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Approved Electric Corp. and Local 25, International Brotherhood of Electrical Workers. Case 29–CA–29184

December 3, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER
AND PEARCE

On June 9, 2009, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party each filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions for the reasons stated below, to modify his remedy,² and to adopt the recommended Order as modified.³ The judge found, and we agree, that the Respondent violated Section 8(a)(1) by discharging employees Esroy Bernard and Desmond Stewart because of their protected concerted activity.

As described more fully in the judge's decision, the Respondent, an electrical contractor, was awarded a sub-

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent excepts to the judge's rejection of its 10(b) defense regarding the discharge of employee Desmond Stewart. The judge found that the complaint allegation regarding Stewart was closely related to the allegations in the unfair labor practice charge and therefore was not barred by Sec. 10 (b). We need not pass on that finding because the Respondent waived its 10 (b) defense by failing to raise it until its posthearing brief. See *Dayton Newspapers*, 339 NLRB 650, 653 *fn.* 8 (2003), *enf.* granted in part, denied in part on other grounds 402 F.3d 651 (6th Cir. 2005); *Newspapers & Mail Deliverers (New York Post)*, 337 NLRB 608, 609 (2002).

² In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge's recommended remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis.

³ We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). We shall substitute a new notice to conform to the Order and to the Board's decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), *enfd.* 354 F.3d 534 (6th Cir. 2004).

contract in late spring 2008 to install and replace lighting fixtures at various public schools. The Respondent hired a five-person crew to perform the work. Members of the crew included employee Romeo Bailey and the alleged discriminatees, Bernard and Stewart. Bailey had worked with the Respondent's president and owner, Trevor Dunwell, previously and was the first person Dunwell hired to work on the public school contract.⁴ The crew began work on July 23. Shortly before August 1, Bernard and Stewart approached Bailey about the Respondent's failure to pay them for the work they had performed so far. Bailey reported to Dunwell that "the guys" were "disgruntled" about not being paid, that "these guys have obligations," and that "we need to get some money." On August 2, Dunwell provided Bailey with funds to make a partial payment to each of the employees to offset their commuting costs and expressly asked Bailey to inform the employees that the money represented "an advance." During the week of August 6, Stewart continued to press Bailey about the Respondent's failure to pay the employees their full wages. By letters dated August 8, the Respondent discharged Bernard and Stewart, stating in the letters that they were being laid off "due to cut back [sic] in staff." The Respondent concedes that the reason given in the letters was false, but contends that Bernard was terminated for poor performance and Stewart for excessive use of his cell phone.

The judge's analysis of the discharges generally follows *Wright Line*,⁵ which we agree describes the appropriate analytical framework. Under *Wright Line*, the General Counsel has the initial burden to prove that the employees' Section 7 activity was a substantial or motivating factor in the discharges. The elements commonly required to support the General Counsel's initial showing are union or protected concerted activity by the employees, employer knowledge of that activity, and animus on the part of the employer. See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), *enfd.* 577 F.3d 467 (2d Cir. 2009). If the General Counsel makes the required initial showing, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the union or protected concerted activity. See *Manno Electric*, 321 NLRB 278, 280 *fn.* 12 (1996), *affd.* 127 F.3d 34 (5th Cir. 1997).

⁴ Although Bernard and Stewart testified that Bailey hired and supervised them, the parties do not contend that Bailey was a supervisor or agent within the meaning of Sec. 2(11) and (13) of the Act.

⁵ 251 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 (1983).

We agree with the judge that the General Counsel carried his initial burden. First, the record shows that Stewart and Bernard were engaged in protected concerted activity. There is no dispute that the subject matter of Stewart's and Bernard's discussions—the effort to obtain payment for their work—was protected by Section 7. The Respondent argues that the activity was not concerted because each employee was merely pursuing his personal interests. We disagree. Stewart and Bernard both testified that “we” spoke to Bailey about needing payment because “we” were facing another week of commuting costs. Bernard stated that “we” meant “mostly myself and [Stewart].” It is not essential to a finding of concerted activity that employees formally agree to act as a group. See, e.g., *Salisbury Hotel*, 283 NLRB 685, 687 (1987) (where employees were “all up in arms” about new lunch-hour policy, employee's complaints to colleagues and employer were part of a concerted effort to convince employer to change its policy, even absent evidence that they explicitly agreed to act together).

