Biosource Landscaping Services, LLC *and* Paul D. Brown *and* Matthew K. Liming. Cases 9–CA–43283 and 9–CA–43287

January 31, 2008

DECISION AND ORDER

BY MEMBERS LIEBMAN AND SCHAUMBER

On July 13, 2007, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel filed exceptions, a supporting brief, an answering brief, and a reply brief. The Respondent filed cross-exceptions, a supporting brief, an answering brief, and a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions,[1] cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Biosource Landscaping Service, LLC, Xenia, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Threatening employees with plant closure if the Union, International Union of Operating Engineers, Local 18, was voted in as their collective-bargaining representative."

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

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

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

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

[1] The Respondent has moved to strike the General Counsel's exception 11, which alleges that the judge erred in failing to order a reinstatement and make-whole remedy for discharged employees Matthew Liming and Paul Brown. In view of our adoption of the judge's findings that these discharges did not violate the Act, we find it unnecessary to pass on the Respondent's motion to strike the exception.

[2] The General Counsel and the Respondent 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.

We adopt the judge's finding that the Respondent did not violate Sec. 8(a)(1) of the Act by coercing its employees. In so doing, we rely particularly on the fact that the judge discredited Brown's testimony that the Respondent's part-owner and president, Jeanne Hellstrom, said that she would do anything to stop a union from coming in the facility.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by interrogating Liming about his union activities, we note that in crediting Liming's testimony over that of Hellstrom, the judge's finding that Hellstrom "did not specifically deny this allegation" is not supported by the record. In adopting the judge's credibility finding, we do not rely on the judge's incorrect description of Hellstrom's testimony, but rather we find that the other reasons stated by the judge sufficiently support his determination to credit Liming's testimony establishing the unlawful interrogation.

The judge recommended that the Board dismiss the 8(a)(3) allegations arising out of the layoffs of employees Liming and Brown. Even assuming that the General Counsel met his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), we agree with the judge's alternative finding that the Respondent proved that it would have laid off Liming and Brown in any event, based on economic business reasons. In dismissing these allegations, we find it unnecessary to rely on the judge's additional observations, set forth in the penultimate paragraph of sec. II,C,3,b of his decision that: (a) the Union filed neither objections to the election nor unfair labor practice charges alleging that the layoffs of Liming and Brown were the result of their union activities; (b) the Union and the Respondent stipulated that Liming had no expectancy of recall after the layoff and therefore was ineligible to vote in the election; and (c) Liming testified that he had no intention of filing this unfair labor practice charge until Brown suggested that he do so.

[3] There are no exceptions to the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by threatening employee Liming with plant closure if the Union was voted in as the employees' collective-bargaining representative.

[4] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Members Liebman and Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

The judge recommended a broad Order requiring the Respondent to cease and desist from violating the Act "in any other manner." We find that a broad order is not warranted in this case. Accordingly, we shall substitute a narrow order requiring the Respondent to cease and desist from violating the Act "in any like or related manner." See *Hickmott Foods*, 242 NLRB 1357 (1979). We shall also modify the recommended Order to include the name of the Union, and shall substitute a new notice in conformity with the recommended Order as modified.

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten employees with plant closure if the Union, International Union of Operating Engineers, Local 18, was voted in as their collective-bargaining representative.

WE WILL NOT interrogate an employee about the employee's union activities.

WE WILL NOT threaten an employee with job loss because the employee supported the Union.

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

BIOSOURCE LANDSCAPING SERVICES, LLC

Eric J. Gill, Esq., for the General Counsel.
Laura L. Wilson, Esq., of Dayton, Ohio, for the Respondent-Employer.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on April 24 and 25, 2007, in Cincinnati, Ohio, pursuant to a consolidated complaint and notice of hearing in the subject cases (the complaint) issued on February 13, 2007, by the Regional Director for Region 9 of the National Labor Relations Board (the Board). The underlying charges and amended charges were filed on various dates in 2006[1] and 2007 by Paul D. Brown and Matthew K. Liming (Brown or Liming), alleging that Biosource Landscaping Services, LLC (the Respondent or Employer) has engaged in certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that it had committed any violations of the Act.

Issues

The complaint alleges that the Respondent engaged in a number of independent violations of Section 8(a)(1) of the Act including threats of job loss, plant closure, and coercive interrogation. Additionally, the complaint alleges that the Respondent engaged in violations of Section 8(a)(1) and (3) of the Act by discriminatorily laying off Brown and Liming because of their support for the International Union of Operating Engineers, Local 18 (the Union).

