut had been partially filled in but one more cement pour was necessary in order to complete the work in filling up the cut. While waiting for the cement truck to arrive to pour the remainder of the cement in the cut on the south side of the project, Lauderdale and Reynolds Junior decided that the barrels should be moved in a manner to allow work on the project to continue. They decided that the Reynolds Junior crew should move to the middle cut of the project and began to excavate the backfill in the far western lane. (Traveling south this was the far right-hand lane by the curb).

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According to Reynolds Junior, he and Lauderdale decided to move the barrels in the following manner in order to keep both crews working. As traffic entered the construction zone from the north an arrow board directed it into the center lanes. This was necessary because the Reynolds Junior crew was going to be preparing the portion of the middle cut in the western most lane for concrete. Before traffic reached the southern most cut where Lauderdale's crew was working, the barrels were placed to direct traffic back over to the right-hand curb lane to go past the area where Lauderdale's crew was working.¹²

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According to Reynolds, he called Erdman to tell him that the barrels were being moved but did not reach him and left a message (Tr. 239-241). Reynolds Junior indicated that when he was not able to reach his superintendent on a previous job on 8 Mile Road in Detroit to notify him that he wanted to rearrange the barrels, he used his discretion to determine the placement.

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Lapham testified that later in the day on May 15 the cement work had not been completed in the southern most cut. He was told by one of the foreman that the concrete crew had run out of cement. Reynolds Junior instructed Lapham to block traffic with his front end loader at the north end of the jobsite. From there Lapham observed Reynolds Junior direct members of his crew and the cement crew to move some barrels so that the traffic was shifted in a manner that would allow the Reynolds Junior crew to begin excavating the right curb lane (heading south) of the middle cut in the project.¹³

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After the barrels had been rearranged, a car drove into the unfilled portion of the southern most cut. The driver was heading south when the accident occurred. The mutually corroborative testimony of Reynolds Junior, Lapham, Cook and Lewis establishes that at the time of the accident the Reynolds Junior crew was working in the right curb lane of the middle cut in the project, north of the accident.¹⁴

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Cook first observed that a car had driven into the southern most cut. Both he and Reynolds Junior called Erdman and informed him of the accident. Consistent with the Respondent's policy, as a foreman on the job, Reynolds Junior took pictures of the accident

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¹² Reynolds Junior's testimony regarding his discussion with Lauderdale is uncontroverted and I credit it.

¹³ The testimony of Lewis corroborates this fact.

¹⁴ There is a discrepancy in the estimated distance between the two cuts. Lewis estimated the distance to be about 200 yards (Tr. 111). Reynolds estimated the distance to be approximately 250 to 300 feet (Tr. 246). It appears that the accident occurred 100 to 200 yards away from where the Reynolds Jr. crew was working.

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scene with a company issued camera (Jt. Exhs. 7-14). After taking the photographs, Reynolds Junior testified he was securing his machine off the road when one of the employees informed him that White wanted to see him at the accident scene. According to Reynolds Junior., by the time he arrived at the accident scene, White had left. Reynolds Junior testified he spoke to Erdman. Erdman stated that he had never seen anything like this "and somebody is going to get fired for it." Erdman said there were cars parked in the middle of the road confusing people as to which way to go (Tr. 254). Erdman asked Reynolds Junior what happened. Reynolds Junior responded that the car drove into the cut where employees were working. Erdman stated that "somebody is going to go down for this." Reynolds Junior testified he felt Erdman was being accusatory and responded that "We're down here, working. I ain't down there, so I don't know what's going on down there and can't control what's going on down there. It's another crew down there." Erdman responded "well, somebody is going down for this. Somebody is going to get fired for this." (Tr. 250-252)¹⁵ The record establishes that two of the vehicles parked by the accident scene belonged to Lauderdale's crew and none belong to the Reynolds Junior crew (Tr. 256-257).

Erdman testified that he approached the accident scene on May 15 traveling south on Livernois. In his view, the lane closure was established in a way in which drivers could not be certain where to go (Tr. 450) Erdman testified that "30 seconds" after arriving on the jobsite he determined that Reynolds Jr. and his crew had engaged in unsafe working practices. He testified he placed Reynolds Jr. in charge of traffic control and he did not follow his instructions. Erdman indicated he held the remainder of the crew responsible because they participated in setting up a negligent and unsafe situation. He testified he did not hold Lauderdale or his crew responsible because they were working in the area that they should have been. Erdman testified that he told White at the accident scene that he had not seen such negligence in all his years in the business and "as far as I'm concerned, if I had my way, I'd fire them all right now" (Tr. 480). Erdman testified that White told him to calm down and that they would talk about it after the weekend (Tr. 547-548).

Boyer testified that he received a phone call from White telling him there had been an accident on the Livernois Avenue job and he returned to the site. When he arrived, he observed that the accident was at the southern most cut on the jobsite. Boyer spoke to employee Andre Robinson and asked him what had happened. Robinson indicated that the car had come between the barrels that had been set up and was coming toward him. Robinson said he moved out of the way after almost being hit and the car then went into the cut. Robinson had been trying to stop the car from coming through the barrels by waving his hands and yelling. (Tr. 566-567.) Boyer took a series of photographs of the scene after the accident. (R. Exhs. 1-4) Before leaving the accident scene Boyer spoke briefly to Don Spencer, a project manager for the Respondent, who was present at the accident scene and reminded him to get witness statements.

D. The Investigation into the Accident.

Consistent with Respondent's policy that foremen write a report of an accident, Reynolds Junior prepared a report regarding the accident of May 15 over the weekend. The following

¹⁵ I credit Reynolds Junior's version of this conversation over that of Erdman. Reynolds Junior's testimony was consistent on both direct and cross-examination (Tr. 374-375). Erdman testified that he spoke to Reynolds on his cell phone. He did not relay any details about the conversation. (Tr. 447) Because of its detailed nature and its consistency, I find Reynolds Junior's version of the conversation to be more credible.

Monday, May 18, he submitted his statement to Tanisha Gibbs, a project assistant for the Respondent. Because he wrote his report on an older form, Gibbs rewrote it on the current "Employee Report Of Incident" form which Reynolds then signed. (GC Exh. 3) Reynolds Junior's report indicates:

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Traffic was running in the far right lane, and the car went out of lane around the line of barrels and into the construction area where we were working, car drove into the trench. The driver was not paying attention when he drove around the barrels into the area where we were working. He could have injured worker or aorse.