Second, the Respondent had knowledge of Stewart's and Bernard's protected concerted activity. Although the Respondent concedes that it had knowledge of Stewart's complaints about not being paid, it denies knowing that those complaints were concerted. We do not find merit in this contention. It is undisputed that Dunwell learned of Stewart's complaints when they were reported by Bailey. Accordingly, Dunwell had knowledge that Stewart and Bailey—a fellow employee who is not alleged to be a supervisor or agent—had discussed the matter together. In addition, Bailey had informed Dunwell that “the guys” were “disgruntled” about not being paid. Accordingly, the evidence is sufficient to show that Dunwell knew or suspected that Stewart's complaints were concerted.⁶

With respect to Bernard, although Bailey testified that Stewart and Bernard were the two most outspoken employees about the Respondent's failure to pay them, it is not clear from the credited testimony that Bailey specifically told Dunwell about Bernard's complaints. Nevertheless, the manner in which Bernard was terminated supports an inference that the Respondent knew about Bernard's protected concerted activity. Specifically, Bernard was discharged at the same time as Stewart with

an identical discharge letter, giving the same explanation—which was pretextual, as discussed below—for his discharge. In addition, both employees were given these written discharge letters even though the Respondent's standard practice was to handle discharges without paperwork. The Board has consistently found that knowledge can be inferred from similar circumstances surrounding an employee's termination. See, e.g., *Pan-Oston Co.*, 336 NLRB 305, 308 (2001) (inferring knowledge from timing, animus, pretext, and simultaneous discipline of a known union supporter); *Knoxville Distribution Co.*, 298 NLRB 688, 688 fn. 1, 696 (1990), enf. mem. 919 F.2d 141 (6th Cir. 1990) (inferring knowledge from timing and simultaneous discharge of three union supporters); accord: *Abbey's Transportation Service v. NLRB*, 837 F.2d 575, 579 (2d Cir. 1988).⁷

Third, the circumstances surrounding the employees' discharges support a finding of animus. The Respondent was aware of the two employees' alleged performance issues by August 1 at the latest, yet did not terminate them until August 8, after Stewart continued to complain about not getting paid, and, in fact, Dunwell had just made a partial payment to cover their commuting costs on August 2, which he described as “an advance.” See *National Steel Supply*, 344 NLRB 973, 974 (2005), enf. 207 Fed. Appx. 9 (2d Cir. 2006) (unlawful motive found where employer claimed that employee's conduct was “a daily problem,” but employee was not disciplined until after the employer learned of a union campaign). The Respondent also gave shifting reasons for the discharges. Stewart and Bernard simultaneously received discharge letters giving the same rationale for their discharges: that they were laid off “due to cut back [sic] in staff.”⁸ At the hearing, however, the Respondent claimed they were discharged for two unrelated nondiscriminatory reasons: excessive cell phone use (Stewart) and inadequate performance (Bernard). The Board commonly recognizes

⁷ In finding that the Respondent knew that Stewart and Bernard had engaged in protected concerted activity, we do not rely on union representatives' inquiries to the Respondent during the same time period about whether the Respondent was paying the prevailing wage. There is no evidence that the Respondent knew or believed that any employees had spoken to the Union or that the Respondent otherwise associated the employees' complaints about not being paid with the Union's inquiries about the wage rate.

⁸ Dunwell testified that he characterized the discharges as layoffs so as not to impede Stewart and Bernard from finding further employment, but the letters themselves undercut that explanation. They state that the Respondent's policy “is to give only title of position and dates of employment to companies seeking references. You can be assured the details of this situation will remain strictly a company matter.” Thus, the letters indicate that the Respondent would *not* tell prospective employers that Stewart and Bernard were laid off, but would only give their job titles and dates of employment.

