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Wayne J. Griffin Electric, Inc. *and* International Brotherhood of Electrical Workers, Local 103, AFL–CIO. Cases 1–CA–34180, 1–CA-34280, 1–CA–34364, and 1–CA–34478

September 27, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On February 4, 1999, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief. The Charging Party also filed exceptions and a supporting brief, and the Respondent 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.[2] 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, Wayne J. Griffin Electric, Inc., Holliston, Massachusetts, its officers, agents, successors, and assigns shall, take the action set forth in the Order.

Dated, Washington, D.C. September 27, 2001

Wilma B. Liebman, Member

John C. Truesdale, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Erica F. Crystal, Esq. and *Susan Lawson, Esq.,* for the Acting General Counsel.

Dion Y. Kohler, Esq. and *Jonathan J. Spitz, Esq.,* for the Respondent.

Burton E. Rosenthal, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in Boston, Massachusetts, on February 10–13, March 24–27, and May 6–8, 1998. The charges were filed and amended, on various dates between June 3, 1996, and March 12, 1997, by International Brotherhood of Electrical Workers, Local 103, AFL–CIO (the Union). Based on these charges and amended charges, the consolidated complaint was issued March 24, 1997, alleging that the Respondent, Wayne J. Griffin Electric, Inc., violated Section 8(a)(1) and (3) of the Act in a number of respects. The Respondent filed its answer to the consolidated complaint on April 4, 1997, denying that it committed the unfair labor practices alleged and raising several affirmative defenses. The consolidated complaint and answer were amended further during the course of the hearing.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed

[1] The Respondent and the Charging Party have 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.

[2] There are no exceptions to the judge's recommended dismissals of the 8(a)(1) allegations regarding the maintenance and enforcement of rules 3.12 and 1.23 of the Respondent's handbook. Nor are there exceptions regarding the reference by the Respondent's president, Wayne Griffin, to employee Stephen Foley as a "troublemaker."

The Respondent has excepted to the judge's findings of violations of Sec. 8(a)(1), based on pars. 7(dd) and (kk) of the complaint, on the ground that the allegations do not support the violations found. We find the Respondent's exceptions without merit. Par. 7(dd) alleges that about June 26, 1996, at a jobsite in Framingham, Massachusetts, the Respondent promised employees benefits if they refrained from union activities. Par. 7(kk) alleges that about July 8, at a jobsite in Framingham, Massachusetts, Griffin told employees they should not associate with prounion employees. The judge found that after employee Sean Schultheis returned to work around June 24 following an injury, he had a telephone conversation with the Respondent's president, Wayne Griffin, in which Griffin asked Schultheis where he wanted to go with the Company. Griffin also advised that Schultheis would be judged by the people he hung around with. This conversation followed Schultheis' being admonished by a foreman for having lunch with an open union supporter. The judge found that these facts supported the allegations of both paragraphs and sustained the alleged 8(a)(1) violations. We affirm the judge's findings. Although both paragraphs referred to a job site rather than a telephone call, and the actual date of the telephone conversation appears to have been sometime between the June 26 and July 8 dates alleged therein, we find that the violations found by the judge are sufficiently related to the allegations in both paragraphs. We further find that the violations were fully and fairly litigated. Indeed, as noted by the judge, Griffin acknowledged the substance of the conversation.

As we adopt the judge's finding that John Leombruno is an agent of the Respondent, we find it unnecessary to pass on the judge's additional finding that Leombruno is a statutory supervisor within the meaning of Sec. 2(11).

[1] After the close of the hearing, the parties entered into a stipulation regarding the contract value of jobs run by certain named foremen.

by the Acting General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with its principal office located in Holliston, Massachusetts, is an electrical contractor in the construction industry. The Respondent annually purchases and receives goods and materials valued in excess of $50,000 directly from points outside the Commonwealth of Massachusetts and performs services valued in excess of $50,000 in States other than the Commonwealth of Massachusetts. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent amended its answer at the hearing to admit, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

The consolidated complaint, as amended at the hearing, alleges 39 instances of independent violations of Section 8(a)(1) of the Act committed by the Respondent's president, Wayne J. Griffin, and several project managers and foremen on various dates between February 20 and December 1996.[2] These alleged violations, which included interrogation, threats, statements of futility, and statements creating the impression of surveillance, allegedly occurred at the Respondent's office in Holliston and at jobsites in Framingham, Mashpee, and Stoughton, Massachusetts. The consolidated complaint further alleges that certain rules maintained in an employee handbook during the 10(b) period, the enforcement of some of these rules through threats and warnings to employees in April, and a revised rule which was issued to employees on November 8, violated Section 8(a)(1) because the rules interfered with, restrained, and coerced employees in the exercise of Section 7 rights. The consolidated complaint alleges that the Respondent further violated Section 8(a)(1) on June 21 by discharging Supervisor James Lexner because he refused to commit unfair labor practices. Finally, the consolidated complaint, as amended, alleges that the Respondent violated Section 8(a)(1) and (3) by issuing verbal and written warnings to Todd Boylan; denying overtime to Steven Foley; and evaluating Dan Ferrick and Richard O'Connell negatively under "Loyalty" because of their union activities and support.

The record establishes that Griffin, the Respondent's president, founded the Company 22 years ago in the basement of his parent's home. At the time of the hearing, the Respondent employed in excess of 350 employees and was organized into two divisions: the service division, supervised by Project Manager Gary Mosca, which typically performs small projects valued at less than $50,000, and the construction division, which is further divided into three regions, i.e., New England, North Carolina, and Alabama. Despite the growth of the Respondent into a large construction contractor with work in far-flung locations, Griffin has remained in control of virtually every aspect of the Respondent's business. The record reflects that he conducts virtually every job interview, makes the ultimate decision to hire and fire employees, is involved in making job assignments, and approving raises and vacation requests. When a job loses money, Griffin decides whether the foreman must complete a detailed questionnaire, referred to as a "job lost form" to account for the loss and then meets with the foreman and project manager to review the performance of the job. The record further reflects that Griffin is not reluctant to telephone employees at home, or visit them at work, when he has a problem or concern. There is also ample evidence in the record to establish that "loyalty," to the Respondent and to its president, is a very important element in the Respondent's corporate culture. Employees and supervisors are evaluated on it, Griffin and many of his supervisors and foremen mention it in conversation and in appraisals of themselves and their subordinates, and it became a factor in the Respondent's opposition to the Union. Thus, it is apparent from this record that Griffin has a lot invested, not only financially but emotionally, in the success of his Company and that he views attacks on the Respondent as personal attacks.

Gerard Richards is the Respondent's operations manager and, essentially, Griffin's right-hand man. Reporting to Richards, and ultimately to Griffin, are project managers whom the Respondent admits are supervisors within the meaning of the Act. The project managers are assigned to oversee one or more construction projects and are responsible for maintaining the profit margin for their respective jobs. The record reflects that these project managers possess and exercise significant authority vis-à-vis the field employees, including assignment and transfer between jobs, overtime authorization, discipline, and recommending raises. The project managers are not resident on the jobs, but work out of the Respondent's Holliston office and visit the jobsites on a regular basis. The project managers also maintain regular contact with the Respondent's project foremen who are present on site and oversee the day-to-day performance of the contract. With the exception of two foremen, Lexner and John Leombruno, the parties agree that the project foremen are not statutory supervisors. However, the General Counsel alleges, and the Respondent denies, that certain foremen named in the consolidated complaint are agents of the Respondent within the meaning of Section 2(13) of the Act. With respect to Lexner and Leombruno, the Respondent identified these two individuals as "large project foremen" to differentiate them from the other foremen named in the consolidated complaint. The General Counsel, while arguing that there is no such position as "large project foreman," alleges that Lexner and Leombruno are statutory supervisors. Respondent agreed with the General Counsel that at least Lexner was a supervisor within the meaning of the Act.

Counsel for the General Counsel attached the stipulation to her brief as Jt. Exh. 1 and moved for its receipt into evidence. Based on the agreement of the parties, Jt. Exh. 1 is received. The transcript contains a number of typographical and spelling errors, some of which have been noted by the Parties in their briefs. Where the error is significant, I have corrected the record in the pertinent portion of this decision.

[2] All dates are in 1996 unless otherwise indicated.

The Respondent is a nonunion, or merit shop, contractor. The record reveals that the Union has utilized various means to have the Respondent become a union-signatory contractor for a number of years without any success. Although the Respondent has occasionally entered into project labor agreements with other International Brotherhood of Electrical Workers (IBEW) local unions, it has never executed a collective-bargaining agreement with the Union. It is undisputed that, in the summer of 1995, while pursuing a bid on the Suffolk County Courthouse construction project, the Respondent contacted the Union for the purpose of discussing a project labor agreement that would apply only to that job. Griffin and Richards met with the Union's former business agent, Donn Berry, and Business Manager Paul Ward and outlined their proposed project agreement. On August 28, 1995, a written proposal was submitted to the Union. There is no dispute that the Union rejected this proposal, requesting that the Respondent instead sign a collective-bargaining agreement covering all work within a 50-mile radius of Boston. Although initial contacts appeared promising, the relationship between the parties soured, apparently as the result of a comment made by Berry to Richards in which he made a reference to "big guns" in an attempt to pressure the Respondent to come to agreement with the Union. Regardless of the exact phrase used by Berry, or his intent, it is clear that Griffin objected to Berry's approach to negotiations and no further discussions were held between the parties.

In early 1996, the Union began a "salting"[3] campaign to organize the Respondent's employees. In evidence is a February 15 letter from Berry to the Union's members enlisting their assistance in the Union's efforts to organize the Respondent, "a notorious, nonunion contractor," by becoming salts. The Union held meetings and training sessions at which members were taught how to gain employment with the Respondent and organize its employees. There is no dispute that members were given advice regarding how to lie on their employment applications to conceal their identity as union members. The complaint alleges that four union members who applied for jobs with the Respondent, in March, April, and July, were interrogated by Griffin or Sandy Crowe, the Respondent's human resource manager.

In early 1996, the Union also began a campaign to have the Respondent's debarment from Federal contracts reinstated.[4] This campaign was publicized in the Boston newspapers and generated a February 20 memo from the Respondent's president to its field employees. The complaint alleges that statements in this letter interrogated employees and created the impression that their union activities were under surveillance. About a month later, Griffin sent another memo to his field employees regarding the Union's attempts to have the Respondent barred from performing public works projects for the Commonwealth of Massachusetts. This letter is alleged to contain similar unlawful statements.

There is no dispute that the Respondent has routinely distributed to its employees handbooks containing, inter alia, rules of conduct and specifying the discipline which may result from their violation. Employees sign forms acknowledging receipt of the handbook and agreeing to read and comply with the rules and procedures contained therein. As noted above, several of these rules are cited by the General Counsel as unlawfully interfering with employees' Section 7 rights. There is no dispute that, on April 23, the Respondent issued written warnings to employees Maguire and Boure for violating one of these rules, prohibiting the discussion of wages. On May 29 and June 13, however, the Respondent rescinded these warnings and on November 8, issued revised rules which attempted to correct some of the concerns cited by the General Counsel. One of the issues in this case is whether the Respondent's attempt to cure these alleged unfair labor practices was effective under the Board's *Passavant* line of cases.[5]

Beginning in about April, and continuing at least through June, the Union began an overt organizing campaign among the Respondent's employees, utilizing several longtime members who had been hired by the Respondent, including Todd Boylan, Steve Foley, Maguire and Frank Bonito. This organizing occurred primarily at two jobs in Framingham, Massachusetts, i.e., Bose[6] and Adessa, and at the Mashpee School. On May 31, the Union staged a walkout lasting several days during which these and other union members picketed at the Respondent's jobsites. The walkout ended on June 6. No more than a dozen employees participated in the walkout. It is undisputed that, in response to this union activity, Griffin visited several jobsites and met with employees, individually and in groups, to express his views regarding the Union. At issue in this case is whether any statements he made in the course of these meetings violated the Act. Several project managers and foremen also discussed the Union with individual employees during the spring and summer and the lawfulness of these conversations, as well as whether the Respondent is liable for the statements and conduct of its nonsupervisory foremen are also at issue.

On June 21, the Respondent admittedly terminated Lexner, whom the General Counsel concedes was a statutory supervisor. The General Counsel and the Charging Party contend that he was discharged for refusing to commit an unfair labor practice. The Respondent denies that Lexner was asked to commit any unfair labor practices and asserts that he was terminated for poor performance as foreman on the Bose job. Shortly after Lexner was terminated, the Union notified the Respondent, by letter, of the identity of its employee-organizers, including Boylan, Ferrick, and Foley. Actions taken against these individuals and employee O'Connell, not named in the Union's letter, are alleged to have violated Section 8(a)(3).

Although most of the union activity and the Respondent's response occurred in the period April through June, there are

[3] The transcript erroneously refers to this practice as "soughting." I shall correct the record to have "salting" replace "soughting" wherever it appears.

[4] At some undisclosed date in the early 1990s, the Respondent had been placed on a list of companies excluded ("debarred") from Federal procurement because of Davis-Bacon Act violations. In September 1994, the Respondent was removed from this list, upon a petition it filed.

[5] *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

[6] The name of this project is spelled incorrectly at various points in the transcript. The record is corrected to replace "Bows" with "Bose" wherever it appears.

allegations in the complaint of statements and conduct through December. The record does not disclose whether the Union's organizing activity ever resulted in the filing of a petition to represent the Respondent's employees.

B. Status of the Foremen

The General Counsel concedes that the project foremen are not statutory supervisors. However, the General Counsel seeks to hold the Respondent liable for certain acts and statements of individual foremen on the theory that they are agents of the Respondent. The Board applies common-law principles when examining whether a nonsupervisory employee is an agent of the Employer. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. The test is whether, under all the circumstances, employees "would reasonably believe that the . . . [alleged agent] was reflecting company policy and speaking and acting for management." *Zimmerman Plumbing & Heating Co.,* 325 NLRB 106 (1997); *Southern Bag Corp.,* 315 NLRB 725 (1994); *Great American Products,* 312 NLRB 962, 962–963 (1993), and cases cited therein. Under Section 2(13) of the Act, the question of whether specific acts performed were actually authorized or subsequently ratified should not be controlling when making agency determinations.

The overwhelming weight of the evidence in the record establishes that, for most purposes, the project foremen are agents of the Respondent. They are generally the only representative of the Respondent on the jobsite every day. They regularly interact with the General Contractor and other subcontractors regarding the job. The foremen coordinate the work of the Respondent's employees, laying out each phase of a job in accordance with the specifications and blueprints and assigning individual tasks to crews of employees. They are assigned by the Respondent to conduct regular safety meetings with the employees and transmit to the Respondent's office forms signed by the employees certifying attendance at such meetings. They are also responsible for collecting other paperwork, such as timesheets, SKU sheets, leave requests, etc., and transmitting them to the office. The foremen fill out evaluations of individual employees and crews and discuss these evaluations with the employees. The record further reveals that the Respondent relies upon its foremen to apprise project managers and the office of violations of company rules so that discipline may be meted out. Finally, I note that the Respondent included the foremen in a meeting with its former labor counsel in May at which the union organizing drive was discussed and instructions were given regarding how to respond within the confines of the law, and that the Respondent instructed the foremen by memo regarding procedures to take in the event of picketing at their jobsites.

Although the Respondent is correct that most of the foremen's duties were ministerial, and that they had no independent authority, that only proves that they were not statutory supervisors. Clearly, based on their interactions with the employees on the job, the employees would reasonably believe that their foreman was acting on behalf of management with respect to the foreman's communications or instructions relating to their work or the Respondent's policies and procedures. Whether specific acts or statements of individual foreman regarding the Union's organizational campaign violated Section 8(a)(1) depends on whether the conduct falls within the scope of this apparent authority. See *GM Electric,* 323 NLRB 125 (1997); *Von's Grocery Co.,* 320 NLRB 53, 56 (1995). I will address this issue in connection with the specific allegations of the consolidated complaint.

The General Counsel also argues in her brief that the position "large project foreman" does not exist. I find it unnecessary to resolve this issue because, whether Lexner was a "large project foreman" or "foreman" who worked on a large project is immaterial. The General Counsel alleged in the consolidated complaint and the Respondent admitted in its answer that, regardless of his title, Lexner was a statutory supervisor. As to Leombruno, he is at least an agent of the Respondent in his capacity as a "foreman." Because Leombruno replaced Lexner on the Bose job, I must infer that he had the same authority and would also be a supervisor within the meaning of Section 2(11) of the Act. Respondent offered no evidence to suggest that Leombruno had any less authority. Accordingly, I find that Lexner and Leombruno were statutory supervisors in their respective capacities as foreman of the Bose job.

C. Griffin's February 20 and March 21 Memos to Employees (Pars. 7 (rr)–(uu) of the Consolidated Complaint)

On February 20, the Respondent distributed a memorandum, signed by its president, to all field employees. Attached to the memo was a copy of a newspaper article with the headline, "Contractor mulls action against Local 103." The article discussed the Union's attempts to have the Respondent's debarment reinstated and the Respondent's consideration of legal action against the Union. The article quotes Griffin as saying that his Company and employees had been subjected to threats, intimidation, distorted facts and false claims, and that workers' vehicles had been vandalized at a job in Cambridge. In the cover memo to employees, Griffin states:

> As you can tell from the article the International Brotherhood of Electrical Workers (IBEW) has targeted our company for its normal harassment activities because of the recent work we have been awarded.
>
> Please let me know of any situations you experience which are union based activities, as we are attempting to track the location and frequency of such issues.

On March 21, the Respondent sent another memorandum, signed by Griffin, to all field employees to "call [their] attention to recent developments stirred up by the Unions which relate to our company and public construction in Massachusetts." Griffin then described the Union's petitioning of State legislators to bar the Respondent from public work and the Respondent's own efforts to solicit support from legislators. Griffin concludes his memo as follows:

> I welcome any questions you may have and would appreciate hearing of any other union activity that you may become aware of. Please call me . . . [telephone number omitted].

The General Counsel alleges that Griffin, by these memos, interrogated employees by asking them to report on the union activities of fellow employees and created the impression among the employees that the Respondent was keeping their union activities under surveillance. The Respondent argues that the solicitation of employees to report on "union activity" must be read in context. According to the Respondent, the employees reading these memos would understand that the only activity that Respondent asked them to report was unprotected activity, i.e., threats, vandalism, etc.

It is well established that an employer's request that employees inform as to other employees' union activities has the tendency to exert a coercive influence on employees' organizational rights. Even when phrased as requests to report "harassment," the Board has found such statements unlawful. *Hawkins-Hawkins Co.*, 289 NLRB 1423 (1988), and cases cited therein. The Respondent relies on the court of appeals decision in *Mississippi Transport v. NLRB*, 33 F.3d 972, 976 (8th Cir. 1994), reversing the Board. The court found that a memo asking employees to report harassment was not unlawful when considered in the context of constant complaints from the employer's employees that nonemployee union organizers were harassing them and interfering with their job performance. According to the court, the language of the memo made clear to employees that the activity they were being asked to report was unprotected.

The Respondent's two memos here provide no such context to its employees. This record is devoid of any evidence that employees of the Respondent were harassed by the Union, or that the Respondent had received complaints from any employees of unprotected activity by the Union or by the employees organizing on its behalf. The request in each of the memos was not directed at specific unprotected conduct, but asked for information about "any other union activity," or "union based activities." Such an open-ended request would convey to employees that the Respondent wanted to know about any union activity of which they were aware, so that the Respondent could keep tabs on the nature and extent of such activity, without regard to whether the activity was protected. By asking employees to report on potentially protected activity, the Respondent violated Section 8(a)(1) of the Act, as alleged in the complaint.

D. The Respondent's Rules, Their Enforcement and Revision and Related Allegations
(Pars. 7(e)–(h), (vv)–(ww) and 8–11 of the Consolidated Complaint)

The General Counsel offered into evidence a document entitled "Wayne J. Griffin Electric, Inc. Company Policy" which is dated April 1994. Robert Boure testified that he received this version of the employee handbook when he was hired in the spring 1996. Richards conceded that the 1994 handbook was in effect during the first half of 1996. The handbook contains the following provision under "Employment Regulations and Procedures":

Company Business Information

> Company business including but not limited to such things as figures on wages, sales, cost, profits, jobs, bids, prices, customers, production techniques, blue prints, take offs, bills of material, estimating techniques, etc. are strictly confidential. Company business must not be discussed with persons not directly connected with the company and/or persons not authorized to receive such information.
>
> Any employee who violates this policy may be terminated without notice.

In the section entitled "Personal Conduct," the handbook identifies what the Respondent considers "Unacceptable Conduct" and the disciplinary action that will result when an employee's behavior is deemed unacceptable. These rules of conduct are divided into three sections, each with different steps in progressive discipline. Under section 3, subject to termination for the first offense, are the following:

> 3.12 Unlawful or improper conduct on or off the company premises which affects either your ability or another employee's ability to perform job responsibilities and/or affects the company's goodwill and reputation in the community.
>
> 3.13 Release of any company business information to unauthorized personnel.
>
> 3.16 Discussion of personal wages with other employees.

The General Counsel offered no evidence that the Respondent has enforced rules 3.12 or 3.13 through issuance of discipline.

As noted above, there is no dispute that the Respondent issued written reprimands to Boure and Maguire on April 23 for violating rule 3.16.[7] Maguire testified that the issue came up when his supervisor, Mosca, asked him to keep an eye on Boure. Maguire told Mosca that he was not paid to watch other employees, pointing out to Mosca that Boure was paid more than he was. When Mosca asked Maguire how he knew that, Maguire told Mosca that he had asked Boure what he was making. Mosca told Maguire that was against the rules and that Maguire had no business asking Boure about his wages. Mosca said that they would have to meet with Griffin to discuss it. Mosca's version of this conversation is consistent with Maguire's testimony. Boure testified that Mosca asked him, probably after the above conversation with Maguire, whether he had discussed his wages with Maguire. When Boure admitted that he had, Mosca told him, "[Y]ou're not allowed to discuss wages, it's in the company handbook," and that they would have to meet with Griffin about it. Mosca did not testify about this conversation.