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Paragraph 4 of the form asked "How could the incident been avoided? What could you have done differently? Reynolds Junior's report indicated "Put more barrels out, that's it. Could have put caution tape from barrel to barrel. But that's not a requirement."

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Safety representative Boyer¹⁶ submitted the photographs he took at the accident scene and an "Employee Report Of Incident" dated May 18 to Gwen Young, the human resources director. His report noted the time of the incident as 2:40 p.m. and indicated:

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Ferguson concrete crew were pouring road cut on Livernois, the crew had the road barricade (sic) from north to south one lane each way, a driver in a car Road (sic) between the barrels (sic) going south and ran in an open hole that were (sic) barricaded off. Ferguson concret (sic) crew had a traffic control person posted by the barricans (sic) he tried to stop the car

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With respect to the questions asked in paragraph 4 as noted above, Boyer responded "Add more barries (sic) and one more flag person." (GC Ex. 8) ¹⁷

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Young directed Boyer to obtain a statement from Lauderdale and his crew regarding the accident. At the hearing Boyer identified GC Exh. 9 as the statement he took from Lauderdale's crew. This document is dated May 18, 2009, and indicates "concrete crew" next to "witness name." Under the provision that asks the witness to fully explain how the accident occurred, it merely states "same". Boyer explained that the reference to "same" referred to the report that Boyer had written (GC Exh. 8).

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Young testified that project manager Donald Spencer submitted statements to her from two nonemployee witnesses (Tr. 634). These statements are titled "Witness Statement of Incident". The first one is an unsigned statement from Angel Ortiz dated May 15, stating in relevant part:

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¹⁶ Boyer testified at the hearing that he is the only person at the Respondent who is responsible for conducting investigations of accidents that occur on a job site. In his approximately 10-year career he has investigated 12 or 13 accidents. Boyer indicated that if he finds a safety violation resulted in an accident, he writes a safety violation report to Respondent's human resources department, which would then decide if discipline was warranted. Boyer did not report a safety violation regarding the accident on May 15. (Tr. 579-580) He also indicated that individuals at the foreman level or above can also report safety violations (Tr. 584-585),

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¹⁷ Boyer testified at the hearing that he answered in that fashion because that is what the crew on the site indicated to him. In his opinion, there were a sufficient number of barrels present at the jobsite (Tr. 581).

Mr. Ortiz seen (sic) the car in the trench after (unintelligible) the accident. Witness stated that the driver drove the car inside the construction barrels. There were 2 trucks parked on the inside of the barrels one was brown and the other white Somat truck. (sic)

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Paragraph 4 in the statement asks "How could the incident been avoided? (sic) What could have done differently? (sic) The statement indicated "FEI could have added more barrels and additional flag person." Under additional comments or observations the report indicated "He stated the incident look (sic) like it was driver's fault." (GC Exh. 6)

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The second statement is also an unsigned statement taken from Bob Allor which indicates, in relevant part:

I was on site to test the concrete for DWSD while I was waiting for the load of concrete to arrive on site. I was sitting in my vehicle inside the construction barrels half between the light and end of the construction zone with my hazard lights on my truck. When I noticed a car driving from the far right lane (which was the detour lane) in between the barrels disregarding the lane closure and drive (sic) into the trench. He was clearly in the wrong for his action by drive (sic) between the barrels (GC Exh.13).

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Erdman testified that he had a meeting with White on May 19 or May 20 in White's office regarding the accident. At that meeting Erdman again recommended that Reynolds and his crew be fired. According to Erdman, White replied that he did not really know what had gone on and that he did not know what would be done regarding discipline. White told Erdman that they were going to investigate the matter. (Tr. 547-548) Erdman testified that when he left the meeting he did not know what decision was going to be made with respect to discipline. After the meeting, Erdmann read the incident reports that had been filed by Respondent's employees but did not see the third party witness reports. He did not give White a summary of the incident reports.

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After being contacted by a representative of the insurance company of the driver who had been involved in the May15 accident, Young asked Lauderdale to complete a witness statement. In a report dated October 9, 2009, Lauderdale's statement indicates that he had David Robinson "flagging" and all cars went into the right lane as ordered. The statement further indicated that one car went left into the barrels for no reason and drove into the hole where his crew was working. (GC Exh. 12)

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Young testified that she maintained the incident reports and witness statements and file (Tr. 634). She had no personal knowledge as to whether White or Bobby Ferguson ever reviewed the file. There is also no evidence that anyone in Respondent's management ever reviewed the photographs taken by Reynolds Junior and Boyer.

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E. The Meeting of May 26

White assigned the Reynolds Junior crew to work on a job on Nevada Street in Detroit the entire week of May 18 to May 22. By the end of the week the crew had not completed its work on that job. Over the weekend of May 23 to May 25 (Memorial Day weekend), White called Reynolds Jr. and told him to contact his crew and have them come to the office on Tuesday, May 26. White informed Reynolds Junior that his crew was being suspended because of the accident. Reynolds Junior contacted his crew, with the exception of George Cook, who was on

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vacation and informed them they were being suspended because of the accident and were to report to a meeting at Respondent's office on May 26.

5 Lapham testified that he met with Lewis Hall and Reynolds Junior at the office at approximately 1:00 PM. The employees were directed to a conference room. Reynolds Senior and Young were present in the conference room. Lapham testified that Reynolds Senior commented "You guys know this has nothing to do with a safety violation. This has to do with you guys filing prevailing wage against Ferguson". (Tr. 51-52, 85) The employees expressed agreement with that statement. Reynolds Senior then stated that "stick to your story, you know, 10 you guys didn't do anything wrong out there that day." Young was present but did not say anything during this exchange.

15 Young then showed that the employees who were present individual identical forms (Jt. Exhs. 3, A, C, D. and E.).¹⁸ The form was entitled "Notice of Safety Violation" and indicated:

20 On May 15, 2009, the driver drove his vehicle into an unattended open trench that was not sufficiently barricaded. Reasonable precautions were not made to eliminate any recognized safety hazards that existed as a result of leaving the open trench unattended and protect the open trench from accidental entry. This is a violation of the company's safety policies and procedures.

The form indicated that the named employee was suspended until further notice. Young indicated that the employees did not have to sign them if they chose not to.