⁶ Because the record supports a finding that the Respondent knew that Stewart and Bernard acted in concert, we do not reach the question of whether proof of such knowledge should be required when an employer takes adverse action against employees based on activities they engaged in “for the purpose of . . . mutual aid and protection.” See *Reynolds Electric, Inc.*, 342 NLRB 156, 158–160 (2004) (then-Member Liebman, dissenting in part). Chairman Liebman adheres to her views expressed in *Reynolds Electric*, but agrees that it is unnecessary to apply those views in this case.

such shifting rationales as evidence that an employer's proffered reasons for discharging an employee are pretextual. See, e.g., *City Stationery, Inc.*, 340 NLRB 523, 524 (2003) (nondiscriminatory reasons for discharge offered at the hearing were found to be pretextual where different from those set forth in the discharge letters); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive."). In addition, the Board has recognized that the General Counsel may offer, as part of his initial showing that a personnel action was discriminatorily motivated, evidence that the employer's purported reasons for the action were pretextual—that is, either false or not in fact relied upon. See, e.g., *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003); accord: *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). Accordingly, we agree with the judge that the General Counsel carried his initial *Wright Line* burden.

Finally, we agree with the judge that the Respondent failed to prove that it would have discharged Stewart and Bernard in the absence of their protected activity. In doing so, we observe, as the judge did, that the claimed reasons for the discharges did not seem to be of significant concern to Dunwell, and therefore were not the real reasons for the discharges.⁹ The judge discredited Dunwell's and Bailey's testimony that Dunwell told Bailey to discharge Stewart and Bernard on August 1, after Dunwell learned of Stewart's allegedly excessive cell phone use and Bernard's alleged performance issues. Thus, the credited evidence shows that the employees' conduct was tolerated and was not deemed to warrant discharge until after Stewart continued to press for payment of his wages. Dunwell even provided Bailey with funds to make what he described as an "advance" payment to Stewart and Bernard on August 2. There is no evidence that any additional complaints about Stewart and Bernard were reported to Dunwell after August 1 that would have precipitated the discharges.¹⁰ Moreover, there is no evidence that either Stewart or Bernard was ever told that cell phone use or poor work was the reason for his discharge.

⁹ We do not rely on the judge's finding that Bailey did not personally think that Bernard's performance issues were significant. Bailey is not a supervisor and did not make the decision to discharge Bernard.

¹⁰ Bailey testified that the contractor for which the Respondent was working complained about Stewart's cell phone use again during the week of August 6, but there is no evidence that that complaint was reported to Dunwell.

Accordingly, we agree with the judge that the Respondent discharged Stewart and Bernard for their protected, concerted activity and that the discharges therefore violated Section 8(a)(1).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Approved Electric Corp., Bronx, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

"(b) Make Esroy Bernard and Desmond Stewart 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 judge's decision, plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010)."

2. Substitute the following for paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its Bronx, New York facility copies of the attached notice marked "Appendix."¹¹ 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 are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 August 8, 2008."

3. Substitute the attached notice for that of the administrative law judge.

¹¹ 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."

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

Wilma B. Liebman,	Chairman
Craig Becker,	Member
Mark Gaston Pearce,	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 employees because of their protected concerted activity of seeking to receive their wages.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Esroy Bernard and Desmond Stewart 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 Esroy Bernard and Desmond Stewart for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest as prescribed in the Board's Order.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Esroy Bernard and Desmond Stewart

and, within 3 days thereafter, notify them in writing that this has been done and that these actions will not be used against them in any way.

APPROVED ELECTRIC CORP.

Linda Harris Crovella, Esq., for the General Counsel.

Alan B. Pearl, Esq., for the Respondent.

Richard S. Brook, Esq. and *Patricia E. Palmeri, Esq.*, for the Charging Party.

DECISION

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Brooklyn, New York, on February 24 and 25 and March 19, 2009. The charge in this case was filed on September 17, 2008, and the complaint that was issued on December 31, 2008, alleged that on or about August 10, 2008, the Respondent discharged Desmond Stewart and Esroy Bernard because of their union activity and because they concertedly protested the Respondent's pay policies and increased production requirements.

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

Findings and Conclusions

I. JURISDICTION

There is no dispute and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is agreed and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

Approved Electric Corporation is an electrical contractor located in the Bronx, New York. The owner is Trevor Dunwell who is the president. It is a nonunion contractor.

Sometime in late spring of 2008, it received a contract from RS Lighting to install and/or replace florescent lighting fixtures and lamps in two school districts located in Nassau and Suffolk County. RS Lighting, which appears to be a national contractor, had received a contract to be the electrical contractor to install bulbs and lighting fixtures from Ameresco pursuant to some type of arrangement with ECG Engineering. ECG seems to have been hired by the school districts to retrofit the lighting in the schools in order to reduce the amount of electricity used.

