Westchester Iron Works Corp. *and* Juan Cabrera. Case 2–CA–31494

April 5, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND WALSH

On October 13, 1999, Administrative Law Judge Steven Davis issued the attached decision. The Respondent and General Counsel filed exceptions[1] and supporting briefs and the General Counsel 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,[2] and conclusions and to adopt the recommended Order.

ORDER

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

Suzanne Sullivan, Esq., for the General Counsel.
Elliot Mandel, Esq. (Epstein, Becker & Green, P.C.), of New York, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge, a first amended charge, and a second amended charge filed on May 27, August 11, and August 26, 1998, respectively by Juan Cabrera, an individual, a complaint was issued against Westchester Iron Works Corp. (Respondent) on September 25, 1998.

The complaint alleges essentially that Respondent (a) threatened its employees with discharge; (b) directed its employees to engage in physical violence toward union representatives if the representatives returned to the jobsite; (c) warned and advised its employees against talking to union representatives; (d) interrogated its employees regarding their protected concerted activity of filing a prevailing wage complaint; (e) warned and advised its employees to withdraw their prevailing wage complaint; (f) threatened its employees that it would report them to the Immigration and Naturalization Service (INS) unless they withdrew their prevailing wage complaint; (g) demanded that its employees solicit withdrawals from other employees of their prevailing wage complaints; and (h) discharged Cesar Barillas, Juan Cabrera, and Itamar Silva and failed and refused to reinstate them.

The Respondent's answer denied the material allegations of the complaint, including its discharge of the three employees, but asserted that it refused to reinstate them because there was no work available for them. On March 1, 2, 10, and April 8, 1999, a hearing was held before me in New York City.

On the evidence presented in this proceeding and my observation of the demeanor of the witnesses and after consideration of the brief filed by the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York corporation having its office and place of business at 3451 Delavall Avenue, Bronx, New York, has been engaged in the business of fabricating and erecting iron works and structural steel. Annually, Respondent derives gross revenues in excess of $1 million and purchases supplies valued in excess of $50,000 directly from suppliers located outside New York State. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I also find that Local 361, Iron Workers, AFL–CIO (Union) is been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is engaged in the fabrication of structural steel and miscellaneous ironworks at its shop in the Bronx and the erection of such structures at various jobsites. Vincent Sergi, its president, owns 50 percent of the stock in the corporation. Vice President Giuseppe (Joe) Palmisano also owns 50 percent of the stock.

In 1998, Respondent employed Cesar Barillas, Juan Cabrera, Audi Campbell, Miguel Rodriguez, and Itamar Silva. Barillas, Cabrera, and Silva welded beams, and Cabrera painted, cut metal, and installed beams. Barillas also installed beams, tied bolts, cut metal, and Silva drove a truck, operated a crane, and performed work in the shop.

In August 1996, Respondent entered into a subcontract with TAP Electrical Contracting Service, Inc., for the fabrication, construction and erection of structural steel and miscellaneous iron work for an automatic fare collection station power upgrade program at various subway stations (TAP job).

The subcontract, which was in the amount of $1,198,000, provided that if work cannot be completed as a result of any labor disturbances or work stoppages, TAP may deduct the cost of completing the work from the balance remaining under the subcontract. The contract also provides that Respondent agrees to comply with all local, state and federal laws, rules and regulations. The contract incorporated by reference the prevailing

[1] The General Counsel excepted, inter alia, to the judge's failure to include in the recommended Order and notice an affirmative reinstatement provision for the 8(a)(3) violations he found. On March 17, 2000, the judge issued an erratum rectifying this inadvertent error.

[2] 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.

wage schedule promulgated by the Comptroller of the City of New York.

Sergi testified that the work set forth in the contract was to be completed in 3 years. He was aware that according to the contract Respondent was required to pay its employees the prevailing wage, which was equivalent to union wages. However, the employees were not paid the prevailing wage.[1]

Sergi further testified that Respondent had a choice of subcontracting the TAP job to union firms, or performing the work with its own employees. He chose to do the work with his employees in order to provide them with steady employment which would last for 3 years. However, he told them that he could not afford to pay union wages or the prevailing wage for that job because they were inexperienced and their ability did not warrant "100 percent union pay." Instead, he agreed to begin paying their salary from the time they punched in at the shop until the time they punched out. Sergi thus agreed to pay them for the time that they would not actually be at the jobsite, and for travelling time to and from the site. He told them that their wages, because of the additional time paid, would exceed the prevailing wage. That was not the case, however.

B. Interference with Employees' Section 7 Rights

In early April 1998,[2] four employees worked on the TAP job at a subway station in Far Rockaway, Queens—Cesar Barillas, Juan Cabrera, Audi Campbell, and Itamar Silva. They were approached by Richard O'Kane, the business agent and vice president of the Union.

Silva testified that O'Kane told him that the job was a union job. Cabrera testified that O'Kane asked them what they were being paid, and inquired if they were members of a union. Cabrera said that they were not union members and he told him their rates of pay. O'Kane asked the men to stop work until the matter could be resolved. The men stopped work at 1 p.m. and returned to the shop at about 2 p.m., whereas their day usually ends at about 4 p.m.

O'Kane testified that he asked the men if they were members of the Union, and if they knew that this was a "union job." The men said that they did know that. He asked if they were being paid the prevailing wage and they said that they were not. He said that they should be paid the prevailing wage and he would look into the matter.

Silva testified that upon their return to the shop they were met by Sergi and Palmisano. Sergi asked them why they stopped work. They explained what happened. Sergi replied that they should not stop work even if the President of the United States told them to stop. Silva further testified that Sergi told them that the next time union people visit the site they should "beat the union people in the head." Barillas testified that Sergi asked who was at the site and what happened. Barillas replied that they left the job because the union representative was there. Sergi asked why he did not him in the head with a hammer. Barillas further stated that Sergi said that he did not want a union on the job, he paid them to work and not to talk, and that if they did not like it that way the "door is open." Cabrera testified to the same effect. He stated that Sergi told them that they are not professional employees, and that he did not want a union in his company, and would not pay them union wages or the prevailing wage. He warned them that if they did not want to work "the way I want" the door is open. No one is going to get the union."

A few days later, while they were working at the jobsite, O'Kane visited again. He asked why they were at the site when they were "not supposed to be there." O'Kane told them that Respondent was stealing money from them. The men decided to stop work and return to the shop in order to resolve the situation because they found their repeated confrontations with O'Kane to be uncomfortable. O'Kane testified that the men asked what they had to do to obtain the prevailing wage. O'Kane said he would help them, and gave them prevailing wage complaint forms.

Silva testified that upon their return to the shop, they met with Sergi and Palmisano. Sergi told them that they are not getting the prevailing wage because they are not qualified employees and they have no certification. He added that if he had to pay the prevailing wage he would be better off if he hired qualified employees. Sergi told the men that if they were not happy with their wages they should leave.

The next time the employees returned to the jobsite they were accompanied by Vice President Palmisano. Two people from the Union picketed with signs saying that employees working on the jobsite were not being paid the prevailing wage. Palmisano testified that O'Kane told him that this was a Local 361 job and that they had to leave.