25 After Young showed the employees the form, Erdmann and Boyer walked in and Reynolds Senior left the conference room. When Erdman walked in he said he just found out about the meeting at that morning from Young. He said that a big mistake had been made the day of the accident. He stated that he told the two foremen that morning how to set up the job and could not understand why the barrels had been set up differently. Reynolds Junior 30 responded by saying that he had told Erdman there were not enough barrels to set up in the proper way. Erdman responded to Reynolds but Lapham did not recall the response. Erdman stated he had not seen anything so bad during his entire career as superintendent. Lapham indicated that if the meeting was about the accident, why wasn't Lauderdale's crew present. Boyer indicated that they were calling them in the next day. (Tr. 55-57.)¹⁹ The safety violations 35 were then presented to the 4 employees. They were all signed by Erdman and Young, but the employees refused to sign them.

40 Before the end of the meeting, Erdmann drew a diagram for the employees and said he specifically had indicated to set traffic control in that way, but that it was switched and set up another way. Erdman repeated that the two foremen were at fault. Reynolds Junior asked how long they were suspended for. Erdman replied that it was up to White. Reynolds asked Erdman if they could speak to White. Erdman said he would see if White would speak to them. When White arrived, Reynolds asked him how long the suspension was for. White replied indefinitely and then told the employees to get off the property. 45

Lewis testified differently than Lapham with respect to portions of the meeting. On direct examination, Lewis testified that when the employees arrived at the conference room, Reynolds

¹⁸ Cook was mailed his suspension notice. (Jt. Exhibit 3B)

50 ¹⁹ There is no evidence in the record indicating that anyone from Lauderdale's crew was disciplined for the accident.

Senior and Young were present. On direct examination, Lewis testified that he asked "Why are we here over this accident when we know it's not. It's over the prevailing wage that Joe and David Hall signed up for. According to Lewis, Reynolds Senior said that he knew that and Young also stated that she understood that but "they had to do this under the safety violation" (Tr. 118).

Lewis testified that after Reynolds Senior left the room, Erdmann and Boyer entered. Lewis told Erdman that "This isn't about the safety incident. It's over prevailing wage and two guys signing up for the union" (Tr. 119).²⁰ Erdman responded that we have to record this as a safety violation. Erdman then indicated that the safety violation was that he told both of the foremen to set up the barrels in a specified manner and they did not follow his directions.

On cross examination, Lewis testified that, in responding to the statement that Lewis made about the prevailing wage claim, Reynolds Senior stated "you have to go through it as a safety violation" (Tr. 133). Lewis testified on cross-examination that Young merely responded by saying that White wanted her to proceed with this is as a safety violation. When I questioned Lewis about what Reynolds Senior said, he responded that Reynolds Senior stated "you guys got to go through with this way. Just follow the channels." (Tr. 138) Finally, on recross examination Lewis testified as follows:

Q. BY MR. MOORE: Did Miles Reynolds Senior say "You're right" or, "That's exactly what this is" I mean again as best you can recall of his words,

A. Yeah, I don't recall him making any comment other than "Follow this is the way it's going"(Tr.139)

Reynolds Junior testified that after he and the other employees were in the conference room, Reynolds Senior came into the room. He did not recall anything specific about what Reynolds Senior said, but he did indicate that Reynolds Senior did not say anything about the reason they were there. (Tr. 299-300.)

To the extent that the testimony of the three General Counsel witnesses conflicts, particularly with respect to the portion of the meeting involving Reynolds Senior, I credit the testimony of Lapham. In addition to his forthright demeanor, he testified consistently on both direct and cross-examination. He also recalled with specificity details of the meeting such as exactly where individuals were seated.

On the other hand, the testimony of Lewis substantially varied between direct and cross-examination. As noted above, on direct examination Lewis testified that both Reynolds Sr. and Young indicated assent with the statement that Lewis testified he made regarding the underlying purpose of the meeting being the prevailing wage claim. On cross examination a fair reading of his testimony does not indicate anything that would establish that Reynolds Senior specifically agreed with his alleged statement. The testimony of Lewis, however, is consistent with that of Lapham with regard to the participants who were present and the order in which topics were discussed. I credit his testimony only to that extent.

As noted above, Reynolds Junior did not recall any details of the discussion when Miles Reynolds Senior was present. He also did not recall Boyer being present at the meeting or

²⁰ Lewis testified that Lapham and Hall told him that they had signed up for the union the week of May 15.

meeting with White at the end. Because of the lack of detail in his testimony regarding this meeting, I do not credit it. In this portion of his testimony, he appeared to testify in a way that would limit the involvement of Reynolds Senior in this matter. In sum, I credit Lapham's testimony with respect to what happened at this meeting, including the portion attended by Erdman and Boyer as I consider it to be the most reliable version.²¹

Young testified that White instructed her to prepare the suspension notices on May 22. (Tr. 637-638.)²² White gave Young a description of what occurred but the actual language on the notice was written by her. Young testified that she met with Boyer before drafting the notice, but she did not indicate what input he had regarding the language. Finally, Young testified that she was not present when the decision to discipline the Reynolds Jr. crew was made (Tr. 639).

Erdman testified on direct examination that the purpose of the meeting on May 26 was to suspend the Reynolds Junior crew because of unsafe working practices (Tr. 467). As noted above, he indicated he made the decision that they had engaged in unsafe working conditions "30 seconds" after he arrived on the scene on May 15. With respect to the meeting on May 26, he testified he spoke only to Young and Reynolds Junior at the meeting and that he had very little to say.²³ Erdman testified that at this time he did not know that any of the crew members had filed a prevailing wage claim with the city of Detroit.²⁴

On cross-examination, Erdmann testified that he was not involved in the preparation of the suspension notices dated May 22 and did not know specifically who had made the decision regarding the suspensions. He was told by Young on the morning of May 26 that he was to give the suspension notices to the Reynolds crew (Tr. 491).

F. The Layoffs of June 4

On June 4, 2009, identical letters signed by Young were sent to Reynolds Jr., Lapham, Hall, Lewis and Cook stating:

Because of lack of work, it will be necessary for the Underground Earth Work, Underground Utilities Division to reduce the number of its employees. Therefore, this is to notify you that you were laid off effective June 5, 2009. (Jt. Exhs. 5A -E)

²¹ In determining what occurred at this meeting, I note that Reynolds Sr. was not called as a witness by the Respondent. While Young testified in the Respondent's case in chief, she was not asked any questions about the specific statements that were made at this meeting.

²² White was not called as a witness by the Respondent.

²³ To the extent that Lapham's testimony conflicts with Erdman's, I credit Lapham. As noted above his testimony was both detailed and consistent. Erdman's testimony regarding the meeting was very brief and lacking in detail.

