Extreme Building Services Corp. *and* Local 78, Asbestos Lead and Hazardous Waste Union, Laborers International Union of North America, AFL–CIO. Cases 29–CA–24894, 29–CA–25007, and 29–CA–25082

April 30, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On February 10, 2003, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and Charging Party filed answering briefs and the Respondent submitted reply briefs.[1]

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

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

Introduction

The Respondent is a corporation solely owned by Emil Braun and engaged in asbestos abatement. Braun also serves as the Respondent's general manager and president. During 2002, the Respondent performed work at the Pilgrim State Psychiatric Center (Pilgrim State site) and at Monroe College. At the Pilgrim State site, the Respondent worked under a subcontract with Active Removal Corp., which is not a party in this case. The complaint in this case alleged that the Respondent violated Section 8(a)(3) and (1) of the Act in several respects at these jobsites.

1. We adopt the judge's findings that the Respondent violated Section 8(a)(1) of the Act by the following conduct: physically assaulting an employee, preventing him from washing up, and destroying his asbestos worker's license, all in reprisal for union activity; interrogating employees about their union membership and activities; threatening to investigate whether employees were union members; threatening to discharge employees because of their union membership or activities; threatening to close the shop in reprisal for union activity; threatening not to hire or retain employees who support the Union or engage in union activities; conditioning continued employment on abandoning union support; and telling employees that other employees had been fired for their union activities.[3]

2. We adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Fabio Morales,[4] Betsey Arruda, and Maria Ortega. We have a different basis than that of the judge for Ortega. The judge found that Ortega's layoff by the Respondent was an unlawful discharge. The judge relied on, among other things, his finding that Supervisor Alvarez gave varying reasons why she had laid off Ortega. Contrary to the judge, we find that Alvarez' testimony is too vague and ambiguous to conclude that she gave distinctly different reasons for Ortega's layoff, and, absent other factors, there is an insufficient basis to find the layoff unlawful. Like the judge, however, we find that the Respondent did not justify its failure to recall Ortega. As fully discussed by the judge, the Respondent laid off three female employees, including union activist Ortega, at the same time. However, the other two employees, unlike Ortega, were recalled shortly after the layoff. When the Respondent failed to recall Ortega at that time without any credible reason for doing so, it effectively discharged her in violation of Section 8(a)(3) and (1).[5]

[1] The Charging Party submitted cross-exceptions, which were untimely filed. The Charging Party's subsequent request that the Board accept the late-filed cross-exceptions was denied. Chairman Battista notes that he dissented and would have accepted the Charging Party's cross-exceptions.

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

There are no exceptions to the judge's dismissal of the complaint allegations that the Respondent violated Sec. 8(a)(3) by discharging employees Caryl Vargas and William Leon, or to his failure to find that Morales was fired based on his contact with OSHA.

We agree with the judge's finding that Rosa Alvarez is a supervisor under Sec. 2(11) of the Act. We do not rely, however, on his finding that she had authority to hire.

We find it unnecessary to pass on the judge's finding that Segundo Moposita is a statutory supervisor or that his questioning of an employee about his union membership and implicitly threatening him with discharge violated Sec. 8(a)(1). Those alleged violations would be cumulative of other 8(a)(1) violations the judge found and would have no effect on the remedy or recommended Order. We shall substitute a new notice to conform to the Order as modified and in accordance with *Ishikawa Gasket America, Inc.,* 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[3] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) when Supervisor Alvarez told a group of employees that employee Fabio Morales had been discharged because he had called OSHA and because he was a member of the Union, we rely solely on the portion of Alvarez' statement attributing the discharge to Morales'sunion membership and not to his having called OSHA.

[4] In adopting this violation, Chairman Battista and Member Schaumber rely on the credited testimony that Supervisor Alvarez told employees that Morales had been discharged because he was a member of the Union and on the pretextual reasons given by the Respondent for Morales' discharge.

[5] We leave to the compliance stage of the proceeding the determination of the appropriate backpay period for Ortega.

3. For the reasons set forth below, we agree with the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging employee Jerzy Sokol for engaging in union activity on April 19, 2002.[6] We also adopt the judge's finding that the Respondent unlawfully discharged employee Andrej Siemak for engaging in the same union activity on April 19.