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

[1] All dates are in 2006, unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a corporation engaged as a contractor performing commercial and residential landscaping and in the production and sale of landscaping products at its facility in Xenia, Ohio, where it derived gross revenues in excess of $500,000 and purchased and received goods and materials valued in excess of $10,000 directly from points outside the State of Ohio. 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

During February 2006, Union Organizer Scott Stevenson met with Respondent's part-owner and president, Jeanne Hellstrom, to explain the benefits of union representation. Hellstrom wanted more time to consider the matter and was reluctant to agree to voluntarily recognizing the Union. Accordingly, Stevenson commenced visiting the various jobsites that Respondent's employees were working on in an effort to independently talk to them about the benefits of union representation. Stevenson met with Brown and Liming at their work location and Brown agreed to talk to his coworkers about the benefits of union representation and inquire whether they would sign union authorization cards. Stevenson also visited employees at their homes and by July 8 had acquired signed authorization cards from a majority of the Respondent's employees. Accordingly, on July 10, Stevenson met with Hellstrom at the facility and asked that she voluntarily recognize the Union as the employee's collective-bargaining representative. Hellstrom was noncommittal and within the hour Stevenson received a telephone call from an attorney representing the Respondent who apprised him that the Employer was unwilling to recognize the Union and wanted to proceed to an election before the Board.

In order to put additional pressure on the Respondent to recognize them, the Union engaged in recognitional picketing for 30 days at various jobsites and began to contact general contractors in the area who had previously employed the Respondent for landscaping services. These union contractors were requested not to retain the Respondent for future landscaping projects due to its refusal to voluntarily recognize the Union as the representative of its employees. Indeed, a local union contractor sent a letter to Hellstrom on May 18, encouraging her to consider the benefits of union representation (R. Exh. 9). As a result of these actions, a considerable portion of the Respondent's repeat commercial landscaping business did not materialize during the remaining months of 2006. Part-Owner Mark Lee testified that during the 2006 business year, the Respondent lost one-third of its business revenue or about $700,000. Accordingly, in June 2006, Hellstrom with input from Lee and

former owner Steve Combs commenced planning for a reduction in force.[2]

On July 17, the Respondent conducted a reduction in force that included the layoff of six employees including Brown and Liming.

The Union filed a representation petition on July 19 (R. Exh. 17). In a Decision and Order dated August 18, the Regional Director found that the unit sought by the Union did not constitute an appropriate bargaining unit, and because the Union would not proceed to an election in any other unit, dismissed the petition (R. Exh. 18). Thereafter, the Union filed a second representation petition on September 8, seeking an expanded bargaining unit and on October 23, the Regional Director issued a Decision and Direction of Election (R. Exh. 1). An election was held on November 21, in which the tally of ballots showed that two votes were cast for the Union and seven ballots against representation. Accordingly, the Regional Director issued a Certification of Results of the election finding that the Union was not selected as the collective-bargaining representative of the Respondent's employees (R. Exh. 20).

Respondent's part-owner, Hellstrom (5-percent ownership interest), along with business partners Mark and Theresa Lee (49- and 46-percent ownership interest, respectively), purchased the Employer from former Owner Combs in November 2005. As part of the sale agreement, Combs remained with the Employer in a sales and estimating capacity for a period of 1 year, leaving the Respondent on December 1. At all material times the pertinent employee complement includes two commercial landscape foremen, Kelly Guthrie and Tim Muterspaw, a residential landscape foreman, Justin Pemberton, and a maintenance and production foreman, Dustin Miller.[3] In addition, there are four employees on the hydro seeding crew, Donald Combs, David Dodson, Brown, and Doug Leslie. As members of the hydro seeding crew, the employees typically move from job-to-job and report to the foreman of the job to which they are assigned. Liming serves as a maintenance mechanic in the shop and as a driver delivering landscape products to customers.

The Respondent generates 40 percent of its revenue from onsite retail and wholesale sales of its landscape products, including topsoil, mulch, garden blends, and gravel. Additional revenue is generated by snow removal jobs during the winter months and the spreading of biosolids in local fields. The remaining 60 percent of the Employer's revenue is generated through its commercial and residential landscaping projects, including hydro seeding. Of this 60 percent, about half is attributed to commercial landscaping work.

A variety of equipment is used by the Employer in its production operations. The Respondent has CAT loaders, a rubber tired backhoe, a track hoe, several bobcats, and a dozer. It also has grinder production machines, a topsoil processor, and a trammel screen. It also uses dump trucks to deliver landscaping products to jobsites and customers.