²⁴ Erdman testified inconsistently with respect to his knowledge of the filing of a prevailing wage claim. On direct examination Erdman testified that he had no knowledge of any employees of the Respondent filing a claim for prevailing wages (Tr. 472). On cross-examination, he admitted that he knew of the prevailing wage claims that Lapham, Hall and former employee Laginess had filed but claimed he did not know about their existence until approximately November 2009 (Tr. 494). Because of his inconsistent testimony on this critical matter, I do not credit his denial that he was unaware of the filing of the prevailing wage claims of Hall and Lapham at the time of the May 26 meeting.

Sherry K. Bonds, the Respondent's accounting manager/office manager, testified that the Respondent employed a total of approximately 100 employees in May 2009, but by December 2009, this number had been reduced to approximately 50 through layoffs. In May 2009 the Respondent had approximately three contracts with the city of Detroit, its largest customer, but by December 2009 this had been reduced to one contract. Bonds testified that she was not involved in any of the layoff decisions.

Erdman was the only witness called by the Respondent to testify regarding the reasons for the lay off of the Reynolds Junior crew Erdman testified that the Reynolds Junior crew was laid off due to a lack of work. The decision to lay them off was made by a group composed of White, Erdmann, Reynolds Sr., and Cara Woods, but that White made the final decision. Erdman indicated that this group meets every Wednesday to discuss projects. He further testified that the decision to lay off the Reynolds Junior crew was made at one of the weekly meetings a couple of days before the layoff notices were issued.²⁵ Because of a shortage of work, a decision was made to lay off an entire crew. At the time of the layoff decision there were eight different utility crews. The group knew that they would be cutting a utility crew because 95 percent of the work was utility work. According to Erdman, the group reviewed production records in determining which crew to lay off. The Reynolds Junior crew was the only entire crew to be laid off at that time. While 5 other employees were laid off at the same time, Erdmann indicated that the group looked at the "work ethic" of the other individuals in determining who to lay off. Erdman testified that the May 15 accident was not discussed at the time of the layoff of the Reynolds Junior crew. He further indicated that there was no discussion of there prevailing wage claim at that time and that he was not even aware of the filing of such a claim.

Erdman's testimony was inconsistent regarding the time frame that was considered when selecting Reynolds Jr.'s crew for layoff. He first testified that their productivity was considered since approximately June 15, 2008 (Tr. 532-533). Thereafter, he testified that production records were considered from the beginning of 2009, "or even farther than that" (Tr. 540 -541). Finally, Erdmann indicated that the only production records actually reviewed at the meeting where the layoff decision was made were those for the preceding week. He admitted that the Reynolds Junior crew was suspended during this period and did no work (Tr. 543). Erdman claimed, however, that the group knew what the production rates were from their previous meetings.

Erdman testified that, depending on the work assigned, the weekly production records measured the amount of footage of pipe installed, or the linear footage of trenches that were dug or the square footage of concrete poured. (Tr. 523-525) These records are compiled by the Respondent's project assistant from the daily timesheets of utility crew foremen. The record indicates, however, that foremen do not always enter complete information on the timesheets. Erdman testified that Respondent can obtain such information from reports prepared by an inspector from the Detroit water department. The records from the water department are obtained only when requested by the Respondent and Erdman did not know how often they were requested. Importantly the Respondent did not introduce any weekly production records to support Erdman's testimony.

Respondent did introduce letters establishing that it laid off seven utility employees on May 26, 2009, for lack of work. On June 4, 2009, in addition to Reynolds Junior's crew, the Respondent laid off another five utility crew employees for lack of work. On September 28, 2009

²⁵ The two Wednesdays preceding the layoff notices were June 3, 2009 and May 27, 2009.

another five utility crew employees were sent layoff notices indicating they were laid off for lack of work. (R. Exh. 5)

5 The record also indicates, however that after the Reynolds Junior crew was laid off, some utility crews worked some overtime. (GC Exhibits 20, 21, 27, 29, 31-45) One utility employee, T. Levi was recalled from layoff after May 2009.

G. The Resolution of Lapham's Prevailing Wage Claim

10 On June 9, White called Lapham and said that he would like to meet with him to try and resolve the prevailing wage claim. Lapham met with White who offered \$15,000 to resolve the claim. Lapham rejected the offer. There was no discussion of Lapham's layoff for suspension at this meeting. On June 11, Lapham and White again spoke by phone. White said that the Respondent needed to get the case resolved that day. Lapham said he was willing to settle for
15 \$68,000. White called back later and agreed to pay that amount. Lapham met White at Respondent's office and received a check in that amount. Again, there was no discussion of Lapham's suspension or layoff. The record does not indicate the resolution of Hall's prevailing wage claim.

20 III. ANALYSIS AND CONCLUSIONS

A. The May 22 suspensions

25 Section 8 (a)(1) of the Act indicates that it is an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of rights guaranteed in Section 7 of the Act. Rights guaranteed by Section 7 of the Act include the right to engage in concerted activities for the purpose of mutual aid or protection.

30 In *Benjamin Franklin Plumbing*, 352 NLRB 525, 536-537 (2008), the Board approved the use of a *Wright Line* analysis for Section 8 (a)(1) allegations that turn on motive, in finding the discharge of two employees violated Section 8 (a)(1) of the Act. See also *TLT Babcock Inc.*, 293 NLRB 163, 167 (1989). In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F. 2d 899 (1st Cir. 1981), cert. denied 455 U. S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U. S. 393, 395 (1983), the Board established a framework for deciding cases turning
35 on employer motivation. To prove an employer's action is discriminatorily motivated and violative of the Act, the General Counsel must first establish, by preponderance of the evidence, and employee's protected conduct was a motivating factor in the employer's decision. The elements commonly required to support such showing are union activity by the employee, employer knowledge of the activity, and, at times, antiunion animus on the part of the employer.
40 If the General Counsel is able to establish a prima facie case of discriminatory motivation, the burden of persuasion shifts " to the employer to demonstrate the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra, at 1089. Accord *Cibao Meat Products*, 338 NLRB 934 (2003).

45 In the instant case, the General Counsel contends that the Respondent violated Section 8 (a)(1) of the Act by first suspending, and then laying off, Lapham, Hall, Cook, Lewis and Reynolds Junior, (the Reynolds Jr. crew) because of the protected concerted activity of Lapham and Hall in filing a prevailing wage claim against the Respondent.