Cabrera testified that he told Palmisano at the site that he wanted to join the Union so that he could receive the prevailing wage. Palmisano replied that if he (Cabrera) wanted to be like them, he should "just go, you can leave right now. I don't want no union guys in my company." O'Kane asked Palmisano if the employees are members of a union. Palmisano replied that they were not, but they were receiving union wages. O'Kane answered that the company was not paying the prevailing wage and was "stealing money" from the workers.

[1] The prevailing wage was $45 per hour. Respondent's certified payroll records (GC Exhs. 28 and 29) for the week ending May 13, 1998 indicate that Barillas, Cabrera, and Silva earned $27.80, $16.50 and $11.78 per hour, respectively. However, other payroll records for the same period of time (QuickReport GC Exh. 18) indicate that they earned $16.29, $12.78, and $11.78 based on a 40-hour week. In that regard, Respondent's chart (R. Exh. 3B) states that those employees worked 40 hours that week.

Furthermore, there appears to be a discrepancy in the amounts of money paid to the employees based upon the payroll records. Thus, the certified payroll states that for the week ending May 13,1998, Barillas earned a gross amount of $389.20 and his net wages paid were $287.19. However, the QuickReport stated that Barillas' check for that period was $651.93. Similarly, the certified payroll stated that Cabrera's gross amount of pay was $224 and his net was $203.95, whereas the QuickReport stated that the amount of his check was $471. Silva's gross certified amount was $224, and his net was $204.53, whereas the QuickReport stated that the amount of his check was $471.

It should also be noted that only Palmisano and Barillas were listed as ironworkers on the certified payroll, whereas Cabrera and Silva were listed as security guard/traffic control. There was no evidence that Cabrera or Silva performed either task.

[2] All dates hereafter are in 1998 unless otherwise stated.

Cabrera testified that in mid-April, Sergi asked him why he was angry. Cabrera replied that every day Sergi fought with Silva, screamed at the workers and called them clowns, and that he (Cabrera) was tired of that. Sergi answered that this was a "struggle because [of] the union activity." Cabrera told Sergi that he must resolve the matter because the employees are "in the middle of it." Sergi replied that if the union representative visits the site again, he (Cabrera) should hit him in the head with a sledgehammer.

Silva testified that in late April, Sergi told him, Barillas and Cabrera that O'Kane was lying to them and he sought to replace them with union workers. Sergi warned them not to speak to union representatives. He advised them that they were not receiving the prevailing wage because they were not "qualified" employees. Sergi told them that if he had to pay the correct wage he would be better off hiring 25 employees. He also told them they should leave the job. Silva further testified that Palmisano asked them at that time to sign a statement dismissing a "charge" against Respondent.

In mid-May, Barillas, Cabrera, and Silva filed complaints with the New York City Office of Comptroller alleging that they had not been paid the prevailing wage for their work on the TAP job. Apparently Silva completed his complaint first, which listed the jobs he had worked on. He testified that Barillas and Cabrera looked at his papers. They decided to file the complaints because they believed that they had been taken advantage of by Respondent and wanted such abuse to stop. Those three employees, together with Michael Giordano, who at that time was no longer employed by Respondent, met at a post office and mailed their complaint forms in one envelope.

On May 26, Cabrera was discharged, as will be more fully described below.

Silva testified that in mid-June, Palmisano asked him to sign a paper withdrawing the prevailing wage complaint, and also to speak to his coworkers and ask them to sign such a paper. Palmisano told him that if the complaint was not withdrawn it might hurt the business. Silva asked whether the company did anything wrong. Palmisano said that it did not. Silva replied then there is nothing to worry about, and refused to do as requested. Palmisano denied asking any employee to withdraw his complaint.

A letter dated June 24 was sent by the Comptroller's Office to Respondent. It advised the company that it was investigating an allegation that Respondent, as a subcontractor to TAP Electric performed work at various locations for the NYC Transit Authority and violated the prevailing wage law. The letter advised that Respondent may be held responsible for such violations and may be required to make payment to the "complaining workers and may be subject to fines and penalties."

Barillas testified that on June 29, Sergi asked him if he sent papers to the Office of the Comptroller. Barillas admitted that he did. Sergi asked him to sign a paper which he had on his desk. Barillas refused. Sergi replied that if he did not sign the papers he could "put immigration on you." Barillas told Sergi to do whatever he wanted "just don't bother me." Sergi asked him to "go take a rest, and when you are ready you can call me and then we can talk." Barillas stated that he called 1 week later but was not able to contact any official of the company. Barillas was not thereafter recalled to work.

Silva testified that on July 8 he was again asked by Sergi to have his coworkers sign a paper withdrawing their prevailing wage complaint. Silva again refused. The following day he was discharged. His discharge will be more fully discussed, infra.

Sergi testified that he was not concerned or afraid that his employees would become unionized, and denied threatening them with discharge if they joined the Union. He stated that Local 361 had no jurisdiction over his employees because its jurisdiction extends only to steel erection and not shopwork. In addition, since this was a public utility job, he was only required to pay the prevailing wage which was equivalent to the union wage, so therefore, according to Sergi, the Union could not "claim the job."

Sergi stated that when the employees returned to the shop early he told them that Local 361 had no right to stop them from working. He conceded that there probably was some discussion with the workers regarding the prevailing wage issue at that time. He stated that he told them they knew that this was a prevailing wage job, and now "all of a sudden you want prevailing wage? I can't pay you the prevailing wage." He told them that they did not have sufficient experience to warrant such a wage rate and that they did not work 8 hours at the jobsite.[3] He told them that he was paying more than the prevailing wage rate. He concluded by telling them to make up their minds—either they could keep working on this job or he would subcontract the work. They agreed to remain on the job.

Sergi conceded that he rebuked the workers for revealing their wage information to "strangers from the street"—apparently a reference to O'Kane. He told them not to speak with anyone unrelated to the job since that would be a waste of their working time.

With respect to Cabrera's allegation that Sergi told him to hit O'Kane, Sergi testified that he believed that his employees were physically afraid of the union people, and he told Cabrera not to be afraid, but that if he is attacked he should defend himself and not let them "kill" him.

Palmisano, who was present on both occasions when the men returned early to the shop, testified that Sergi only told the men that they could not leave the job if someone, even the President, tells them to do so. He denied that there was any discussion about the prevailing wage, unions or threats to employees.

Palmisano denied speaking to any employees about a union, although his pretrial affidavit contained the statement that his employees told him that union representatives came to the jobsite. He denied threatening employees with discharge if they joined the Union.

C. The Alleged Discharges

1. Cabrera

Cabrera was hired by Respondent on June 17, 1997. He performed work including installing beams, welding, and painting and cutting metal inside and outside the shop. He also main-

[3] It was Sergi's belief that union workers were required to work 8 hours at the site.

tained the company's vehicles by fixing their brakes and changing the oil.

Cabrera testified that on May 26, he and employee Audi Campbell were told by Sergi that there was no more work for them because he had a problem with the Union and he could not send any employees "over there," apparently a reference to the TAP job. Cabrera asked why, and Sergi said that there was nothing he could do for them, adding that there was no more work for them so he had to discharge them.

Cabrera replied that there was much work remaining on the TAP job, including the completion of two stations. Sergi answered that he did not want them here "for now." Cabrera was not recalled to work.