B. The 8(a)(1) Allegations

The Board has held that interrogation is not a per se violation of Section 8(a)(1) of the Act. *Rossmore House,* 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). In determining whether an interrogation is unlawful, the Board examines whether, under all the circumstances the questioning reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. 269 NLRB, above at 1177–1178. *Emery Worldwide,* 309 NLRB 185, 186 (1992). Under the totality of circumstances approach, the Board examines factors such as whether the interrogated employee is an open and active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of interrogation. *Rossmore House,* 269 NLRB at 1178 fn. 20; *Bourne v. NLRB,* 332 F.2d 47, 48 (2d Cir. 1964); *Sunnyvale Medical Clinic,* 277 NLRB 1217, 1218 (1985).

1. Allegations concerning Jeanne Hellstrom

The General Counsel alleges in paragraph 5(a) of the complaint that in June 2006, Hellstrom coerced employees by telling an employee that it would not permit a union, or it would prevent a union, and that a union would never work informing employees that it would be futile for them to select the Union as their bargaining representative.

a. Facts

There is no dispute that the Respondent was opposed to having the Union represent its employees and Hellstrom informed them that it was not in their best interests because it would come between them. Indeed, Hellstrom told employees who engaged her in conversations about the Union that in her opinion a third-party organization would interfere with our mutual ability to succeed in the landscaping business. Moreover, Hellstrom told employees that if a union came in she would lose control and would be unable to discuss issues and problems with employees without the presence of a union representative.

In May 2006, Brown testified that he talked to Hellstrom at the water cooler with Foreman Miller and informed her that he thought a union would benefit both the Employer and its employees. According to Brown, Hellstrom stated that there would be no union in the facility. Brown further testified that immediately after the conversation with Hellstrom, Foreman Miller told him that Hellstrom would shut the doors before a union would come in the facility.

In June 2006, Brown expressed his opinion to Hellstrom by room floor that "[w]e need a union because it would help us get more prevailing wage work." According to Brown, Hellstrom told him that there would be no way that a union could come in the facility because she would lose total control of personnel. Hellstrom further told Brown "that everybody has an opinion and you are entitled to your opinion but there would be no way that a union would be in there" and she would do anything to stop a union from coming in the facility.

[2] The evidence establishes that in April 2006, the Respondent employed 14 employees. By April 2007, the complement of employees had been reduced to seven employees.

[3] In the Regional Director's Decision and Direction of Election dated October 23, he found that Foreman Muterspaw, Pemberton, and Miller were not supervisors within the meaning of Sec. 2(11) of the Act and were eligible to vote in the November 21 election (R. Exh. 1).

Hellstrom categorically denied that she made the statements attributed to her in this paragraph of the complaint.

b. Discussion

Brown's testimony does not confirm that Hellstrom made the statements attributed to her in the complaint allegations. Rather, Brown testified that Foreman Miller informed him that Hellstrom would shut the doors before a union would come in the facility. First, I note that no allegations are alleged in the complaint that Miller engaged in any unlawful conduct. Second, even if such allegations were alleged, the Regional Director affirmatively determined that Miller was not a statutory supervisor within the meaning of the Act and, therefore, such statements cannot be attributed to the Respondent (R. Exh. 1). Lastly, Brown's testimony connects the statements alleged in the complaint to Miller rather than Hellstrom. I find that Brown's testimony cannot be credited as he asserts that Miller told him what Hellstrom would do and that Hellstrom's testimony is couched by her opinion rather than direct threats to Brown. Moreover, Miller did not support Brown's testimony that Hellstrom stated there would be no union in the facility.

For all of those reasons, I recommend that the allegations alleged in paragraph 5(a) of the complaint be dismissed.

2. Allegations of plant closure

The General Counsel alleges in paragraphs 5(b) and (c) of the complaint that during June 2006, Hellstrom threatened employees with plant closure if the Union was voted in as their collective-bargaining representative.

a. Facts

Since 1986, Guthrie was employed at the predecessor employer and he continued as a landscaping foreman at the Respondent until he voluntarily left in September 2006, due to his hours of work being reduced. Guthrie signed a union authorization card and expressed his opinion to Hellstrom that a union would be beneficial to the Employer and its employees. Hellstrom informed Guthrie that in her opinion a union was not the right way to go for the Respondent. Guthrie testified that Hellstrom held a number of meetings with employees in which the Union was discussed. The majority of the meetings occurred after July 2006, but he remembered that a meeting was held in June 2006 with all employees. During the course of the meeting, Guthrie testified that Hellstrom stated that she would close the doors before she would let the Union come in and take control of her company. Employee Doug Leslie also testified that he attended a meeting in June 2006, with seven or eight employees in which Hellstrom discussed issues related to the Union and the distribution of authorization cards. During the course of the meeting, Leslie testified that Hellstrom informed the employees that if the Union came in she would have to close the doors. Hellstrom further stated that she could not afford to have the Union come in and would have to go through the Union if she wanted to talk with anybody. She also said that the Union would just cause conflict in the Company.