According to Boure, the day after Mosca asked him about his discussion of wages with Maguire, he and Maguire had a meeting with Griffin. Sandy Crowe and Mosca were also present.

[7] Maguire testified that he told a couple other employees that he had received this reprimand. There is no evidence that the Respondent was aware that Maguire had disseminated this information, nor any evidence that the Respondent itself communicated to other employees that it had disciplined Maguire and Boure for violating rule 3.16.

Griffin asked Boure to read rule 3.16 to himself and then asked if the rule was easily understood. Boure said it was. He was given a reprimand to sign and was excused from the meeting. Prior to being excused, Griffin had asked Maguire to read the rules aloud and Maguire was reading as Boure left. Maguire testified that, after Boure was excused, Griffin lectured him for 30 minutes about the rules and asked Maguire why he wanted to know Boure's wages. Maguire said he was curious because he and Boure were doing the same job, Maguire had more experience and had been with the company longer. Griffin then asked if Maguire wanted to know Griffin's wages. Maguire said no, because their jobs were different. Griffin then said it took him 20 years to write the rules and they had to be adhered to by all employees. He then gave Maguire his written reprimand and told Maguire to read the rules. Griffin also told Mosca to test Maguire on the rules in a few weeks. Although Griffin acknowledged meeting with Boure and Maguire to give them the reprimands, he did not dispute Maguire and Boure regarding what was said in the meeting. Mosca testified only that separate meetings were held with Boure and Maguire at which each was given his warning. Crowe was not asked about this meeting.

Mosca testified that he did not know that Maguire was a member of the Union at the time he was given the warning, but learned this on May 19 when Maguire handed him some union literature on a job in Holliston and told Mosca that he was a union member. Mosca testified that he relayed this information to Griffin. According to Richards, Griffin instructed him in May to look into the legality of the warnings and that, after consulting with counsel, determined that the warnings should be rescinded. There is no dispute that Richards and Crowe met with Maguire on May 30 to advise him that the reprimand was being rescinded. Mosca was also present for this meeting, but Boure was not. According to Richards, he told Maguire that, "in light of circumstances of recent development," the Respondent was making the reprimand null and void. Maguire was given a memo confirming this which was signed by Griffin and Mosca and which Maguire signed at the meeting. It is undisputed that Maguire asked if Boure would receive the same memo and that Richards told him it was no concern of his. According to Richards, on the day of the meeting, Maguire had called the office and informed the Respondent that he had distributed union literature on his break. Richards testified that Maguire wanted to know if this was a violation of company policy and that he was told that it was not as long as he does not do it on working time. Richards testified further that, during the meeting at which the reprimand was rescinded, he also told Maguire that he was free to discuss wages and do any other organizing activity as long as he did so in accordance with law and the company policy. Richards did not advise Maguire that rule 3.16 or any other rules in the handbook were being rescinded or changed at that time.

Although the Respondent's memo rescinding Boure's reprimand is dated May 29, he did not sign it until June 13, the same date it was signed by Mosca. Boure recalled that he did not learn that his warning was rescinded until he gave Mosca his two weeks notice.[8] According to Boure, Mosca encouraged him to stay and offered to relocate him to another job. Mosca told Boure that the Respondent had ripped up his warning, that it was illegal and that the Respondent was only trying to get something on Maguire because he was a problem. After he gave his notice, Boure met with Mosca and Sandy Crowe and they gave him the memo explaining that his warning was null and void. Mosca specifically denied telling Boure that the warning was just an attempt to get Maguire. According to Mosca, when Boure gave his 2-week notice, he asked why he was leaving. Boure told Mosca something about a problem with the mileage limit on his leased vehicle and Mosca offered to make arrangements for him to work closer to home. Mosca testified that Boure just shrugged and said he would think about it. According to Mosca, the subject of the reprimand did not come up in this conversation. Although Mosca denied that Maguire was discussed, he acknowledged asking Boure if problems he had with Maguire had anything to do with his resignation and that Boure said they did not. Neither Crowe nor Richards testified regarding any meetings with Boure at which he was informed that the warning was rescinded.

Richards conceded that other employees were never told that the warnings to Maguire and Boure had been rescinded. As noted above, Richards would not even tell Maguire that Boure's reprimand was rescinded when he asked about it. There is no dispute that, despite what Richards may have told Maguire about his right to discuss wages with other employees, the rules set forth above remained in effect and employees were not advised until November that they were free to discuss wages with one another.

Richards admitted that, as a result of the unfair labor practice charges, he and counsel reviewed the employee handbook during the summer and revised the rules. Employees were notified of the changes by memos dated November 13 and 22. Among the changes were a revised definition of "Company Business Information" which does not include wages, but does include labor costs, and a new list of "Group I Violations." The General Counsel alleges that only one of the new rules violates Section 8(a)(1), i.e., "1.23 Inappropriate conduct that reflects unfavorably on the company and/or fellow employees." The rule prohibiting discussion of wages does not appear on this list. However, the memo and attached revisions in evidence do not specifically advise employee that rule 3.16 has been revoked. As the General Counsel points out, the rules alleged to be unlawful were in section 3 of the Respondent's 1994 employee handbook, not section 1. It is unclear from the record whether he list of Group I violations distributed to employees in November replaced all the rules in the 1994 handbook.

On May 20, 1997, Griffin sent a memo to employee Rodney Regan regarding a telephone conversation that Griffin and Richards had with Regan about his job assignment. According to the memo, Griffin advised Regan during the telephone conversation:

> that any future concerns about major personnel issues were matters that you should raise with me personally or with

[8] Boure recalled that he left the Respondent in about July.

> Gerry Richards or Sandy Crowe. I stated that I wanted you to take up important issues with the office rather than have other personnel on your assigned jobsite become involved unnecessarily. Especially whereas I was personally involved in hiring you to the company, it is appropriate to direct matters to me or the office as *I did not want to have uncontrolled jobsite discussions and concerns amongst other employees regarding job assignments.* Your situation was special and personal to you and I requested that you keep such matters confidential for the benefit of all. [Emphasis added.]

Board law is clear that an employer's prohibition of employees' discussion of wages is unlawful. *Fredericksburg Glass & Mirror, Inc.*, 323 NLRB 165 (1997), and cases cited therein. The Respondent does not dispute the General Counsel's contention that rule 3.16 in the 1994 handbook and its enforcement against Maguire and Boure violated Section 8(a)(1) of the Act. Rather, the Respondent argues that it has effectively repudiated this unlawful conduct under *Passavant Memorial Area Hospital*, supra. See also *Kawasaki Motors Corp.*, 231 NLRB 1151 (1958). In order to effectively repudiate unlawful conduct, the repudiation must be timely, unambiguous, specific in nature to the coercive conduct, and free from other proscribed conduct. There must also be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct after the publication. Further, the repudiation should give assurances to employees that the employer will not interfere with their Section 7 rights in the future. *Webco Industries*, 327 NLRB 172 (1998); *United Refrigerated Services*, 325 NLRB 258 (1998).

Here, the unlawful conduct that the Respondent attempted to disavow was the maintenance of an unlawful prohibition on employee discussions of wages and discipline imposed under the rule. As noted above, the rule was not rescinded until more than 6 months after its unlawful enforcement and there is no evidence that any employees, other than possibly Maguire and Boure, were told that the rule was not in effect and that they were free to discuss wages. Moreover, the notification to employees regarding the revisions to the Respondent's handbook did not specifically refer to elimination of the rule or give employees assurances that the Respondent would not interfere with their exercise of Section 7 rights. With respect to the reprimands issued to Maguire and Boure, they were not rescinded until 5 and 7 weeks later. It appears that Maguire's reprimand was rescinded only after the Respondent became aware on May 19 that he was a member of the Union and was organizing his fellow employees. Respondent did not notify Boure that his warning was rescinded until he gave his 2-week notice. Neither Maguire nor Boure were told that the other employee's reprimand had also been rescinded. In fact, Boure was led to believe that the Respondent gave him the reprimand in order to conceal its attempt to get Maguire.[9] I also note that the memos to Maguire and Boure rescinding their reprimands are ambiguous. The memo does not specify why the reprimands was being declared null and void, does not inform them that the rule was no longer in effect and gives no assurance that the Respondent would not interfere with their exercise of Section 7 rights in the future. Respondent itself concedes that no such assurance was given, arguing that it was "implicit" in the rescission of the reprimand. The Board requires that such assurances be explicit for a repudiation to be effective. I also note that the attempted repudiation did not refer to the unlawful interrogation and threats, related to the Respondent's enforcement of rule 3.16, which are alleged in the complaint and that the Respondent committed other unfair labor practices after the attempted repudiation, to be discussed infra. Accordingly, I find that the Respondent has not effectively repudiated its unlawful maintenance and enforcement of rule 3.16.

Based on the above, I find that the Respondent violated Section 8(a)(1) by the maintenance of rule 3.16 in the employee handbook it distributed to employees at least through the first half of 1996 and by its enforcement of the rule through the reprimands issued to Maguire and Boure on April 23. In addition, because employees' discussion of wages is protected concerted activity, Mosca's questioning of Maguire and Boure regarding their discussions and his statements to them that they had violated company policy and would have to meet with Griffin about it constituted unlawful interrogation and a threat of discipline as alleged in paragraph 7(e). Griffin's questioning of Maguire and Mosca during the April 23 meeting regarding what they had discussed and his warnings to them to read the rules and adhere to them constituted unlawful interrogation, interference with employees' rights to engage in protected activity and a threat of future discipline if they continued to discuss wages as alleged in paragraphs 7(f) through (h). Finally, Mosca's statement to Boure when he told him that his reprimand had been rescinded, that the Respondent was only trying to get Maguire, violated Section 8(a)(1) of the Act, as alleged in paragraphs 7(vv) and (ww), because it conveys the impression to employees that the Respondent will fabricate warnings in order to rid itself of employees who exercise their Section 7 rights.

The General Counsel also alleges that the Respondent's definition of "company business information" contained in the 1994 handbook violates Section 8(a)(1) of the Act because it includes wages. Under the Respondent's policies, as they existed before the November revisions, including rule 3.13, employees were subject to termination for discussing such "business information" with unauthorized personnel. An employee reading this definition might reasonably assume that discussion of wages, benefits, and working conditions with a union representative or with a Government agent investigating a complaint would violate this rule. In *Lafayette Park Hotel*, 326 NLRB 824 (1998), a majority of the Board found that a rule prohibiting employees from "divulging employer-private information" to unauthorized individuals did not violate the Act because, on its

[9] I credit Boure over Mosca to the extent their testimony differs as to the timing of the rescission and statements made in connection therewith. Although Boure's recollection of events almost 2 years past may not have been clear, he had sufficient recall of the significant events and conversations. Moreover, he was not a union member, bore some hostility toward Maguire and would have no reason to be untruthful regarding these events. Mosca, on the other hand, being a loyal foreman and aware of how much emphasis Griffin placed on such loyalty, had reason to testify favorably for the Respondent.

face, it did not cover the discussion of wages and benefits. The original company business information rule here explicitly covered wages and Griffin's May 1997 memo to employee Regan suggests that even the revised rule covers employee discussions of their working conditions. For the reasons discussed above in connection with rule 3.16, I find that the Respondent's company business information policy and rule 3.13 would reasonably tend to chill employees in the exercise of their Section 7 rights and therefore violates Section 8(a)(1).

The General Counsel, relying on the Board's decision in *Cincinnati Suburban Press*, 289 NLRB 966 (1988), argues that rule 3.12 in the 1994 handbook and rule 1.23 in the revised rules, also violate the Act because they are overly broad and ambiguous. Recently, the Board held that, in determining whether the mere maintenance of rules such as rule 3.12 and 1.23 violate Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill the employees' exercise of Section 7 rights. If so, the maintenance of the rule would be unlawful even absent evidence of enforcement. *Lafayette Park Hotel*, supra. A majority of the Board found in that case that a rule prohibiting "unlawful or improper conduct off premises and during non-working hours" did not violate the Act because the majority did not believe that the rule could be reasonably read as encompassing Section 7 activity. The Board distinguished *Cincinnati Press*, supra, noting that there was evidence in that case that the employer had enforced such a rule against protected activity. As noted above, there is no evidence here that the Respondent has enforced either rule 3.12 or 1.23 against any conduct which would be protected under Section 7 of the Act. Accordingly, I shall recommend dismissal of the complaint's allegations with respect to rules 3.12 and 1.23.

E. Interrogation of Applicants (Pars. 7(a)–(d) of the Consolidated Complaint)

Robert A. Arey Jr., a 13-year member of the Union, testified that he went to the Respondent's office in Holliston, Massachusetts, in September 1995, filled out an application and left a copy of his resume. On cross-examination, Arey acknowledged that he heard that the Respondent was hiring from "someone at the Union hall" who suggested he look for work there. According to Arey, the former employers listed on his application and resume and the two computer classes he took at the Union's joint apprenticeship and training committee (JATC) would reveal his union affiliation. Arey testified that he made several followup phone calls in September 1995, but was not called in for an interview at that time. In March, when Arey learned that the Respondent was again looking for electricians, he called the Respondent's office and asked if they still had his application on file. As a result of this call, an interview was set up for Saturday, March 16, at the Respondent's office. Arey acknowledged, on cross-examination, that he told the Union's business agent, Donn Berry, that he was going on the interview, that he had gone on similar interviews at non-union contractors as part of the Union's COMET, or salting program, that he made a tape recording immediately after the interview of what had happened and that he gave a transcript of this tape to the Union.

Arey was interviewed by Griffin, Human Resources Manager Sandy Crowe, and a man identified as a project manager whose name Arey could not recall.[10] Arey testified that, during the March 16 interview, Griffin asked him what his longest period of unemployment had been and Arey told him 28 months. Griffin then asked Arey if he had health insurance during that period and Arey responded affirmatively. Griffin then asked if Arey had to make COBRA payments to keep his health insurance in effect and Arey said, "No." According to Arey, Griffin did not explain why he wanted to know this. Arey did not volunteer that his health insurance had remained in effect under a provision of the Union's health and welfare fund which provides benefits to members on temporary layoff. Arey recalled further that someone asked him about the two classes he had taken at the JATC, and Griffin followed up by asking Arey if he had gone through the JATC's apprenticeship program. Arey said he did not.

Crowe and Griffin did not dispute Arey's testimony. Both witnesses for the Respondent recalled Griffin asking Arey about health insurance coverage during his period of unemployment. Both denied being aware that the Union's health and welfare fund provides continued coverage, at no cost to the employee, during temporary layoffs.[11] According to Griffin and Crowe, they routinely ask applicants who are unemployed at the time of the interview questions about health insurance and COBRA payments. They explained that they do this because the Respondent will sometimes pick up the COBRA payments for a new employee during the 90-day waiting period before the Respondent's own health insurance kicks in. In fact, the Respondent did this for Lexner when he was hired. Crowe and Griffin also recalled asking Arey if he had received his apprenticeship training at the JATC. They testified that they did so because Arey had revealed on his application that he had taken courses through the JATC. Crowe testified that the Respondent routinely asks applicants where they received their apprenticeship training because this information assists in determining the foundation the employee has for his skills. Crowe testified that she is familiar with the JATC apprenticeship program, considers it an excellent program and has modeled the Respondent's own apprenticeship program on that of the JATC. Griffin did not explain in as much detail his reason for asking this question.

Frederick Murrin, a member of the Union since October 1988, testified that he applied for work at the Respondent in February and was also interviewed on March 16. According to Murrin, he called a blind ad in the newspaper and hung up when the person answering the phone gave the Respondent's name. Murrin recalled seeing a letter from the Union about its salting campaign against the Respondent. Murrin spoke to

[10] It appears from Arey's application in evidence and the testimony regarding who was present for other interviews on March 16 that the project manager was Gary Mosca.

[11] On rebuttal, the General Counsel offered the testimony of the Union's former business manager, Russell Sheehan, that, during a meeting in 1994, he told Griffin and Richards about this benefit. I find this testimony unbelievable. Sheehan apparently recalled this specific bit of information from a meeting that occurred 4 years before he testified, yet he had no recollection when it took place. Sheehan acknowledged there were no notes or other record of this meeting to refresh his recollection.

Berry at the Union about applying for work with the Respondent, but he did not go through the Union's COMET training before he applied. According to Murrin, Berry told him to terminate the interview immediately if the Respondent asked if he was a member of the Union.

Murrin was interviewed by Griffin, Crowe, and Project Manager Mosca. Murrin admitted providing a fictitious work history on his application, claiming that he did so because of his belief that a nonunion contractor like the Respondent would not hire him if he revealed his union affiliation. Murrin testified that, during his interview, Griffin asked him about his work experience and then, out of the blue, asked if Murrin was a "signatory member" of he Union. Because Murrin did not understand what Griffin meant by that term, he asked Griffin to rephrase the question. Griffin then asked if Murrin was a member of the Union. Murrin replied that he was not. There is no dispute that Murrin was hired within a week to 10 days of his interview and that he worked for the Respondent a little over 2 months before quitting.

Griffin and Crowe specifically denied that Murrin was asked if he was a "signatory member" or member of the Union. Crowe, who sits in on most interviews, testified that she has never heard Griffin ask any applicant about their union membership. Mosca generally denied hearing Griffin ask any applicant if they were a member of the Union, but did not specifically deny that Murrin was asked this question. Although Mosca recalled being present for Murrin's interview, he had no specific recollection of what was said during this interview.

Vincent Baker, another 13-year member of the Union, testified that he applied for a job with the Respondent in March and was interviewed on either the first or second Saturday in April. Baker recalled that Griffin, a woman from the office, i.e., Crowe, and two men identified as project managers were on the panel that interviewed him. According to Baker, Griffin did most of the talking. Baker testified that Griffin asked him about the contractors he had listed on the application. According to Baker, the last employer listed was Shawmut Design & Construction[12] and it had been a long time since he worked there. Baker testified that Griffin asked him where he had worked between Shawmut and the interview. Baker told Griffin he had worked for Suffolk Electric, a small union shop. Griffin then asked where he had worked for Suffolk and Baker told him at the Boston Globe for 1-1/2 years. Griffin then asked if that was a rate job, i.e., one on which employees were paid prevailing wages. Baker replied that he did not know if it was a rate job, but he was paid the union rate.[13] Baker recalled that later in the interview, Griffin asked him three times if he received his training at the JATC and that he replied negatively. Griffin never asked Baker where he got his training. Baker also recalled that Griffin asked him still later in the interview if he was on the Union's referral list. When Baker replied that he was, Griffin said, "[S]o that means you'll be going back to work there." Baker told Griffin that that was not necessarily so, that if he found a good job with the Respondent, he would work for Griffin. Baker admitted making notes of the interview and giving them to the Union and that the Union may have asked him to do this. Baker also admitted taking COMET training, but could not recall if it was before or after he applied.

Crowe testified that Griffin asked Baker about the companies he had worked for and that Baker volunteered the information about Suffolk Electric being a union job. She recalled Griffin asking Baker whether he had worked on public or private jobs. According to Crowe, the Respondent asked applicants this because the Respondent does both kinds of work and attempts to screen out applicants who are looking to work only on the higher-paid rate jobs. Crowe also recalled Griffin asking more than once if Baker had received his training at the JATC. Crowe recalled further that Baker was asked if he knew when he would be recalled because he had indicated he was on lay off and subject to recall on his application.[14] Griffin also recalled asking Baker about the companies he worked for and whether the work was rated because Baker listed his prior wage rate as $25/hour on the application. According to Griffin, Baker replied that he did not know if it was a rate job but he received the union rate. Griffin asked Baker what he meant and Baker told him he had worked for Suffolk. Griffin responded, "[O]kay, that's not on your application," and then explained that the Respondent would be hiring Baker for private work as well as public work and asked if he understood that. Griffin testified that he asks applicants such questions because he doesn't want to hire "rate-mongers," i.e., individuals who are accustomed to working rated jobs and could not get by at the Respondent's lower rate for nonpublic jobs. Griffin could not recall asking Baker about the JATC, but he did recall asking him what number he was on the Union's out-of-work roster. Griffin explained that he asked Baker this because he had answered, "[N]o," in response to the question about recall on the application and had told Griffin in the interview that he worked for Suffolk, a company Griffin knew to be a union contractor. According to Griffin, he wanted to know where Baker was on the referral list to determine whether he was likely to stay with the Respondent if hired.

Paul Pica, a member of the Union since 1988, testified that he applied for a job with the Respondent in June and was interviewed on July 13. Only Griffin and a woman, identified as Administrative Assistant Emmie, were present. According to Pica, he was given a booklet describing the Respondent's benefits to look through. While he was looking at it, Griffin asked Pica if he had ever gone to school at the JATC. Pica testified that he did not respond but continued looking blankly at the literature in order to appear as if he did not know what Griffin was talking about. After a pause, Griffin continued, "[O]r was it just Wentworth?"[15] Pica replied, "[Y]es, just Wentworth." According to Pica, Griffin then asked if he had any schooling at the IBEW and Pica said, "[N]o." Griffin then asked where Pica

[12] This employer is incorrectly referred to in the transcript as "Charlotte Design & Construction." The transcript is corrected to reflect the correct name as Shawmut.

[13] Baker's testimony is not corroborated by his application. Shawmut does not appear on the application and, rather than indicating a long period of unemployment, the application identifies two recent employers, neither of which is Suffolk.

[14] Baker's application does not corroborate Crowe in this regard.

[15] Pica's application listed his training as having been received at Wentworth Institute, a technical college in the Boston area.

got his 15-hour code update and Pica gave the name of a school that had sent him information in the mail in order not to disclose his training at the JATC. Pica admitted on cross-examination that he received COMET training before applying at the Respondent and that he was not truthful on his application. He denied that he was told to falsify his application by the Union. Pica also acknowledged reporting what happened at his interview to the Union the same day he was interviewed.