Sergi testified that when he released Cabrera and Campbell in May, he was not aware that Cabrera had filed a prevailing wage complaint. The letter dated June 24 from the Comptroller's office, described above, was not received by Sergi until after Cabrera was terminated.

2. Barillas

Barillas was hired in 1981. He performed welding and cutting work, installed beams and columns, and tied bolts.

Barillas stated that he had been deported by the INS, and that Palmisano and Sergi sponsored him so that he could become a United States citizen. He received his "green card" in 1985 or 1987.

In mid-March 1998, Barillas was laid off from the TAP job for 1 week for lack of work. At the same time, Giordano was laid off for a few days because of lack of work.

As set forth above, on June 29, Barillas admitted to Sergi that he sent papers to the Office of the Comptroller. Sergi asked him to sign a paper which Barillas refused to do. Sergi then threatened him with the INS if he did not sign, and then told him to take a rest and call when he was ready to talk. Barillas was not employed by Respondent after that day.

Sergi testified that when he laid off Barillas he was aware that the Comptroller's office was investigating a complaint that had been filed with it. Although he did not know the nature of the complaint or who had filed it, he knew that the complaint involved the TAP contract. He also must have known that employees filed the complaint since the letter stated that Respondent may be required to make payment to the "complaining workers." He further stated that he may have asked Barillas if he knew anything about the complaint. Sergi denied asking Barillas to withdraw his complaint because he did not know that he filed a complaint. However, I find that the paper that Sergi asked to sign was a document withdrawing the prevailing wage complaint, as will be discussed, infra. Moreover, in view of my finding that Sergi demanded that Barillas withdraw his complaint, it follows that Sergi believed that he filed it. In addition, inasmuch as Sergi was admittedly resentful that Barillas refused to honor their agreement that he would not be paid the prevailing wage for the TAP job, it is likely that Sergi would have demanded that Barillas withdraw his complaint, thereby acknowledging their agreement.

Sergi stated that during the conversation in which he laid off Barillas, he told Barillas that with respect to the prevailing wage complaint, Barillas knew that they had an understanding, set forth above, that he would not pay employees prevailing wage for this job, but that they would be paid from the time they punched in at the shop. He added that in view of that understanding he agreed to do the work with Respondent's employees and not subcontract it. According to Sergi, Barillas replied that he was aware of their agreement but it was not in writing. With that, Sergi became angry and resentful at his answer, reminding Barillas of all he did for him, such as paying his bail money when he was arrested and deported, and sponsoring him for a work permit and for legal residence by certifying that he had a needed skill.

Sergi testified that he could not recall if he told Barillas at that time that he should call the INS now, or he should have made a call at the time of Barillas' problems with his citizenship.

Sergi denied threatening to discharge Barillas unless he convinced other employees to withdraw their prevailing wage complaints, adding that he had already decided to lay him off because there was no other work. Sergi conceded, however, that he told Barillas to stay home for a "little while" until work became available, because there was no work.

Respondent argues that Barillas is a statutory supervisor. The evidence as to that issue is as follows:

Palmisano works for the most part in the shop, coordinating the fabrication of steel, ordering materials, and laying out the work for the employees working there.

Palmisano and Sergi have authority to hire and fire employees, although Sergi is generally the person who takes such action. They both recall employees from layoff. Palmisano stated that Barillas never had any of those functions. He further stated that he or former employee Giordano gave employees their assignments. Palmisano stated that Barillas did not tell employees what they were supposed to do. However, Barillas was more experienced than other employees due to his long work history with Respondent.

Sergi testified that Palmisano was very rarely absent from work, but when he was, Sergi supervised the workers or he designated someone by seniority or other means to be the supervisor or foreman. Such a supervisor could hire or fire employees but that authority was never exercised by the supervisor.

Palmisano worked in the field 15 to 20 percent of his time. Sergi stated that when Palmisano was not present at the outside jobsite he (Sergi) gave Giordano and Barillas the authority to hire and discharge. Sergi stated that when Barillas was working on a job he told Sergi that an employee member of Local 580 Ironworkers who was employed by Respondent for that job, refused to work. Sergi told him that he had the authority to fire the man and should do so. Sergi did not know whether Barillas actually discharged him.

In any event, during the material times herein, Sergi conceded that from March 1998 to the time of Barillas' discharge, Barillas did not hire or fire anyone.

Cabrera and Silva wrote on their prevailing wage complaints that Giordano and Barillas were their "supervisor and/or foreman." Cabrera testified that Palmisano and Barillas told him what to weld. Barillas, who was a more experienced welder than Cabrera, also did welding work when they were on the

same job. Cabrera further stated that Palmisano gave the blueprints to Barillas who explained to the workers the work that had to be performed. He described Barillas' main function as ensuring that the men did not get hurt. Cabrera did not regard Barillas as the foreman or leadman. Barillas was a more experienced welder who did such work more than 50 percent of the time. The rest of his time was spent tying bolts, hanging beams and measuring. Cabrera also stated that Barillas never disciplined any employees and that when he wanted a day off from work for vacation or a sick day he would ask Palmisano.

Barillas stated that he was "sort of a foreman" in the absence of Palmisano from the josbite. He denied hiring or firing anyone or recommending such action.

3. Respondent's economic defenses to the discharges of Cabrera and Barillas

As set forth above, I find that Respondent discharged Cabrera in late May and Barillas in late June. Respondent argues that it laid off and did not recall Cabrera and Barillas for lack of work.

Cabrera testified that he worked every day from April until his termination in late May. He stated that when he was released, 25 percent or 1-1/2 months of the TAP job remained to be performed. Silva stated that prior to his discharge in early July, work including the fabrication of stairs at the Far Rockaway station remained to be done.

Sergi testified that in May, the TAP job was nearing its conclusion and very little work remained. The stations they worked on at that time were the last work to be performed on that job. Respondent had no other work where it had shop drawings approved which was ready to fabricate, or if shop drawings were approved, the work was not ready to be performed. Palmisano testified that as of the date of the hearing, 5 percent of the TAP job remained, which included work to be performed following approval of drawings by the Transit Authority.

Sergi testified that in the past, Respondent has had occasional periods when it had little work. He stated that during periods of a short slow down, he "always tried to keep the men busy" by working in the shop doing such chores as painting, cleaning and fixing broken materials. He stated that he tried to keep the employees "doing nothing" so that in the event a new job became available, they would have work to perform. This was corroborated by Cabrera who stated that he, Campbell, Barillas, and Gonzalez performed work at Sergi's home. However, Cabrera further stated that when he did such work, there was also work in the shop and much work remaining on the TAP job. Sergi stated that in this regard he was reluctant to send the men home so he "made work" and employed them in his house at which they worked 1 to 2 weeks.

Despite this effort, Respondent has in the past laid off employees when there was a lack of work. Thus, Barillas had been laid off, Silva had been laid off three times, and on one such occasion Palmisano said that he would recall him in 2 or 3 months if work became available.

In late May, Palmisano went on vacation. Prior to his leaving, he and Sergi agreed that since no work was being received by Respondent it had to lay off two employees. Seniority and skill level were taken into consideration. Accordingly, Cabrera and Audi Campbell were laid off in May. Sergi stated that he told them that no work was ready, and he asked them to stay home "a little bit" and collect unemployment insurance for a "little while." He told them that when work was available, and if he could use them according to their skill and ability he would recall them.