Sokol and Siemak worked for the Respondent at the Pilgrim State site from March 20 to April 19. The Respondent's supervisor, Rosa Alvarez, commenced work at the jobsite on April 19.

During lunch on April 19, Sokol and Siemak wore shirts and caps with Local 78 insignia, talked about the Union to about 15 coworkers, and distributed union flyers to coworkers. Sokol approached a group of workers that included Alvarez and talked about the benefits of union affiliation with them, and Alvarez admitted that she saw the two men handing out flyers. An unidentified "inspector monitor" took some flyers and drove away. When lunch ended, Sokol and Siemak removed their union apparel and returned to work.

Shortly after lunch, Herb Anderson arrived at the jobsite. Anderson was employed by Active Removal Corp., a general contractor which had orally subcontracted asbestos removal work at the Pilgrim State site to the Respondent.[7] Anderson told Alvarez that "somebody was handing flyers over here," and ordered her to "get me who was handing out the flyers." Alvarez called Sokol over, had him pick out his asbestos license, and gave Sokol's license to Anderson. Anderson then repeatedly told Sokol to get "out, out," and told him that he was fired. Sokol testified that, when Alvarez returned his license, she apologized, but also stated: "You are not working here anymore. No more job." Alvarez testified that she was "shocked" and puzzled by these events, but did not stop Anderson from ejecting Sokol from the property. After Sokol left the jobsite, he called the Respondent's office and told the person who answered the call that he had been fired and asked that his paycheck be mailed to him.

When Emil Braun arrived at the jobsite that afternoon, Alvarez told him what had happened. He told her he would find out what the problem was and later said they could do nothing about Sokol. That same afternoon, Braun discharged Siemak, physically assaulted him, tore up his license, and prevented him from cleaning up before leaving the worksite.

The judge found that Sokol's discharge violated Section 8(a)(3) and (1) of the Act. He found that Anderson was an agent of the Respondent under Section 2(13) of the Act, that Anderson discharged Sokol on the Respondent's behalf because of his union activities, and thus the discharge was attributable to the Respondent. We agree with the judge that the Respondent violated Section 8(a)(3) and (1) by Sokol's discharge. However, we disagree that Anderson was responsible for Sokol's discharge, and find instead that the Respondent, not Anderson, discharged Sokol. We find that Sokol's discharge did not occur when Anderson ejected him from the worksite, but was effectuated when the Respondent permitted Sokol, who believed that he had been discharged, to leave its employ.[8] Thus, we find it unnecessary to reach the issue of whether Anderson was the Respondent's agent.

In considering the lawfulness of Sokol's discharge, we find it useful to review the judge's finding, which we adopt, that the Respondent unlawfully discharged employee Siemak. As noted, Siemak and Sokol joined together in engaging in union activity on April 19. The judge concluded, and we agree, that the Respondent aggressively and unlawfully retaliated against Siemak for his union activity. Shortly after Siemak and Sokol returned to work after their lunchtime union activity, the Respondent's president, Braun, assaulted Siemak, tore up his asbestos handling license, sought to prevent him from retrieving his tools, confiscated his hard hat, prevented him from washing his hands in a fire hydrant, and discharged him. The judge rejected as pretextual the Respondent's claim that Siemak was discharged for using an allegedly improper asbestos handler's license, and found that the real reason for Siemak's discharge was his union activity. Therefore, the judge concluded that the Respondent violated Section 8(a)(3) by discharging Siemak. The judge further found that Braun's aggressive actions against Siemak, occurring during the course of an unlawful discharge, independently violated Section 8(a)(1). The record amply supports the judge's findings regarding employee Siemak and we adopt them.

With respect to Sokol's discharge, we find further that the record demonstrates that the General Counsel estab-

[6] All dates are 2002, unless otherwise noted.

[7] There is little evidence in the record of Anderson's precise role or responsibilities other than that he inspected the Respondent's work at that site.

The record does not indicate any ownership interest or business relationship between Active Removal and the Respondent other than the subcontracting agreement.