Griffin recalled that Pica's interview was so unusual that he asked Emmie to write a summary of what happened in case he might be questioned about it later. Griffin recalled that Pica appeared to be very nervous and asked a lot of questions, more than Griffin asked. Griffin admitted asking Pica about his training at Wentworth because he went to the same school. He adamantly denied asking Pica whether he had attended the JATC or any schooling by the IBEW, but he admitted asking him where he took his code update course. Griffin explained that he asks applicants this to make sure their licenses are current. On cross-examination, Griffin conceded that he could have determined whether Pica's license was current by asking to see it.

Crowe testified that the Respondent followed the same format for all interviews in the first half of 1996, asking the same questions. According to Crowe, late in 1996, after the above-four interviews, she created a form questionnaire to follow in interviews. Crowe testified that, with minor exceptions, all the questions on the form were the same questions that the Respondent asked applicants before the form was created. However, on cross-examination, Crowe conceded that there might be questions other than those appearing on the form that were asked in interviews in 1996. Crowe was forced to admit that the form is nothing more than a guideline, contradicting her earlier testimony. Crowe further testified that she interviews more than 100 people in a year's time and that she generally does not take notes of the interviews, that only Griffin does. Griffin testified that he sometimes interviews 40 people in a month and generally cannot remember what happened in a particular interview without looking at his notes on the application and the photograph of each applicant taken after the interview.

The General Counsel alleges that, during the above-four interviews, the Respondent unlawfully interrogated applicants by asking them questions designed to reveal their union affiliation. Specifically, the General Counsel relies on Griffin's asking Murrin whether he was a "signatory member," or member of the Union; asking Arey about his health insurance coverage during the 28 months he was on layoff; asking Arey, Baker, and Pica about JATC training; and asking Baker whether the job he worked on at the Boston Globe was a rate job and whether he was on the Union's out-of-work list. Although paragraph 7(b) alleges that Crowe unlawfully interrogated applicants on or about March 16, none of the General Counsel's witnesses attributed any of the allegedly unlawful questions to her. Accordingly, I shall recommend dismissal of paragraph 7(b) for failure of proof.

The Respondent's witnesses did not contradict the testimony of Arey and Baker regarding the questions they were asked in their respective interviews. Instead, the Respondent argues that these questions served a legitimate business need and were not coercive. The Respondent's witnesses did contradict the testimony of Murrin and Pica regarding what they were asked in their interviews, requiring a credibility resolution before reaching the merits of these allegations. As noted above, Murrin admitted that he was not truthful on his application and during his interview. While the General Counsel makes light of this in her brief, the fact that this witness was willing to lie to advance the Union's cause in its salting campaign against the Respondent raises the question how far he would go to support the Union's program. Moreover, I find it hard to believe that Griffin, a sophisticated nonunion contractor who had been dealing with the Union for some time and was aware of its efforts to have him become a union contractor, including its salting programs, would have asked an applicant directly whether he was a member of the union. I note that the complaint does not even allege such a direct interrogation. Accordingly, based on the above considerations and the demeanor of the witnesses, I find that Griffin did not ask Murrin during his interview on March 16, whether he was a signatory or any other kind of member of the Union. On the other hand, because Griffin admitted asking other applicants about their training, and in particular JATC training, and admitted asking Pica where he got his code update, I credit Pica and find that Griffin in fact asked him if he had ever gone to the JATC and if he had any schooling at the IBEW.

The Board has long held that "questions concerning union preference, in the context of job application interviews, are inherently coercive and unlawful, even when the applicant is hired." *Gilbertson Coal Co.*, 291 NLRB 344 (1988), and cases cited therein. See also *Active Transportation*, 296 NLRB 431 fn. 3 (1989). The questions here, however, did not directly seek disclosure of union membership or sentiments. Rather, it is claimed that the Respondent sought to gauge the membership status of these applicants in a roundabout way, on the theory that JATC training, working on rate jobs, being on the Union's referral list or having health insurance while unemployed without making COBRA payments are indicia of union membership. Unfortunately for the General Counsel and the Charging Party, it is undisputed that nonmembers receive training at the JATC, work on rate jobs, register at the Union's hiring hall, and may have insurance without making COBRA payments.[16] Moreover, the Respondent has proffered legitimate reasons for asking such questions of these applicants. In the case of Arey, he revealed on his application that he had some training at the JATC and Griffin inquired about the extent of his training there. Similarly, Baker volunteered that he had worked for a union contractor. By asking whether he was on the Union's referral list, Griffin sought to determine whether Baker was likely to stay with the Respondent if offered a job. His interest in whether an applicant did rate work would indicate whether he would be content making considerably less than the prevailing wage on a regular basis. To hold that a prospective employer cannot ask an applicant such questions without committing an unfair labor practice would essentially put the Union in charge of the hiring process. Under the General Counsel's the-

[16] As the Respondent points out in its brief, an unemployed individual may be covered under a spouse's insurance and be able to maintain insurance that way without making COBRA payments.

ory, a prospective employer would have to accept whatever an applicant revealed on the application and could not probe into such important areas as the nature of his training, the type of prior work experience, or the anticipated duration of employment of an applicant. With respect to Griffin's questioning of Arey regarding health insurance and COBRA payments, this is so innocuous and so far removed from union membership and sentiments that it cannot be found unlawful. An applicant could not reasonably believe that an employer was seeking to learn his union sentiments by asking him whether he had health insurance and made COBRA payments.

Accordingly, I shall recommend dismissal of paragraphs 7(a), (c), and (d) of the complaint because, as a matter of law, the credited testimony does not establish any unlawful interrogation regarding the union membership or sentiments of applicants.

F. The Respondent's Response to the Union's Organizational Campaign

1. Griffin's meetings with employees at the Mashpee High School site
(Pars. 7(z) and (aa) of the consolidated complaint)

There is no dispute that Griffin visited the Mashpee High School jobsite on or about May 31, the first day of the Union's strike and picketing, and spoke to employees individually. Michael Miscia, the project foreman at Mashpee, was present for these conversations. One of the employees Griffin spoke to that day was Stephen Foley, a member of the Union since 1984. When he first arrived on the job in late March, Foley told Miscia that he was a member of the Union and that he was there to help organize the Respondent's employees. Foley wore union insignia on the job throughout his employment. When Griffin and Miscia approached Foley during his visit to the job, Foley volunteered that he was going to be passing out union authorization cards. According to Foley, Griffin asked him to do so in front of Miscia. Foley recalled that there followed a discussion of the courthouse job in Boston and Foley asked Griffin why he didn't just sign an agreement with his local. As best as Foley could recall at the hearing, Griffin responded that he would never become a union shop. On cross-examination, Foley recalled that Griffin also said that he had tried to work with Foley's union by offering the Union a project agreement for the courthouse and that the Union had refused his offer. He further recalled Griffin telling him that he had worked with other local unions in other parts of the country. When shown his affidavit, Foley also recalled that, when he asked Griffin why he did not sign an agreement with the Union, Griffin responded, "[B]ecause I don't need Paul Ward's permission to wipe my ass."[17] Although Foley indicated in that portion of the affidavit that he could not recall anything else being said about the Union, he had stated earlier in the affidavit that, although he could not recall exactly how this conversation went, he did recall Griffin saying that he would never become a union shop.

During his visit to the Mashpee job, Griffin also spoke to Richard O'Connell, a longtime member of a different local of the IBEW who had been employed by the Respondent since August 1995. Miscia was also present. O'Connell believed that he was the last person Griffin spoke to that day. O'Connell testified that, after some small talk, Griffin told him that Foley was a union member and would be passing out union authorization cards. Griffin said he would appreciate it if O'Connell did not sign one. O'Connell informed Griffin that he, too, was a union member. Griffin replied, "I know that, but you're not a troublemaker." O'Connell told Griffin that he did not believe that Foley was there to cause trouble either and Griffin responded, "[Y]ou're probably right." According to O'Connell, Griffin then changed the subject and started talking about work he had coming up in O'Connell's hometown and told O'Connell that he had room to grow with the Company. According to O'Connell, he had not made his union membership known to any representatives of the Respondent before this conversation. On cross-examination, O'Connell acknowledged that, in his pretrial affidavit, Griffin did not refer to Foley by name when he told him that Local 103 would be handing out authorization cards. O'Connell explained that, because Foley was the only Local 103 member on the job and the only employee handing out cards, he understood that Griffin was referring to Foley when he used the term "troublemaker."

Griffin testified that he spoke to O'Connell before he spoke to Foley. According to Griffin, he told O'Connell that the Union was trying to organize and that they may ask him to sign a union authorization card. He admits telling O'Connell to "reconsider signing an authorization card . . . we've had a good working relationship and the job's gone well and Mike [Miscia]'s treating you well." Griffin recalled that O'Connell agreed that the job was fine and that Miscia was a good foreman but he told Griffin that he was a member of Local 223. Griffin testified that he told O'Connell that was fine, "[J]ust keep doing a good job, like you're doing for me . . . and everything will be fine. I'm not looking to have any problems with anybody. I just want to let you know that Local 103 will be asking you to sign one of their authorization cards." Griffin denied telling O'Connell that he would never be a union shop.

Griffin testified that he already knew that Foley was in the Union when he approached him on the job. According to Griffin, he told Foley that he knew the Union had a campaign to organize his employees and that Foley was involved. Griffin testified that he told Foley, "[W]hen you do your soliciting and you do your handbilling, please do it within the constraints of the law and everything will be fine . . . I'm not looking to have any trouble." Foley responded that the Union was not trying to cause him any trouble. According to Griffin, he then told Foley about his efforts to negotiate a project agreement with the Union for the courthouse or other work in Boston and that Foley told him he could be a rich man and have a more successful shop with the Union. Griffin told Foley he was happy the way things were and reminded him again to limit his solicitation to nonworktime and nonwork areas. Griffin specifically denied telling Foley that he could only pass out union cards and literature in front of Miscia and denied telling Foley that he would never be a union shop.

Miscia testified that Griffin spoke to O'Connell first and recalled that Griffin told O'Connell that there were union cards

[17] Paul Ward is the Union's business manager.

being passed around and, "I'd like you not to sign them." At that point, according to Miscia, O'Connell revealed his membership in a different local of the Union. Miscia corroborated Griffin regarding the rest of the conversation and specifically denied that Griffin referred to Foley by name, or called him a troublemaker, in this conversation. Miscia also corroborated Griffin's version of his conversation with Foley, although in less detail. Miscia denied that Griffin told Foley that he could pass out cards only if he did it in front of Miscia and further denied that Griffin told Foley that he would never be a union shop.

The complaint alleges that, during his conversations with Foley and O'Connell, Griffin threatened employees with unspecified reprisals if they engaged in union activities and told employees that it was futile to select the Union as their bargaining representative. The General Counsel relies on Griffin's references to "troublemakers" when talking to O'Connell about Foley's organizing activities to prove the first allegation and Griffin's statement to Foley that he would never be a union shop to prove the alleged statement of futility. Because Griffin and Miscia deny that these statements were made, I must resolve this credibility conflict before reaching the merits of the allegation.

Although the Respondent valiantly attempted to show that the testimony of O'Connell and Foley was contradicted by their affidavits, I see no significant disparity. Each witness testified consistently as to their respective conversations with Griffin. Moreover, as the General Counsel points out in her brief, both Griffin and Miscia used the word "trouble" in their versions of the conversations, lending credibility to O'Connell's testimony. While it is true that Miscia corroborated Griffin's denials, I do not attach much weight to this testimony in light of the written opinions Miscia expressed in his November 1996 evaluation form regarding the "extra challenge" created by the Union's organizing effort and the employees who supported it. Because of his strong sense of loyalty to Griffin and the Respondent, Miscia could be expected to corroborate whatever Griffin said. Finally, I note that, as with much of Griffin's testimony, his version of these conversations was glib. Accordingly, I credit the testimony of Foley and O'Connell and find that Griffin made the statements attributed to him by those witnesses.

The Board has historically held that statements to employees indicating that an employer will never recognize a union or sign a collective-bargaining agreement with a union have the tendency to interfere with, restrain, and coerce employees in the exercise of Section 7 rights. Such statements convey the impression that employee support for a union will be futile because the employer will never acquiesce to their choice of a union to represent them. *Wellstream Corp.*, 313 NLRB 698, 706 (1994); *Soltech, Inc.*, 306 NLRB 269, 271 (1992). The Respondent argues here that Griffin's statement could not be unlawful because the Respondent already had entered into project agreements with other locals of the IBEW at other projects, citing *Chambers Development Co.*, 267 NLRB 611 fn. 2 (1983). The Respondent also argues that it is "incredible and nonsensical" that Griffin would say he would never be union when he had signed agreements with unions.

While it may be true that the Respondent has, on its own terms, signed project labor agreements with Unions, there is no dispute that the Respondent has never recognized any union as exclusive bargaining representative of its employees under Section 9(a) of the Act. To do so would mean that the Respondent would be a "union contractor" with a continuing obligation to deal with the Union, not limited to any one job. It is clear from the evidence in the record that this is something that Griffin was not willing to do. In this context, Griffin's statement that he would never become a "union shop" is neither incredible nor nonsensical. In essence, Griffin was telling Foley that, while he might be willing to sign a project agreement with Foley's Union for a specific job if the terms were to Griffin's advantage, he would never recognize the Union generally as the representative of his employees.[18] This is a statement of futility which is unlawful under Section 8(a)(1) of the Act, as alleged in paragraph 7(aa) of the complaint. The statement found lawful by the Board in *Chambers Development* is distinguishable. In that case, the employer told an employee that "66 will never be here," referring to Local 66 of the Operating Engineers. The administrative law judge and the Board found that this was not an antiunion statement under the unique circumstances of that case because Local 66 in fact was "here" because a company commonly owned and controlled by the Respondent already had an agreement with that local covering the same jobsite. It is undisputed that the Respondent did not have any agreements with Foley's local, at Mashpee or any other jobsite.

The Board has also held that calling employees "troublemakers," in express or implicit reference to their protected activities, may constitute a threat in violation of Section 8(a)(1) of the Act. However, this is not a per se violation. Rather, it is the context in which the word is used and not the use of the word alone that imparts an unlawful connotation. *Monfort of Colorado*, 298 NLRB 73, 84 (1990), enfd. in relevant part 965 F.2d 1538 (10th Cir. 1992); *Perth Amboy Hospital*, 279 NLRB 52 fn. 2 (1986); *U.S. Steel Corp.*, 279 NLRB 16 fn. 1 (1986). In the instant case, Griffin's use of the word "troublemaker," in an apparent reference to Foley, cannot be found unlawful when considered in context. When O'Connell told Griffin that he was a union member, Griffin said, "I know, but you're not a troublemaker." O'Connell understood this to be a reference to Foley, the only member of the Union who was organizing for the Union on site. When O'Connell told Griffin that Foley was not there to cause trouble, Griffin agreed with him. This exchange is thus devoid of an threat of reprisal or force or promise of benefit. See *Comcast Cablevision*, 313 NLRB 220, 253 (1993). In contrast, those cases where the Board has found references to union activists as troublemakers unlawful, there is at least an implied threat of retaliation against such troublemakers. Griffin's innocuous comment here, quickly retracted, does not rise to the level of an unfair labor practice. Accordingly, I shall recommend dismissal of paragraph 7(z) of the complaint.

[18] This is consistent with the statement that Griffin made to Dan Ferrick during his job interview in November 1994. Ferrick testified credibly that Griffin told him that he liked to sign project agreements with the Union when it was beneficial to the Respondent, but that he was not going to become a union shop.

2. Griffin's visit to the Bose site
(Par. 7(r) of the consolidated complaint)

There is no dispute that, while the union members were on strike, Griffin visited the Bose site on June 5 and spoke to the nonstriking employees at two meetings. It is also undisputed that the purpose of these meetings was to inform the employees regarding the disadvantages to joining the Union. Lexner, the foreman on the job, attended both meetings and testified for the General Counsel. According to Lexner, no other management representatives were present for these meetings. Sean Schultheis, a team leader, and Steven Kinsella, an employee, also testified for the General Counsel regarding the meeting they attended.

Lexner testified that Griffin told the employees that the Union wanted to organize his shop and get him to be a union contractor and that, if that happened, all the guys working for him would go to the bench and the Union would put its own people on the job. According to Lexner, Griffin continued by telling the employees that the Union wanted him and not his employees. Griffin also told the employees that if they signed union authorization cards, they would be giving up their rights and would have to abide by the union contract and that they could no longer do side jobs. He recalled Griffin also telling the employees, "[I]f you had signed a card and you changed your mind, you could get it back." It is not clear from his testimony whether these statements were made at both meetings. On cross-examination, Lexner admitted that he could not recall everything that was said during the two meetings he attended and could not recall in what order Griffin made the statements that he did recall. Through leading questions by Respondent's counsel, Lexner was able to recall that Griffin told employees that, if he had to raise his labor rates, he would have to raise his prices and would not be able to bid competitively for jobs.

Schultheis testified that he attended the second meeting. According to Schultheis, Griffin began the meeting by complimenting the employees for doing a great job at Bose and then started talking about the Union and how it was trying to disrupt things. Griffin was reading from notes as he talked. Schultheis recalled that Griffin told the employees that signing a union authorization card was "like sticking a knife in his chest, or his heart, or something like that." Griffin also told the employees that, if they were to go to the Union, the Union would put them on the bench, that Griffin would be able to keep a couple guys, but the Union would replace the employees with people off their own list. According to Schultheis, Griffin also said that, with the Respondent, when they were done with a job, they are sent to another job, but that in the Union, when the job's done, "[Y]ou go back to the bench." Along this line, Griffin told the employees that the Union would "treat you like a tool. Sometimes you're put back in the toolbox, sometimes you're thrown back. You're just a tool with the Union." Schultheis also recalled Griffin telling the employees that, if they signed cards, it was not too late to get them back. He recalled that, after the meeting, Griffin spoke to the apprentices about registering them with the State for prevailing wage work. On cross-examination, Schultheis admitted that he didn't recall "verbatim" what was said, but he distinctly remembered what the meeting was about. He recalled further that Griffin told the employees that they would not get as much work with the Union, but he could not recall if Griffin explained the reason for this. Schultheis also recalled that Griffin talked about signing agreements with local unions in other parts of the country and that he offered the same thing to Local 103, but Local 103 refused, saying, "[I]t's either the whole company or it's nothing."

Steven Kinsella attended the same meeting as Schultheis. Kinsella testified that Griffin told the employees at this meeting that he was working on a pool system to get all the employees work on prevailing rate jobs for a couple months every year. Kinsella recalled that Griffin also told the employees that the Union did not want them as members, the Union already had plenty of members laid off, that the Union wanted Griffin and the work he is getting. According to Kinsella, Griffin said, before he left the meeting, "I don't want anybody to sign union authorization cards, it's like sticking a knife in my back, or chest, one or the other." Griffin told the employees that signing a card is like signing a binding legal contract, but he told the employees not to worry if they already had signed a card because "it can be withdrawn." Kinsella could not recall what Griffin said regarding how the card could be withdrawn. On cross-examination, Kinsella testified that Griffin did not tell employees that the Respondent or Griffin personally, could get their cards back.

Griffin admitted talking to the employees about the Union's hiring hall during his two meetings at Bose. According to Griffin, he told the employees that, if the Respondent was a union shop, it would have to hire from the union hiring hall. He told the employees that the hiring hall had a list of approximately 1000 people out of work and that, if they were number 1000 and the Respondent was a union company, the Union would direct employees in the hall to go to the Respondent's jobs and that the Respondent's employees would have to wait for 999 people to get assigned jobs before getting work. He admitted telling the employees that they might have a problem with continuity of employment in the Union and that could affect their ability to get a loan. He reminded the employees that the Respondent tries to provide continuity of employment when it hires someone. Griffin testified further that he also talked about the impact of the Union on the Respondent's ability to bid competitively on jobs, telling them that higher labor rates and union jurisdictional rules would cause it to lose bids, resulting in layoffs because the Respondent would not have as much work. Griffin acknowledged telling the employees that, if they had signed a union card and changed their mind because of what he was telling them, "I can tell you, if you call me, whom to send a letter to, requesting your card back." Griffin adamantly denied telling the employees that he could get their cards back for them. Finally, Griffin told the employees about a new system that he and Crowe had been working on to more fairly distribute prevailing wage work among the employees. According to Griffin, he got the information he used about the Union's hiring hall from a memo that Lexner gave him in April, listing "some of the items your men should be informed of about Local 103." Griffin admitted using this memo as an outline while speaking to the employees. One of the items on Lexner's list was a reference to the "1200 men on the bench at this time."

The complaint alleges that Griffin violated Section 8(a)(1) in three respects during the course of these meetings, i.e., that he threatened employees with job loss if they selected the Union as their collective-bargaining representative; that he equated union activities with disloyalty to the Respondent; and that he told employees that Respondent could get their signed union cards back. While there are some discrepancies in the versions of the meeting recited by the four witnesses, there is not much dispute about what was said. Although Griffin did not admit telling employees that they would "go on the bench" if Respondent recognized the Union, he did admit telling the employees that the Union would direct some of the 1000 people on its out of work list to the Respondent's jobs if the Respondent became a "union shop," that they would have to wait for 999 people ahead of them to be assigned work and that they would no longer have the same continuity of employment that they enjoyed with the Respondent. He also admitted referring to Lexner's memo which referred to "men on the bench." Moreover, Griffin admitted telling the employees that there might be lay offs resulting from the impact of unionization on the Respondent's competitiveness in job bids. Griffin also did not specifically deny the comment equating signing a union card with sticking a knife in one of his vital organs. Although Griffin denied telling the employees that he or the Respondent would get the union cards back for the employees,[19] he admitted telling employees who changed their mind to call him and he would tell them how to get the card back. To the extent there are any conflicts in the testimony, I credit Schultheis and Kinsella who impressed me as truthful and who had nothing to gain from the outcome of this proceeding. Both Griffin and Lexner had much at stake in this proceeding which may color their recollections. However, Lexner's testimony on this aspect of the case was corroborated by Schultheis and Kinsella, whom I have credited, and did not differ significantly from Griffin's recollection.