Liming testified that around the beginning of June 2006, at a time when he was talking to Miller just after lunch, Hellstrom approached them and asked, "[W]hat do you all know about the Union thing?" Liming said it was going to get us prevailing wage jobs so it's probably a good thing. Hellstrom then said that a union would not help the company and would hurt it financially. She further stated "that if the Union got in, she would probably close the doors down and then open it back up in a different name later on."

Hellstrom admitted holding a meeting with employees in June 2006, in which issues relating to the Union were discussed but denies that she made any threatening statements or informed employees that she would close the doors if the Union was voted in as their collective-bargaining representative either during the meeting or at any other time.

Both Foremen Muterspaw and Miller testified that they attended a meeting in June 2006 with other employees in which Hellstrom stated that the Respondent could not financially support a union, a union was not in the best interest of the Company and it was not the direction that she wanted to take the Company. While Muterspaw stated in his testimony that Hellstrom never threatened employees about their union activities or threatened to close the plant, he did not specifically testify that Hellstrom did not make the comments alleged in the complaint during the June 2006 meeting. Miller testified that he does not remember Hellstrom saying at the June 2006 meeting that if the Union comes in she would close the doors but he could not state that Hellstrom did not say it either. He testified that he simply could not remember (GC Exh. 14).

Miller was not asked about nor did he testify concerning the statements that Hellstrom made in Liming and his presence about closing the doors down in early June 2006.

b. Discussion

Guthrie impressed me as a credible witness whose testimony has a ring of truth to it. He was of the opinion that the presence of the Union could generate more prevailing wage work for the Respondent and so informed Hellstrom. He supported Hellstrom's testimony that business started to dramatically drop off in the summer of 2006 after the Union put pressure on local general contractors to not hire the Respondent for landscaping services and a number of employees including himself saw their work hours reduced. I also note that Guthrie was a foreman who worked closely with Hellstrom on a daily basis and supported her testimony that Brown and Liming were laid off for legitimate business reasons unrelated to their union activities. Therefore, I find his version of what occurred at the June 2006 meeting more plausible and fully credit his testimony that Hellstrom told employees that she would close the doors if the union was voted in as their collective-bargaining representative. Likewise, Leslie specifically named the employees who attended the June 2006 meeting in the showroom and was positive that Hellstrom stated during the course of the meeting, when discussing issues relating to the Union and expressing that a union was not in the best interests of the Company, that she would close the doors if the Union came in.

Liming's testimony that Hellstrom threatened to close the doors down is consistent with the testimony of Guthrie and Leslie. Miller was not asked nor did he testify about the June 2006 threat to close the doors down.

For all of the above reasons, I credit the testimony of Guthrie and Leslie and do not rely on the general denials of Muterspaw

and Miller that did not specifically deny the comments made by Hellstrom at the June 2006 meeting in finding that Hellstrom made the comments attributed to her in paragraphs 5(b) and (c) of the complaint. Likewise, I credit Liming's testimony that is fully consistent with Guthrie and Leslie that Hellstrom threatened to close the doors down if the Union was voted in as the employees' collective-bargaining representative. Under these circumstances, I conclude that Respondent engaged in violations of Section 8(a)(1) of the Act. *Williamhouse of California, Inc.*, 317 NLRB 699 (1995).

3. Interrogation of employee's union activities

The General Counsel alleges in paragraph 5(d) of the complaint that on July 11 Hellstrom interrogated an employee about the employee's union activities.

a. Facts

Liming testified that on July 11 Hellstrom approached him in the shop and asked whether he had signed a union card or had any conversations with union representatives. Liming said, he signed a union card but had not spoken to Scott Stevenson in a month. Hellstrom stated that Stevenson was just at the facility and was aggressive toward her.

b. Discussion

I credit Liming's testimony regarding this alleged discussion for a number of reasons. First, Stevenson credibly testified that on July 10 he went to the facility and told Hellstrom that a majority of the employees signed authorization cards and requested voluntary recognition. Thus, Hellstrom's statement that Stevenson was just there appears to confirm that she spoke with Liming at a point in time very close to July 10. Second, while Hellstrom generally denied that she did not interrogate employees, she was never asked whether she interrogated Liming about signing a union card or whether he had any discussions with union officials. Thus, she did not specifically deny this allegation. Third, Hellstrom was present in a conversation she had with Miller who informed her that Liming did not understand the significance of what signing a union card really meant. Fourth, Liming's testimony is consistent with his pretrial affidavit that was given on December 13, a period of time closer to the events in question (R. Exh. 5). Under these circumstances, Liming's testimony has a ring of truth to it and I find that Hellstrom interrogated him about whether he signed a union card or had any conversations with union representatives. Accordingly, I sustain the allegations in paragraph 5(d) of the complaint and conclude that Respondent violated Section 8(a)(1) of the Act.