[8] In this regard, we reject the Respondent's argument that Sokol tendered a de facto resignation. We find that the events surrounding Sokol's ejection from the premises reasonably led him to believe that the Respondent had discharged him. We note in particular that Supervisor Alvarez told Sokol that he no longer had a job. While we do not find here that Alvarez herself discharged Sokol, we find that her status as a supervisor of the Respondent gave her words sufficient weight for Sokol to reasonably rely on them.

lished a prima facie case under *Wright Line*[9] that Sokol's union activity was a motivating factor in the Respondent's severing of his employment. It is undisputed that Sokol engaged in union activity when he distributed the union flyers during lunchtime on April 19. The Respondent was aware of this activity: Supervisor Alvarez saw both Sokol and Siemak distributing the flyers and admitted having told Braun "what happened." Accordingly, the judge concluded, and we agree, that the Respondent, and its president Braun, had knowledge of these employees' union activity.

The Respondent's animus against its employees' union activities is amply demonstrated by its numerous, contemporaneous 8(a)(1) and (3) violations. In particular, the manner in which Braun unlawfully discharged Siemak, on the same day as Sokol and for the same union activity, strongly supports a finding that Sokol's discharge was unlawfully motivated. *Yellow Ambulance Service*, 342 NLRB 804, 804 (2004), citing *Howard's Sheet Metal, Inc.*, 333 NLRB 361 (2001) (discriminatory discharge of one worker a factor to consider in weighing whether the contemporaneous discharge of a second coworker, who engaged at the same time in the same pro-union activity, was discriminatory). The General Counsel satisfied his initial burden under *Wright Line*.

Finally, the Respondent has not shown that it would have discharged Sokol even in the absence of his protected activity. It is well settled that an employee has the right to distribute union literature during nonworking time and in nonworking areas. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Hudgens v. NLRB*, 424 U.S. 507 (1976). The Respondent, as Sokol's employer, has a legitimate interest in maintaining efficient and disciplined operations, but the Respondent has made no showing or claim that Sokol's activities disrupted its operations in any way. Further, the Respondent has not shown that no work was available for Sokol to perform (i.e., at other sites) after Anderson ejected him from the Pilgrim State site.[10]

Accordingly, we find that the Respondent violated Section 8(a)(3) of the Act when it terminated Sokol.

[9] 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Consistent with his previously stated position, Member Schaumber believes that *Wright Line* is a causation test that requires a showing of causal nexus between the antiunion animus and the adverse employment action. See, e.g., *L.B.&B. Associates, Inc.,* 346 NLRB 1025, 1026 fn. 7 (2006). He finds such a nexus here.

[10] In light of the fact that the complaint does not name Active Removal or any other entity as a party that could have a property interest in the premises on which Sokol was performing work, we find it unnecessary to consider any rights or obligations that such an interest might create respecting Sokol's union activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Extreme Building Services Corp., Great Neck, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted 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

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT physically assault you; prevent you from washing up at a fire hydrant; destroy your asbestos workers licenses; question you concerning your union membership and activities; threaten you with an investigation to discover whether you are a member of the Union; threaten you with discharge because of your membership in the Union or your activities in support of the Union; tell you that other employees were fired for their union activities; threaten you with shop closure because of your union activities; threaten that you or other employees would not be hired or retained if you or they support the Union or engage in union activities; condition your continued employment on your abandonment of your support for the Union and your cessation of activities on behalf of the Union.

WE WILL NOT discharge or otherwise discriminate against you for supporting Local 78, Asbestos Lead and Hazardous Waste Union, Laborers International Union of North America, AFL–CIO, or any other union.

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

WE WILL within 14 days from the date of this Order, offer Jerzy Sokol, Andrej Siemak, Betsey Arruda, Maria Ortega, and Fabio Morales full reinstatement to their former jobs or, if those jobs no longer exist, to substan-

tially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jerzy Sokol, Andrej Siemak, Betsey Arruda, Maria Ortega, and Fabio Morales whole for any loss of earnings and other benefits suffered as a result of their discharges, less any interim earnings, plus interest.

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

EXTREME BUILDING SERVICES CORP.