Based on the credited testimony of Schultheis, as corroborated by Lexner and, to some extent, by Griffin himself, I find that Griffin suggested to employees at the Bose meetings that, if the Respondent were unionized, they would be replaced by union members on the out of work list and would have to wait "on the bench" until a job opening occurred. An employer has the right under Section 8(c) of the Act to communicate to his employees his general views about unionism or his specific views about a particular union, as long as the communication is unaccompanied by a "threat of reprisal or force or promise of benefit." The Supreme Court has interpreted Section 8(c) to permit an employer to make predictions as to the precise effects of unionization, provided that the prediction is "carefully phrased on the basis of objective fact to convey an employer's belief as to the demonstrably probable consequences beyond his control." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Such statements must be considered in the context in which they are made and in view of the totality of the employer's conduct. In addition, the economically dependent relationship of the employees to their employer must be considered because, as the Court noted, employees may reasonably tend to pick up intended implications which might be more readily dismissed by a disinterested listener. Id. at 617; *Hertz Corp.*, 316 NLRB 672, 683 (1995). As the Respondent correctly points out, expository statements about the realities of life in a unionized environment are permissible campaign propaganda. See *Michael's Markets*, 274 NLRB 826 (1985); *Rexall Corp.*, 265 NLRB 121 (1982), modified at 272 NLRB 316 (1984), enfd. as modified 725 F.2d 74 (8th Cir. 1984). However, in those cases, the statements were based on actual experience and were not predictions of what would occur in the event the targeted employees were unionized. In the instant case, Griffin's statement that employees would "go on the bench" and be replaced by the 1000 men on the Union's out of work list was not based on any actual experience, nor was it a prediction based on objective fact. Rather, it was a threat of job loss as the direct result of employees exercising their right to choose union representation and violated Section 8(a)(1) of the Act. *Feldkamp Enterprises*, 323 NLRB 1193 fn. 4 (1997).[20]

The undenied testimony of Schultheis and Kinsella establishes that Griffin equated signing a union authorization card with stabbing him in the back, or heart or words to that effect. Although the witnesses may not have recalled the precise part of the body attacked by the employees' exercise of their right to sign a card, the intent of the statement was clear, i.e., that any employee who chose union representation would be disloyal to the Respondent. Griffin's comment at the Bose meeting is consistent with other evidence in the record indicating the importance that Griffin attached to loyalty and his view that union support was incongruent with loyalty to the Respondent. Respondent is correct that no explicit threat or promise accompanied this statement. However, the Board has held that such statements are independently unlawful. *Dauman Pallet, Inc.*, 314 NLRB 185, 186 fn. 7 (1994). Under this precedent, I must find that Griffin's statement here violated Section 8(a)(1) of the Act.

Griffin admitted telling the employees that, if they had signed a union authorization card and changed their mind, they could call him and he would tell them to whom to write to get their card back. The Board has held that "an employer may lawfully inform employees of their right to revoke their authorization cards, even where employees have not solicited such information, as long as the employer makes no attempt to ascertain whether employees will avail themselves of this right nor offers any assistance, or otherwise creates a situation where employees would tend to feel peril in refraining from such revocation." *R. L. White Co.*, 262 NLRB 575, 576 (1982). Here, Griffin did not merely advise employees of their right, he solicited them to call him to find out how to get their cards back. Through this procedure, the Respondent could "ascertain whether employees avail[ed] themselves of this right." Moreover, because this information was provided to employees in

[19] I note that none of the General Counsel's witnesses actually testified that Griffin said that he or the Respondent would get the cards back for the employees.

[20] The General Counsel has not alleged that Griffin's statements about the impact of a union on his competitiveness and availability of future work was unlawful. Thus I need not address the arguments raised by the Respondent in its brief as to this part of Griffin's speech.

the same speech in which Griffin suggested they would be replaced by union members on the out of work list if the Respondent were a union shop, and equated signing a card with a mortal wound to the Respondent's president, employees would reasonably tend to feel peril if they did not exercise their right to revoke their authorization card. *Adair Standish Corp.*, 290 NLRB 317 (1988), enfd. 912 F.2d 854 (6th Cir. 1990). Accordingly, I find that the Respondent violated Section 8(a)(1) through this statement as well.

3. Griffin's communications with Schultheis in June and July (Paragraphs 7(o), (p), (t), (v), (w), (cc), (dd), and (kk) of the consolidated complaint)

Schultheis was employed by the Respondent from July 1995 until February 1997. In November 1995, when Schultheis got his journeyman's license, he received a raise and was sent to work on the Bose job under Lexner. According to Schultheis, Griffin made him a team leader and suggested he try to learn from Lexner.[21] Schultheis admitted that he and Lexner drove to work together and were friends. Although Schultheis is now a member of the Union and obtains work through the Union, he did not belong to the Union during the relevant time period. As noted above, Schultheis attended Griffin's meeting at Bose. About 2 days later, on Friday June 7, he injured his hand and was sent home. He tried to return to work the following Monday, June 10, but Project Manager Burns sent him home to recover further. According to Schultheis, he was out of work for about 2 weeks and then worked in the office for about 1-1/2 months before returning to work as an electrician in the field. The Respondent continued to pay him his regular wages during the period he was out of work.

Schultheis testified that Griffin called him about 8–10 times during the 2 weeks in June that he was home with his injury. The first call was the Friday night after he was injured. In this call, Griffin asked about his hand and Schultheis told Griffin that he wanted to return to work. Griffin told him that was fine as long as Schultheis did not work with any tools. According to Schultheis, he had been laying out work for the crew and would not need to work with the tools. There was no discussion of the Union during this conversation. Griffin called again on Sunday night. After asking how his hand was, Griffin started talking about Boylan, one of the Union's members on the Bose job who had gone on strike and had been reinstated to a different job on Friday. Griffin told Schultheis that he was sending Boylan back out to the Bose job the next morning and he asked Schultheis to put him to work with "someone you can trust to keep an eye on him." Boylan had been sent to a prevailing wage job when he returned from the strike and Schultheis told Griffin that some of the other employees at Bose were upset that Boylan went from picketing to a rate job. According to Schultheis, Griffin responded, "I just wanted to show that kid that he couldn't go wherever he wanted. I just wanted to teach him a lesson." On cross-examination, Schultheis acknowledged that he did not mention the latter comment in his pretrial affidavit, given shortly after these conversations.

Schultheis testified further that Griffin called him practically every night the following week. Although he could not differentiate what was said in each conversation, he recalled that, in one conversation, Griffin said, "[I]t's not too late to get the cards back." When Schultheis told Griffin that he had not signed a card, Griffin said that he was not talking about Schultheis. He told Schultheis that he was a leader on the job, that the other employees respect him. He asked Schultheis to talk to the others, "[M]aybe they'll tell you if they had signed anything." Schultheis recalled Griffin saying something about a certified letter and a lawyer in connection with getting the cards back. He specifically denied that Griffin asked him who signed cards.[22] Schultheis also recalled Griffin talking about the Respondent being a "family" and needing to stick together to beat the Union. During one of the conversations, again not recalling which one, Griffin told Schultheis to "[L]et me know if anybody out there is f—ing me." Schultheis recalled that, during the second week that he was out of work, during a telephone call that Schultheis had initiated to tell Griffin that his doctor released him for light duty, Griffin told Schultheis that he had fired Lexner. According to Schultheis, Griffin said, "I had to let Jim go. I couldn't have those guys out there doing whatever they want," and said something like "running their mouths off." Schultheis admitted that he signed a union authorization card at the end of his second week out of work.

Schultheis testified that, one day after he returned to work and while he was working light duty in the office, he was joined by Dan Ferrick while eating lunch at his truck parked outside the office. Ferrick was a foreman on the Adessa job who had been identified by the Union in a letter to the Respondent as one of its organizers. Sometime after lunch, Gary Vest, a foreman for whom Schultheis had been working in the office, preparing the budget for an upcoming job, asked Schultheis to go outside with him for a smoke. According to Schultheis, Vest said, "[Y]ou know, Griff called me on the interoffice phone. He said there was a tailgate party out front; that my boy Sean's outside with Ferrick." Vest then told Schultheis that he could not do that, have lunch with Ferrick in front of the office. After having his recollection refreshed with his pre-trial affidavit, Schultheis recalled that Vest also said that Griffin told Vest to tell Schultheis to watch who he hangs around with. On cross-examination, Schultheis conceded that he had conversations with Vest in which Schultheis expressed to Vest his concern that rumors were going around that he had signed a card. It is unclear whether this occurred before or after the above incident.

Schultheis testified further that Griffin called him at home the night after this conversation with Vest and asked about his plans with the Company, whether Schultheis wanted to be "just a worker," or a leadman, or a foreman. In this conversation, Griffin said, "[Y]ou know, you get judged by the people you

[21] According to Griffin, Lexner requested that Schultheis be assigned to Bose. While not admitting that he designated Schultheis a team leader at Bose, Griffin testified that he instructed Lexner to give Schultheis some leadership responsibilities. I find this is consistent with Schultheis recollection of his conversation with Griffin and, because Schultheis was a generally more credible witness than Griffin, discredit Griffin's attempt to contradict Schultheis on this point.

[22] Lexner testified that Schultheis told him, before he was fired, that Griffin asked him to find out if anybody had signed cards.

hang around with." Schultheis replied, "[Y]es, I know. Gary told me about having lunch with Danny." Griffin told Schultheis that he also knew and was disappointed, that he always thought Ferrick was a smart man.

Griffin admitted making several telephone calls to Schultheis while Schultheis was home due to his injury. According to Griffin, it was his practice at that time to maintain such contact with injured employees as a way of "managing their [worker's compensation] claim. Griffin denied discussing Boylan's assignment with Schultheis." According to Griffin, he discussed this with Lexner. Griffin did recall the subject of union authorization cards coming up in one of his telephone conversations with Schultheis. According to Griffin, Schultheis raised the issue by telling Griffin that he had received some calls from a few of the fellows at Bose wanting to know the process for getting their cards back. Griffin told Schultheis that he should not be dealing with that while he was on the road to recovery. He instructed Schultheis to tell any employees who called inquiring about this to call Griffin personally and Griffin would explain to them the person and place they could send a letter to, requesting their card back. Griffin conceded that this was the same instruction he had given the employees during his meeting at Bose. Griffin admitted telling Schultheis during a telephone conversation that he had fired Lexner, but contradicted Schultheis as to the reason he gave for this action. According to Griffin, he told Schultheis that he let Lexner go because Lexner was not directing and coordinating the men and wasn't staying focused to obtain the Company's goals and directives.

Griffin acknowledged having a conversation with Schultheis in mid-June, while Schultheis was out of work, about the Union and the unfair labor practice charges it had filed.[23] According to Griffin, Schultheis told him that some of the men were concerned about the disruptions and disturbances that the Union would have on the Company. Griffin testified that he told Schultheis not to worry about it and to tell the others the same. Griffin testified further that he told Schultheis in this conversation that, "disappointingly, the unions had taken a position that they're just f—ing with me, and they're trying to hurt me personally. And they're trying to take the steps to have us spend a lot of money on frivolous charges, taking action to redebar us. But, you know, we're going to work through these things; and if we stay focused and work hard, we're all family at Griffin. And I try to take care of the employees like they are part of my family, just like you take care of your family. Now you need not to worry about those things, let's just do what we do best, which is work hard, stay focused on our work, and we're going to overcome any of these problems." On cross-examination by the Charging Party's counsel, Griffin admitted telling Schultheis that the money being spent on legal fees to defend "frivolous charges" could have been put into the Respondent's profit-sharing and 401(k) plans for the benefit of the employees.

[23] Schultheis recalled such a conversation taking place in December, as will be discussed, infra. Griffin's testimony will be discussed here, however, because parts of it corroborate Schultheis recollection as to the telephone conversations he had with Griffin in June and because Griffin testified that this conversation occurred in June.

Griffin denied having a conversation with Vest about Schultheis having lunch with Ferrick and denied telling Vest to talk to Schultheis about it. Griffin did recall a conversation, in late June or early July, that was initiated by Schultheis, in which Schultheis expressed concern about working in the office and people thinking he was a union person because of his friendship with Lexner. Griffin testified that he told Schultheis not to worry about it, that it was not a concern of his or the Company. According to Griffin, he said, "[D]isappointingly, the men are going to judge you by who you hang around with. That's a statement my mom kinda told me when I was growing up. I'm going to judge you by what you do for the company and how hard you work for me." Griffin also acknowledged having a conversation with Schultheis, shortly before he returned to full duty, about his future with the Company. According to Griffin, Schultheis indicated that he did not want to go back to the Bose job and he and Griffin discussed what he wanted to do instead. In the course of this conversation, Griffin did ask Schultheis what were his goals with the Company, whether he wanted to take courses to advance his skills, or work on any special projects, and if there was any particular foreman he would like to work with. Griffin recalled that Schultheis identified Vest as someone with whom he wanted to work and that they discussed Schultheis working with Vest at a public school in Haverhill. Schultheis ultimately chose not to work on this job because of the distance from his home.

Vest also testified for the Respondent regarding his conversations with Schultheis while Schultheis was working in the office. Although he denied that Schultheis was working for him, Vest acknowledged that Schultheis had been assigned to work at the Haverhill job and that Schultheis was assisting him with the budget for that job. Vest recalled having a conversation with Schultheis on the loading dock in back of the Respondent's building, while on a cigarette break, during this period of time. According to Vest, Schultheis initiated the conversation, telling Vest that "it really sucks what's going on." When Vest asked what the problem was, Schultheis responded that everybody thinks he's dirty because he joined the Union. When Vest told Schultheis not to worry about it, Schultheis repeated his concern about the rumors and told Vest that he had not even signed a union card. At that point, Vest told Schultheis, "[I]f it bothers you so much, don't sit there and have lunch with Ferrick in his truck every day. Hell, popular opinion, they're looking at you, hanging with the union guy." Vest denied discussing this conversation with Griffin and also denied that Griffin told him to tell Schultheis that he saw him having lunch with Ferrick. Vest further denied that Griffin instructed him to tell Schultheis to watch who he hangs around with. Finally, Vest recalled that Schultheis "apologized" to him, while they were both working on a job at AT&T, for the unfair labor practice charge being filed over this conversation. Vest testified that Schultheis said, "[I]t's Wayne we're after."

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act, through Griffin's telephone conversations with Schultheis, by telling employees that, if they signed union cards, the Respondent could get them back; by soliciting employees to report on the union activities of others; by telling an employee that another employee had been reassigned because

the employee had gone on strike; by telling a crew leader to keep another employee under surveillance; by interrogating employees about their union activities and sympathies; and by promising employees' benefits if they refrained from union activities.[24] As noted above, I found Schultheis a generally credible witness. In fact, my finding in this regard was echoed by Griffin himself, who described Schultheis as a "forthright individual." I note that Schultheis did not attempt to embellish his testimony, was willing to admit that Griffin did not directly ask him who signed cards, and acknowledged difficulty recalling precisely what statements were made in each of the many telephone conversations he had with Griffin. At the same time, while I believe that Schultheis was testifying honestly, as best he could recall, regarding his many conversations with Griffin, I note that his recollection was limited and often needed to be refreshed, either through a leading question or with his affidavit. On the other hand, Griffin was not a generally credible witness, as previously noted. In particular, with regard to his conversations with Schultheis, he professed many times difficulty recalling dates and other details of conversations that occurred almost 2 years before his testimony, yet he seemed able to recall precisely what he did not say, conveniently disavowing any unfair labor practices. In many respects, gaps in Schultheis' memory were illuminated by Griffin's testimony, with Griffin acknowledging at least the substance of these conversations, if not the precise wording attributed to him by Schultheis.

Although Schultheis was only able to recall that Griffin told him it's not too late to get the cards back and that he said something about a certified letter, Griffin admitted telling Schultheis the same thing he told the employees at the Bose meeting, i.e., that if any employees wanted to know how to get their cards back, to call Griffin personally and he would explain it to them. Based on this admission and for the reasons discussed above, I find that this instruction violated Section 8(a)(1) as alleged in paragraph 7(t)(i).[25]

Schultheis denied that Griffin asked him directly who had signed cards, but he did recall Griffin asking him to talk to the other employees, "maybe they'll tell you if they had signed anything," expressing the view that Schultheis was a leader and other employees respected him. This latter part of the conversation is consistent with the opinion expressed by Griffin at the hearing regarding Schultheis. Griffin did not specifically deny this portion of Schultheis' testimony. Even if he had, I would credit Schultheis for the reasons set forth above. Accordingly, I find that Griffin did solicit Schultheis to report on other employees' union activities, as alleged in paragraph 7(t)(ii).

Griffin expressly denied having any discussion with Schultheis regarding Boylan. The Respondent argues, in its brief, that I should discredit Schultheis regarding this testimony because it doesn't make sense that Griffin would indicate that he was punishing an employee by reassigning him to a higher-paid job. Moreover, because Schultheis acknowledged that he did not make crew assignments, why would Griffin instruct him to "[P]ut Boylan to work with someone you can trust to keep an eye on him?" Although I have found Schultheis more credible than Griffin, Respondent is correct that much about this alleged conversation does not make sense. It is undisputed that Boylan was initially assigned to a higher-paid rate job on his return from the strike and then reassigned to the Bose job on June 10, but there would appear to be no reason for Griffin to discuss Boylan's assignment with Schultheis, who was not the foreman at Bose. Nonetheless, I find that Griffin did discuss Boylan's return to the Bose job with Schultheis, a team leader whom Griffn perceived to have influence with the other employees. Griffin had already indicated concern about Boylan's union activities in discussions with Lexner. Thus, it would not be implausible for him to also ask a crew leader like Schultheis to, in essence, keep an eye on Boylan as well. Accordingly, considering the timing of this conversation and the demeanor of the witnesses, I find that Griffin did ask Schultheis, in his role as a team leader, to keep Boylan under surveillance by assigning him to work with someone that Schultheis could trust "to keep an eye on [Boylan]." Such a request violates Section 8(a)(1) because it conveys to employees the impression that the Respondent is keeping their protected activities under surveillance. Accordingly, the Respondent violated Section 8(a)(1) as alleged in paragraph 7(w) of the complaint.

As to the comment attributed to Griffin, that he assigned Boylan to the rate job to teach him a lesson, I find that the General Counsel has not met her burden that such a statement was made. Although I believe Schultheis that Griffin discussed Boylan's assignment to a rate job during their phone conversation and that he told Griffin that other employees at Bose were upset about this, I find based on Schultheis failure to mention this comment in his affidavit that Griffin did not equate the reassignment with punishment for engaging in a strike. Boylan apparently was sent to another job because he had been replaced at Bose while out on strike. It clearly was not punitive because Boylan received a higher rate of pay at his new assignment. I conclude that Schultheis either misunderstood what Griffin told him, or did not accurately recall the explanation given. Accordingly, I shall recommend dismissal of paragraph 7(v) of the complaint.

The General Counsel alleges at paragraphs 7(cc) and (dd) that Griffin interrogated Schultheis regarding his union activities and sympathies and promised him benefits if he refrained from union activities. Based on counsel for the General Counsel's brief, it appears that this allegation relates to the telephone conversation in which Griffin asked Schultheis where he wanted to go with the Company. There is no dispute that a conversation took place in which Griffin discussed Schultheis future plans. Schultheis recalled such a conversation occurring after his conversation with Vest about being seen with Ferrick, while Griffin recalled that this conversation related to Schultheis next assignment after his light duty ended. Even under Schultheis version of the conversation, Griffin did not ask him

[24] Because the complaint alleges that these alleged unfair labor practices occurred at Bose at the Respondent's Holliston office, or at a job site in Framingham, it is unclear from the complaint itself that these are the allegations which relate to Schultheis' testimony. However, I have relied on counsel for the General Counsel's brief to match the allegations to the evidence.

[25] Although my finding differs to some extent from the precise allegation, the violation found is reasonably encompassed by the complaint allegation.

any questions about his union sympathies and activities. The General Counsel concedes this but argues that Griffin was nonetheless "[T]rying to get this information from him while, at the same time, warn him that becoming a foreman and hanging out with union supporters were incompatible." I am not prepared to make such a leap. Nothing in the conversation as testified to by Schultheis could reasonably be viewed as an interrogation regarding union activities or sympathies. Accordingly, I shall recommend dismissal of paragraph 7(cc) of the complaint. Griffin admitted telling Schultheis that he would be judged by the people he hung around with, but put this comment in a different conversation and claimed he was referring to how the men would judge him, not how Griffin would judge him. I credit Schultheis that the comment was made in connection with the discussion of Schultheis' goals with the Respondent and implied that Schultheis desire to be a foreman or leader with the Respondent might be affected by his association with known union supporters. Such an implication would reasonably tend to restrain and coerce an employee in the exercise of his Section 7 rights. Accordingly, I find that the Respondent violated Section 8(a)(1) as alleged in paragraph 7(dd) of the complaint.

The complaint alleges at paragraphs 7(o) and (p) that the Respondent violated the Act, through Vest's and Griffin's comments to Schultheis regarding his being seen having lunch with Ferrick, by creating the impression of surveillance and by telling employees not to associate with prounion employees. I credit Schultheis regarding this incident. Griffin's testimony, while acknowledging bits and pieces of the conversation, denied any unlawful conduct. Those portions of the conversation which Griffin did acknowledge, such as his mother's advice, tend to reinforce Schultheis credibility. As to Vest, he acknowledged commenting about Schultheis' "hanging with the union guy" and how that would negatively impact others' opinion of Schultheis. Accordingly, I find that Vest did tell Schultheis that Griffin saw him with Ferrick and that Griffin instructed Vest to advise Schultheis to "watch who he hangs around with." Griffin confirmed his awareness of Schultheis' association with Feerick and reinforced Vest's advice in a telephone conversation that night. Although Vest was not a supervisor within the meaning of the Act, he was a foreman at the time of this conversation and Schultheis was working under his direction in connection with the budget for the school job that was coming up. Vest's comments were consistent with the views Griffin himself expressed to Schultheis. Under the circumstances, Schultheis would reasonably believe that Vest "was reflecting company policy and speaking and acting for management" during this conversation. *Zimmerman Plumbing & Heating Co.*, 325 NLRB 106 (1997). Accordingly, I find that Respondent is liable for the statements Vest made to Schultheis and that the Respondent violated the Act as alleged in paragraph 7(p). I further find that Griffin's statements to Schultheis created the impression that the Respondent was keeping his protected activities under surveillance, as alleged in paragraph 7(o). Finally, Griffin's recounting of his momma's advice impliedly threatened that employees should not associate with prounion employees if they hoped to advance with the Respondent, in violation of Section 8(a)(1) as alleged in paragraph 7(kk) of the complaint.