50 The Respondent contends, in essence, that (1) the evidence does not establish that Lapham and Hall were engaged in protected concerted activity and (2) even if the conduct of Lapham and Hall was concerted, there was no knowledge of the concerted nature of their

conduct in filing prevailing wage claims. The Respondent also argues that if I should find that the General Counsel has established a prima facie case, the Respondent has established a valid *Wright Line* defense. In this regard, the Respondent contends that it would have suspended and laid off the Reynolds Junior crew regardless of any protected concerted activity that Lapham and Hall may have engaged in.

The Board's present definition of protected concerted activities is set forth in *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Myers I*), remanded sub. nom. *Prill v. NLRB*, 755 F. 2d 941 (D. C. Cir.1985), reaffirmed on remand 281 NLRB 862 (1986) (*Myers II*) affirmed sub. nom. *Prill v. NLRB*, 835 F. 2d 1481 (D. C. Circuit. 1987). Accord *NLRB V. City Disposal Systems, Inc.*, 465 U. S. 822, 835 (1984). In *Meyers* the Board stated that concerted actions of employees are protected under Section 7 if they might reasonably be expected to affect terms or conditions of employment. The Board further indicated that concerted activities encompassed those activities that are "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Myers I*, supra, at 497. In addition, in *Benjamin Franklin Plumbing*, supra, at 538 the Board noted that employee conversations about wages are at the core of activity protected by Section 7 of the Act.

As set forth above, an employee acting solely on his own behalf is not engaged in concerted activity. However, "[i]t is well settled that the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much concerted activity as is ordinary group activity. Such individual action is concerted as long as it engaged him with the object of initiating or inducing. . . . group action" *Benjamin Franklin Plumbing*, supra at 538 and cases cited therein.

It is clear that discussion between employees regarding whether they are receiving prevailing wages as required by law amounts to mutual aid and protection. See *Walter Bruckner & Co.*, 273 NLRB 1306 fn. 6 (1984). The Board has also held that the protection of the Act extends to employees who, in a concerted fashion, seek to improve working conditions by enlisting the efforts of other administrative bodies. *Francis House, Inc.*, 322 NLRB 516, 522 (1996); *Delta Health Center*, 310 NLRB 26, 43 (1993).

Applying these principles to the instant case, it is clear that Lapham and Hall engaged in protected concerted activities as defined by the Board. Lapham's discussions with the other employees, including Hall regarding what wages and benefits other employees received and whether he was being paid correctly was clearly within the ambit of Section 7 protection. Lapham's concern regarding whether he was being paid the proper wage rate may have started out as an individual concern, but thereafter he had numerous conversations with his fellow employees about the wages being paid by the Respondent to nonunion employees.

As indicated above, seeking to enlist the assistance of the Detroit water department is a protected activity as long as it was engaged in a concerted manner. The uncontroverted evidence establishes that Lapham first contacted the Detroit water department and found out that prevailing wage law did, in fact, apply to Respondent's employees when they were working on jobs for the city of Detroit. After obtaining this information, Lapham spoke to Hall as he knew from their previous conversations that Hall was not a union member and, like Lapham, was not receiving the same wages and benefits as the employees who were members of a union. When Lapham asked Hall if he was interested in filing a prevailing wage claim against the Respondent, Hall indicated that he was. To that end, Lapham and Hall called the water department together and were told what information was needed in order to start an investigation into whether they were being properly paid under the prevailing wage ordinance.

The credited and uncontroverted testimony of Lapham establishes that he and Hall were acting in concert in their phone conversation with a representative of the water department with respect to the information necessary to begin an investigation under the prevailing wage ordinance. On March 2, 2009 Lapham and Hall jointly met with Edwards and Moore from the water department and formally initiated an investigation into whether the Respondent was paying them appropriately under the prevailing wage ordinance. I therefore find that the evidence establishes that Hall and Lapham acted in concert in pursuing their prevailing wage claim against the Respondent.

Under the circumstances, I do not agree with the Respondent's contention that the fact that Hall did not testify is a critical detriment to finding that Lapham and Hall engaged in concerted activity. The testimony of Lewis corroborates Lapham's regarding the many discussions that Lapham had with fellow employees, including Hall, regarding the issue of wages. The testimony of Edwards corroborates that of Lapham in establishing that the pursuit of the prevailing wage claim was done in a concerted manner. I note that the Board has held that where allegations are sustained by the record, the testimony of an alleged discriminatee is not a necessary requirement. *Southern Maryland Hospital*, 276 NLRB 1349,1359 fn. 9 (1985). Accordingly, I do not draw an adverse inference from Hall's failure to testify at the hearing.

The record establishes that the Respondent was notified of the results of the prevailing wage claim investigation regarding Lapham and Hall by the Detroit water department on May 18. Since it is clear that such a claim is protected activity, the only question is whether the Respondent knew of the concerted nature of the action of Lapham and Hall.

The water department letter notified the Respondent of its obligation to make whole Hall, Lapham and John Laginess. In May 2009 Laginess was no longer working for the Respondent. Lapham and Hall worked side-by-side as the only nonunion employees on the Reynolds Junior crew. After calling the water department, Lapham informed Reynolds Sr. of his intention to pursue "prevailing wage claims" against Respondent. In addition, on May 26, when the Reynolds Jr. crew was assembled at the Respondent's facility to receive their suspension notices for the accident, Reynolds Sr. admitted that the suspensions had "nothing to do with a safety violation" but rather it had to do with "you guys filing prevailing wage against Ferguson."

When these facts are viewed collectively, I conclude that the Respondent knew of the concerted nature of the prevailing wage claims of Lapham and Hall before the suspension notices were prepared on May 22. Lapham informed Reynolds Sr. but he was going to file prevailing wage claims. Thereafter, he filed such a claim in concert with Hall. Thus, when Respondent was notified by letter that both Hall and Lapham had filed prevailing wage claims it was clear that the filing of Hall's claim arose from Lapham's announced efforts to initiate such conduct. To find otherwise, would strain credulity in my view. I would have to find that Hall and Lapham, even though similarly situated as the only nonunion employees working daily on the same crew, independently filed prevailing wage claims at the same time. In reaching my conclusion, I note that there is no evidence whatsoever to controvert the testimony of Lapham regarding what he stated to Reynolds Senior regarding his intention to file prevailing wage claims and Reynolds Senior's admissions that the suspensions were motivated because "you guys" filed prevailing wage claims. As I have noted previously, Reynolds Senior did not testify at the hearing. Young, who was present at the May 26 meeting, testified but did not say anything to controvert Lapham's testimony regarding that meeting. Moreover, there is no credible evidence to controvert the facts regarding the Respondent's knowledge of the concerted nature of the filing of the prevailing wage claims. As noted previously, I do not credit Erdman's denials that he did not know anything about the filing of prevailing wage claims until a month before the hearing and neither White nor Ferguson testified at the hearing.