Tara O'Rourke, Esq., for the General Counsel.
Steven M. Coren, Esq. (Coren & Braun, P.C.), of New York, New York, for the Respondent.
Lowell Peterson, Esq. (Meyer, Suozzi, English & Klein, P.C.), of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge and an amended charge filed on May 2, and June 26, 2002,[1] respectively, in Case 29–CA–24894 by Laborers' Eastern Regional Organizing Fund, Laborers International Union of North America, AFL–CIO (Union),[2] and based on a charge and an amended charge filed on June 28 and August 20, respectively, in Case 29–CA–25007 by the Union, and based on a charge filed on September 5 in Case 29–CA–25082 by it, a complaint and an amended complaint were issued on August 20 and September 5, respectively, against Extreme Building Services Corp. (Respondent, Employer, or Extreme).

The complaints allege essentially that the Respondent (a) interrogated its employees about their membership in a union, (b) threatened employees with plant closure because of their union activities, (c) informed employees that a former employee was discharged because of his support for the Union and that the Respondent would not hire or retain employees if they supported or engaged in union activities, (d) threatened employees with physical harm, (e) destroyed employees' property by ripping up their asbestos handlers' licenses, (f) impeded employees' access to a fire hydrant to wash their hands, (g) threatened employees with an investigation to discover whether they were members of the Union, (h) threatened employees with discharge because of their support for the Union, (i) conditioned employees' employment on their abandonment of their support for the Union and their cessation of activities on behalf of the Union, (j) informed employees that it would be futile for them to select the Union as their bargaining representative, and (k) discharged seven named employees because of their union activities.

The Respondent's answer, as amended at the hearing, denied the material allegations of the complaint and on September 24 and October 16–18 and 21–24, a hearing was held before me in Brooklyn, New York.

On the evidence presented in this proceeding and my observation of the demeanor of the witnesses and after consideration of the briefs filed by all parties,[3] I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a domestic corporation having its principal place of business located at 107 Northern Boulevard, Great Neck, New York, has been engaged in the performance of asbestos abatement and other construction activities for various customers. During the past calendar year, the Respondent purchased and received services from Asbestos Transportation Co., Inc. (ATC), a New York corporation, in excess of $50,000 in value, and during the past year, ATC has hauled approximately 31 loads of asbestos waste for the Respondent, for which ATC charged it $2800 per load for each load of asbestos waste hauled to landfills located outside New York State. It was stipulated and I find that for the purposes of this proceeding the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

It was stipulated and I find that Local 78, Asbestos Lead and Hazardous Waste Union, Laborers International Union of North America, AFL–CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent has been engaged in asbestos abatement at two jobsites material to this case. One site is located at Monroe College in the Bronx and the other is at Pilgrim State Psychiatric Center (PSPC) on Long Island. Both jobs began in about March 2002. The PSPC jobsite consists of about 40 small empty buildings. At both jobsites the work performed included the preparation of the worksite including the placement of plastic sheets around the work area, the removal of asbestos from pipes, walls, and ceilings, the containment of the asbestos in bags, and the transportation of the items removed to a containment bin or truck outside the work area. While working in the containment area the employees wear protective suits and masks with respirators. All employees must be licensed asbestos handlers and produce their license to their supervisor when

[1] All dates hereafter are in 2002 unless otherwise stated.

[2] At the hearing, the complaint was amended to substitute Local 78, Asbestos Lead and Hazardous Waste Union, Laborers International Union of North America, AFL–CIO for the name of the Charging Party.

[3] The Respondent's amended brief, filed after the time to file briefs had expired, contains matters inadvertently omitted from its original, timely filed brief. I have considered the amended brief over the objections of the General Counsel and the Union. There is no prejudice to any party where an entire section of the Respondent's brief had been inadvertently omitted from the original brief and no reference therein has been made to the briefs of the opposing parties. The Respondent thus did not seek to take advantage of this filing.

they report to work each day. The supervisor retains the license during the workday.

The president and general manager of the Respondent is Emil Braun. An admitted supervisor is James Noel. The Respondent runs its jobsites with a "supervisor" and a foreman. At issue are the supervisory and agency status of Rosa Alvarez who was designated "supervisor" by Braun, Segundo Moposita who has been referred to as "foreman," and Herb Anderson.