4. Additional conduct attributed to Griffin

a. Griffin's meeting with Kinsella
(Par. 7(q) of the consolidated complaint)

Kinsella testified that, in late September, he called Griffin and asked for a raise. Thereafter, Griffin met with Kinsella at the Respondent's Holliston office for a pay review. Sandy Crowe was also present. During this meeting, Kinsella brought up the Union. Kinsella testified that he raised this issue because he believed that Griffin would not assign him to any prevailing rate work if he thought Kinsella was prounion. According to Kinsella, he told Griffin that he and two other employees were getting a bum rap because they were looked at as if they had signed cards in support of the Union.[26] Griffin responded, "[D]id your mother ever tell you that you were judged by who you hang around with." Kinsella didn't say anything in response. Kinsella acknowledged that, at the end of the meeting, Griffin gave him a $.75/hour raise and made him a leadman.[27] Griffin absolutely denied discussing Kinsella's union affiliation during this meeting. It is undisputed that Kinsella had signed a union card before this meeting and wore a union button on the Bose job on the day that union members picketed the site.

The complaint alleges that Griffin violated the Act during his meeting with Kinsella by creating the impression that employees' union activities were under surveillance. The General Counsel relies on Griffin's statement about "being judged by who you hang around with." Although Griffin denied making such a statement to Kinsella, he admitted telling Schultheis, during a meeting in June or July, that his mom told him when he was growing up that people will judge you by who you hang around with. This expression was one Griffin was accustomed to using. Because I found Kinsella to be a generally more credible witness than Griffin and because Griffin admittedly made such a statement before, I credit Kinsella's version of this meeting.

In determining whether an employer has created the impression of surveillance, the Board applies the following test: whether employees would reasonably assume from the statement in question that their union activities have been placed under surveillance. *United Charter Service*, 306 NLRB 150 (1992), and cases cited therein. Accord: *Hertz Corp.*, supra, 316 NLRB at 685. Griffin's statement here, that Kinsella would be judged by who he hangs around with, would reasonably lead Kinsella to believe that the Respondent was watching his activities to ascertain his support for the Union. Griffin's remark was made in response to the concern expressed by Kinsella about the "bum rap" he was getting because of the perception he was a union supporter. Griffin's remark did nothing to allay those

[26] Kinsella testified that, in mid-July, Leombruno told him, in the jobsite trailer at Bose, "[R]umor has it you signed a card." Kinsella testified that he was "shocked" and denied that he signed a card, asking Leombruno who told him this. Leombruno attributed the rumor to one of the "salts" on the job.

[27] Kinsella's personnel file shows that he received an additional $1/hour raise in December.

concerns. Although there is no dispute that Kinsella signed a union card, there is no evidence that Respondent became aware of this other than through Leombruno's July comments to Kinsella. Kinsella denied signing a card when confronted by Leombruno with this "rumor," suggesting that he wanted to keep his union support hidden from the Respondent. The fact that Kinsella wore a union button 1 day, along with other employees, does not mean he was an open active union supporter. At no time did Kinsella volunteer to Respondent that he was a union supporter. The fact that Griffin gave Kinsella the raise he requested with additional responsibilities as a leadman does not negate the chilling effect of Griffin's warning that he would be judged by his associates. This was no more than the carrot and stick approach to discouraging employees' support for the union which was characteristic of the Respondent's campaign. Accordingly, I find that the Respondent violated the Act as alleged in paragraph 7(q) of the complaint.

b. Griffin's December telephone conversation with Schultheis (Pars. 7(xx) and (yy) of the consolidated complaint)

Schultheis testified that, in early December, he was transferred from a prevailing rate job. Later that month, shortly before Christmas, Schultheis telephoned Griffin to discuss the transfer. According to Schultheis, he began the conversation by saying, "You know, Wayne, I could really use the extra money. You told me if I ever needed help to give you a call." Griffin responded by asking, "Where do you want to go? What do you want to do with this company?" Griffin then said, "[M]aybe you're not happy here at Griffin Electric. Maybe there's someplace you'd rather be. What can we do to improve the company?" According to Schultheis, Griffin became more hostile as the conversation continued. At one point, Griffin said, "You know what we spent $250,000 on last year? NLRB charges. Wouldn't you rather have that money in your profit sharing?" Schultheis said yes. Griffin then said, "[F]—king with my company is like f—king with my kids." Because of the tone the conversation was taking, Schultheis hurried to end the conversation.

Schultheis' wife was called as a rebuttal witness to corroborate his version of the conversation. Although she did not hear Griffin's side of the conversation, she was present in the room when Schultheis spoke to Griffin on the phone and recalled that her husband was pacing the floor while talking on the phone. According to Mrs. Schultheis, her husband said, when he got off the phone, that he never should have called Griffin. Mrs. Schultheis testified further that her husband told her what Griffin said during the conversation. Specifically, she testified that her husband told her that Griffin said, "I've worked hard to get my company where it is, and my company is like my children . . . . when you f—k with my company, you're f—king with my kid." She also recalled her husband telling her that Griffin said, "Do you know how much money I spend a year on NLRB charges?"[28]

Mrs. Schultheis testified that, a few nights later, Griffin called and asked to speak to Schultheis. He was not there, but Mrs. Schultheis took the opportunity to complain to Griffin about the way he had spoken to her husband during the previous call. She told Griffin that he had been disrespectful to her husband and that it was not right that Griffin was talking to her husband about things that had nothing to do with him and that it was wrong for Griffin to swear at her husband. Griffin apologized, telling Mrs. Schultheis that he had not meant to come across that way. He asked Mrs. Schultheis to have her husband call him. Mrs. Schultheis testified that her husband did call Griffin later that night and reported to her that Griffin had also apologized to him for swearing.

Griffin gave a different version of the December telephone conversation. According to Griffin, when he returned a voice mail message from Schultheis on December 20, Mrs. Schultheis answered the phone. Mrs. Schultheis told Griffin that her husband was not yet home and then proceeded to criticize Griffin, accusing him of not caring about his employees. When Griffin asked what she meant, Mrs. Schultheis complained about her husband being taken off a rated job. According to Griffin, he explained to Mrs. Schultheis how the work was assigned and that he does his best to distribute rated work among his employees. While Griffin was defending himself to Mrs. Schultheis, Schultheis came home and got on the phone. According to Griffin, Schultheis asked Griffin if he knew that Schultheis had been moved off the rated job. Griffin professed no knowledge of this and then told Schultheis that he was "a little bit miffed" by his wife's criticism. Griffin then reviewed all the things that he had done for Schultheis, concluding by telling Schultheis that he took the criticism personally. According to Griffin, he told Schultheis, "And by the way, if you're not happy any more, and we can't work it out, you've got to do what's best for the Schultheis family. I can't please everybody in the company. I do the best I can do as the president." Griffin testified that he'd "taken it a little bit personal, because I'd just about had my fill of it." According to Griffin, this was the last conversation that he had with Schultheis.

Although Griffin's recollection of this conversation did not include any reference to the NLRB charges, he did admit discussing unfair labor practice charges during a telephone conversation with Schultheis in June.[29] As noted above, Griffin testified that he told Schultheis in June, "Disappointingly, the unions have taken a position that they're just f—king with me, and they're trying to hurt me personally. And they're trying to take steps to have us spend a lot of money on frivolous charges, taking action to re-debar us. But you know, we're going to work through these things, and if we stay focused and work hard, we're all family at Griffin. And I try to take care of my employees like they are part of my family, just like you take care of your family." What is significant about Griffin's testi-

[28] Although Mrs. Schultheis' testimony regarding what her husband told her that Griffin said to him is hearsay, it is admissible to corroborate Schultheis own testimony regarding the conversation. *Dauman Pallet, Inc.*, supra at 186.

[29] From the formal papers, it appears that the bulk of the charges were not filed until after Griffin's June conversation with Schultheis. Thus it is unlikely that Griffin would have referred to the cost of defending numerous frivolous charges that early in the game. Such a comment would more likely have been made in December, as Schultheis recalled.

mony is that many of the themes in this speech he allegedly gave to Schultheis in June are consistent with statements attributed to him by Schultheis in the December conversation, i.e., his analogy of the Respondent to his family, references to the Union f—king with him through the filing of charges and other efforts to organize his company, and the way in which he personalized the Union's organizational efforts. These themes are also apparent in the other unlawful statements that I have found that Griffin made during earlier meetings and conversations with employees. Moreover, Griffin admitted discussing the alternative use of the legal fees to benefit employees in at least one conversation with Schultheis. Accordingly, I credit Mr. and Mrs. Schultheis version of the December conversation to the extent they differ with Griffin's testimony.

The General Counsel amended the complaint at the hearing to allege that the Respondent violated Section 8(a)(1) of the Act in two respects during the December telephone conversation between Griffin and Schultheis. Specifically, the General Counsel alleges that Griffin impliedly threatened employees with unspecified reprisals in retaliation for their union activities and promised employees monetary benefits in exchange for their refraining from protected concerted activities. The General Counsel argues that Griffin's reference to f—king with his company, in the context of his other comments regarding the cost of NLRB charges and his suggestion that Schultheis should look for someplace else to work if he was no longer happy at the Respondent, would reasonably be understood by Schultheis as a threat of unspecified reprisals for supporting the Union. The General Counsel further argues that Griffin's asking Schultheis whether he wouldn't rather have the $250,000 that the Respondent spent on NLRB charges in his profit sharing would reasonably be understood as a promise of increased benefits if the employees refrained from their activities in support of the Union. The Respondent argues that, even under Schultheis' version of the conversation, Griffin made no threats or promises of benefit. The Respondent characterizes Griffin's comments as the expression of his frustration and anger over the impact on his company of the cost of defending the numerous charges that the Union had filed.

Considering Griffin's statements in the context in which they were made, I find that Griffin's suggestion that Schultheis might be happier someplace else was not unlawful. Griffin made this comment early in the conversation while discussing Schultheis' complaint about being taken off a rated job. In the course of that discussion Griffin asked Schultheis where he wanted to go, i.e., what job did he want to work on with the company. It is unclear whether Griffin's reference to Schultheis' perceived unhappiness was related to his union activities or the removal from the rated job. Because the comment was ambiguous, it cannot be said that the Respondent restrained, coerced, or interfered with Schultheis protected activities by this comment. Accordingly, I shall recommend dismissal of paragraph 7(xx) of the complaint.

Later in the conversation, as Griffin became more hostile, he did specifically refer to the Union and the NLRB charges it had filed, equated f—king with his company with f—king with his kids and asked Schultheis if he would rather have the money spent on NLRB charges in his profit sharing. These comments were not ambiguous. Such statements convey to employees that their employer would reward them with increased benefits if they and their Union refrained from filing charges under the Act. Such statements would reasonably tend to restrain, coerce, and interfere with employees' exercise of their statutory rights. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 7(yy) of the complaint.

5. The conduct of Respondent's project managers and foremen

a. Trzecieski's alleged interrogation and threats at Adessa (Pars. 7(i), (gg), and (hh) of the consolidated complaint)

Daniel Ferrick was employed by the Respondent from January 1995 to January 1997. In about the late summer of 1995, he became the foreman on the Adessa job in Framingham after Lexner was transferred to the Bose job. Ferrick was the foreman during the Union's organizational campaign in 1996, reporting to Allen Trzecieski, the project manager and an admitted supervisor. Ferrick was identified by the Union as one of its employee organizers by letter dated June 24. Ferrick joined the Union in September and has worked for union contractors since leaving the Respondent's employ.

Ferrick testified that he first became aware of the Union's organizing campaign in May when Trzecieski told him that he was sending an employee, Lou Bonito, to the Adessa job because Bonito's prior foreman did not think he was productive enough. Trzecieski told Ferrick that Bonito was a member of the Union and asked Ferrick to keep an eye on him to make sure he was producing as much as the other employees.[30] Ferrick testified that, after Bonito came to the job, he passed out union cards and literature during break one day and that Ferrick informed Trzecieski of this. According to Ferrick, Griffin visited the job the following week and met with the employees. This meeting occurred shortly after the union members went on strike and picketed the Respondent's jobsites. It appears from Ferrick's testimony that Griffin made similar comments regarding the impact of unionization on the Respondent's competitiveness that he made during his meetings with the Bose employees. Griffin admitted meeting with the employees at Adessa and using Lexner's April memo as "talking points" for his speech. Griffin testified that he singled out Ferrick as an employee who had recently taken out a loan to buy a truck. Griffin told the employees that if they were union members, they would have a harder time getting such a loan because they would not have the same continuity of employment that they had with the Respondent. According to Ferrick, Trzecieski also spoke briefly about the effect of a union on the Respondent's ability to compete with other contractors. The General Counsel has not alleged that anything that Griffin or Trzecieski said during this meeting at Adessa was unlawful.

[30] Trzecieski denied telling Ferrick that Bonito was a member of the Union although he admitted being aware that Bonito was a union supporter at the time of this conversation. He corroborates Ferrick regarding the reason for Bonito's assignment, indicating that Bonito was on probation as a problem employee at the time. Documentary evidence in the record establishes that Bonito was transferred to Adessa on or about May 10.

Ferrick recalled that, around the time of this meeting, while Trzecieski was visiting the site, Ferrick asked him about rumors going around that all the employees at Bose and Adessa had signed union cards and that they were all going to be laid off. Ferrick asked Trzecieski if he knew anything about it. Trzecieski said, "No," and then said, "I'm not supposed to ask you, but has anybody signed cards?" Ferrick told him that he was not aware of any. Trzecieski denied ever asking Ferrick if anyone had signed cards. According to Trzecieski, it was Ferrick who brought up the subject of union cards. Trzecieski did not testify as to what Ferrick said on the subject. The General Counsel alleges, at paragraph 7(gg) of the complaint, that Trzecieski's questioning violated Section 8(a)(1). I credit Ferrick's testimony over Trzecieski's general denial. Although Ferrick's memory required refreshing as to some matters, he recalled this conversation without assistance. Moreover, his demeanor impressed me as someone who truthfully endeavored to recall the events of 2 years ago as best he could, without embellishment or speculation. Trzecieski, on the other hand, professed to have a precise recollection of 2 year old conversations even though he made no notes at that time and reviewed nothing in preparation for his testimony. Finally, I note that Trzecieski's questioning of Ferrick was consistent with Griffin's efforts to determine who signed cards through the advice he gave at the Bose meetings regarding how to get the cards back, discussed above.

In deciding whether an employer's questioning of its employees violates the Act, the Board examines all the circumstances involved in the interrogation to determine whether the questioning would reasonably tend to restrain, coerce, or interfere with employees' exercise of their Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). Among the factors considered are the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Hudson Neckwear, Inc.*, 302 NLRB 93, 95 (1991), citing *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985). Trzecieski's inquiry whether any one had signed cards occurred against the backdrop of Griffin's meetings with employees in which he expressed his opposition to the Union and solicited employees to retrieve their signed cards. Trzecieski was Ferrick's immediate supervisor. The information sought was the protected activity of other employees and Trzecieski did not explain the purpose of the inquiry. Although Ferrick was a foreman, he was not a statutory supervisor.[31] Moreover, at the time of this questioning, Ferrick had not revealed his own union sympathies. Contrary to the Respondent's assertion, Ferrick did not volunteer that he and others had signed cards by asking Trzecieski whether he had "[H]eard the rumors that we all had signed cards." This is not an admission that he and other employees at Adessa had in fact signed cards. Accordingly, under all the circumstances, I find that the Respondent violated Section 8(a)(1) of the Act through Trzecieski's interrogation of Ferrick. *Cumberland Farms*, 307 NLRB 1479 (1992), enfd. 984 F.2d 556 (1st Cir. 1993).

Ferrick further testified that, in late June, after attending a monthly labor meeting at the Respondent's Holliston office, he was asked to view a video about unions called "Little Card, Big Problem." After viewing the video, Griffin and Trzecieski came into the room and Griffin asked Ferrick if he had any problems with the Company. Ferrick said he did not. Griffin then told Ferrick about a restructuring of the pay rates. As Ferrick was leaving, Griffin told him that he had let Lexner go, that "things weren't going too good at Bose." Ferrick had known and worked with Lexner for a number of years and they were known to be friends. Trzecieski also testified to this conversation, corroborating Ferrick's testimony that Griffin informed him of Lexner's termination. Trzecieski denied that Lexner discussed changes in the pay scales and recalled that Ferrick commented on the way out that "Jimmy must have got in hot water up there" and "no guilt by association."

According to Ferrick, the day after the Union's letter identifying him as an organizer was sent out, Trzecieski visited him at the job and told Ferrick that Griffin asked him to speak to Ferrick about his decision to join the Union. Trzecieski asked Ferrick when he decided to sign a card, referring to comments Ferrick had made during a pay review indicating that he wanted to be a foreman for the Respondent. Ferrick told Trzecieski that he signed the card the week that Lexner was terminated. Trzecieski asked Ferrick why he wanted to become a union member and whether he was afraid of being laid off if he was a union member. Ferrick understood this to be a reference to union members being laid off and having to wait on the out of work list for jobs. Ferrick told Trzecieski that he did not think he would have a problem being laid off, that he would be able to keep working. Ferrick also told Trzecieski that he did not feel good about the way Lexner was laid off, expressing his belief that Lexner was let go because he would not give the union guys a hard time, not because of problems at Bose. Trzecieski told Ferrick that he did not know anything about the situation and then changed the subject.[32]

Trzecieski acknowledged having a conversation with Ferrick about Ferrick's joining the Union, but his recollection is substantially different. According to Trzecieski, he asked Ferrick what he meant by the "no guilt by association" comment referred to above. Trzecieski explained that he was concerned that Ferrick might have been referring to the work issues at Bose and he did not want to be surprised with similar issues at Adessa. On cross-examination, Trzecieski acknowledged that he was also aware of union problems at the Bose site. Trzecieski testified that Ferrick responded, "[W]ell, the cat's out of the bag now. Yeah, I'm union and have been for a long time."

[31] Although I found above that the Respondent's foremen had apparent authority and employees could reasonably believe they were agents of the Respondent, this finding does not privilege the Respondent's questioning of a nonsupervisory foreman to determine the union activities or sympathies of its employees.

[32] This is a compilation of Ferrick's testimony and his affidavit which was read into the record as past recollection recorded after Ferrick was unable to recall the exact sequence of the conversation. I note that, even before refreshing his memory with the affidavit, Ferrick did recall Trzecieski asking him when he decided to sign a card, referring to Ferrick's comments about being a foreman, and asked if he was afraid of being laid off with the Union.

Ferrick then told Trzecieski that he got involved with the Union when he had a dispute with a former employer over a COBRA issue and that the Union had taken him out to dinner. Ferrick also told Trzecieski that what made up his mind was Lexner's termination. Trzecieski recalled that Ferrick referred to joining the Union as an opportunity and stated that if things did not work out with the Union, he could always return to working for a merit shop. Trzecieski testified that he told Ferrick that he had a lot of opportunity with the Respondent and reviewed his employment history with the Respondent, his promotion to foreman, his pay raises and said, "You know, the company has done a lot for you now." He denied that Ferrick expressed any belief that Lexner's termination was because he would not give the union guys a hard time.

The General Counsel alleges, at paragraph 7(hh) of the complaint, that Trzecieski's questioning of Ferrick regarding when and why he signed a card was unlawful and, at paragraph 7(i), that Trzecieski's reference to previous pay review in the same conversation constituted an implied threat of no promotions because he signed a union card. The Respondent argues that Ferrick's testimony should be discredited because he could not recall being asked why he signed a union card despite several attempts to refresh his recollection. The sole evidence of this question is Ferrick's past recollection recorded in the affidavit. The Respondent also argues that, under Trzecieski's version of this conversation, it was not coercive as a matter of law. Under the Board's test set forth in Rossmore House, supra, I find that Trzecieski's questioning of Ferrick as to the timing and reasons for signing a card was not coercive. I note that Ferrick had already been identified by the Union as an employee organizer. Trzecieski's questioning during this conversation did not seek information regarding any other employees, but merely sought to determine why one of its foreman would choose to join a Union. Contrary to the General Counsel's argument, I find nothing coercive in Trzecieski's reference to Ferrick's comments in an earlier pay review. Trzecieski was simply attempting to harmonize Ferrick's stated desire to be a foreman for the Respondent with his joining the Union. There was implicit in this question no threat of lack of promotions. In fact, Ferrick already was a foreman and Trzecieski's statements did not suggest he could not remain in his position. Accordingly, I shall recommend dismissal of paragraphs 7 (i) and (hh) of the complaint.

b. Mosca and Sullivan at Stoughton
(Pars. 7(k) and (l) of the consolidated complaint)

On a Saturday in mid-June, Ferrick worked overtime on a job at a health care facility in Stoughton, Massachusetts, where Mosca was the project manager and Steve Sullivan was the foreman. Ferrick was working as a journeyman, pulling wire. Ferrick testified that, during break, Mosca started talking about the Union. Sullivan and two or three other electricians were also present. According to Ferrick, Mosca said that the Union had nothing to offer that the Respondent didn't offer. Mosca also said that if anybody signed cards, they would end up sitting on the Union's hiring hall list and would not be able to work. During this conversation, Sullivan said that if any of the union salts tried to hand him a union card, he would punch them in the head. According to Ferrick, Mosca said nothing in response to Sullivan's comment.