4. The agency status of Theresa Lee

The Board and the courts have uniformly held that whether someone acts as an agent under the Act must be determined by common law principles of agency. See, e.g., *NLRB v. Plasterers Local 90,* 606 F.2d 189 (7th Cir. 1979), enfg. 236 NLRB 329 (1978).

Applying these principles to the subject case, the evidence establishes that Lee is a principal of the Respondent holding a 46-percent ownership interest and also holds the title of vice president. According to her husband and majority owner, she has attended financial planning meetings related to the business.

Several employees credibly testified that shortly after the business was sold in November 2005 Lee was introduced at a meeting that they attended as one of the new owners of the Company.

Significantly, in a notice to Respondent's employees that announced the date for the representation election, Lee was a signatory along with Hellstrom and urged employees to vote no and to reject the Union's attempt to come between management and the employees. The memorandum ended by stating, "[I]n the meantime if you have any questions relating to the election or the Company's position relating to the Union please feel free to contact one of us." (R. Exh. 21(c).)

For all of the above reasons, and particularly noting that Lee urged employees to contact her if they had any questions relating to the election or the Company's position relating to the Union, I find that as a principal owner and an officer of the corporation, Lee is an agent within the meaning of Section 2(13) of the Act.

5. Allegation concerning Theresa Lee

The General Counsel alleges in paragraph 6 of the complaint that about December 5 Lee threatened an employee with job loss because the employee supported the Union.

a. Facts

Employee Donald Combs (no relation to former owner Steve Combs) testified that he was in the office on or about December 5, and engaged Lee in a conversation. He asked Lee if she was glad that the union stuff was over. During the course of their discussion, Combs informed Lee that he was one of the two "yes" votes for the Union in the recently held election. According to Combs, "Lee said I would never believe that." Lee then said, "You might as well just spit in my face, don't you like your job, do you want to come back in the spring."

Lee did not testify and, accordingly, the above statements stand unrebutted.

b. Discussion

Based on my prior finding that Lee is an agent of the Respondent, I find that Lee's statements to Combs are threatening in nature, and therefore violate Section 8(a)(1) of the Act. *Watts Electric Corp.,* 323 NLRB 734 (1997).

C. The 8(a)(1) and (3) Allegations

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1993). In *Manno Electric*, 321

NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

1. The positions of the parties

The General Counsel alleges in paragraph 7 of the complaint that Brown and Liming were laid off on July 17 due to their vigorous pursuit of union activities. In this regard, the General Counsel argues that the Respondent knew that both of these individuals were actively engaged in the union organizing campaign and initiated the layoff to rid themselves of these two employees. Additionally, the General Counsel asserts that the Respondent advertised for positions and hired new employees after the layoff that both Brown and Liming were qualified for and could have performed. Lastly, the General Counsel contends that employees who signed union authorization cards had their work hours reduced while other employees who did not sign cards received an increase in work hours after the layoff. In summary, the General Counsel argues that the reasons for the layoffs of Brown and Liming were pretextual to mask the true reasons that they were separated from the Respondent.

The Respondent counters that the evidence supports their affirmative defense that they were bleeding red ink, primarily because the Union convinced local area general contractors not to do business with them due to the Respondent's refusal to voluntary recognize the Union, and it was necessary for the Respondent to conduct a reduction in force to help offset their monetary loses. In this regard, the Respondent evaluated the strengths and weaknesses of its employees and analyzed what positions were revenue producing before deciding to let go six employees including the two discriminatees.[4] With respect to some employees receiving fewer hours after the layoff, that was the result of a reduced workload in certain portions of the business and the Respondent points to the fact that a number of employees who signed union authorization cards did receive an increase in work hours. Lastly, the Respondent argues that while it advertised for positions after the layoff, it filled these positions with less costly temporary employees and some of the positions required skills and experience that Brown and Liming did not possess. In summary, the Respondent contends that the layoff was necessitated by its precarious financial position and was unrelated to the union activities of Brown and Liming.

[4] The other four employees that were laid off included laborers Kyle Combs, Pablo Gonzalez, and Tim B. Muterspaw, and truckdriver Mike Fosnaugh. The layoff of these individuals was effectuated by seniority as the reduced workload impacted these positions and none of the positions were substantial revenue producers. As she did for Brown and Liming, Hellstrom prepared layoff justifications for these employees. (R. Exh. 10.)