I do not agree with Respondent's argument that the required element of knowledge of the concerted nature of the activity of Lapham and Hall was not proven and therefore the General Counsel has not established a prima facie case. In support of its argument, the Respondent relies on the Board's decision in *Reynolds Electric Inc.*, 342 NLRB 16 (2004).

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In *Reynolds Electric*, the critical issue in the case was whether the employer knew when it laid off employee Gabriel Rice, that his individual efforts to secure the state-required prevailing wage was an outgrowth of concerted activity involving other employees. In that case, employee Rice had approximately 12 conversations with Edward Whitcher, one of the employer's supervisors. Price told Whitcher that the other subcontractor's employees told him that the project they were working on was a prevailing wage job. Whitcher told Rice that the job was not a prevailing wage job. After talking to the general contractor's superintendent, Price told Whitcher that the superintendent said the job was a prevailing wage job. Richard told Rice that he would get back to him but did not. Thereafter, Rice was laid off, allegedly for lack of work. The General Counsel alleged, inter alia, the Rice's layoff was a violation of Section 8 (a)(1) of the Act. A Board panel majority (then Member Liebman dissenting) dismissed the complaint regarding Rice, finding that there was no evidence that Whitcher knew that Rice, in raising the prevailing wage issue, was acting for others as well as himself. Accordingly, the Board found that the General Counsel did not establish that the employer knew of the concerted nature of Rice's discussion with other employees before he was laid off.

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As noted above, in the instant case the evidence establishes that before the date of the suspension notices (May 22), Lapham told Reynolds Sr. that he was filing prevailing wage claims and the Respondent was formally served with the notice of the wage delinquency from the Detroit water and sewer Department naming both Lapham and Hall. Finally, on May 26 Reynolds Sr. acknowledged that the suspensions were because "you guys" filed prevailing wage claims. Because the evidence establishes that the Respondent knew that the filing of the claims of Hall and Lapham were due to Lapham's initiation of those claims, I find the *Reynolds Electric* case distinguishable.

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In considering the evidence that supports the protected concerted nature of Lapham and Hall's filing of prevailing wage claims as a motivating factor in the decision to suspend the Reynolds Junior, crew I rely on the credited testimony of Lapham that Reynolds Senior acknowledged on May 26 that the suspension of the Reynolds Junior crew was in retaliation for the filing of the prevailing wage claims.

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There is obviously an issue as to whether, if the protected concerted activity of Lapham and Hall is found to be the reason for their suspensions, are Lewis, Cook and Reynolds Junior, alleged as discriminatees in the complaint, also entitled to a remedy. Neither Lewis, Cook nor Reynolds Junior were involved in the filing of the prevailing wage claims by Lapham and Hall. The Board has held, however, with court approval, that when an employer discharges an employee as part of a plan to establish a defense to the discharge of a known union activist, the discharge of the other employee also violates the Act. *Jack August Enterprises Inc.*, 232 NLRB 881, 900 (1977) enfd. 583 F. 2d 575 (1st Cir., 1978.); *Greenfield Die and Mfg. Corp.*, 327 NLRB 237, 247 (1998). Accordingly, Board law supports the proposition that, if Cook Lewis and Reynolds Junior were suspended to mask a discriminatory motive for the suspensions of Lapham and Hall, their suspensions also violate Section 8 (a)(1) of the Act.

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Based on the foregoing, I find that the General Counsel has met the initial burden of persuasion as required under *Wright Line* with regard to the suspensions of Lapham, Hall, Lewis Cook and Reynolds Junior. I now turn to consider whether the Respondent has met its

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burden to establish that it would have taken the same action in the absence of protected concerted activity.

5 The Respondent contends that the accident of May 15 was the reason for the suspension of Reynolds Jr. and his entire crew. It argues that the actions of Reynolds Junior and his crew in deviating from Erdman's instructions as to how traffic control was to be conducted that day resulted in an egregious safety violation warranting suspension.

10 I find that the timing of the suspensions coupled with the lack of an investigation into the underlying accident, cast substantial doubt on the validity of Respondent's argument. It is clear that Erdman was upset by the accident that occurred on May 15 and attributed it to the manner in which the traffic barrels had been moved during the day. On the day of the accident he told Reynolds Junior that someone would be fired for the accident. He testified that he made his decision "30 seconds" after arriving on the scene that day that Reynolds Junior and his crew were at fault. I credit Erdman's testimony that he recommended to White on May 15 that the entire Reynolds crew be fired, but that White told Erdman to calm down and they would talk about it after the weekend.²⁶

20 On Monday, May 18, when it received the letter from the Detroit water and sewer department, the Respondent was made aware of the prevailing wage claims filed by Lapham and Hall and that it owed a substantial amount of backpay to each of them. Importantly, the letter also indicated that the Respondent would not receive further payments from the city until the matter was rectified. On May 19 or May 20 Erdman met with White and again recommended that Reynolds Jr. and his crew be fired. White told Erdman that he (White) did not really know what had gone on and that "they were going to investigate the matter" Abruptly, however, on 25 May 22, White told Young to prepare suspension notices for all the members of the Reynolds Junior crew.

30 It is unclear who actually made the decision to suspend the Reynolds Junior crew. While Erdman made a recommendation regarding discipline, he admitted that he did not know who made the decision to suspend the crew. Young prepared the suspension notices pursuant to White's direction, but she had no role in the decision. Erdman was instructed by Young to give the suspension notices to the crew on the morning of May 26, but that was the first time that he learned of the decision. As noted earlier, White did not testify. Thus, no Respondent witnesses testified that they were responsible for making the suspension decision and to explain why they made it. In addition, no one who did testify could even identify with specificity the management personnel who made the decision. The Board has noted that the lack of such evidence casts doubt on the veracity of a respondent's explanation for disciplinary action. See *Louis A. Weiss Memorial Hospital*, 324 NLRB 946, at 957 (1997) enf. denied in relevant part, 172 F. 3d 432 (7th 35 Cir. (1999)).