Mosca testified that, although Sullivan is a foreman for the Respondent, he was not a foreman on the Stoughton job. According to Mosca, Sullivan was working with his tools and was assisting Mosca on this job as Mosca's "point-man," coordinating the work. Mosca admitted discussing the Union's organizing campaign with the employees at the Stoughton job during a break. He did not specifically deny the comments about the Union's hiring list attributed to him by Ferrick. Mosca did acknowledge telling the employees that it was the Respondent's position, and in the best interests of the company, that they not sign the union cards. Mosca also corroborated Ferrick's testimony that Sullivan told the employees that, if anybody handed him a card, he would punch them in the head, or face. Mosca recalled that everybody chuckled when Sullivan said this. According to Mosca, he responded to the comment by saying, "[T]hat's not nice, we don't want any violence." Sullivan did not testify.

The complaint alleges, at paragraph 7(k), that Mosca told employees it would be futile to select the Union as their bargaining representative and threatened employees with job loss during this conversation at Stoughton. I find that Ferrick's testimony does not support this allegation. Mosca's comment that the Union had nothing to offer that the Respondent did not already offer is nothing more than campaign propaganda, akin to comparing the employees' existing benefits with those offered by a union. The statement contained no threat that the Respondent would take benefits away, refuse to bargain with the Union, or otherwise take action against the employees solely because they choose union representation. Cf. *Soltech, Inc.*, supra. Similarly, Mosca's reference to the Union's out-of-work list was not a threat of job loss. In contrast to Griffin's statements at Bose found unlawful above, Mosca did not threaten that employees would lose their jobs to union members on the out of work list. Instead, he merely described the experiences of union members who depend on the hiring hall to find work. Accordingly, I shall recommend dismissal of paragraph 7(k) of the complaint.

The complaint alleges, at paragraph 7(l), that Sullivan's statement that he would punch anybody who tried to hand him a union card was an unlawful threat of physical assault for engaging in union activities. There is no dispute that Sullivan made this statement. However, because Sullivan was not a statutory supervisor at the time, I must determine whether employees would reasonably believe that Sullivan was "reflecting company policy and speaking and acting for management" when he made this statement. *Zimmerman Plumbing & Heating Co.*, supra. Although Ferrick identified Sullivan as the foreman for this one-day job, he did not describe any interaction he had with Sullivan in that role. Thus the record is silent as to what Sullivan's duties and responsibilities were vis-a-vis the other employees on the job. I note that Mosca himself was present on the job and there is no dispute that he was a statutory supervisor. Thus, there is no evidence that Sullivan had even apparent authority on this job. Moreover, even assuming that Sullivan had apparent authority similar to that possessed by foremen like Ferrick who worked on bigger jobs, such authority would not

extend to physically assaulting employees. Under the circumstances, I find that the employees who heard this comment would not reasonably believe that Sullivan's threat reflected company policy or that he was speaking and acting for management when he made this statement. *Von's Grocery Co.*, 320 NLRB 53, 56 (1995). Accordingly, I shall recommend dismissal of paragraph 7(l) of the complaint.

c. Leombruno's conduct at Bose
(Pars. 7(n) and (qq) of the consolidated complaint)

Foley was transferred from the Mashpee School to the Bose job sometime in July. By that time, John Leombruno had replaced Lexner as the foreman. Foley testified that most of the crew, including Leombruno, Paul Eckhardt, and Paul Brown, two of the Respondent's foreman who were working as leadmen at Bose, ate lunch together at the Respondent's onsite trailer. Foley recalled that Project Manager Bob Burns occasionally was present as well. According to Foley, Leombruno, Eckhardt, and other procompany employees would often give the union supporters a hard time during these lunchbreaks. Foley testified that they made "derogatory comments" to Todd Boylan and Harry Walpole.[33] When asked for specifics, Foley testified that on one occasion Leombruno told Boylan to "[T]ake the scum that he got and just get out of here." When pressed to recall any other specifics, Foley testified that, on another occasion, employee Rob Ruggieri told Boylan, "[T]his isn't your world. Just get out of here." According to Foley, Leombruno, and Burns were present when this was said and they both just laughed. On cross-examination, Foley admitted that he could not recall the context in which these statements were made, and he further acknowledged that, in a pretrial affidavit, he could not recall what antiunion comment provoked Burns to laugh. Foley also conceded that, during these lunchtime discussions, Boylan got loud and used profanity when talking about the Union and that Boylan and Walpole probably told the procompany employees that they did not know what they were talking about, or were fools for working for peanuts, or similar comments. Although Boylan testified as a witness for the General Counsel, he was not asked about these statements. Walpole did not appear as a witness.

The complaint alleges, at paragraph 7(n), that Leombruno harassed employees because of their union activities on or about July 12 and, at paragraph 7(qq), that Leombruno and Eckhardt impliedly threatened employees with discharge if they engaged in union activities or talked about the Union on various dates in late June and July. It appears, from counsel for the General Counsel's brief, that these allegations are based on the testimony of Foley described above.[34] As the General Counsel notes in her brief, the Board recognizes that, in the course of organizational campaigns, "statements are sometimes made of a kind that may or may not be coercive, depending on the context in which they are uttered. In order to derive the true import of these remarks, it is necessary to view the circumstances in which they are made." *Hertz Corp.*, supra at 685–686, citing *Shaw's Supermarkets*, 289 NLRB 844 (1988). Assuming that Foley's testimony were credited, I would nevertheless find that the General Counsel has not met her burden of establishing the violations alleged in paragraphs 7(n) and (qq). Although Foley testified generally that foremen and procompany employees gave the union supporters a hard time, the only specifics he recalled were taken out of context and contain no explicit threat or promise of benefit. It appears these were no more than hyperbole in the course of a heated discussion on the pros and cons of the Union, during which the union supporters became equally exuberant. Accordingly, I shall recommend dismissal of paragraphs 7(n) and (qq).

d. Lexner's allegedly unlawful statements
(Pars. 7(s) and (u) of the consolidated complaint)

Lexner testified that, after Griffin met with the employees at Bose, on or about June 5, he spoke to Lexner and asked Lexner to go around to the men, one-on-one, and ask them how they felt about the Union. Lexner did not comply with this instruction. Lexner did not testify that he told anyone else about this conversation. However, Ferrick testified that, sometime in June, before Lexner was terminated, he had a telephone conversation with Lexner during which Lexner said that Griffin wanted Lexner to let him know "what was happening, if the guys were passing out cards, if the guys were pro-union, that type of thing." Ferrick did not testify that Lexner told him that Griffin asked him to get this information by interrogating the employees. Griffin denied asking Lexner to interrogate employees about their union activities. However, he admitted having a conversation with Lexner, after his meetings at Bose, in which he told Lexner that if anyone had any questions about what was discussed at the meeting, "[P]lease call me at the office and contact me personally." This is consistent with the instructions he gave to the employees during the meeting, i.e., to call him personally to find out how to get their union authorization cards back.

The complaint alleges, at paragraph 7(s), that the Respondent violated the Act by Lexner telling employees that Griffin had directed him to interrogate employees about their union activities and sentiments. This allegation is not supported by the evidence in the record. Even assuming that Griffin asked Lexner to interrogate employees, Lexner did not do so. Griffin's instruction to Lexner cannot violate the Act because Lexner was a statutory supervisor, no employee was aware of this instruction and Lexner never carried it out. *Resistance Technology*, 280 NLRB 1004, 1007 (1986). As noted above, Lexner did not tell Ferrick that Griffin asked him to interrogate employees. According to Ferrick, Lexner was asked by Griffin to keep him informed, as any supervisor would be expected to, of what was happening with the union organizing campaign. As the Board stated, in *Resistance Technology*, supra, "[W]hen two members of management converse and nothing further occurs, there is no impact on employee rights and no violation of the Act." Id. at fn. 8. I also note that, at the time of this conversation, Ferrick

[33] Walpole's name appears incorrectly in the transcript as Wuerful. The record is corrected to reflect the correct spelling of his name.

[34] Respondent apparently believed that par. 7(n) was based on a different conversation between Leombruno and Kinsella, arguing in its brief that nothing unlawful occurred in that conversation. I need not address this issue inasmuch as the General Counsel does not claim that anything Leombruno said to Kinsella during that conversation was unlawful.

was a foreman, and potential agent of the Respondent in its anti-union campaign, Lexner and Ferrick were friends and Lexner had recommended that Griffin hire Ferrick, and Ferrick acknowledged that Lexner had told him that he was sympathetic to the Union. Under these circumstances, Lexner's statement to Ferrick would not reasonably tend to restrain, coerce or interfere with Ferrick's exercise of his rights under the Act. Accordingly, I shall recommend dismissal of paragraph 7(s) of the complaint.

Lexner testified that he told Ferrick and Schultheis about the conference call with Griffin, Sandy Crowe, and a man identified as the Respondent's attorney in which, according to Lexner, Griffin asked him to give union supporters Boylan and Harris a hard time and to either start a fight with one of them, or have some "big lurch type"[35] start a fight with them. Schultheis testified that Lexner told him, in a telephone conversation during his first week out of work, that Griffin said to Lexner, "See if you can get the guys, you know, maybe you can get some of the guys on the job that are anti-union to start fights with the union guys. And then just like walk away. Write them up for whatever you can, see if you can get them into trouble." According to Schultheis, Lexner told him that he had refused to do these things. Ferrick recalled that Lexner told him, also during a telephone conversation in early June, that Griffin had asked Lexner to give the union guys a hard time, make them feel unwanted. Ferrick testified that Lexner also said that Griffin wanted Lexner to have a couple of his guys pick a fight with the union salts and that Griffin did not want Lexner to break it up too soon. Ferrick also recalled that Lexner told him that he had refused to do as Griffin requested. As will be discussed in more detail later, Griffin denies making such a request of Lexner.[36]

Paragraph 7(u) of the complaint alleges that the Respondent violated Section 8(a)(1) by Lexner's telling Ferrick and Schultheis about Griffin's alleged instruction to cause the physical assault of prounion employees. Lexner was an admitted supervisor of the Respondent at the time he spoke to Ferrick and Schultheis. Although Ferrick was a foreman, he and Schultheis were both statutory employees as well as Lexner's friends. Schultheis was under Lexner's direct supervision at the time. All three witnesses testified fairly consistently about what was said in their respective conversations. The issue is whether Lexner's statements to Ferrick and Schultheis, that the owner and president of the Respondent had instructed him to cause the physical assault of prounion employees, would reasonably tend to restrain, coerce, or interfere with their exercise of statutory rights. In making my decision, I note that Lexner told both employees, in the same conversation, that he had refused to do as instructed.

I find that, under all the circumstances, Lexner's statements to Ferrick and Schultheis regarding Griffin's instructions were unlawful. Even though Lexner was friends with these two employees and told them that he would not carry out Griffin's instructions, the statement by itself conveyed to employees how far the owner of the Company was willing to go to thwart his employees organizing activities. Such a statement would have the natural tendency to restrain and coerce an employee in his decision whether to support a Union, because to do so might lead to a company-orchestrated physical assault. Even though Lexner told the employees that he was unwilling to comply with Griffin's instructions, the employees were aware that the Respondent had many other foreman who were not so sympathetic to the union and could be expected to carry out such an instruction. Accordingly, I find that the Respondent violated Section 8(a)(1) by Lexner's conduct in reporting his version of the conference call to Ferrick and Schultheis, as alleged in paragraph 7(u) of the complaint.

6. The loyalty ratings

(Pars. 7(bb) and 15(a) and (e) of the consolidated complaint)

It is undisputed that one of the foremen's responsibilities is to periodically evaluate the performance of the employees on their crews. The Respondent's foremen utilize two forms for this purpose. The first is an individual appraisal entitled "Electrical Journeyman Monthly Work Report" on which the project foreman evaluates the employee on 10 items, using a 1–3 rating system, with 3 the highest score. There is no evaluation of loyalty on this form. Although identified as a monthly report, the record reveals that such evaluations are done every couple months. It is these evaluations that the foremen routinely discuss with individual employees. The second form is entitled "Crew Evaluation" and is utilized by the foreman to rate all the employees on his crew, on a monthly basis, in six areas, including "loyalty," on a scale of 1–5, with 5 the highest score. A company document entitled "Characteristics of a Good Employee," defines loyalty for purposes of these evaluations as "act[ing] professionally and show[ing] dedication to their job and company." In contrast to the individual employee evaluation form, there is no space for an employee's signature on the crew evaluation form. From the testimony of the Respondent's witnesses, which was corroborated by several of the General Counsel's witnesses, the latter form is not routinely reviewed or discussed with individual employees.

The parties dispute whether and to what extent these foremen evaluations affect employees' terms and conditions of employment. O'Connell testified that he was told by Dave Wall, one of the foreman who evaluated him early in his employment, that his evaluation would be used to determine the amount of any wage increase he got. On cross-examination, O'Connell acknowledged that he did not mention this in his pretrial affidavit. The Respondent's witnesses testified that the project manager's utilize the foreman's crew evaluations to determine whether there are problems with the crew that need to be addressed. According to Richards, a project manager would independently investigate if the foreman's crew evaluation indicated that there

[35] The transcript incorrectly records this testimony as a "large" type person. The record is hereby corrected to replace "large" with "Lurch" wherever it appears in testimony regarding this conference call.

[36] This conference call and the credibility issues surrounding it will be discussed in connection with Lexner's discharge. It is not material whether the conference call occurred as Lexner recalled for purposes of determining whether Lexner's statements to employees about the call were unlawful. It is the statements themselves, not whether they are true, which determine whether employees would reasonably be restrained or coerced.

were significant performance problems with any employees on the crew. The record establishes that Griffin, in determining whether to give an employee a raise or a promotion, and the amount of the raise, does consider the foreman's evaluation of individual employees in conjunction with other information, including the employee's conformance with the "Characteristics of a Good Employee." Griffin himself has commented on the loyalty of individual foreman in their performance evaluations.

As noted above, O'Connell was a member of a different local of the IBEW when he started working for the Respondent. There is no dispute that he revealed his union membership to Griffin and Miscia when Griffin visited the Mashpee School job in late May to talk to the employees about the Union's organizing drive. As found above, in that conversation Griffin implied that Foley, a member of the Union who was passing out cards, was a troublemaker but that O'Connell was not. The week after this conversation, O'Connell participated in the Union's first strike. O'Connell testified that he also began talking to other employees about the Union and answering any questions they had. O'Connell received generally favorable evaluations from his foreman Miscia in January and March, before his union affiliation became known, including a rating of 3 under loyalty. At the time of the January evaluation, Miscia told O'Connell that he could improve his score in that category by taking the blueprints and specs for the job home to study them on his own time. In August, upon returning from vacation, O'Connell was reassigned to the Adessa job in Framingham where he worked for about a month under Foreman Scott Towne. Towne evaluated O'Connell on September 13 and gave him lower ratings than Miscia had and commented negatively about his attitude and his commitment to the job. Towne gave O'Connell a "0" for loyalty on the crew evaluation form. O'Connell testified that he was unaware of Towne's evaluation before the hearing. On cross-examination, O'Connell admitted that he had disagreements with Towne regarding how best to do the work and that he even showed the project manager, Trzecieski, work that Towne had done which was not done properly.

O'Connell returned to the Mashpee job in September and received another evaluation from Miscia on September 27.[37] O'Connell testified that he met with Miscia in the office trailer at the jobsite to discuss this evaluation. According to O'Connell, Miscia brought up "loyalty" and said, "I think your loyalty is more to the Union than it is to the company." O'Connell responded by telling Miscia that he shows up for work every day, he does his job to the best of his ability, and that his loyalty is with the company. Miscia smiled and said, "I think you're still more loyal to the Union than you are to the company." O'Connell testified that Miscia explained that is why he gave him a lower rating. O'Connell recalled that Miscia showed him a form like the "Electrical Journeyman Monthly Report" during this meeting. He did not recall seeing a "Crew Evaluation" form. The record does not contain a monthly report for O'Connell completed by Miscia in September. However, a crew evaluation dated September 27, with only O'Connell's name on it, shows that Miscia rated him a "2" under "loyalty." Miscia rated him a "4" on four categories and a "3" on one. The "loyalty" rating was a decline from Miscia's last evaluation of O'Connell, but an improvement over Towne's evaluation.

Miscia acknowledged meeting with O'Connell to discuss the September 27 crew evaluation. According to Miscia, O'Connell asked him why he was getting a "2" for loyalty. Miscia testified that he told O'Connell that was his opinion. O'Connell then asked if it was because he was in the union and Miscia told O'Connell it was not. Miscia testified that he and O'Connell did not have a detailed discussion regarding any of the other items on the crew evaluation. When asked at the hearing why he gave O'Connell a lower rating on loyalty than he had on his previous evaluation, Miscia cited three factors: that O'Connell had refused to work overtime on a couple of occasions because he had to go bowling; that O'Connell ordered too much speaker wire while wiring the auditorium; and that O'Connell stranded another employee who carpooled with him by leaving the job without telling him. Miscia did not testify that he told O'Connell that this was the reason for the decline in his loyalty rating. Moreover, Miscia gave O'Connell a higher rating than his previous evaluation in such areas as "work effort" and "thoroughness in completing tasks" despite the three factors he cited as a basis for downgrading him on loyalty.

On the September 13 crew evaluation done by Towne at the Adessa job, Towne also gave Ferrick a "0" for loyalty. Ferrick testified that he was unaware of this evaluation. As noted above, Ferrick had previously been the foreman at Adessa and had been identified by the Union as one of its employee organizers in the letter dated June 24. Towne became Ferrick's foreman when Ferrick's work on the night shift ended. Two other employees evaluated by Towne on September 13, Sean Walsh and Kevin Boudreau, were given a "3" and a "4.5," respectively, under loyalty. There is no evidence in the record regarding the union affiliation or sympathies of Walsh or Boudreau. Towne testified that Ferrick was talking bad about the Company and Griffin and talking about labor issues, such as benefits, that were not an issue for Towne and that he considered this disloyal. Towne testified that he gave O'Connell a "0" for loyalty for similar reasons, i.e., that he badmouthed the Company and Griffin, accusing Griffin of being greedy and not putting money into the 401(k) plan and treating his workers like "fleas in a jar." Towne further testified that O'Connell and Ferrick did not show respect for the tools and that was also disloyal in his view. Towne had only worked with Ferrick and O'Connell about a month when he completed this crew evaluation. Towne did not show it to the employees, nor discuss it with them. Towne turned the form into the office and did not know what became of it after that.

The General Counsel alleges that Miscia's statement to O'Connell, on or about September 27, regarding the reason for his lower rating under loyalty violated Section 8(a)(1) of the Act. The General Counsel further alleges that the Respondent discriminated against O'Connell and Ferrick in September through the loyalty ratings they received from Miscia and Towne on September 13 and 27. Although Miscia denied making the statement attributed to him by O'Connell, I find him not

[37] O'Connell testified that he began wearing a union sticker on his hardhat and a union belt buckle after he returned to Mashpee from Adessa.

credible in this regard. As noted above, Miscia's self-evaluation completed in October for his own performance appraisal revealed the importance he placed on loyalty to the Company and to Griffin personally and his desire to assist the Respondent in meeting the "challenge" of the Union's organizing effort. Miscia's comments on this form lend credibility to O'Connell's testimony that Miscia linked O'Connell's loyalty rating to his support for the Union. The explanation Miscia provided at the hearing for the lower rating he gave to O'Connell was nothing more than a post hoc justification since Miscia admits he did not give this explanation to O'Connell when O'Connell asked him why his rating was lower. Moreover, the reasons cited at the hearing, in particular the claim that O'Connell ordered too much wire, would appear to be inconsistent with the higher ratings he received in the other categories. Having credited O'Connell's testimony, I further find that Miscia's statement violated Section 8(a)(1) of the Act. Comments equating support for the Union with disloyalty to the employer have a reasonable tendency to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights, particularly when uttered in the context of an evaluation which becomes part of the employee's personnel record with the Company.

With respect to the evaluations themselves, it is clear from Miscia's statement to O'Connell that the lower rating he received under loyalty on September 27 was motivated by his support for the Union. Thus, General Counsel has made out a prima facie case of discrimination. Because I have discredited Miscia's testimony that the reduced rating was for other reasons, the Respondent has not met its burden under *Wright Line*, supra, of establishing that O'Connell's would have received a lower rating in the absence of protected activity. The Respondent argues that there is no violation because there is no showing that the Respondent utilized this evaluation to adversely affect O'Connell's employment. While it is true that O'Connell suffered no immediate harm as a result of the lowered rating under loyalty, it is clear from this record that Griffin attaches much weight to "loyalty" when considering his employees for raises, promotions and job assignments. It is also clear that the crew evaluation was included in O'Connell's personnel file which Griffin admits he reviews when considering employees for raises. Under these circumstances, I find that the Respondent discriminated against O'Connell, in violation of Section 8(a)(1) and (3), when Miscia evaluated him negatively under loyalty. *Churchill's Supermarkets*, 285 NLRB 138 fn. 1 (1987).

Towne essentially admitted that he was motivated by O'Connell's and Ferrick's support for the Union when he gave them a "0" for loyalty on September 13 because they were "badmouthing" the company and Griffin. The "badmouthing" consisted of their discussion of "labor issues" including the Respondent's benefits and how its president treated the employees. Even if there were other reasons for giving them such a low rating, Towne's testimony is enough to prove a prima facie case of antiunion motivation. Because there is no evidence that other employees had received such a low rating on loyalty for not respecting company tools, I find that Respondent has not met its burden of showing that they would have received a "0" in the absence of protected activity. Although neither Ferrick nor O'Connell were aware of this evaluation, there is no dispute that the evaluation was in their personnel files and available for consideration by Griffin when determining raises, promotions and the like. Accordingly, I find that the Respondent discriminated against Ferrick and O'Connell on September 13, in violation of Section 8(a)(1) and (3) of the Act, by giving them a "0" rating for loyalty.