2. The layoff of Paul Brown

a. Facts

Brown was a long-term employee of the predecessor employer having worked approximately 18 years and continued as an employee for the Respondent after the sale of the business in November 2005. During his tenure, he served as a laborer, bobcat operator, and grinder and more recently as a member of a hydro seeding crew. Brown served as the operator of the crew and was responsible for the spraying of a hydro seed mixture to assist in fertilization. The other member of Brown's crew was employee Doug Leslie who served as the driver of the hydro seed trailer.

In April 2006, Brown met Stevenson and talked about the benefits of the Union and what it could do for the employees of the Respondent. Brown visited with his fellow employees at their homes and passed out union authorization cards to a number of employees. After the employees signed the cards, Brown returned them to Stevenson.

In May 2006, Brown talked to Hellstrom at the water cooler about the Union and expressed his reasons why it would be beneficial for both the Employer and its employees. Hellstrom informed Brown that in her opinion a union would not be in the best interests of the Employer and she was opposed to the concept as it would interfere with her ability to manage the Company.

In June 2006, Brown again talked to Hellstrom about the Union and why it would be helpful in obtaining additional work including prevailing rate jobs. Once again, Hellstrom expressed her reasons for not wanting a union at the Respondent. After this conversation, Brown testified that his work hours were reduced while other employees experienced an increase in their hours of work.

Brown acknowledged that he had problems in organizing and completing the paperwork for each job that he worked on and this continued after Hellstrom repeatedly reminded him of the requirement. As a result, Leslie took over the responsibility and prepared the paper work that was submitted to the office to support the hours they worked on each respective job. Brown also testified that while he and Leslie were working at the Versailles Waste Water Treatment Plant on or about June 14, they created deep ruts in adjacent land owned by a farmer and it was necessary for him to return to the field along with other employees to repair the damage. He also acknowledged that he forgot to take a measuring wheel on the return trip and measure the job as he was instructed to do by Hellstrom. Lastly, Brown admitted that Hellstrom observed him lying down on the York Commons job on July 7 but he asserts that this is part of the job when waiting for a laborer to provide him with additional pieces of sod to be laid.

On July 17, Brown was called into the office by Hellstrom and was told that he was going to be laid off for lack of work along with five other employees.

Brown had never been laid off during the summer before and after talking to other employees after the layoff, he learned that several employees were quite busy including two members of the other hydro seeding crew. Brown returned to the office after his layoff to inquire of Hellstrom if there was any work

available since he had been informed by fellow employees that the Respondent had recently hired a temporary truckdriver. Hellstrom instructed him to complete an application but Brown declined to do so.

In February and March 2007, Brown observed a number of advertisements in the local newspaper for positions at the Respondent that he believed he was qualified for (GC Exhs. 2, 3, 4, and 11). However, he did not file applications for any of the positions.

b. Discussion

Hellstrom credibly testified that due to the dire financial condition of the Respondent, primarily due to the Union putting pressure on local general contractors not to hire or renew contracts with the Respondent, she was forced to consider the drastic measure of a reduction in force (R. Exh. 7).[5] After consulting with Co-owner Mark Lee and former owner Combs, it was decided to concentrate on positions that were not major revenue producers and to evaluate employees based on whether they had the flexibility to perform other tasks to make the Respondent more efficient in face of their declining revenues and loss of net income. In addition, Hellstrom compiled in late June 2006 a layoff justification outline for the employees under consideration including performance deficiencies that she observed with specific employees (R. Exh. 10). In regard to Brown, she compared his productivity to the other hydro seed crew and concluded that Brown and Leslie took longer to perform similarly situated jobs. Likewise, Hellstrom evaluated recent problems with Brown's performance including his responsibility for creating deep ruts on the Versailles job in a farmer's adjacent field that required additional expense to fix in addition to driving several hours to repair the damage. Hellstrom also considered that Brown failed to bring a measuring wheel to measure the job while they were repairing the damage as he was instructed to do. Hellstrom further considered Brown's long-term problem in not submitting proper paperwork which necessitated additional training and ultimately Leslie maintaining and submitting Brown's paperwork. Lastly, Hellstrom noted the complaint of a customer for the York Commons job, in which she observed Brown lying down on the job for approximately 1 hour, that it was one of the worst trimming jobs he had seen and several pieces of sod were double stacked.

On July 17, Hellstrom informed Brown that he would be laid off for lack of work along with five other employees. Hellstrom admitted that she did not inform Brown during their discussion that performance issues were also considered when deciding which employees would be selected for layoff.

There is no question that Brown was one of the leading union adherents who distributed union authorization cards to employees and made known his union sympathies to Hellstrom. Likewise, it is apparent that the Respondent was opposed to having a Union at the facility and Hellstrom expressed this sentiment openly both orally and in writing.