Sergi stated that Campbell was recalled 2 to 3 weeks after his layoff but he did not return to work. Campbell was recalled before Cabrera because Sergi believed that he possessed slightly more skill, and was more adept at doing small jobs than Cabrera. At that time there was no work involving the fabrication of major structural pieces. Sergi did not recall Cabrera because he was not skilled at the type of work that was then available.

Sergi stated that since Campbell did not return to work and Cabrera was not recalled, Palmisano first did the work himself, and then hired three employees: Isaias Patrocino, Satnarine Premnoff, and Jeffrey Perez.

Patrocino, who earned $15 per hour was hired after Silva's discharge in July.[4] His exact date of hire was not provided. Patrocino worked periodically for Respondent for 20 years. It called him to work when he was needed. He worked only 1 or 2 weeks when hired in about July and performed welding work. He quit without notice. Sergi characterized him as an "excellent and highly specialized welder who could perform very fine work." Sergi did not believe that Cabrera could perform the type of work that Patrocino did. However, Sergi believed that Barillas could do such work, and termed Barillas an "excellent welder who could weld structural steel of high quality." However, Sergi stated that Barillas was not recalled because his main skill was the installation of structural and miscellaneous ironwork—outside work.

Premnoff was hired on August 28 and earned $11.70 per hour based on a 40-hour week. He worked only 2 to 4 weeks and then resigned. Sergi testified that Premnoff apparently misrepresented his ability to read drawings and do layouts as he could not do such work. However, Palmisano testified that he was skilled in making railings and was a good welder, and did better work than Cabrera and other employees.

Perez was hired on October 9, earned $10.64 per hour, and was still employed at the time of the hearing. He lays out and fabricates railings, and is able to read drawings. He also welds, does small layout work and some railing work. Sergi stated that his skill "needs cultivating and one day he could be a good worker." Sergi stated that Cabrera could not lay out work from shop drawings in structural steel, but he could do limited welding. He further stated that his work was "not that excellent." Sergi made suggestions and he improved slightly. He had no assembly skills. Sergi further stated that Cabrera is a good worker considering his limited skill, and that he needs more experience and maturity. Sergi stated that Barillas could do perhaps 50 percent of the work that Perez performed, and that Perez is more skilled in the work currently available than Barillas or Cabrera. Palmisano testified that Perez was a welder who had some ability to make railings. According to Palmisano,

[4] All references to hourly wages hereafter are based upon a 40-hour week.

Perez did better work than Cabrera and was more skilled then Barillas. He was hired to fabricate items in the shop.

Sergi stated that upon the layoff of Cabrera in May, any work remaining to be done on the TAP job was performed by Palmisano and Barillas. Upon the layoff of Barillas in June, no further work was performed on the TAP job, inasmuch as all the stations had been completed.

Sergi testified that in the spring 1998, Respondent had a backlog of work amounting to $200,000 to $300,000 which constituted only 10 percent of its typical backlog. The reason for this falloff of business was that the TAP job was a "disaster," the employees were not efficient, he had to dedicate much time to coordinating the job and as a result he could not bid for new work. It should be noted, however, that there was no evidence that any of the work performed by the employees was unsatisfactory or that there was any delay caused by inferior work.

Respondent produced a chart which purported to show which employees were laid off, who was hired and who worked on a daily basis. There were also entries for nonproductive time and other entries made for the purpose of cost accounting records.

4. Silva

Silva was hired in September 1989.[5] He worked as a welder, drove a truck, operated a crane and did fabrication work in the shop.

Silva testified that on July 8, Sergi requested that he ask his coworkers to sign a form withdrawing their prevailing wage complaints. Silva refused. At that time, Sergi also told him that he was told by an employee of Mighty Good Gas, the gas station that Respondent uses to fill its vehicles, that he had filled his own car with gasoline and charged it to Respondent's account. Silva denied doing that.

The following day, Silva was discharged. He was told by secretary Susan Ziello that he was fired for "misbehavior."

Respondent asserts that Silva was discharged for filling the tank of his personal car with gasoline at the gas station and charging it to Respondent's account.

Navdeep Kumar, a gasoline attendant at Mighty Good Gas, testified that beginning in early May, Silva brought his personal vehicle, a Ford Taurus, to the station and had it filled with gas, each time stopping the pump at $15. Silva told Kumar to charge that sum to Respondent's account. In filling out the gas receipt, Kumar's usual practice was to write on the receipt the license plate number of the vehicle being filled. However, when Silva's Ford was filled, Silva told Kumar to write the license plate number of Respondent's van. Kumar did so, and Silva signed the receipt. The bills were presented to Respondent which paid the amount set forth on the receipt.

In early July, when Silva made the same request, Kumar asked him why he could not record on the receipt the license plate number of the Ford. Silva became defensive and threatened that if Kumar did not continue this practice, Respondent would take its business elsewhere.

Kumar immediately reported the past practice and this conversation to his uncle, the owner of the gas station, who told Kumar to inform Sergi of the matter.

The next time Sergi came for gas, Kumar asked him whether Silva was a relative or simply an employee. Sergi asked why, and Kumar told him of Silva's demands to have gas for his personal car charged to Respondent and his threat to cease doing business with the gas station if Kumar did not continue to charge Silva's personal gasoline to the company. Sergi asked Kumar how long this has been done and Kumar told him 2 months. Sergi asked if anyone else had engaged in this practice and Kumar said that someone else did the same thing in early 1998. Kumar told him that each time Silva got gas for his personal vehicle, the sum was $15 and the license plate number recorded was that of Respondent's van, GZ8225.

Sergi testified that upon receiving this information, he checked the gasoline receipts and observed that Silva had signed several tickets for $15 which bore the van's license plate number. About 3 to 5 days later, on about July 9, he told Silva what he learned and asked why he did it. Silva said that everyone did the same thing. Sergi asked whom and Silva said that Giordano, who left Respondent's employ 2 or 3 months before, had also engaged in that practice. Sergi asked how Silva could have done this when Sergi sold him a car and forgave part of the sales price. Sergi said that Silva's reply was that he agreed to quit his job, but then immediately said that he preferred to be discharged. Sergi said he would let Silva know his decision later that day. Sergi decided that he could not trust Silva since he stole from Respondent and decided to discharge him. He directed secretary Ziello to tell Silva that he was fired. She did so. Ziello and Palmisano, who were present at the meeting with Silva, corroborated Sergi's testimony concerning that meeting.

At hearing, Silva denied the gas theft accusations against him. He stated that he occasionally had the tank of his Ford filled but always paid for it and did not ask that it be charged to Respondent's account.

A review of a summary of the gasoline receipts establishes that on April 13, 28, May 14, 22, 29, and June 4, 9, 17 and 25, Silva signed a receipt for $15 worth of gasoline which was charged to Respondent's van. It should be noted that June 25 was Silva's last purchase of gasoline. Shortly thereafter Kumar brought the matter to Sergi's attention and Silva was discharged.