The Union has been attempting to organize the employees of the Respondent since about March 2002. It has sought to enlist the aid of "salts"—employees who obtain a job at Extreme and then organize their coworkers.

B. The Alleged Supervisory Status of Rosa Alvarez and Segundo Moposita

1. Legal Principles

Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is phrased in the disjunctive. The exercise of authority requiring independent judgment with respect to any one of the actions specified is sufficient to confer statutory supervisory status. *Queen Mary*, 317 NLRB 1303 (1995).

2. Rosa Alvarez

On April 19, Rosa Alvarez began work at PSPC. Braun introduced her to the workers as their "supervisor." The Respondent argues that this introduction does not necessarily imply that it conferred on her the Act's definition of "supervisor." Rather, it argues that Braun was referring to her as its licensed asbestos supervisor. I need not determine this issue as her job functions establish that she was a statutory supervisor within the meaning of Section 2(11) of the Act.

Alvarez was the highest ranking Respondent representative on the jobsite. *Laser Tool, Inc.,* 320 NLRB 105, 108 (1995). She received orders directly from Braun, and she told the foreman what work must be done. It was her admitted responsibility to make sure that the job was performed properly "under the regulations," and was in charge of the day-to-day operations at the worksite at which she "judges" production. *Manno Electric*, 321 NLRB 278, 290 (1996). She did no manual work at the jobsite. She also maintained the important log books which recorded the names of the workers and their hours of work, and retained their licenses during the workday.

Alvarez denied having the authority to hire. However, she stated that she recommended to Braun that Leon and others be hired and they were. The Respondent argues that this was a ministerial act in that she reported to Braun that prospective workers appeared at the jobsite. According to her, Braun asked whether they were needed, and he directed her to hire them. This indicates that Braun needed more workers but left to her the actual hiring. In addition, the fact that Braun asked her whether they were needed indicates that he sought her recommendation as to the work force requirements of the job, and that she effectively recommended their hire.

The testimony regarding the hire of Morales also establishes that Alvarez had the authority to hire, which she exercised. Alvarez testified that she did not hire Morales, and would not have because of her previous work experience with him. She described that they could not work together on a prior job, he did not follow orders, and in fact she recommended his discharge from that job. It is inconceivable, therefore, that she would have stood by, as she stated, and permitted manager Mike Luther to hire Morales. I accordingly find, as Morales testified, that Alvarez hired him for the Monroe College job.

Alvarez denied having the authority to lay off employees. She stated that at the start of each job, Braun assigned ten workers, telling her that she has a certain number of hours or days to complete the job. At the end of the day she tells Braun how much work was completed. If fewer workers were needed the next day, Braun tells her to send the workers to another site. But she also tells Braun that she needs more employees to finish the job. She further stated that if Braun directed her to lay off a certain number of workers, he would tell her which named employee should stay, but then she had the discretion to lay off others of her choosing, using independent judgment in making the choice of which workers to let go. She also laid off Ortega and her two female coworkers because the work was too difficult. This evidence establishes that Alvarez exercised Section 2(11) authority in laying off employees.

The evidence also establishes that Alvarez had the authority, which she exercised, to warn employees, discharge them, and recall them from layoff. Braun's August 5 letter to the Department of Labor stated that Alvarez discharged Morales. She also stated that she warned Leon and Vargas about their poor work and ultimately dismissed them for that reason. *C.P. Associates, Inc.,* 336 NLRB 167, 172 (2001) (Coelho). These actions involved the exercise of independent judgment with Alvarez making the determination that the work of Leon and Vargas was of poor quality, and that the work was too difficult for the female employees. She recalled Ortega's two colleagues to work. There is no evidence that Alvarez consulted with Braun or Noel concerning her decision to discharge Leon and Vargas and lay off the three female workers. She also exercised independent judgment in granting time off only when the work permitted an employee to be absent. On those occasions she requested that the employee give her 1 week's notice.

Based on all of the above, I find and conclude that Alvarez is a supervisor within the meaning of Section 2(11) of the Act.