I find that the decision to conduct the layoff was made in advance of Stevenson meeting with Hellstrom on July 10, and apprising her that a majority of the employees had signed union authorization cards which prompted his request that Hellstrom voluntarily recognize the Union. While it is apparent that a number of employees lost hours of work after the layoff, this is an end product of a reduced workload in certain areas of the business rather than a penalty for supporting the Union. In this regard, the evidence shows that employees Donald Combs, David Dodson, and Justin Pemberton[6] all signed union authorization cards but they were not laid off on July 17, and their work hours increased after the layoff (R. Exh. 23).

It is also significant that Guthrie, who suffered a loss of work hours with the reduction of the commercial landscaping portion of the business, testified that the loss of prevailing wage jobs and the Union putting pressure on local general contractors not to renew business with the Respondent was what precipitated the layoff. Likewise, Guthrie testified that prior to the layoff Hellstrom complained to him about Brown's lack of productivity and his inability to fill out paperwork for the jobs he performed. Guthrie was of the opinion that those were the primary reasons that Brown was selected for layoff. It is noted that Guthrie signed a union authorization card and expressed his opinion to Hellstrom as to why a union would be beneficial at the Respondent. Despite his advocacy for a union, he was not laid off and left the Respondent voluntarily in September 2006, due to having his hours of work reduced.

For all of the above reasons, I find that Brown was not laid off because of his union activities but rather because of a business necessitated layoff that was carefully planned, considered and effectuated based on nondiscriminatory criteria. Therefore, I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act when it laid off Brown on July 17.

3. The layoff of Matthew Liming

a. Facts

Liming commenced work with the predecessor employer in 2001, and continued to be employed with the Respondent after it purchased the business. He principally worked as a mechanic and also drove a truck when making deliveries to customers.

Liming learned about the Union when Stevenson visited one of the jobsites in March 2006, and signed a union authorization card on July 8. He spoke with other employees during May and June 2006, about the Union and gave an authorization card to his supervisor, Miller.

On March 6, Hellstrom approved a raise for Liming that increased his wages from $13.75 to $16.50 per hour (R. Exh. 5).

On July 11, Hellstrom approached Liming in the shop and asked him whether he had signed a union card or had any conversations with union representatives. Liming replied that he signed a union card but had not talked to Stevenson in a month. Hellstrom said that Stevenson was just there and that he was aggressive toward her.

[5] The exhibit shows a breakdown of the net income for each month during 2006. It confirms that the Respondent suffered substantial net income declines in the first 6 months of the year that continued throughout the second portion of the year. Hellstrom credibly testified that she is able to estimate business 6 months in advance and knew due to general contractors in the area not hiring the Respondent that business would continue to decline in the second half of the year.

[6] Dodson and Pemberton informed Hellstrom that they had signed union authorization cards.

On July 17, Liming returned home after his shift. Hellstrom called him on the telephone and requested that he return to the shop as there was something important she needed to discuss with him. Liming returned to the shop and went to Hellstrom's office. Hellstrom informed Liming that because work was slow he was going to be laid off. Liming strenuously objected to the fact that work was slow but told Hellstrom, "[Y]ou are going to do whatever you want and let's get this over with."

After the layoff, Liming observed advertisements in the local newspaper for a number of jobs at the Respondent, some of which he testified he was qualified for. However, he acknowledged that he did not apply for any of the positions.

Prior to the election that was held on November 21, the Union and the Respondent agreed that Liming had no expectancy of recall from the layoff and, therefore, was ineligible to vote in the election (R. Exh. 1).

b. Discussion

As Hellstrom did for all of the other employees that were laid off on July 17, she compiled a layoff justification for Liming in late June 2006 (R. Exh. 10). Based on the downward trend in business both at the time of the layoff and forecasted for the rest of the year, Hellstrom determined that no major maintenance projects were planned and, therefore, she only required a total of two mechanics. As it concerned Liming, Hellstrom was aware that Miller had talked to him on June 22 concerning productivity issues relative to a lack of scheduled maintenance being completed, not keeping the shop area clean, and not following verbal instructions relative to repairs. Likewise, Hellstrom had also met with Liming on that same day to discuss his excessive use of the Employer's cell phone for personal calls. In that regard, for the time period from May 15 through June 14, Liming's business cell phone had 314 minutes of usage, with the majority of the calls made during nonbusiness hours and to nonbusiness telephone numbers. Liming was issued a "memo of understanding" for this infraction (R. Exh. 4).