There was evidence of other theft in the shop. Palmisano testified that Silva was a trusted employee who had the keys to the shop and its alarm combination. In 1997, a $400 band saw was missing. Palmisano asked Silva if he knew anything about it. Silva said that he did not. A few days later, Silva told Palmisano that Giordano stole the saw but that he did not want to become involved, and did not want to "fight" anyone and did not want to have a bad relationship with his coworkers.

Palmisano told Silva to return the saw. He refused because the other workers would think that he was the thief. Palmisano and Sergi decided not to confront or discipline Giordano or ask that he return the saw. They did not take any action against him because Silva did not want problems with the other employees, and Respondent's officials did not want any strife between them, and Palmisano did not know who to believe—Silva or

[5] The parties stipulated to his hire date.

Giordano. Another factor which entered into the decision not to discharge Giordano was that he was a long-tenured employee of 18 years. The shop keys were taken from Barillas and Giordano in order to prevent future thefts.

Sergi testified that he considered Respondent as family, and its employees as part of the family. He repeatedly testified that he helped his employees whenever he could. Thus, when Silva needed a letter to return from Brazil following a lengthy visit to his sick mother, Sergi provided the letter, even to the extent of lying about his qualifications, and rehired him. Sergi also sold him a car but forgave half the payment after Silva said the car needed repairs. Similarly, as set forth above, Sergi paid bail money for Barillas when he was deported, and sponsored him for legal residence status.

III. ANALYSIS AND DISCUSSION

A. Interference with Employees' Section 7 Rights

The complaint alleges essentially that Respondent unlawfully (a) threatened its employees with discharge; (b) directed its employees to engage in physical violence towards union representatives if the representatives returned to the jobsite; (c) warned and advised its employees against talking to union representatives; (d) interrogated its employees regarding their protected concerted activity of filing prevailing wage complaints; (e) warned and advised its employees to withdraw their prevailing wage complaints, and demanded that they solicit withdrawals from other employees of their prevailing wage complaints; and (f) threatened its employees that it would report them to the INS unless they withdrew their prevailing wage complaints.

I credit the testimony of the employee witnesses concerning the above incidents. Sergi and Palmisano were admittedly angry and upset that Union Representative O'Kane visited the jobsite and spoke to their employees. Although they correctly told the employees that they should not stop the job unless directed by Respondent's representatives or officials of TAP or the Transit Authority, nevertheless their accompanying threats, warnings, and directions to employees violated the Act. The employee witnesses' insistence that they completed the prevailing wage complaints independently is not believable in view of the identical listing of jobs and other details in each complaint form. However, although their credibility in that regard was somewhat lacking, it was not fatal to their credibility as a whole, particularly as to conversations with Respondent's officials. Such conversations, in which they were threatened with discharge and told to attack union representatives, must have left an indelible impression upon them, and I credit their consistent, forthright, and mutually corroborative testimony when their recitation of the facts differed from that of Sergi and Palmisano.

I find that the employees were unlawfully threatened with discharge. I find that Sergi told the employees that he did not want a union on the job, and would not pay them union wages or the prevailing wage and that if they did not want to work under those terms, "the door is open," and they should leave. The employees' mutually corroborative testimony that Sergi threatened them with discharge because of their concern about not being paid the prevailing wage or their interest in a union convinces me that these threats were made. I cannot credit Sergi's testimony that he was not concerned or afraid that the employees would become unionized because Local 361 had no jurisdiction over the type of work done by Respondent. Sergi's admitted reason for saying this was that since he was required to pay the prevailing wage which was equivalent to the union wage, he was not concerned by the Union. Sergi's testimony is undermined by the fact that Respondent was not paying the prevailing wage to its employees. Although Local 361 may have had no interest in representing the employees, and even assuming that it had no jurisdiction over Respondent's shop, Sergi was concerned that Union Representative O'Kane was speaking to his employees, and that they were giving him information concerning their wage rate. He admittedly chastised the employees for revealing their wage rates to "strangers." Thus, Sergi was concededly concerned with the employees' involvement with the Union. It should also be noted that Sergi admitted threatening employees with subcontracting their work if they were not satisfied with their wages. Thus, he conceded telling the workers that they should make up their minds—either they could keep working on the TAP job at their current wages, or he would subcontract the work. Accordingly, if he had to pay the prevailing wage he would eliminate their jobs. That in itself is an unlawful threat to subcontract work because of their voicing displeasure at not being paid the prevailing wage.

The presentation of a wage grievance or a demand for higher wages constitutes protected, concerted activity. *Liberty Ashes & Rubbish Co.,* 323 NLRB 9, 12 (1997). Specifically, a threat to file a prevailing wage claim constitutes protected, concerted activity. *Williams Contracting,* 309 NLRB 433, 438 (1992). In addition, the employees were engaged in union activity by speaking to Union Representative O'Kane. The evidence establishes that Respondent threatened its employees with discharge when they presented a claim to be paid the prevailing wage, and that Respondent knew that that claim was promoted by the Union.

I also find that, as alleged in the complaint, Respondent directed its employees to engage in physical violence toward union representatives. I credit the testimony of the employees that Sergi told them to hit the union representative in the head with a hammer if he visited the jobsite again. The employees' consistent testimony that Sergi gave this instruction at a time when they returned to the shop early after having been approached by O'Kane is believable. Sergi was admittedly upset that the men left the jobsite early and blamed O'Kane for causing them to stop work. I cannot credit Sergi's testimony that he believed that his employees were physically afraid of the union representatives, and he merely told Cabrera to defend himself if he was attacked. No employee testified that he was afraid of O'Kane or any other union representative. They left work early not because they were afraid of being attacked but because they wished the matter to be resolved between Respondent and the Union and did not want to be in the "middle" of the controversy. It is unlikely that the union representative would have threatened the employees especially since they testified that they sought his advice as to how to obtain the prevailing wage, and he assisted them by giving them the complaint forms.

Advising an employee to assault a union representative has an intimidating effect and interferes with the rights of employees under Section 7 of the Act to form, join, or assist labor organizations free from interference by Respondent. *Beverly California Corp*., 326 NLRB 153 (1998), where the employer told an employee to tell a union representative that he would be killed; *Rainbow Garment Contracting*, 314 NLRB 929, 937 (1994), where employees were told of threats made to union agents.

I further find that Sergi warned his employees not to speak to union representatives. He conceded that he told them not to speak to anyone unrelated to the job since that would be a waste of their working time. I credit Silva's testimony that Sergi told the men simply not to speak to union representatives. This directive is an unlawfully broad prohibition against employees' union activity during their nonworktime. Even assuming that the rule encompassed worktime, there was no evidence of such a directive against talking about other subjects while working. *Industrial Wire Products,* 317 NLRB 190 (1995). I accordingly find Sergi's direction to employees not to talk to union representatives was unlawful.