3. Segundo Moposita

Moposita was the foreman at PSPC and was given directions by Alvarez such as what work to do each day. Moposita, in turn, told the employees what they had to do, for example, erect tents, and remove asbestos, showed them how to do the work if they were not familiar with it, and where to work. He directs about 35 employees each day, assigning them to different areas once their work in one area was completed. Employee Betsey

Arruda observed Moposita watching the work performed by the employees and saw him give them materials when needed. Arruda did not see Moposita perform cleaning work. Employee Vargas stated that Moposita checked his work and gave him instructions in performing the work. Neither he nor Morales saw Moposita doing demolition work, sweeping, or bagging asbestos materials. Rather, they saw Moposita come to the site to check the work and then leave.

Moposita testified that he has no authority to hire, fire, or give time off to the workers. However, he stated that he assigned work to Arruda and Ortega and checked their work. He stated that if the work was not done correctly he tells the employees to correct it, but has not discharged or suspended anyone for that reason. If something goes wrong at the worksite or if he has a problem with an employee he tells Alvarez. He also reports the status of the work to her since she is often not inside the work area.

Moposita testified that in addition to his duties assigning jobs and checking the work performed, as a licensed asbestos handler he does manual work consisting of removing asbestos. He estimated that he does such manual work about 30 percent of the time, while the remaining 70 percent of his time he watches the workers to make certain that they are working properly.

In sum, Moposita is the foreman directly involved in the actual work being performed. As such, he is responsible to ensure that the work gets done. In furtherance of this, he assigns employees to perform the work, he reassigns them to different areas, and checks their work. He also requires that they redo work that they did improperly. His authority over 35 employees and the fact that 70 percent of his time is spent supervising those workers convinces me that he possesses the supervisory authority to assign and responsibly direct employees under his charge. It is clear that in the exercise of such authority Moposita uses independent judgment. The performance of asbestos removal work is involved and requires an adherence to various Federal, State, and city regulations. The specific instructions given by Moposita relate to his determination that the work he directs will be done in accordance with the regulations. *Demi's Leather Corp*., 321 NLRB 966, 974–975 (1996).

I accordingly find and conclude that Moposita is a supervisor within the meaning of Section 2(11) of the Act.

C. Pilgrim State Psychiatric Center

1. Jerzy Sokol and Andrej Siemak

a. Jerzy Sokol

Jerzy Sokol and Andrej Siemak worked for the Respondent at PSPC from March 20 to April 19.[4] On April 18, Sokol and Siemak discussed the Union in their car during lunch. They said that their pay was lower than they would receive if they received union wages. Sokol stated that no management representative heard their conversation.

That evening, Sokol, a member of the Union, prepared a flyer at his home with the help of his son. Siemak was also present. The flyer stated:

UNION YES
Working as Asbestos Handler is
Dangerous and Hard.
We Deserve:
Union Wages
Medical Coverage
Dental Plan
Vision Plan
Annuity
Pension
And Work with Respect and Dignity
WE WANT UNION REPRESENTATION
ON THIS PROJECT

The following day, April 19, Sokol and Siemak ate lunch and then put on shirts that said "Local 78 organizer" and caps that said "Local 78." They then distributed the flyers to about 15 coworkers who were eating lunch. While handing out the flyers, Sokol told the workers that the job they were working at was not a union job. He also told them that their pay rate of $15 per hour was too low compared to union wages, which are $23.15, and that if the work being done was "union work" they would receive medical coverage, a dental plan, and a pension fund.

Sokol testified that he saw Alvarez sitting with a group of workers eating lunch, and that he approached them and told them the same as above, adding that if there was a union, working conditions would be better and they would have a shop steward. The employees, not including Alvarez, applauded his statement.

Employee Betsey Arruda testified that she was seated at lunch with other employees including Maria Ortega, Raphael, Luis, and Alvarez, and they were given the flyer. The employees applauded when Sokol and Siemak said that they would have benefits such as a good salary, respect, an annuity, and a dental plan if they had a union. Arruda stated that Alvarez was present during this time, and she said that "the union is good but here it's not permitted to have a union."

Sokol stated that while he was distributing flyers an "inspector monitor" took one or two flyers and left in his car. Before lunchtime ended, Sokol and Siemak took off their union garb.