In or about mid July 2008, Approved hired a group of non-union electricians to begin work at the Wyandanch Memorial High School. The foreman or lead person was to be Romeo Bailey. He in turn contacted several men, including Desmond Stewart and Esroy Bernard who he knew from prior work experience. (Bernard had worked with him on a previous job in Harlem). These people all met at the Company's office on July 22, where they filled out the necessary paperwork and were hired. The evidence indicates to me that at the time of their hire the employees were not told their rates of pay and they assumed that it would be the standard rate for similar work that they had done before on nonpublic jobs. (Around \$20 to \$21 per hour).

On Wednesday, July 23, 2008, work began at Wyandanch High School. For this job there were two crews; one composed of about five men directly employed by Approved and another larger group of men who are employees of RS Lighting. The electrical workers employed by Approved were Romeo Bailey, Esroy Bernard, Everton Christie, Devon Cowan, Fitzroy Simon, and Desmond Stewart. The person who was in overall charge of the project was Andrew Beason and he was an employee of RS. For reasons unknown to me, the employees of both crews were placed on the payroll of Approved, albeit the employees of RS were never actually employed by Approved.

The work at Wyandanch involved removing old fixtures, putting up new fixtures, changing ballasts, and installing new lamps. Andrew Beason, RS's supervisor, told Bailey that he expected Approved's men, in the aggregate, to do 70 fixtures a day. And according to Bailey, they managed to meet and beat this quota for most of the time that his crew worked at this site.¹

During their first week on the job, the crew worked three 10 hour days.

On Friday, July 25, 2008, Union Representative George Psillos visited the Wyandanch High School and spoke to Bailey. He asked what work they were doing and how much the men were being paid. Bailey responded that his company was replacing fixtures, ballasts, and lamps. According to Psillos, he was told that the men were being paid \$21 per hour and he told Bailey that this was not the proper prevailing wage rate.

In fact, the evidence shows that the prevailing rate for this type of work on a public school is \$52.56 per hour. The overtime rate is computed at 1½ that amount for work done after 8 hours per day.

On Monday, July 28, Psillos and another union business agent, Kevin Harvey, visited the job site. After they arrived, they spoke to Beason, and asked what the work was and what the wage rate was. After speaking to Beason, both representatives spoke to some of the men working at the jobsite and told them that for this type of work they should be earning more. The workers didn't respond. Nevertheless, soon thereafter, Desmond Stewart approached the union representatives, asked about the prevailing rates and was given a business card.

Later on the 28, Union Agent Kevin Harvey made inquiries from various people about this job and whether the employees were being paid prevailing wages. Among the people he contacted were Vince Crimi, the Sr. project manager for Ameresco and Denzil Davis who apparently is the owner of a company called Jenco or Jako. Harvey also discovered that Approved was working with a Long Island electrical contractor named June Electric, who although not providing any labor, provided the electrical license to enable Approved to work on the schools.

At some point after July 29 a meeting was set up. The participants were to be the union representatives and representatives from the various contractors. The meeting was scheduled to take place on the morning of August 5, 2008, and there is no question but that all participants were aware that the main purpose of this meeting was to address the Union's assertion that

the employees on the project were not being paid at the State's required prevailing wage rate.

In the meantime, the work assigned to Respondent Approved at the Wyandanch School was completed by Friday, August 1, 2008. After completion, Bailey told the men that they should not report to work on Monday and should await further instructions. The crew was then supposed to move to the Freeport School. It is noted that at this point in time, none of the men, including Bailey had yet been paid by Approved and there was some grumbling about this to Bailey.

By August 1, 2008, the workers and in particular, Esroy Bernard, were complaining to Bailey about not having been paid. As a result, Bailey contacted Trevor Dunwell who told him that he had come up with \$4000 and that Bailey could distribute \$800 to each employee as an advance on their wages. This was accomplished on Saturday, August 2, 2008.

On Sunday August 3, Bailey called Esroy Bernard and told him that the crew was going to be going to go to a school in Freeport. Bernard, in turn communicated this information to Desmond Stewart. They were told to wait for further instructions as to when they would start.