I further find that on June 29, Sergi questioned Barillas concerning whether he sent a complaint to the Office of the Comptroller, and asked him to sign a paper. Barillas refused. I credit Barillas' testimony that Sergi then warned him that if he did not sign, he (Sergi) could "put immigration on" him. I find that Sergi's request that Barillas sign a paper was a request that he sign a document withdrawing his prevailing wage complaint. Other employees testified that they were asked to sign such a paper. Thus, Silva testified that in mid-June, Palmisano asked him to withdraw the complaint, and also requested that he speak to his coworkers and ask them to sign a form dismissing the prevailing wage complaint.[6] I credit the employees' testimony concerning this request. Sergi's testimony tends to confirm that this request occurred. Thus, Sergi testified that he told the employees that they knew that this was a prevailing wage job, and now "all of a sudden you want prevailing wage? I can't pay the prevailing wage." Although Sergi's admitted comments occurred before the complaints were filed, it indicates that Sergi was angry at their seeking the prevailing wage, and would seek to have them withdraw their complaints. Moreover, Sergi admitted that he may have asked Barillas if he knew anything about a prevailing wage complaint. I cannot credit Sergi's denial that he asked Barillas to withdraw the complaint since he did not know who filed it. It is clear that when Barillas was discharged Sergi knew that a complaint had been filed. It is also clear that the letter from the Comptroller's Office advised Respondent that it may have to reimburse its "complaining workers." Thus, Sergi must have known that all or some of the employees had filed complaints.

The Board has held that interrogation of employees concerning letters of complaint to a Governmental agency violates Section 8(a)(1) of the Act. *Frances House, Inc*., 322 NLRB 516, 522 (1996). It is also a violation to ask employees to withdraw their petitions or claims. *Apollo Construction Co.*, 322 NLRB 996, 1003 (1997); *Norbar, Inc*., 267 NLRB 916, 917 (1983). I accordingly find that Respondent's interrogation of Barillas, and its request to its employees to withdraw the prevailing wage complaints violated the Act.

I further find that Sergi threatened to report Barillas to the INS if he did not withdraw his prevailing wage complaint. I credit Barillas' testimony that at his discharge interview on June 29, Sergi asked him to sign a paper which he believed to be related to the prevailing wage complaint, and upon his refusal was told that he could "put immigration on you." Barillas told Sergi to do whatever he wanted. He was then told to leave and take a rest and that he (Barillas) should call when he wanted to talk. He was not recalled to work thereafter. Sergi conceded that he mentioned the Immigration Service during his discussion with Barillas, adding that he either told him that he should call the INS now, or he may have said that he should have called when Barillas had immigration problems earlier.

It would not have made sense for Sergi to simply remind Barillas that he should have called the INS in the past. Barillas received his "green card" more than 10 years before his discharge, and it would not have helped Sergi's effort to convince Barillas to sign the paper to merely tell Barillas that he regretted not having called INS 10 years earlier. Rather, I find as testified by Barillas and as Sergi conceded he may have said, he threatened to call INS on June 29. Further support for this finding is found in Barillas' response to this threat. He told Sergi to do whatever he wanted to do. He would not have responded in that manner if Sergi had just lamented the fact that he had not called INS in the past.

The Board has held that it is a violation of the Act to threaten employees with deportation or the invocation of the immigration authorities because of their protected activities. See *Orbit Lightspeed Courier Systems*, 323 NLRB 380, 391 (1997); *Great American Products*, 312 NLRB 962, 966–967 (1993). Here, Sergi's threat to report Barillas to the INS if he did not withdraw the prevailing wage complaint violated the Act. Although Barillas may have been a legal citizen at the time of the threat, the warning nevertheless tended to interfere with Barillas' Section 7 rights.

B. The Discharges

1. Cabrera

In order to establish an unlawful discharge, the General Counsel is required to show by a preponderance of the evidence that animus against protected conduct was a motivating factor in the employer's conduct. Once this showing has been made, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. To sustain her initial burden, the General Counsel must show that (a) the employee was engaged in protected activity; (b) the employer was aware of the activity; and (c) the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue which the expertise of the Board is peculiarly suited to determine. *Naomi Knitting Plant, Division of Andrex Industries Corp.*, 328 NLRB 1279 (1999).

[6] Silva's other testimony that such a request was made in late April is incorrect since a complaint had not been filed at that time.

As set forth above, Cabrera engaged in union activities by speaking to Union Representative O'Kane, and he engaged in protected concerted activities by complaining about not receiving the prevailing wage. These facts were known to Respondent at the time of his discharge. In addition, I have found that Cabrera was the subject of unlawful threats of discharge, a direction to physically attack O'Kane, and a warning not to speak to union representatives. Respondent's union animus and anger toward its employees for complaining about not receiving the prevailing wage is amply demonstrated in the record. Thus, Cabrera and the other employees were threatened with discharge if they did not like the wages they received or the fact that Respondent was a nonunion shop. Following Cabrera's discharge, Respondent unlawfully sought to have employees withdraw their prevailing wage complaints.

The timing of the discharge, on May 26, followed closely the above threats, warnings and directions made to Cabrera.

I accordingly find that the General Counsel has established that the union activities and the protected concerted activities of Cabrera were motivating factors in Respondent's decision to discharge him. *Wright Line,* 251 NLRB 1083 (1980).

Having found that the General Counsel has established unlawful motivation in the discharge of Cabrera, the burden shifts to Respondent to prove that it would have discharged him even in the absence of his union and protected, concerted activities. *Wright Line*, supra. I find that Respondent has not met its burden.

I credit Cabrera's testimony that when he was discharged he and Campbell were told by Sergi that there was no more work for them because he had a problem with the Union and he could not send any employees "over there." Cabrera asked why and Sergi said that there was nothing he could do for them, and there was no more work for them. When Cabrera answered that there was a lot of work on the TAP job, including 2 more stations to be completed, Sergi said that he did not want them here "for now." Sergi's statements clearly show that he did not want to send employees to the TAP job because he sought to avoid further confrontations with the Union. That is an impermissible basis upon which to discharge them.

Respondent claims that it laid off Cabrera for lack of work, and did not discharge him. That assertion is not supported by the facts. Respondent has not shown that it had less work in late May when it laid off or discharged Cabrera. The chart it produced only shows the hours of work engaged in by its employees, and not the amount of business it had. No credible proof was presented that its business slowed down in late May at the time of Cabrera's termination. Indeed, Sergi testified that at the time of Cabrera's layoff it had a backlog of work of $200,000 to $300,000. In fact, although Palmisano and Sergi testified that in May 1998 only 5 percent of the TAP job remained to be performed, a form completed by it in February 1999, 8 months later, stated that TAP was still a "current job."

Although I am aware that in the past employees such as Barillas and Silva had been laid off for short periods of time due to lack of work, there has also been evidence that in times of slow work, Respondent continues to employ its workers. Thus, Respondent's chart of work performed by employees indicates that following Cabrera's release, it employed Barillas, Rodriguez and Silva at various times in doing work designated as "90"—which Sergi characterized as "miscellaneous shop work, nonproductive time, wasting time, nothing to do, cleaning shop, painting, organizing tools." He stated that he had the men "do something in the shop to stay there. I can't send them home and we pay them." Further, there was evidence that during times of slow work the employees painted Sergi's home. He stated that the employees spent 1 or 2 weeks doing such work.

Even assuming Cabrera was laid off, Campbell, who was laid off at the same time as Cabrera, was recalled 2 to 3 weeks after their layoff. Respondent's explanation for choosing Campbell for recall was that he had "slightly more skill" at small jobs, the type of work Respondent was then doing, than Cabrera. However, Campbell did not return to work upon his recall. Respondent then hired successively, Patrocino, Premnoff, and Perez.