Hellstrom additionally relied on the fact that Liming worked in a nonrevenue generating position and the repair requirements could be adequately handled by the other two mechanics.[7] Hellstrom was also concerned with Liming's grooming and disheveled appearance that did not present a good public image when he was making deliveries to customers.[8]

Miller testified that Liming continued to have disagreements with Hellstrom over his pay and vacation entitlement. Miller stated that Hellstrom informed him that Liming was laid off because of a lack of work, poor job performance, and his disheveled appearance. Miller further testified that he had become good friends with Liming over the years and Liming never told him that he thought the layoff was related to his union activities. Rather, he told Miller that the layoff was due to not seeing eye-to-eye with Hellstrom.

While not dispositive, I note that the Union did not file objections to the conduct of the election nor did they file the unfair labor practice charges on behalf of Brown or Liming alleging that the layoff was the result of their union activities. Likewise, it is significant to note that the Union stipulated with the Employer that Liming had no expectancy of recall after the layoff, and therefore was ineligible to vote in the election. That stipulation occurred prior to the filing of the subject unfair labor practice charge by Liming. Lastly, I note that Liming testified that he had no intention of filing the subject unfair labor practice charge until he was approached by Brown who suggested that he do so.

Based on the forgoing, I find that the layoff of Liming was based on legitimate nondiscriminatory reasons unrelated to his union activities. Therefore, I find that the Respondent did not engage in violations of Section 8(a)(1) and (3) of the Act.[9]

4. Newspaper advertisements and the hiring of employees

There is no dispute that the Respondent advertised after the layoff for a number of positions that were to be filled on a temporary basis with the exception of one permanent position.

It must be noted that after the layoff of six employees on July 17 additional attrition occurred with the voluntary resignations of Leslie, Guthrie, and George Kirby in August and September 2006. Additionally, Hohn was injured at work and went on worker's compensation and Combs broke his arm and was unable to work as a hydro seeder. Accordingly, the Respondent decided to advertise for temporary help commencing in December 2006, and placed three additional advertisements in late February and early March 2007. The Respondent determined to use temporary agencies or word of mouth to fill these positions as the costs were considerably less than the wages that Brown and Liming earned at the time of their layoff. Most of the individuals hired pursuant to these advertisements worked short durations including the five individuals that worked for 1 week as snowplow drivers. This is consistent with the Respondent's position that it anticipated it would continue to lose money during the first quarter of 2007, and is confirmed by the actual figures that were introduced at the hearing showing a loss of net income in excess of $90,000 (R. Exh. 8). In any event, the Respondent did not consider Brown or Liming for those positions because neither of them responded to the advertisements and the Respondent could not afford to pay them their former wages and benefits.

As it concerns the permanent employee, Clark Widenheft was hired in September 2006 for a newly created position to increase business in production due to his heavy equipment background and sewer and pipe excavation experience. He was not hired to do mechanical work, operate the hydro seeding equipment, or drive a truck, job experience that both Brown and Liming possessed. Likewise, neither Brown nor Liming had experience equivalent to Widenheft and were not qualified

[7] Miller and employee Darell Hohn also performed maintenance functions.

[8] Guthrie testified that he informed Hellstrom that Liming frequently appeared at work with alcohol on his breath and in his opinion was not competent to fix brakes on the Respondent's equipment.

[9] Accordingly, I find that the General Counsel did not establish that antiunion sentiment was a substantial or motivating factor in the layoff of Brown or Liming. If others disagree, I would still find that the Respondent would have taken the same action concerning both employees even if they not engaged in protected activity.

for the position. Additionally, Widenheft was hired to help fill the void of Hohn being off work due to a work-related injury. Unfortunately, Widenheft did not work out based on expectations and he left Respondent's employ in March 2007.

Based on the foregoing, and particularly noting that neither Brown nor Liming applied for any of the advertised positions, I am of the opinion that the Respondent legitimately did not consider them for the advertised positions in addition to Widenheft's position.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act when it threatened employees with plant closure if the Union was voted in as their collective-bargaining representative, when it interrogated an employee about the employee's union activities and by threatening an employee with job loss because the employee supported the Union.

4. Respondent did not violate Section 8(a)(1) of the Act when it informed employees that it would not permit a union and that it would be futile for them to select the Union as their bargaining representative.

5. Respondent did not violate Section 8(a)(1) and (3) of the Act when it laid off employees Paul Brown and Matthew Liming on July 17, 2006.

THE 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.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Biosource Landscaping Services, LLC, Xenia, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with plant closure if the Union was voted in as their collective-bargaining representative.

(b) Interrogating an employee about the employee's union activities.

(c) Threatening an employee with job loss because the employee supported the Union.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of 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 after service by the Region, post at its facility in Xenia, Ohio, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 12, 2006.

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

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

[10] 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.

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