On Tuesday morning, August 5, 2008, a meeting was held at the Wyandanch School. In attendance were the two union representatives, along with Vince Crimi, the project manager for Amaresco, Richard Pinnock from R.S. Lighting, Trevor Dunwell the president of Approved, and Denzil Davis and James Acardi from June Electric. At this meeting, the union representatives were given what purported to be certified payrolls. Upon review, the union representatives expressed skepticism about the wage rates and also stated that the overtime paid was incorrect because under the prevailing rate, overtime should have been paid after 8 hours of work per day instead of after 40 hours of work per week. There also was some question raised by the Union about whether anyone connected with the job had a legally required license to work in Suffolk County.

Desmond Stewart testified that on the afternoon of August 5, he received a phone call from Bailey who told him that he needed his social security number because the Company was going to change his wage rate to about \$52 per hour. Stewart testified that Bailey said that there had been a meeting between the Company and the Union and that the Union was pressuring the employer to pay the prevailing rate.

The crew started working at the Freeport School on Wednesday, August 6, 2008. The work on this site was simpler than the work at the Wyandanch School because the employees did not have to change the fixtures that held the lamps. For this job, Beason told Bailey that each man on the Respondent's crew would be required to do 40 units per day. According to Bailey, Beason told him that if Bailey's crew couldn't do this, RS would be able to bring in other guys to do the work.

According to Bailey, he then held a meeting with the employees and explained that they individually would be responsible for 40 units per day. This engendered some complaints from Stewart and Bernard. Stewart expressed distress at there being an individual quota when they were being paid by the hour. Bernard indicated that a quota of 40 was ridiculous. Bailey told the men to give it a shot and reminded them that when they were at Wyandanch, they had met and exceeded the

¹ According to Bailey, they got a slow start on the first day and did 68 fixtures. But he also testified that thereafter they "made like 72, 76."

70 unit installation quota that had been given to them by Beason. He also told them, in effect, that if they could not meet the quota, the Respondent could lose the job and they would be “firing themselves.”

Bailey testified that on Thursday and Friday (August 7 and 8), the members of his crew did not meet the 40 unit quota. He opined that it may be that the men, not having been paid yet, were not so anxious to work so fast. And in this regard, Bailey concedes that the two employees who were vocal about their lack of pay were Bernard and Stewart. Bailey states that he told Trevor Dunwell that the men were “really disgruntled because there was no money coming in.” According to Bailey, Dunwell responded by stating that he thought he had told him the previous week to get rid of Bernard and Stewart.

The last day that Esroy Bernard and Stewart Desmond worked for the Respondent was on Friday, August 8, 2008. Thereafter, on August 10, 2008, they received letters telling them that they had been permanently laid off.

After these layoffs, the Company continued to work at the Freeport School until October 2, 2008, when it terminated its contract with RS Lighting over some dispute between the two companies. Thus, after Approved walked away from this contract, there is little likelihood that Stewart or Bernard would have continued working for the Respondent.

The Respondent contends that it laid off Esroy Bernard and Desmond Stewart because of their work performance. In the case of Esroy Bernard, it contends that he did not have sufficient skills. In this regard, Bailey described an instance during the Wyandanch job where Beason brought to his attention that Bernard had miswired some fixtures. In the case of Stewart, Bailey asserts that during that same week, Beason complained that he saw Stewart spending too much time outside talking on his cell phone. According to Trevor Dunwell, when he heard about these complaints by Beason, he told Bailey on August 1, 2008, to let Bernard and Stewart go.

Nevertheless, the two men were paid \$800 advances on August 2, were not told that they were being let go, and were transferred to the Freeport job on August 6, 2008. It therefore seems to me that Bailey, who was in charge of this project, did not feel that Desmond and Bernard were incapable of, or not willing to do their jobs. In this regard, despite any time that Bernard may have spent on the phone, the evidence shows that at the Wyandanch job, the Respondent’s workers were able to meet and exceed the expectations that RC had set for them. It also seems to me that Bailey did not think that the wiring problems encountered by Bernard were not correctable with a little bit of instruction and practice.

Analysis

The Respondent contends that the allegations of the complaint relating to Desmond Stewart should be dismissed under Section 10(b) of the Act because the charge filed by the Union did not allege that his discharge was specifically motivated by his protected concerted activities. I reject this argument.