Respondent's reasons for not recalling Cabrera, and instead hiring those three men do not withstand scrutiny. Assuming Sergi's testimony that Patrocino was a skilled welder and that Cabrera could not perform to his standard, Patrocino was employed for only 1 or 2 weeks. There was a conflict in the testimony of Sergi and Palmisano concerning Premnoff. Sergi said that Premnoff misrepresented his ability to read drawings and do layouts, he could not do such work, and resigned after 2 to 4 weeks. Palmisano, however, stated that he was skilled in making railings and was a good welder. Cabrera was a welder. There was no evidence that his work was criticized during his employment with Respondent.

Regarding Perez, although I am aware that Sergi stated that Perez was a better worker and more skilled than Cabrera, his estimation of both men's potential was very similar. Thus. Sergi stated that Perez' skills need cultivating and one day he could be a good worker. As to Cabrera, he stated that he was a good worker but needed more experience and maturity, and when he made suggestions Cabrera improved slightly.

Although I am aware that Sergi stated that Cabrera's work consisted of outside installation jobs of which there were none when these three men were hired, there was no showing that Cabrera could not perform this work, or had not performed that work in the past. Thus, Cabrera testified that he had welded, painted metal and cut metal inside the shop.

I accordingly find and conclude that Respondent has not met its burden of proving that it would have discharged Cabrera even in the absence of his union and protected, concerted activities.

2. Barillas

a. Supervisory status

Respondent argues that Barillas is a statutory supervisor. The evidence does not support that assertion.

Section 2(11) of the Act defines the term "supervisor" as

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such author-

> ity is not of a merely routine or clerical nature, but requires the use of independent judgment.

Barillas was an ironworker who performed the same type of work on construction jobsites as the other employees. The only arguable areas in which Barillas could be considered a supervisor is in his direction of work and assignments to employees at the jobsites. Inasmuch as Palmisano was at such sites only 15 to 20 percent of his worktime, it is clear, as testified by Cabrera, that Barillas told him what to weld, and explained what work had to be done. Cabrera did not regard Barillas as a foreman or leadman, but merely a more experienced welder.

The Board has held that the direction of lesser skilled employees by skilled journeymen is "not the type of authority contemplated in the statutory definition of a supervisor." *Gerber Co*., 270 NLRB 1235, 1238 (1984), citing *Southern Bleachery & Print Works*, 115 NLRB 787, 791 (1956). In addition, it appears that the instructions given by Barillas do not require independent judgment, but constituted the authority of a skilled employee over an unskilled worker. *First Western Building Services,* 309 NLRB 591, 601 (1992). Barillas acted as a conduit of information, first receiving the blueprints from Palmisano and then explaining the work to the men. *A.J.R. Coating Corp*., 292 NLRB 148, 164 (1988). It should be noted that when Cabrera wanted a day off from work he would ask Palmisano.

In finding that an ironworker who instructed coworkers where and how to tie rods and other work called for by the blueprints was not a statutory supervisor, the Board noted that "the fact that an employee exercises superior skills and has long experience . . . does not warrant the conclusion that he is a supervisor within the meaning of Section 2(11) of the Act. *Iron Workers Local 272 (B & B Steel Contractors),* 228 NLRB 89, 91 (1977).

Sergi testified that he gave Barillas the authority to discharge an ironworker union member for not working, but he did not know whether Barillas actually fired him. On the other hand, Palmisano testified that Barillas never had authority to discharge employees. This speculative authority to discharge cannot support a finding that Barillas is a statutory supervisor.

I accordingly find and conclude that Barillas is not a supervisor within the meaning of Section 2(11) of the Act.

b. The merits

As set forth above, Barillas engaged in union activities by speaking to Union Representative O'Kane, and engaged in protected, concerted activities by complaining about not receiving the prevailing wage, and filing a prevailing wage complaint. These facts were known to Respondent at the time of his discharge. In addition, I have found that Barillas was the subject of unlawful threats of discharge, a direction to physically attack O'Kane, and a warning not to speak to union representatives. He was also interrogated by Sergi concerning his filing the complaint, and asked to sign a statement withdrawing the complaint. I have also found that Sergi threatened to call the INS if Barillas did not withdraw his complaint.

Respondent's union animus and anger toward its employees for complaining about not receiving the prevailing wage is amply demonstrated in the record. Thus, Barillas and the other employees were threatened with discharge if they did not like the wages they received or the fact that Respondent was a nonunion shop.

Respondent argues that Barillas was laid off for lack of work and not discharged. The discharge interview establishes that Barillas was fired. At that interview, Sergi asked Barillas to sign a statement withdrawing his prevailing wage complaint, and when Barillas refused, Sergi threatened to call the INS. Sergi admittedly was angered when Barillas acknowledged their alleged agreement that he would not receive the prevailing wage for the TAP job, but noted that their understanding was not in writing. I have found that Barillas was told that he should "take a rest" and when he was ready he should call and then they would talk. Sergi conceded telling Barillas to stay home for a little while as there was no work.

The above recitation clearly establishes that Barillas was discharged.

> The test for determining whether [an employer's] statements constitute an unlawful discharge depends on whether they would reasonably lead the employees to believe that they had been discharged and the fact of discharge does not depend on the use of formal words of firing. . . . It is sufficient if the words or actions of the employer would logically lead a prudent person to believe his tenure has been terminated. *Ridgeway Trucking Co.*, 243 NLRB 1048, 1049 (1979).

It is clear that Sergi would have been and was resentful at the lack of loyalty shown by his employees. This is made very evident during the discharge interview of Barillas in which he "resented" Barillas' remark that their agreement concerning pay was not in writing. Obviously Sergi was angry at the employees' filing the prevailing wage complaints and he considered their action as disloyalty.

Thus, immediately after refusing to withdraw the prevailing wage complaint, Sergi told Barillas to leave. Sergi was in effect telling Barillas to think about his refusal to withdraw his complaint, and that he should call when he wanted to talk about it. I accordingly find that Barillas was discharged. It is unlawful to discharge an employee because he has engaged in union activities or complained with others about his wages or filed a complaint concerning his wages, or refused to withdraw such complaint. *Frances House*, supra*; Williams Contracting,* supra.

I accordingly find that the General Counsel has established that the union activities and the protected concerted activities of Barillas were motivating factors in Respondent's decision to discharge him. *Wright Line,* supra.

I find that Respondent has not met its burden of proving that it would have discharged Barillas even in the absence of his union and protected, concerted activities.

Respondent alleges that it laid off Barillas for lack of work. However, as set forth above, Respondent produced no credible evidence that it had less work when Barillas was discharged. Further, Respondent has retained employees during periods of lack of work by performing work in the shop and such as work as painting Sergi's home.

Following Barillas' discharge, Respondent hired Patrocino, Premnoff, and Perez. Respondent could have recalled Barillas.

Sergi testified that Barillas was an "excellent welder" who could perform the work that Patrocino did. Although Sergi stated that Barillas was not recalled because his main skill was the installation of structural and miscellaneous work which was outside work, there was no showing that with his 17 years of experience with Respondent, he could not have done the inside work performed by Patrocino, or that he had not done such work in the past. Similarly, Sergi stated that Barillas could perform perhaps 50 percent of the work that Perez performed, and that Perez was more skilled than Barillas. However, Perez did among other things welding, which Barillas was highly skilled at. There was no showing that Barillas has not performed the types of work that Perez performed, or that he could not quickly have learned such skills.