40 The record does not contain any indication as to what occurred from May 19 or 20 to May 22 to give Respondent a legitimate reason to suspend the entire Reynolds Junior crew. Certainly, the record does not show any investigation into the facts of what occurred on May 15. 45 In this regard, as described earlier, there was, in fact, a substantial amount of evidence available to the Respondent, including the photographs of Boyer and Reynolds, employee incident reports of the accident and third-party witness statements. I note in particular that safety

50 ²⁶ Erdman appeared to me to have a somewhat volatile personality and it seems likely that he would react emotionally and prematurely to the occurrence of an accident on a job that he was responsible for.

representative Boyer, the individual Respondent has designated to investigate accidents, wrote a report that apparently nobody bothered to read before suspending the Reynolds Junior crew. In addition, Boyer interviewed Lauderdale's crew, who confirmed Boyer's description of what had occurred. While Young gathered the results of the investigation into a file, neither White nor Ferguson ever reviewed the evidence.²⁷ Other than Erdman's angry brief questions of Reynolds Jr. at the accident scene, Reynolds Jr. and his crew were never given an opportunity to explain what happened on May 15 before they were suspended. There is no evidence that Erdman ever spoke to Lauderdale about his role in the events of May 15. After the Respondent received notice of the meritorious prevailing wage claims on May 18, and without any further investigation into the events surrounding the accident, Young was ordered to prepare suspension notices by White on May 22. In my view the timing of the suspensions, coming shortly after the Respondent learned of the results of the prevailing wage claims filed by Lapham and Hall, is highly suspect. My suspicion is heightened by the fact that the Respondent made no effort to determine what happened on the day of the accident before it suspended the entire Reynolds Junior crew. The Board has held that suspicious timing coupled with the lack of an investigation into an incident supports a finding of discriminatory motivation. *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002). See also *Washington Nursing Home Inc.*, 321 NLRB 366, 375 (1996) regarding the lack of an adequate investigation as supporting a discriminatory motivation.

Since there was no real investigation into the events of May 15, there was no consideration of the role of foreman Lauderdale and his crew regarding the circumstances of the accident on that date. The credible testimony of Reynolds Junior establishes that he and Lauderdale decided to move the barrels from their original location that day. It is clear that Lauderdale and his crew were the employees working around the cut that the car went into. The record reveals that Lauderdale and one of his crew members had parked their vehicles near the cut, an issue that Erdman appeared to consider important in his discussion with Reynolds Junior at the scene. According to credited testimony of safety representative of Boyer, flagger Andre Robinson, a member of Lauderdale's crew, was stationed by the cut and observed a car come between the barrels. Robinson tried to stop the car but the driver failed to follow its directions and went to the cut. Surely, finding out what happened from the employees closest to the incident would have been warranted if the Respondent was attempting to determine how to legitimately apply its safety policy.

Respondent's safety disciplinary program is contained within its safety program policy statement dated November 21, 2007. Jt. Exhibit 6. It provides for progressive disciplinary policy, however, it indicates the severity of the violation will determine the level of disciplinary action administered. The policy emphasizes however that the enforcement of the rules should be done in a fair and consistent manner. Importantly, the Respondent did not introduce any evidence regarding discipline imposed on any employees for safety violations prior to May 15, 2009. The record does indicate however that in November 2008, Reynolds Junior, while operating his excavator, accidentally struck a light pole next to a car dealership. The pole fell and caused approximately \$1500 in damages to a car on a lot. Reynolds Junior immediately informed his superintendent of the accident and was never disciplined for it. There is no indication in the record as to what financial liability, if any, was imposed upon the Respondent by virtue of the accident of May 15. The Respondent's unprecedented and sweeping suspension of the entire Reynolds Junior crew was an extraordinary event since there is no evidence that it ever disciplined employees previously for a safety violation.

²⁷ Erdman testified that he read the employee incident report forms after his meeting with White on May 19 or 20, but did not inform him of the content of those reports.

In my view, to suspend the entire Reynolds Junior crew, when only Reynolds Junior was involved in the decision to move the traffic barrels, establishes clearly that Respondent's action was a pretext and designed to disguise the fact that the motivation behind its action was the protected concerted activity of Lapham and Hall. Accordingly, I find that Respondent has not rebutted the General Counsel's prima facie case and I therefore find that its suspension of Lapham, Hall, Lewis, Reynolds Junior and Cook to be in violation of Section 8 (a)(1) of the Act.

B. The layoffs of June 4

As set forth in the previous section, I find that the General Counsel has established a prima facie case with respect to the suspension of the Reynolds Junior crew. The same facts support the existence of a prima facie case regarding the layoffs. Accordingly I will examine the Respondent's defense to the allegation that the layoffs of Reynolds Junior, Lapham, Hall, Lewis and Cook are violative of Section 8 (a)(1) of the Act to determine if the prima facie case is rebutted. To rebut a prima facie case under *Wright Line*, the Board has held that "An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993) enf. 99 F. 3d 1139 (6th Cir. 1996). Accord *Coastal Insulation Corp.*, 354 NLRB No. 70, JD sl. op at 20. (2009).

The Respondent argues that the discriminatees were laid off for legitimate business due to a lack of work. In support of this argument it relies on the fact that the Respondent had three jobs with the city of Detroit in May of 2009 but by December 2009 was only one such job. Respondent also notes that from May 2009 to December 2009 it reduced its entire work force, encompassing all its divisions, from approximately 100 employees to approximate 50. In particular the Respondent relies on the layoff of 23 underground utility employees from May 2009 to September 2009, including the 5 members of the Reynolds Jr.'s crew, as supporting its legitimate business reasons for their layoff. Finally, Respondent contends the decision to lay off the Reynolds Jr. crew was based on their relative lack of productivity.

Counsel for the General Counsel argues that the Respondent's contention regarding the reasons for the layoff of the Reynolds Jr. crew is pretextual. She bases this argument on what she claims is Erdman's inconsistent testimony regarding the reasons for the layoff and the lack of any productivity records to support his testimony. In addition, Counsel for the General Counsel relies on the fact that there were some overtime hours worked by utility crews after the layoff and one employee was recalled to work.

I find that the evidence supports a finding that the Respondent may have had legitimate business reasons to lay off some employees on June 4, 2009, but that the Respondent chose to layoff Lapham, Hall, Lewis, Reynolds Junior and Cook for discriminatory reasons and that the layoffs violated Section 8 (a)(1) of the Act. The Board has held that even if there may be legitimate reasons for a layoff generally, if the selection of employees for layoff is based on a discriminatory motive, those layoffs are violative of the Act. *W. F. Bolin Co.*, supra; *Knoxville Distribution Co.*, 298 NLRB 688 (1990).