It is well settled that a complaint may assert allegations that are not specifically referenced in an unfair labor charge if they are closely related to the allegations made in the charge. Since the unfair labor practice charge alleges that the Respondent

discharged Esroy Bernard because of his pay complaints and since Stewart allegedly was involved in and discharged for the exact the same activity, it is my conclusion that *if proven*, the allegations of the complaint would be closely related to the charge.² *Redd-I Inc.*, 290 NLRB 115 (1988); *Nickles Bakery of Indiana*, 296 NLRB 927 (1989); *Dickens, Inc.*, 352 NLRB 667 (2008); *Kentucky Tennessee Clay Co.*, 343 NLRB 931, 932 (2004). *Ross Stores Inc.*, 329 NLRB 573 (1999); *Seton Co.*, 332 NLRB 979 (2000),

I do not believe that the General Counsel has made out a *prima facie* case that the Respondent discharged Bernard and Stewart because of their union activities. For one thing, there is little evidence to show that they engaged in any type of significant union activity or that the employer was aware of such activity. While it is true that the Union did make a protest about the wage rates being paid to all of the employees, there is nothing to indicate that the Employer made its decision to discharge these two employees because they were involved in any union organizing activity, or because they joined or supported the Union.

Nevertheless, my conclusion as to the allegation that these two employees were discharged because of their protected concerted activity is just the opposite.

In somewhat different but overlapping ways, the General Counsel posits that the Respondent discharged Esroy Bernard and Desmond Stewart because of complaints about pay issues.

To me, the evidence shows when the employees were hired to do this project, they probably were not specifically told what their wage rates would be. They therefore assumed that they would receive around \$20 per hour. They clearly were *not* told that they would be paid at the state mandated prevailing wage rate which is \$52.56 per hour.

In any event, the Union came upon the scene in late July 2008, and made inquiries from Bailey and Beason about whether the employees on the job were being paid the prevailing wage rate. And on Tuesday August 5, 2008, union representatives demanded that these employees should all be paid at the rate of \$52.56 per hour. It also demanded that employees should receive overtime rate after 8 hours worked on any given day. Indeed, the Respondent and the other companies doing this project were aware, by virtue of various communications from union representatives on July 29, 2008, that the Union was going to make the wage rates for all the work to be performed in Nassau and Suffolk counties an issue. Soon after the meeting concluded, the credited testimony shows that Desmond Stewart was told by foreman Bailey that the Respondent was going to change his wage rate to about \$52 per hour. Also, Stewart credibly testified that Bailey said that there had been a meeting between the Company and the Union and that the Union was pressuring the employer to pay the prevailing rate.

The other pay issue involved the fact that no one on the job received any pay for the first 2 weeks. They received only an \$800 advance on Saturday, August 2, 2008, and this after much grumbling to Bailey by Bernard and Stewart.

² I note that the charge did allege that the Respondent violated the Act by “discontinuing his [Stewart’s] employment because he was seen speaking to a Business Representative of Local 25, I.B.E.W...”

So by the time that the meeting was held on August 5, between the Union and the employers, the men employed by Approved who had been assigned to work at the Wyandanch School had finished work there but had received only partial payment. Moreover there was at least an issue as to whether under State law they were going to be credited with the correct amount of overtime pay. (They ultimately were.)³ So from the Respondent's perspective, it was aware (a) that employees were complaining about not being paid and (b) that the Union was complaining that the employees were not being paid the correct prevailing wage rate. As these are complaints relating to wages, they would, to the extent expressed concertedly by employees, constitute protected concerted activity under Section 7 of the Act. Moreover, if the Respondent made its decision to lay off or discharge employees because it *believed* that they were engaged in concerted complaints about their pay or wage rates, such conduct would violate Section 8(a)(1) of the Act. *Atwood Mobile Products*, 326 NLRB 1196, 1204-1205 (1998).

The evidence shows that when the crew, including Stewart and Bernard, transferred to the Freeport School on Wednesday August 6, 2008, these two employees continued to complain to Bailey about the fact that they had not yet been paid. This is conceded by Bailey who testified that the two employees were vocal about their lack of pay were Bernard and Stewart. He also testified that he told Dunwell that the men were "really disgruntled because there was no money coming in."