G. Additional Allegations of Antiunion Discrimination

1. Boylan's warnings

(Pars. 15(b) and (c) of the consolidated complaint)

Todd Boylan has been a member of the Union since 1988. He was hired by the Respondent in March and assigned to work at the Bose project under Foreman Lexner. Boylan testified that he began talking to his fellow employees about joining the Union and handing out union literature about a month after he started working. Lexner testified that he became aware of Boylan's union activities in April and informed Griffin of this. According to Lexner, Griffin told him to keep an eye on Boylan, that he did not want Boylan working alone because he could not be trusted. On cross-examination, Lexner acknowledged that Griffin did not say why he believed that Boylan could not be trusted, but Griffin had generally expressed concern about union vandalism. When Boylan began distributing union literature at Bose, Lexner advised Griffin and Griffin told Lexner to write up Boylan if he did it on worktime. According to Lexner, Griffin regularly asked Lexner during telephone conversations how Boylan and fellow union member Charlie Harris were doing and whether there was anything Lexner could write them up for.

Boylan went on strike the first week of June and picketed the Bose site with fellow union members and employees Maguire and Harris. According to Lexner, Griffin told him that he was sending replacements for the striking employees so that work would not be slowed and to have Boylan call the office if and when he returned. When Boylan and Harris returned after picketing, Boylan was sent to work at a prevailing rate job at the Andover Middle School for a day before returning to Bose. Griffin's telephone conversation with Schultheis regarding Boylan's return to the Bose job was discussed above. Boylan was one of the union members and adherents identified in the Union's June 24 letter to the Respondent as someone who would be organizing the Respondent's employees. In addition to his union organizational activities, Boylan spoke up during a meeting at Bose when project manager Burns told the employees that Lexner had been fired. Boylan expressed his belief that Lexner had been "railroaded."

On July 10, Boylan was given a verbal warning for allegedly telling another employee to slow down on the job. According to Boylan, one day on his way out of the building to use the bathroom, he came across helper Steve Sweet who does not normally work in Boylan's area. Boylan testified that he asked Sweet what he was doing, if there was something he could do to help. Sweet told Boylan that he was looking for material. Boylan asked Sweet where he was working and Sweet told him. As Boylan left the area, he said to Sweet, "[T]ake it easy." Sometime after Boylan returned from the bathroom, Foreman Leombruno approached him with a binder containing the Re-

spondent's rules and regulations and accused Boylan of violating the rules. When Boylan asked what he did, Leombruno told him he was telling the men to "lay down." According to Boylan, he did not understand what Leombruno was talking about until he saw Sweet in the background. Boylan testified that he denied telling anyone to slow down and Leombruno said he was going to give Boylan a written reprimand. Boylan protested that he should not be written up because he did not do anything wrong. Later, Leombruno told Boylan that he would receive a verbal warning and that Project Manager Burns would be coming to the site to give him the warning. The warning, signed by Burns and approved by Griffin cites section 10.5, section 2.9, and accuses Boylan of "interfering with job progress" based on Sweet's claim that Boylan told him to "slow down." On the warning notice, Burns wrote that Boylan, "[A]dmitted he to[ld] Steve to 'take it easy'." Boylan testified that "take it easy" is a meaningless expression that he customarily uses and he denied any improper intention behind his exchange with Sweet.

Leombruno testified that he gave Boylan the verbal warning in response to a complaint from Sweet that Boylan was "bothering [him] every time [he went] up and down the stairs, telling me to slow down and not to work so fast." In contrast to Leombruno's testimony regarding the nature of Sweet's complaint, the document memorializing Boylan's verbal warning refers to only one incident of Boylan telling Sweet to "slow down." Leombruno further testified that Sweet complained to him within Sweet's first couple days on the job. Leombruno acknowledged that he chose to believe Sweet in part because of Boylan's "obnoxious" behavior during the lunchtime discussions. It is undisputed that Leombruno wrote up the verbal reprimand and gave it to Boylan without giving Boylan an opportunity to respond to Sweet's accusation. Leombruno did acknowledge that, when he gave Boylan the verbal reprimand, Boylan denied telling Sweet to slow down and claimed that he only told Sweet to "take it easy" as a form of greeting. Sweet did not testify in this proceeding.

Leombruno acknowledged being aware of Boylan's pro-union sympathies because of the heated lunchtime discussions regarding the pros and cons of union representation described above. Leombruno also corroborated Boylan's testimony that he spoke up in protest of Lexner's discharge during the meeting at which Burns informed the crew that the Respondent had terminated Lexner. In preparation for a performance evaluation in May, Leombruno had identified as one of his "personal goals for the next six months to a year," to "assist the company in on-site issues with the current union problems." Leombruno completed this form before he was assigned to the Bose job.

I credit Boylan's testimony regarding his interaction with Sweet and find that he did not in fact tell Sweet to slow down production on the job. Although it is clear from the record that Boylan was a strong and vocal union supporter, he did not appear to me to be someone who would lie under oath to advance the cause. On the contrary, he appeared to be testifying in a candid and truthful manner to the best of his recollection regarding events occurring 2 years earlier. In contrast, Leombruno exhibited the same quality that the Respondent's other foremen and project managers had, i.e., a loyalty to Griffin and the Respondent which bordered on cult-like fervor and a willingness to say whatever he thought was necessary to protect and defend his leader. This "loyalty" is demonstrated in the forms Leombruno and others complete in preparation for their performance evaluations, as well as in forms filled out to evaluate progress or lack thereof on jobs assigned. I have also considered the fact that Leombruno exaggerated the nature of Sweet's complaint when he testified at the hearing, exploding a one-time comment allegedly made by Boylan to "slow down" into constant badgering of Sweet not to work so fast.

Having found that Boylan did not engage in the misconduct alleged, I find that the Respondent violated Section 8(a)(1) and (3) of the Act by verbally reprimanding Boylan on July 10. It is undisputed that Boylan was a known union activist. The other unfair labor practices found herein establish the Respondent's antiunion animus generally. The record also reveals specific animus directed toward Boylan as shown by Leombruno's comments to Boylan during the lunchtime discussions and the fact that he considered Boylan's conduct during these discussions in choosing to believe Sweet. In addition, I note that the record reflects that Griffin was looking for something to write Boylan up for since he was first informed by Lexner that Boylan was soliciting for the Union. Leombruno's quick response to Sweet's complaint demonstrated his desire to meet his "personal goal" by satisfying Griffin's request. Accordingly, the General Counsel has satisfied its burden of demonstrating that union activity was a motivating factor in the Respondent's decision to issue a verbal warning to Boylan. The Respondent has not met its burden under *Wright Line*[38] of demonstrating that it would have taken the same action in the absence of Boylan's union activities. Leombruno's exaggerated description of the conduct for which Boylan received the verbal warning shows the pretextual nature of the Respondent's asserted reason. An employer does not meet its *Wright Line* burden when its asserted reason for discipline is found to be pretextual. *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

The Respondent also argues that this allegation should be dismissed because there is no evidence in the record that a recorded verbal warning affects an employee's terms and conditions of employment. However, under the Respondent's disciplinary policies in effect at the time, a verbal warning was the first step in a progressive disciplinary policy for certain types of behavior.[39] Moreover, the Respondent has taken the position, in response to an allegation that Boylan was discriminatorily denied a raise, that this verbal warning was one of the factors establishing that he was not an exceptional employee deserving of a raise at the time he requested one, under the Respondent's policies with respect to raises. This convinces me that a reprimand like the one issued to Boylan does affect terms and conditions of employment under the Respondent's personnel poli-

[38] 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1980), cert. denied 455 U.S. 988 (1982).

[39] I note that, under this policy, the first step for the type of violation Boylan allegedly committed was a written warning, lending credibility to Boylan's testimony that Leombruno initially told him he would receive a written warning for his comment to Sweet. The fact that the Respondent ultimately chose a lesser form of discipline does not negate the unlawful nature of the discipline which did issue.

cies. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act by issuing a recorded verbal reprimand to Boylan on July 10.

On September 19, Boylan was told to report to the Respondent's Holliston office where he met with Burns, Richards, and Crowe and was given a written warning. The warning accuses Boylan of soliciting during working time in a working area in violation of company policy. According to the warning notice, Foreman Eckhardt overheard a brief nonwork related conversation between Boylan and employee James Condon on September 12 and reported it to Leombruno. The warning indicates that Leombruno "investigated" and was told by Condon that Boylan had solicited him numerous times to join the Union and that this solicitation occurred during worktimes in work areas. Attached to the warning notice is a handwritten memo to Griffin, dated September 18 and signed by Leombruno and Condon, describing Boylan's union solicitations. When he was given the warning, Boylan said it was not true, it was bull and accused the Respondent of giving reprimands to him so they could fire him. Richards denied this was their intention. Boylan wrote a statement on the reprimand denying the accusations and asserting that he was being punished for his union affiliation.

Boylan testified that, during the time he worked with Condon, who was an apprentice, he and Condon frequently spoke about the Union and other things, such as the job, family, and current events. Boylan admitted asking Condon if he considered joining the Union and gave Condon Bill Corley's phone number at the union hall and telling Condon that he could call Corley if he had any questions about the Union. Boylan also admitted asking Condon while they were working whether he had called Corley yet. Boylan also admitted being aware of the company policy against soliciting during worktime and in work areas.

Eckhardt testified that he overheard a heated discussion between Boylan and Condon while the two employees were pulling wire in an electrical closet. According to Eckhardt, he heard Boylan asking Condon why he did not call someone. Eckhardt said he asked Condon what was going on when he heard Boylan raise his voice and Condon told him that Boylan would not leave him alone, that he kept bothering Condon about calling someone whom Eckhardt surmised was a union organizer. Eckhardt testified that he immediately informed Leombruno about this and was not thereafter involved. Leombruno described the sequence of events a little differently. At first, Leombruno claimed that Condon came to him with a complaint about Boylan. On further questioning by Respondent's counsel, he testified that Eckhardt told him that he overheard Boylan yelling across the floor to Condon, "Are you going to call them? When are you going to call them? Why don't you Call them? You've got to call the hall." Leombruno testified that he then went and talked to Condon who told him that Boylan was "[B]ugging him all the time. He's always harassing me about trying to call this guy Bill, and he's kind of bogging me down." Leombruno then added that Condon requested that he be moved to a different work area. Curiously, Leombruno volunteered that despite Condon's complaint, the two employees were doing pretty well in terms of production. According to Leombruno, after talking to Condon, he called the office and reported this to Gerry Richards who told him to write something up and to tell Boylan to report to the office the next morning. Leombruno testified that he told Boylan to report to the office, as instructed by Richards. Leombruno claims that, on his return from the office, Boylan made some disparaging remarks about the Respondent and Richards and that he responded, "I'll address your concerns to the office. If you want to meet with them again, I'll let them know, or you can call them. It's an open forum." Finally, Leombruno claimed that Condon expressed concern about working with Boylan when he heard that Boylan had been sent to the office. In response to this, Leombruno sent Condon to the office, where presumably he would meet up with Boylan who had also been sent there. I find Leombruno's description of events grossly exaggerated and an obvious attempt to demonstrate his loyalty to the Respondent by making Boylan's conduct appear much worse than it was. Accordingly, I attach very little weight to Leombruno's testimony.[40]

Further support for my determination regarding Leombruno's credibility can be found in Richards' version of these events. According to Richards, Leombruno called him and reported that Eckhardt had overheard a conversation between Boylan and Condon about the Union. Richards testified that he asked Leombruno to get a statement from Condon and that Leombruno did not fax over the statement until a few days later. Despite Leombruno's claim that Boylan had been harassing Condon, Richards testified that he concluded based on Condon's statement that there was no harassment because Condon had asked Boylan some questions and was a participant in the discussions. Richards corroborated Boylan's testimony that he told the Respondent that he believed the warning was in retaliation for union activity. There is no evidence in the record that any other employee has ever been disciplined for a violation of the Respondent's no solicitation rule. In fact, Crowe testified that she could recall no such discipline.

Although I have discredited Leombruno, there is no dispute that Boylan spoke to Condon while working about joining the Union and solicited him to call Corley, the Union's business agent. It is also undisputed that the Respondent had a policy prohibiting "solicitation by an employee of another employee while either the person doing the soliciting or the person being solicited is on working time." Although the discipline prescribed for a first offense under this policy is termination, the Respondent chose to issue a written warning instead. The General Counsel does not allege that the Respondent's rule is facially invalid. The General Counsel argues instead that Boylan's conversation with Condon was not "solicitation" in violation of this rule and that the facts demonstrate that he was disciplined for merely talking about the Union during work. Because it is undisputed that Boylan's conversations with Condon did not interfere with their production and because Condon was not also disciplined for his participation in these discussions, the General Counsel argues that Boylan's written warning was discriminatory. Finally, the General Counsel contends that even if Boylan's conduct could be characterized as solicitation, the warning would still be unlawful because there is no evidence

[40] Condon did not testify.

that any other employees were disciplined for violation of this rule.

The General Counsel's argument is based on the erroneous belief that solicitation is limited to distributing cards or literature. Boylan admitted soliciting Condon to join the Union and soliciting him to call the union hall and admitted doing so while both were working. The fact that no other employees have been disciplined for violation of the rule does not establish a discriminatory motive. The General Counsel has failed to prove that other employees in fact engaged in solicitation in violation of the rule with the Respondent's knowledge. See *Albertson's, Inc.*, 307 NLRB 787 (1992). Accordingly, I shall recommend dismissal of this allegation. *Ultrasystems Western Constructors*, 310 NLRB 545 (1993), enf. denied on other grounds 18 F.3d 251 (4th Cir. 1994); *Cannondale Corp.*, 310 NLRB 845 fn. 2 (1993).

2. Denial of overtime to Foley
(Par. 15(d) of the consolidated complaint)

As noted above, Foley was employed by the Respondent at the Mashpee School job from approximately late March to the end of July. He was a longtime member of the Union who told his foreman, Miscia, on his first day on the job that he intended to organize the Respondent's employees. He was identified in the Union's June 24 letter as an employee organizer and participated in two strikes called by the Union, in early June and in July. I have already found above that Griffin committed an unfair labor practice when he told Foley on or about May 31 that he would never be a union shop. I also found above that Griffin implied that Foley was a "troublemaker" in a conversation Griffin had with O'Connell the same day. Although I did not find that Griffin's comment violated the Act, it is evidence of the Respondent's animus toward Foley's union activity.

Foley testified that when he was transferred to the Bose job in late July, foreman Miscia told him that there would be Saturday work at Mashpee for the rest of the summer and that Miscia would be calling Foley for overtime. Foley testified further that he had worked overtime most Saturdays since he started at Mashpee, but that he was never called for overtime after he went to Bose. Foley recalled that two other employees who were working at Bose and had not been working at Mashpee worked overtime at Mashpee in August. Foley's timecards confirm his testimony that he worked virtually every Saturday at Mashpee until he began working at Bose on July 29 and that he did not work any more overtime, at least through September 8. These time records further reflect that Dye and Ruggiero did work Saturdays at Mashpee, after putting in their 40 hours at Bose, through August 25. On cross-examination, Foley admitted that, the first Saturday he worked overtime, Miscia told him that he did not get enough work done. He also admitted, somewhat reluctantly, that one other Saturday when he worked overtime, Miscia expressed concern about Foley being hung over and assigned him to work at ground level as a result. Foley further acknowledged that he was 45 minutes late for work that day. There is no dispute, however, that he continued to be assigned overtime work until his transfer to Bose notwithstanding these incidents.

Miscia testified that, as Foley left the job to work at Bose, Foley said, "[G]ive me a call if you need my help on Saturdays," and that he responded, "[F]ine." Miscia acknowledged that there was a substantial amount of overtime required at Mashpee in August because they were trying to complete the work before the scheduled opening of school. According to Miscia, when he knew there was going to be overtime on a Saturday, he would first seek volunteers from among the crew at Mashpee. If he didn't get enough volunteers, he would tell his project manager, Trzecieski, how many men he needed and Trzecieski would find them. Miscia testified that sometimes he didn't know who would be working until they showed up on Saturday. Miscia denied calling any employees himself to work overtime and denied telling Trzecieski that Foley had expressed interest in working overtime at Mashpee. Miscia also denied specifically requesting that Trzecieski assign Dye and Ruggieri to work overtime at Mashpee. Foreman Towne testified that he worked Saturday overtime at Mashpee. According to Towne, he called Trzecieski, usually on a Thursday, to ask if there was any overtime and to let Trzecieski know that he was available to work overtime. Trzecieski would then tell him if there was work available.

Trzecieski testified that it was his responsibility to find additional people to work the required overtime at Mashpee if Miscia did not have enough employees from his regular crew who were willing to work the overtime. According to Trzecieski, when Miscia told him how many people he needed, Trzecieski would offer the overtime to those people who had contacted him and expressed an interest in working overtime. Trzecieski identified Dye and Ruggieri as such employees. He testified further that Foley never contacted him about working overtime. Trzecieski denied that Miscia requested any employees by name and he specifically denied that Miscia told him that Foley was interested in working overtime at Mashpee. Trzecieski also testified that, in choosing people to work overtime, he considered their performance and pay scale. With respect to the latter, he preferred employees with lower pay rates because the overtime cost would be less. There is no dispute that the Mashpee job was a prevailing rate job. Trzecieski admitted that he became aware of Foley's union affiliation when the Respondent received the Union's letter revealing his union membership. I infer from the other evidence in the record that Trzecieski was referring to the Union's June 24 letter.

The complaint alleges that the Respondent's failure to call Foley for Saturday work at Mashpee after his reassignment to Bose violated Section 8(a)(1) and (3) of the Act. There is no dispute that Foley was a known union organizer and the unfair labor practice findings above establish that Respondent had antiunion animus. There is also no dispute that there was overtime work available at Mashpee, that Foreman Miscia knew of Foley's interest in working overtime, and that Foley was not offered any overtime while other employees who were working at Bose were. The General Counsel relies on this evidence to establish a prima facie case that the Respondent discriminated against Foley because of his union membership. The Respondent contends that Foley did not work overtime because he never contacted the project manager, Trzecieski, to express his interest. Respondent argues alternatively that Trzecieski would

not have selected Foley for overtime because his pay rate was too high and because he had problems when he did work Saturdays while assigned to Mashpee.

Although the General Counsel has established knowledge and animus, both general and specific as to Foley's union activities, and that Foley was not assigned overtime whereas other employees were, I find that this is insufficient to establish a prima facie case of discrimination under the Act. Rather, I find that the preponderance of the evidence establishes that Foley was not assigned overtime simply because Trzecieski, who selected the employees for overtime, was not aware of his interest in working overtime. Although I have found Foley a generally more credible witness than Miscia, it is immaterial that Miscia "promised" to call Foley for overtime after his transfer to Bose. Miscia was not a statutory supervisor and there is no evidence in the record that Miscia had any role in selection of employees for overtime beyond the authority he had over his crew at Mashpee. After Foley left Mashpee, Miscia was no longer his foreman. In the absence of evidence that Miscia communicated Foley's interest to Trzecieski, I find that Trzecieski's failure to call Foley was not unlawfully motivated. Accordingly, I shall recommend dismissal of this allegation of the complaint.

H. Lexner's Discharge
(Pars. 12–14 of the Consolidated Complaint)

Lexner has been an electrician for 20 years, with approximately 13 years experience as a foreman. He was employed by the Respondent from January 1995 until his discharge on June 21. Before being assigned to the Bose job, in September 1995, Lexner was the Respondent's foreman at the Adessa job, also in Framingham. In a letter dated June 28, 1995, Griffin commended Lexner for his performance on that job and praised Lexner for being "up front, honest, direct and show[ing] all sincere attempts to be fair." Lexner was given a $3120 increase in salary at the same time to reward his "continued success and achievement." On September 18, 1995, the electrical inspector for the town of Framingham sent the Respondent a copy of a letter complimenting Lexner for his competence and integrity.

The reassignment to Bose represented a significant increase in Lexner's responsibilities because the job was much larger. Robert Burns was the Respondent's project manager for the Bose job. Paul Brown was the foreman at Bose before Lexner's reassignment. One of Lexner's first assignments when he went to Bose was to prepare the budget for the job. Lexner had no role in the selection of employees or leadmen for the job, with Griffin or the project manager determining who would be assigned. Lexner did determine where each of the two leadmen would work and assigned them their crews. Schultheis and Ruggieri were the leadmen on the Bose job.

As the project foreman, Lexner, was required to attend weekly meetings with the General Contractor, Turner Construction, and the foremen from the other contractors to review the job's progress and to coordinate the work of the various trades on site. Burns occasionally attended these meetings as well, more often in the early stages of the job. Lexner was also required to attend a monthly labor meeting at the Respondent's office in Holliston with Wayne Griffin, Richards, and Burns to discuss the budget. At these meetings, using computer printouts, the Respondent would keep track of the actual man-hours used in relation to what had been projected in the budget. These meetings were very important to Griffin as a means of tracking each job's progress to ensure that the Respondent achieved its anticipated profit margin when the job was completed. At these monthly meetings, the foreman's photographs, videotapes, and daily logs were reviewed to keep tabs on the progress of the job. In addition, Burns visited the job approximately once a week and walked the site with Lexner, sometimes asking questions about the job.

Lexner admitted that he had contact with the Union before he was hired by the Respondent. The Union had assisted Lexner and Ferrick in a wage dispute with their previous employer, East Coast Electric. Lexner testified that he told the Union's business manager, Paul Ward, in December 1994, that he was going to go to work for the Respondent and that Ward asked him to keep in touch. Lexner admitted that he did "keep in touch" with the Union while working for the Respondent. Lexner further testified that he first became aware that the Union was organizing the Respondent's employees when a carpenter brought some literature from Local 103 onto the job. Shortly thereafter, Lexner saw Boylan wearing union stickers on his hardhat and informed the Respondent through his project manager. As noted above, Lexner also informed the Respondent when Boylan started handing out union literature at Bose. Lexner's conversations with Griffin regarding these events has already been discussed above.