I accordingly find and conclude that Respondent has not met its burden of proving that it would have discharged Barillas even in the absence of his union and protected, concerted activities.

3. Silva

As set forth above, Silva had been the subject of an unlawful threat of discharge because of the employees' complaint about not receiving the prevailing wage, and because of Union Representative O'Kane's involvement in the matter. In mid-June, and again 1 day before his discharge, Silva was also unlawfully asked by Palmisano to sign a withdrawal of the complaint, and have his coworkers do the same. He refused.

At the time of Silva's discharge on July 8, Respondent had been notified by the Office of the Comptroller that its employees had complained about not receiving the prevailing wage for their work on the TAP job. While it is true that the letter did not specifically state who had complained, the letter mentioned that Respondent may be liable to reimburse the "complaining workers." Respondent could not doubt that Silva was among the workers who filed the complaint. Moreover, the fact that Palmisano asked him to sign a letter withdrawing the complaint lends support to this finding.

Accordingly, I find that Silva's union activities in speaking to Union Representative O'Kane, his filing of the prevailing wage complaint, and his refusal to withdraw it or ask other employees to withdraw it coming shortly before his discharge establishes that his union activities and protected concerted activity of filing the complaint was a motivating factor in Respondent's decision to discharge him. *Wright Line*, supra.

I find that Respondent has met its burden of proving that it would have discharged Silva even in the absence of his protected activities. *Wright Line*, supra.

Silva concedes that he was told at his discharge interview that Sergi had learned that Silva filled his car with gasoline which he charged to Respondent's account. The credited account of gasoline attendant Kumar supports a finding that Silva had engaged in theft of gasoline. Kumar's detailed recitation of the requests of Silva to fill his personal car with gas and charge it to Respondent, listing its van's license plate number on the receipt, has not been adequately contradicted by Silva's simple denial at hearing.

Kumar reported this practice to Sergi. Sergi promptly began an investigation and discovered that Kumar's accusations were true—that there were a number of $15 charges made to Respondent's van—which had been Silva's practice of charging the gasoline. Three to 5 days after Sergi received this information, he confronted Silva who, I find, admitted the theft. Silva was discharged that day for dishonesty.

The General Counsel argues that the 3-to-5 day timelag shows that Respondent did not conduct a timely investigation into the matter and did not consider this to be a serious offense. I cannot agree. Although no reason was given for the delay between the time of Sergi's becoming aware of the theft and the discharge of Silva, Sergi did undertake an investigation by reviewing the gasoline tickets. The few days involved certainly did not constitute a condonation of Silva's conduct, and upon Silva's admission of the theft he was discharged that day.

The General Counsel further contends that Respondent has tolerated theft in the past, and therefore its discharge of Silva establishes disparate treatment against him. As set forth above, Silva informed Palmisano that Giordano had stolen a $400 saw from Respondent's premises. Palmisano told Silva to return the saw, but Silva refused, saying that he did not want to become involved, and because others would believe that he was the thief. Respondent's actions in not confronting Giordano under the circumstances were reasonable. Palmisano and Sergi explained that they did not want to cause dissension between the workers—and they did not know whether to believe Silva's version that Giordano stole the saw. Nevertheless, Respondent did take remedial action by removing the shop keys from Giordano in order to prevent future thefts.[7]

Inasmuch as I find that Respondent has set forth a reasonable explanation for its failure to discharge Giordano, I accordingly cannot find that Silva has been the subject of disparate treatment against him. Respondent legitimately discharged Silva for theft. *Shen Automotive Dealership Group,* 321 NLRB 586, 600 (1996); *Hampton Inn*, 309 NLRB 942, 946 (1992).

I accordingly find and conclude that Respondent did not violate the Act by its discharge of Silva.

CONCLUSIONS OF LAW

1. Respondent, Westchester Iron Works Corp., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Local 361, Iron Workers, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening its employees with discharge because they supported the Union, and because they engaged in protected, concerted activities, Respondent violated Section 8(a)(1) of the Act.

4. By directing its employees to engage in physical violence towards union representatives, Respondent violated Section 8(a)(1) of the Act.

5. By warning and advising its employees against talking to union representatives, Respondent violated Section 8(a)(1) of the Act.

[7] The General Counsel argues that the fact that Respondent permitted Silva to retain the keys indicates that he was a trusted employee. He was considered trustworthy only until he was caught stealing.

6. By interrogating its employees regarding their filing a prevailing wage complaint with the New York City Office of the Comptroller, Respondent violated Section 8(a)(1) of the Act.

7. By warning and advising its employees to withdraw their prevailing wage complaint, with the New York City Office of the Comptroller, and demanding that they solicit withdrawals of such complaints from other employees, Respondent violated Section 8(a)(1) of the Act.

8. By threatening its employees that it would call the Immigration and Naturalization Service unless they withdrew their prevailing wage complaint with the New York City Office of the Comptroller, Respondent violated Section 8(a)(1) of the Act.

9. By discharging employees Cesar Barillas and Juan Cabrera because of their union and protected, concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act

10. Respondent has not violated the Act in its discharge of Itamar Silva.

REMEDY

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

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of a 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).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

The Respondent, Westchester Iron Works Corp., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening its employees with discharge because they supported the Union or because they engaged in protected, concerted activities.

(b) Directing its employees to engage in physical violence towards union representatives of Local 361, Iron Workers, AFL–CIO.

(c) Warning and advising its employees against talking to union representatives.

(d) Interrogating its employees regarding their filing a prevailing wage complaint with the New York City Office of the Comptroller.

(e) Warning and advising its employees to withdraw their prevailing wage complaint with the New York City Office of the Comptroller, and demanding that they solicit withdrawals of such complaints from other employees.

(f) Threatening its employees that it would call the Immigration and Naturalization Service unless they withdrew their prevailing wage complaint with the New York City Office of the Comptroller.

(g) Discharging or otherwise discriminating against any employee for supporting Local 361, or any other union, or for engaging in protected, concerted activities.

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

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

(a) Make Cesar Barillas and Juan Cabrera 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.

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

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in the Bronx, New York, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 2, 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, 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 April 15, 1998.

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

(f) It is further ordered that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[8] 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.

[9] 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."

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.

WE WILL NOT threaten our employees with discharge because they supported Local 361, Iron Workers, AFL–CIO, or because they engaged in protected, concerted activities.

WE WILL NOT direct our employees to engage in physical violence toward union representatives.

WE WILL NOT warn or advise our employees against talking to union representatives.

WE WILL NOT interrogate our employees regarding their filing a prevailing wage complaint with the New York City Office of the Comptroller.

WE WILL NOT warn or advise our employees to withdraw their prevailing wage complaint, or demand that they solicit withdrawals of such complaints from other employees.

WE WILL NOT threaten our employees that we would call the Immigration and Naturalization Service unless they withdrew their prevailing wage complaint.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting Local 361, or any other union, or for engaging in protected, concerted activities.

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

WE WILL make Cesar Barillas and Juan Cabrera whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

WESTCHESTER IRON WORKS CORP.