The evidence establishes that the Respondent began to experience a decline in business in May 2009. Specifically with regard to the underground utilities division, on May 26, the Respondent laid off 7 utility employees for lack of work. On June 4, in addition to the Reynolds Jr. crew to another 5 utility employees were laid off another employee was laid off on June 11 and 5 more on September 28. It is true that some overtime hours were worked by underground utility crews after June 4 and that one employee was recalled, but I find that such evidence is

insufficient to establish that the Respondent had no basis to layoff any employees in June 2009. However, I find that the Respondent had a discriminatory motive in selecting the Reynolds Junior crew for layoff for the following reasons.

5 As indicated above, Erdman was the only witness who testified for Respondent regarding the reasons for the layoff of the Reynolds Junior crew. He testified that the decision was made by a group composed of himself, White, Reynolds Senior and Woods, but that the final decision was made by White. He further testified that this decision was made at a regular weekly
10 Wednesday production meeting shortly before the layoff notices were issued. According to Erdman, because of a shortage of work, a decision was made to layoff and entire utility crew. At the time there were eight different utility crews. Erdmann indicated that the decision to layoff the Reynolds Jr. crew was based on their productivity and that production records were reviewed in determining which crew to layoff. He testified inconsistently, however, regarding the timeframe that was considered when selecting the Reynolds Junior crew for layoff. He first testified that
15 their productivity had been considered since approximately June 15, 2008. Later he testified that production records were considered from the beginning of 2009, "or even farther than that." Finally, he admitted that the only production records actually reviewed at the meeting where the layoff decision was made were those for the week preceding the meeting. This was during the period of time that the Reynolds Jr. crew was laid off. Erdman tried to explain, however that the
20 group making the layoff decision knew what the production rates were from their previous weekly meetings.

Erdman described the weekly production records as being compiled by Respondent's project assistant from the daily time sheets of utility crew foremen. These records reflect
25 productivity depending upon the work assigned. The record demonstrates, however, that foremen do not always fill in the time sheets appropriately. When foremen do not indicate complete information on the timesheet, the Respondent can obtain such information, upon request, from reports prepared by a Detroit water department inspector. Erdman could not state, however, how often to his Respondent seeks such information from the city.

30 I find that Erdman's vague testimony regarding the alleged lack of production by the Reynolds Junior crew relative to other crews to be unconvincing. He did not explain what particular circumstances dictated that an entire crew be laid off. He offered no comparison between the productivity of the Reynolds Junior crew and other crews. Importantly, the
35 Respondent introduced no production records in support of Erdman's testimony. These records are clearly within the Respondent's control and the failure to produce them causes me to draw the inference that they would not have supported Respondent's position regarding the reasons for the layoff of the Reynolds Junior crew. See *Thermal Masters, Inc.*, 318 NLRB 43 (1995); *Bay Metal Cabinets Inc.*, 302 NLRB 152, 178, 179 (1991). In addition, the Respondent did not call
40 any witnesses to corroborate the testimony of Erdman. I noted in particular that White, who made the final decision, did not testify at the hearing.

I find that Erdman's unsupported testimony does not establish by a preponderance of the evidence a legitimate reason for the selection for layoff of the entire Reynolds Junior crew. I
45 thus conclude that the Respondent has not rebutted the prima facie case by establishing it would have selected the Reynolds Junior crew for layoff in the absence of the protected concerted activity engaged in by Lapham and Hall. I therefore conclude that the layoff of Lapham, Hall, Lewis, Reynolds Junior and Cook violated Section 8 (a)(1) of the Act.²⁸

50 ²⁸ Since the record establishes unlawful discrimination with respect to Hall's layoff, it was not necessary for him to testify at the hearing in order to be entitled to a remedy. *Southern*

Conclusions of Law

1. By suspending Joseph Lapham, David Hall, Miles Reynolds Jr., William Lewis and George Cook on May 26, 2009, and laying off the above named employees on June 4, 2009, because Lapham and Hall engaged in protected concerted activities the Respondent violated Section 8 (a)(1) of the Act.

2. By engaging in such conduct the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8 (a)(1) and Section 2(6) and (7) of the Act.

Remedy

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

The Respondent having discriminatorily first suspending and then laying off Joseph Lapham, David Hall, Miles Reynolds Jr. William Lewis and George Cook, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).²⁹

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁰

ORDER

The Respondent, Ferguson Enterprises Inc., Detroit Michigan its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, laying off or otherwise discriminating against any employee for filing a concerted prevailing wage claim, or otherwise engaging in protected concerted activity.

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

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

Maryland Hospital, supra.

²⁹ The General Counsel seeks compound interest computed on a quarterly basis for any backpay. I deny this request. The Board has recently indicated that it is not prepared at this time to deviate from its current practice of assessing simple interest. *Atlas Refinery, Inc.*, 354 NLRB No. 120 at fn. 9 (2010).

³⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of the Board's Order, offer Joseph Lapham, David Hall, Miles Reynolds Jr., William Lewis and George Cook 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 or privileges previously enjoyed.

5

(b) Make Joseph Lapham, David Hall, Miles Reynolds Jr., William Lewis and George Cook whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

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(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspensions and layoffs and within 3 days thereafter notify the employees in writing that this has been done and that the suspensions and layoffs will not be used against them in any way.

15

(d) 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.

20

(e) Within 14 days after service by the Region, post at its facility in Detroit Michigan copies of the attached notice marked "Appendix."³¹ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 26, 2009.

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

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Dated, Washington, D.C., March 3, 2010.

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Mark Carissimi
Administrative Law Judge

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³¹ 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."

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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 suspend, lay off or otherwise discriminate against any of you for filing a concerted prevailing wage claim, or otherwise engaging in protected concerted activity.

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

WE WILL, within 14 days from the date of this Order, offer Joseph Lapham, David Hall Miles Reynolds Jr., William Lewis and George Cook 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 or privileges previously enjoyed.

WE WILL make whole Joseph Lapham, David Hall, Miles Reynolds Jr., William Lewis and George Cook for any loss of earnings and other benefits resulting from their discharge, 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 suspensions and layoffs of Joseph Lapham, David Hall, Miles Reynolds Jr., William Lewis and George Cook and WE WILL, within 3 days thereafter, notify each of them in writing

that this has been done and that the suspensions and layoffs will not be used against them in any way.

FERGUSON ENTERPRISES, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

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

477 Michigan Avenue, Federal Building, Room 300

Detroit, Michigan 48226-2569

Hours: 8:15 a.m. to 4:45 p.m.

313-226-3200.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 313-226-3244.