As found above, Boylan and Harris, union members who were working at Bose, went on strike and joined Maguire, another union member employed by the Respondent, in picketing the Bose job for several days in the first week of June. It is undisputed that Boylan and Harris were replaced and that Boylan was sent to another job on their return to work. Griffin's visit to the job and meetings with the employees during the strike has already been discussed, as well as Griffin's instruction to Lexner to interrogate the employees regarding their union sympathies. A day or two after Griffin's meetings with the employees, according to Lexner, he participated in a conference call with Griffin and others. There is much dispute between the parties regarding who else participated in this call, the purpose of the call and what was said. It is this call which the General Counsel and the Charging Party rely on to prove that Lexner was asked to commit an unfair labor practice. Prior to and at the hearing, the Respondent sought to exclude testimony regarding this call on the basis of attorney/client privilege. My ruling, denying the Respondent's motion, is part of the record and affirmed.[41] Credibility resolutions with respect to this call are crucial to the outcome of the General Counsel's allegations regarding Lexner's discharge.

Lexner testified that he received a message to call Griffin and that, when he called Griffin, Griffin told him that Sandy

[41] The Respondent's request for special permission to appeal my ruling during the hearing was denied by the Board as untimely filed, without prejudice to the Respondent's filing exceptions with the Board after issuance of this decision. Because no party has argued in their briefs that I should revisit my ruling, I shall not discuss it further herein.

Crowe and an attorney, whose name Lexner could not recall, were also on the line. Griffin told Lexner during this conference call that he wanted Lexner to give Boylan and Harris a hard time. According to Lexner, Griffin went on to say that he wanted Lexner to start a fight with one of them. At that point, the attorney interrupted and said, "[D]on't have Jim do that." Griffin then told Lexner to find someone else, "some big Lurch type of person" and have him start a fight with one of the Union guys. Lexner recalled that either Griffin or the attorney then said, "and don't have anybody hurry over there to help him." Lexner testified further that he told Griffin that he did not do things like that, that he had no problems with Boylan and Harris, that they came to work every day, did their jobs and went home. Griffin said okay and then Crowe and the attorney hung up. When only Griffin and Lexner were on the line, Griffin told Lexner, "[T]his is something you can get away with doing, Jim." Lexner responded, again, that he does not do things like that and the conversation ended.[42] In a statement Lexner gave to the Union 4 days after he was terminated, Lexner described a different version of this conversation. In that statement, Lexner stated that it was Griffin who corrected himself and said that it would probably not be a good idea for Lexner to give Boylan and Harris a hard time, that Lexner should get some of the other guys on the job to do it. In that statement, Lexner also stated that it was the attorney who then suggested that Lexner get another employee to start a fight with the union guys and that Lexner not hurry to break it up.

Within three weeks of this conversation, Burns met Lexner in the office trailer at Bose, gave him his final paycheck and told Lexner that he was being let go for "lack of supervision." According to Lexner, neither Burns nor any other management representative had spoken to him before this about problems with his supervision, nor had he been warned that his job was in jeopardy. According to Lexner, Burns did not provide any explanation of the reason for his discharge at the time he was terminated. On cross-examination, Lexner specifically denied that anything unusual or different happened at the May monthly labor meeting, the last one before his termination. Lexner admitted that he applied to join the Union before his termination and that the Union's executive board approved him for membership in July, about a month after he was fired. He also acknowledged that he started working for a union contractor on October 1, earning about $8/hour more than he did at the Respondent. In addition, in the statement Lexner gave to the Union shortly after he was fired, he stated that he volunteered to help the Union with its organizing drive "at the time [he] was originally employed by" the Respondent. At the hearing, Lexner initially denied this, until he was shown the statement. On redirect examination, he testified that he meant that he offered to help the Union after Boylan started wearing union stickers on his hardhat.

[42] As found above, Lexner told Schultheis and Ferrick about Griffin's request. Because Lexner was a statutory supervisor when he relayed this information to these employees, I found a violation of Sec. 8(a)(1) of the Act. Lexner's statement to the employees would be unlawful without regard to its truth because it is the reasonable tendency of such a statement to chill employees' exercise of their statutory rights which determines whether the statement is unlawful.

Griffin acknowledged having a conference call with Lexner and an attorney on the line. However, Griffin claims that Richards, not Crowe, was the fourth person on the line. According to Griffin, it was Lexner who initiated this call, on Friday, June 7, after Boylan and Harris had been reinstated following the strike. Griffin testified that Lexner complained that sending Boylan to a prevailing rate job after he went on strike was bad for morale and set a bad example for the other employees. Griffin asked Lexner what he recommended be done. Lexner had no recommendation. Griffin then asked if Lexner could use Boylan back at Bose. When Lexner told him he could because Schultheis had injured his hand that day, Griffin called Richards and Attorney Kohler into a conference call to obtain legal advice regarding what to do about Boylan's job assignment. Griffin then had Lexner explain the problem to Kohler and Griffin asked Kohler if he could put Boylan back to work at Bose under the circumstances described by Lexner. According to Griffin, Kohler replied that he could as long as it was for business reasons. Apparently satisfied with that advice, Griffin dismissed Kohler from the call and, with Lexner and Richards still on the line, discussed reinstating Boylan to Bose the following Monday. Before the call concluded, Richards also reminded Lexner of his responsibilities for reporting and documenting any further picketing at the jobsite. Griffin expressly denied that he or anyone else said anything about giving Boylan and Harris a hard time, or starting a fight or causing a fight with them, as Lexner claimed.[43]

Sandy Crowe testified for the Respondent and denied participating in any conference calls with Lexner and Griffin, or with Lexner, Griffin and an attorney and specifically denied that she was party to such a call in which Boylan and Harris were discussed. On cross-examination, however, she acknowledged being a party to conference calls with Griffin, legal counsel and others within the Company, such as Richards or one of the project managers, to discuss labor relations or human resource matters. According to Crowe, it was a common practice for Griffin to conduct business through the use of conference calls. Nevertheless, she insisted that she never participated in a call with a foreman like Lexner on the line in which Griffin discussed causing a fight among employees.

Richards corroborated Griffin's testimony about the June 7 conference call with Lexner and Kohler. According to Richards, Griffin called him and told him that he had Lexner on the line and that he needed to talk to Richards and legal counsel about Boylan's assignment after the strike. At that point, Griffin called Kohler, who joined the conference call. Griffin then asked Lexner to recite his concerns about Boylan's assignment and Lexner expressed his belief that it did not look good for the other employees to send Boylan to a prevailing rate job after he went on strike. Griffin asked Kohler to brief Lexner on the legal requirements for reinstating strikers and Kohler did, in particular telling the parties on the line that the job assignments had to be strictly for business reasons. Kohler exited the call after about 2 minutes and Griffin, Richards, and Lexner discussed sending Boylan back to Bose as a replacement for the

[43] Attorney Kohler, who represented the Respondent at the hearing, did not testify regarding this conference call.

injured Schultheis. After agreeing to this, Griffin wrapped up the conversation by asking Richards if he had anything to add. Richards reminded Lexner of his responsibilities for reporting information to the office in the event of picketing and the call concluded. Richards specifically denied that Griffin told Lexner to give Boylan and Harris a hard time, and denied that there was any discussion of starting a fight or having someone else start a fight with them, with Lexner not hurrying to break it up. Richards' account of this conversation did not vary on cross-examination, despite extensive questioning by the Charging Party's counsel in an effort to impeach his credibility.

Griffin also testified, further contradicting Lexner, that he had a conversation with Lexner, after his meeting with the employees at Bose on June 5, in which he questioned Lexner regarding a discrepancy in manhour projections for completion of the job. Griffin and Richards testified that this discrepancy between projected hours and budgeted hours first came to light during the May labor meeting and that Lexner could not explain the variance, or swing, as Griffin described it. Griffin testified that it was this problem which led to Lexner's termination, not any refusal by Lexner to commit unfair labor practices. The General Counsel, the Charging Party, and the Respondent spent a good deal of time at the hearing establish-ing whether or not there was any manhours problem on the Bose job and whether or not Lexner would have been fired if there was such a problem.

As noted above, it is essential to the General Counsel's case that I credit Lexner regarding the conference call. If I do not credit Lexner, then the General Counsel has failed to prove that Lexner refused to commit an unfair labor practice and the allegedly unlawful motivation for his termination evaporates.[44] On the other hand, if I credit Lexner, I must determine, applying a *Wright Line* analysis, whether his refusal to cause the physical assault of two union supporters was the motivating factor in the decision to terminate him, or whether the Respondent established that Lexner would have been discharged even absent this refusal because of problems with the way he ran the Bose job. There are no witnesses who can corroborate Lexner's testimony. On the other hand, the Respondent had the benefit of Griffin and Richards mutually corroborative testimony regarding a conference call they participated in with Lexner and Kohler and Crowe's persistent denial that there was a conference call in which she and Lexner were participants.

Resolution of these credibility issues is made more difficult by the fact that neither Griffin nor Lexner impressed me as entirely candid and truthful witnesses. As noted above, both had much to gain from the outcome of these proceedings. Moreover, I have already discredited Griffin's denials and explanations regarding other alleged unfair labor practices and have noted how the importance of "loyalty" in the Respondent's corporate culture impacted the credibility of many of the Respondent's witnesses. On the other hand, Lexner displayed a generally poor recall of most events he was asked to testify about, especially on cross-examination when the Respondent's counsel attempted to elicit information that might adversely affect his credibility.[45] I also note that Lexner's testimony was at times inconsistent with the sworn statement he gave to the Union a scant 4 days after his termination. The General Counsel's attempts on redirect to clarify the inconsistencies only exacerbated them. For example, Lexner denied offering to help the Union with its campaign against the Respondent when he started working for the Respondent, in contradiction of the statement he gave to the Union. His claim, on redirect, that he made this offer only after Boylan started wearing union stickers on his hardhat is still inconsistent with the prior sworn statement. Also inconsistent with prior sworn testimony is his claim at the hearing that Griffin asked him whether he had "written up," i.e., given a written warning to, Boylan and Harris. He denied in his pretrial affidavit given a month after his termination that Griffin ever asked him this. At most, Griffin asked him whether there was anything Lexner could write them up for, a different question than that described in his testimony at the hearing. Finally, Lexner acknowledged "playing both sides" when he wrote an antiunion memo to Griffin in April, which Griffin then used in his meetings with the employees to discourage their support for the Union. According to Lexner, he did this because he was getting signals that the Respondent's management perceived him to be prounion and he wanted to convince them he was a team player, even though he in fact was sympathetic to the Union.

Also complicating the resolution of this credibility issue is the involvement of an attorney, in all probability the same attorney who represented the Respondent at the hearing. A decision to discredit Griffin and Richards would be tantamount to saying that the Respondent's counsel suborned perjury because both witnesses identify him as a participant in the call with Lexner. If they were not being truthful when they denied Lexner's version of the conversation, Respondent's counsel would surely know they were lying, yet he had them take the stand and testify nonetheless. Counsel for the Charging Party obviously is aware of this implication because he argues that the attorney probably exited the call quickly, before any talk of assaulting the union activist came up. This argument is inconsistent with the testimony of his own witness who claimed that the attorney was a direct participant in the discussion of the unfair labor practice. The General Counsel and counsel for the Charging Party also attempt to get around this issue by speculating that there were in fact two conference calls, one with Crowe and the other with Richards. The problem with this argument is that no witness claimed there were more than the one conference call. Absent evidence of a second conference call, I must find that there was only one call on June 7. The two versions of this call offered by General Counsel and the Charging

[44] The General Counsel briefly cites Lexner's testimony that Griffin asked him to interrogate employees as another unlawful motivation for his termination. However, Lexner did not testify that he refused to interrogate employees, he simply ignored the request and, apparently, Griffin never followed up by inquiring any further of Lexner as to the results of any interrogation. I find that, even if Griffin asked Lexner to interrogate employees, the General Counsel has failed to show that Lexner's failure to do so was a motivating factor in his termination.

[45] For example, although he acknowledged that the Union assisted him in obtaining a monetary settlement of prevailing wage claims against his former employer, he claimed no recollection of the amount he recovered or when he received it.

Party on the one hand and the Respondent on the other simply can not be harmonized.

Having considered all of the above factors and the demeanor of the witnesses, I cannot credit Lexner's version of this call. The inconsistencies between his testimony at the hearing and his prior statements, his generally poor recall of events, his desire to help the Union which had helped him collect money from a prior employer and to become a union member convince me that he was not being truthful when he accused Griffin of asking him to arrange to have two employees who were union activists assaulted on the job. While I have no doubt that Griffin was vehemently opposed to the idea of his employees joining the Union, and that he was willing to violate the Act in the manner I have found previously in this decision in order to avoid recognizing the Union as his employees' exclusive collective-bargaining representative, nothing in this record suggest that he would go beyond interrogation, surveillance, threats of job loss, and promises of benefits and resort to physical violence as a means of preventing the Union from representing his employees. Particularly since, at the point in time when this conversation allegedly occurred, there was no need for such action. The Union's strike was supported by only a handful of employees, even at the Bose job which was purported to be a hotbed of union support. Lexner's testimony simply does not make sense.

In reaching this conclusion, I have also considered the testimony of Ferrick and Schultheis, whom I credited, that Lexner told them, before he was terminated, about Griffin's request. The General Counsel and the Charging Party argue that this establishes the truthfulness of Lexner's testimony because he would have no reason to concoct such a story at that time. However, Lexner admits that he had applied to become a union member before he was terminated and that he had offered to help the Union with its campaign no later than April. What better way to help the Union than by telling employees who were not yet union members that the owner of the Company would go so far as to cause the assault of employees who were union members! It is clear from the testimony of Ferrick and Schultheis that Lexner's support for the Union was a factor in their decision to join the Union as well. In addition, Lexner himself acknowledged, in the July affidavit, that he suspected that Griffin "gave up on him" as an ally in the Respondent's antiunion campaign a month before his termination. If Griffin then questioned Lexner's handling of the Bose job on June 5, as Griffin claims he did, this would have given Lexner reason to believe his job was in jeopardy at the time he told Ferrick and Schultheis about Griffin's "plans" for Boylan and Harris.[46] Thus, my decision to credit Ferrick and Schultheis does not require that I credit Lexner as well.

Because the General Counsel has failed to prove by credible evidence that Lexner refused to commit an unfair labor practice, it is unnecessary to decide whether the Respondent terminated Lexner for having a bad job at Bose or for some other reason. I note that the General Counsel and the Charging Party make a persuasive argument that Lexner would not have been fired for the alleged discrepancy in manhour projections. At most, this suggest that the Respondent may have decided to rid itself of a supervisor who was perceived to be a union supporter and replace him with one whose "loyalty" to the Respondent was beyond question "in order to ensure that labor unrest did not have a strongly adverse impact on contract performance."[47] Assuming that were the Respondent's motivation for terminating Lexner, it would not be an unfair labor practice. The Act does not protect statutory supervisors who engage in union activities. See *Parker-Robb Chevrolet*, 262 NLRB 402 (1982), enfd. sub nom. *Food & Commercial Workers Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983). Accordingly, I shall recommend dismissal of the complaint's allegation that the Respondent terminated Lexner in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Wayne J. Griffin Electric, Inc., is, and has been at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local 103, AFL–CIO is, and has been at all material times, a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by:

(a) Interrogating employees regarding their union and protected concerted activities and the union activities of their fellow employees; creating the impression among employees that their union activities were under surveillance; and soliciting employees to report on the union activities of their fellow employees.

(b) Maintaining rules prohibiting employees from discussing their wages, benefits, and working condiditons and by enforcing those rules through threats of discipline and issuance of written warnings.

(c) Soliciting employees to revoke their union authorization cards and instructing them to contact the Respondent's president if they wished to revoke their union authorization cards.

(d) Threatening employees with job loss if they selected the Union to be their collective-bargaining representative; implying that support for the Union would effect their advancement with the Respondent; and equating employees' support for the Union with disloyalty to the Respondent and its president.

(e) Telling employees that discipline they received was a subterfuge to conceal discriminatory actions against union supporters.

(f) Telling employees that selection of the Union as their collective-bargaining representative would be futile because the Respondent would never be a union contractor.

(g) Telling employees that the Respondent would cause union employees to be assaulted.

[46] Significantly, the General Counsel chose not to recall Lexner in rebuttal to counter the detailed testimony of the Respondent's witnesses regarding the May labor meeting and Griffin's June 5 conversation with Lexner about the swing in manhours.

[47] The Respondent's agent, Damian Cassin, made this statement in a May 23, 1997 letter to Turner Construction Company, the general contractor on the Bose job.

(h) Promising employees increased benefits if the Union did not file unfair labor practice charges against the Respondent.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by downgrading employees on loyalty on their crew evaluions and by issuing verbal reprimands to employees because of their union membership and activities.

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

6. The Respondent did not commit any other unfair labor practices alleged in the consolidated complaint as amended at the hearing.

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. Specifically, the Respondent shall be ordered to rescind the negative loyalty ratings given to Daniel Ferrick and Richard O'Connell on September 13 and 27, 1996, nd the recorded verbal reprimand issued to Todd Boylan on July 10. To the extent that Boylan's September 19 written warning was based on the fact that he had received the unlawful verbal warning, the written warning shall be reduced to a verbal reprimand. I shall further recommend that Ferrick, O'Connell and Boylan be notified in writing that the Respondent has taken these actions to remedy the unfair labor practices committed against them.

To remedy the Respondent's unfair labor practices in violation of Section 8(a)(1), I shall recommend that a ntice to eployees be posted at the Respondent's Holliston office and at all jobsites within the service division and the New England Region of the construction division. In addition, because the projects on which the unfair labor practices were committed may have ended, I shall recommend that the Respondent mail a copy of the ntice to any former employees who were employed on those projects on and after February 20, 1996, the date of the first unfair labor practice found.

I shall further recommend that the Respondent rescind any rules which still exist that prohibit employees from discussing their wages, benefits, and working conditions and any discipline that may have been issued for a violation of such rules.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[48]

ORDER

The Respondent, Wayne J. Griffin Electric, Inc., Holliston, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees regarding their union and protected concerted activities and the union activities of their fellow employees, creating the impression among employees that their union activities were under surveillance, and soliciting employees to report on the union activities of their fellow employees.

(b) Maintaining rules prohibiting employees from discussing their wages, benefits, and working condiditons and enforcing those rules through threats of discipline and issuance of written warnings.

(c) Soliciting employees to revoke their union authorization cards and instructing them to contact the Respondent's president if they wished to revoke their union authorization cards.

(d) Threatening employees with job loss if they selected the Union to be their collective-bargaining representative; implying that support for the Union would effect their advancement with the Respondent; and equating employees' support for the Union with disloyalty to the Respondent and its president.

(e) Telling employees that discipline they received was a subterfuge to conceal discriminatory actions against union supporters.

(f) Telling employees that selection of the Union as their collective-bargaining representative would be futile because the Respondent would never be a union contractor.

(g) Telling employees that the Respondent would cause union employees to be assaulted.

(h) Promising employees increased benefits if the Union did not file unfair labor practice charges against the Respondent.

(i) Discriminating against employees because of their union membership, activities, and support by downgrading in loyalty on their crew evaluations and by issuing verbal reprimands.

(j) 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) Within 14 days from the date of this Order, rescind any rules which still exist that prohibit employees from discussing their wages, benefits, and working conditions and any discipline that may have been issued for a violation of such rules.

(b) Within 14 days from the date of this Order, rescind the negative loyalty ratings given to Daniel Ferrick and Richard O'Connell on September 13 and 27, 1996, and the recorded verbal reprimand issued to Todd Boylan on July 10 and, within 3 days therafter, notify them in writing that this has been done and that the negative evaluations and verbal reprimand will not be used against them.

(c) Within 14 days after service by the Region, post at its facility in Holliston, Massachusetts, and at all job sites within the service division and the New England Region of the construction division copies of the attached notice marked "Appendix."[49] Copies of the notice, on forms provided by the Regional Director for Region 1, 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

[48] 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.

[49] 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."

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, closed the facility involved in these proceedings, or completed any of the construction projects 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 such facilities and construction projects, at any time since February 20, 1996.

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

IT IS FURTHER ORDERED that paragraphs 7(a)–(d), (i), (k), (l), (n), (s), (v), (z), (cc), (hh), (qq), and (xx), paragraphs 8(a)(iv) and (d), paragrphs 12–14, and paragraphs 15(c) and (d) of the consolidated complaint, as amended, are dismissed.

Dated, Washington, D.C. February 4, 1999

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 interrogate you regarding your union and protected concerted activities and the union activities of your fellow employees, create the impression that your union activities are under surveillance, nor solicit you to report on the union activities of your fellow employees.

WE WILL NOT maintain rules prohibiting you from discussing your wages, benefits, and working condiditons nor enforce those rules through threats of discipline and issuance of written warnings.

WE WILL NOT solicit you to revoke your union authorization cards nor instruct you to contact the president of the Company if you wish to revoke your union authorization cards.

WE WILL NOT threaten you with job loss if you select the Union to be your collective-bargaining representative; imply that your support for the Union would effect your advancement with the Company; nor equate your support for the Union with disloyalty to the Company and its president.

WE WILL NOT tell you that discipline you receive is a subterfuge to conceal discriminatory actions we've taken against union supporters.

WE WILL NOT tell you that your selection of the Union as your collective-bargaining representative would be futile because we would never be a union contractor.

WE WILL NOT tell you that we will cause union employees to be assaulted.

WE WILL NOT promise you increased benefits if the Union does not file unfair labor practice charges against us.

WE WILL NOT discriminate against you because of your union membership, activities, and support by downgrading you in loyalty on your crew evaluations or by issuing verbal reprimands.

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

WE WILL, within 14 days from the date of the Board's Order, rescind any rules which still exist that prohibit you from discussing your wages, benefits, and working conditions and any discipline that may have been issued for a violation of such rules.

WE WILL, within 14 days from the date of the Board's Order, rescind the negative loyalty ratings given to Daniel Ferrick and Richard O'Connell on September 13 and 27, 1996, and the recorded verbal reprimand issued to Todd Boylan on July 10 and, WE WILL, within 3 days therafter, notify them in writing that this has been done and that the negative evaluations and verbal reprimand will not be used against them.

WAYNE J. GRIFFIN ELECTRIC, INC.