Based on the credited testimony and viewing the timing of the events, it is my opinion that the General Counsel has made out a prima facie case, in accordance with *Wright Line*, 251 NLRB 1083 (1980), that Stewart and Bernard were discharged because the Respondent was being faced with complaints by these two that they were not being paid on time, compounded by complaints by the Union that all of the employees were not being paid the proper overtime rate under the prevailing wage laws.

Reviewing the evidence presented by the Respondent, I am not persuaded that it has met its burden to demonstrate that it would have terminated Stewart and Bernard for reasons other than their protected concerted activities or their perceived protected concerted activities. In this regard, I do not credit the contention by Trevor Dunwell or Romeo Bailey that the Dunwell told Bailey to get rid of these two employees on August 1, 2008. (At the end of the second week of work at the Wyandanch School). For one thing, it seems highly improbable that Bailey, who had worked for Dunwell and hopes to work for him again, would simply ignore a direct order to fire two workers.⁴ For another thing, the alleged shortcomings of Stewart and Bernard were not convincing. In Stewart's case, he allegedly spent some time outside talking on the phone. But the fact

³ It is not my job to decide any kind of wage or hour claim and I will not do so in this forum.

⁴ I note that there is nothing in writing, by way of a letter or email, to corroborate that representatives of RC Electric complained about the two employees in question. Nor is there any such written communications between Bailey and Dunwell. However, I do not want to make too much of this because I recognize that the Respondent is a small company and may not engage in the same type of bureaucratic note making that is often done by larger enterprises.

is that the quotas that RC Electric set for Approved at the Wyandanch School were met or exceeded after the first day on the job. And in Bernard's case, Bailey although relating problems with Bernard's wiring, did not, in my opinion, seem to think that this was all that significant.

CONCLUSIONS OF LAW

1. By discharging Esroy Bernard and Desmond Stewart because of their protected concerted activities, the Respondent has violated Section 8(a) (1) of the Act.

2. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

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

In view of the above, I shall recommend that the Respondent, having discriminatorily discharged employees, must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the dates of discharge 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 (2987).⁵

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Approved Electric Corp., Bronx, New York, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging employees because of their protected concerted activity of seeking to receive their wages.

(b) 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.

⁵ The evidence indicates that the Respondent's electricians who worked on this project were hired on a project basis only and that there is a reasonable basis for assuming that Stewart and Bernard would have been laid off when the Respondent finished work on October 2, 2008. On the other hand, there is some evidence to suggest that, on occasion, the Respondent has rehired employees to work on new projects after an initial project has been completed. In cases such as this, the Board, in *Dean General Contractors*, 285 NLRB 573 (1987), has concluded that a Respondent in the construction industry may raise, at the compliance stage of the proceeding, the issue of whether or not a discriminatee would likely have been transferred to other jobs after completion of the job to which he was originally assigned. In this regard, I note that in *Dean*, the Board overruled *Brown & Lambrecht Earth Movers*, 267 NLRB 186 fn. 3 (1983), to the extent that the latter case held that there was a pre-compliance presumption against reinstatement in the construction industry.

⁶ 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.

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 Esroy Bernard and Desmond Stewart, 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.

(b) Make Esroy Bernard and Desmond Stewart 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 this Decision.⁷

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against Esroy Bernard and Desmond Stewart and within three days thereafter, notify them in writing, that this has been done and that the discharges will not be used against them in any way.

(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.

(e) Within 14 days after service by the Region, post at its facilities in the Bronx, New York, copies of the attached notice marked "Appendix."⁸ 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

⁷ Inasmuch as the evidence shows that at least by August 5, the Respondent had agreed to pay its employees the prevailing rate, the discriminatees' backpay should be computed at that rate of pay.

⁸ If this Order is enforced by a Judgment of the 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."

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 August 8, 2008.

(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.

Dated, Washington, D.C., June 9, 2009.

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 employees because of their protected concerted activity of seeking to be paid on time or because they may seek higher pay or better working conditions.

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 offer Esroy Bernard and Desmond Stewart, 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 Esroy Bernard and Desmond Stewart for the loss of earnings they suffered as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful discharges of Esroy Bernard and Desmond Stewart and notify them, in writing, that this has been done and that these actions will not be used against them in any way.

APPROVED ELECTRIC CORP.