Ten minutes after the "inspector monitor" was at the worksite, Herb Anderson arrived in a van. Sokol testified that Anderson had not seen him distributing flyers, but he had seen Anderson at the site before, inspecting the buildings after they were finished. Employee Maria Ortega stated that she had seen Anderson checking her work. Siemak testified that sometime before that day he had seen Anderson fire foreman Christof Yakobowsky. Alvarez testified that a Polish worker told her that Anderson fired "Chris" and that Anderson was "here to see if anybody is not working . . . and he is going to fire."[5] Alvarez

[4] They have been referred to by other employees as the "Polish workers."

[5] The Respondent objects to my consideration of this evidence concerning Yakobowsky as hearsay. However, no hearsay objection was made at the hearing. In the absence of an objection from the party against whom the evidence is offered, hearsay is admissible and becomes part of the record. See *Alvin J. Bart*, 236 NLRB 242, 243 (1978). In fact, Alvarez' testimony concerning "Chris" was received during the Respondent's examination of her.

testified that Anderson worked directly for the owner of the property. Braun told her that Anderson is "part of the owner . . . management . . . something."

Alvarez, who began work for the first time at this jobsite that day, was called to the van by Anderson, and they spoke for about 1 minute. Alvarez then called Sokol to the van. Anderson said "out." Sokol asked "why, I am a good worker." Anderson repeated loudly "out, out" and told Sokol that he was fired. Sokol testified that Alvarez gave Sokol his asbestos license, saying, "I am very sorry. This is not my business. I've been working here only for a few hours." She also told him "give me your license. You are not working here anymore. No more job."

Sokol left the jobsite. He called the Respondent's office, informed the person answering the phone that he had been fired,[6] and asked that a check be mailed to him.

Arruda testified that she heard Anderson ask Alvarez to give him the license of the person who handed out the flyers and she did so. Arruda then heard Anderson tell Sokol to go home. After lunch, Arruda asked Alvarez why Sokol was fired. Alvarez replied, "Because he's with the union. It's not permitted to speak about the union." Arruda argued that such activity occurred during the lunch hour. Alvarez answered, "It was not permitted. Emil Braun didn't like that discussed. He did not permit the people from the union to infiltrate the work premises. Braun had a preference for people who were not union members. At work it is not permitted that people who belong to the union work on the premises."

Alvarez testified that at lunch on April 19, her first day at the jobsite, she saw two men handing out flyers. She did not know that they were employees of the Respondent. After they finished doing that they changed into work clothes and one of the men told her not to worry, that this was a very small job. She replied that the man should not worry, everything is all right, and "we just need to work." Herb Anderson arrived at the job, called Alvarez to the car, and told her that "somebody was handing flyers over here." He ordered her to "get me who was handing out the flyers." One employee told Alvarez that the Polish workers had distributed the flyers and pointed to them. Alvarez told Anderson that the employees said that the Polish workers had done that. Anderson directed her to call them over. Alvarez did so and Sokol approached. Alvarez asked him who he was and asked him to pick out his license from the ones she held. Sokol took his license, and Alvarez gave it to Anderson. Anderson told Sokol that he was fired. When Sokol questioned his discharge, Anderson said that he did not want anyone doing anything on his property without him knowing about it. Alvarez was "shocked" when this occurred and asked Anderson what was going on. Alvarez quoted Anderson as repeating many times "If somebody keep on doing this and if one of them. . . . If I know who is keeping doing it, then everybody is going to get fired."

Alvarez did not contact Braun immediately because she had no way of doing so. Later, however, she told Braun what happened. He told her to "stand by," and he would find out what the problem was. Braun later told her they could do nothing about the firing of Sokol.

Alvarez denied speaking with anyone from the Respondent between the time the flyers were distributed and Anderson's arrival. She further stated that no other supervisor of the Employer was present during the lunchtime distribution of flyers. She denied speaking to Sokol after Anderson fired him.

b. The Agency Status of Herb Anderson

The Respondent began work at the PSPC in March 2002, pursuant to an oral agreement with Active Removal Corp., whose contact person with the Respondent is Herb Anderson.

The logbook for May 1, 2002, contains the notation: "Vinny & Herby & other project monitor on site doing visual. Request on little extra clean on bldg. 58 & they be prepare for finals on 57–58."

Section 2(13) of the Act provides:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The Board applies common law principles of agency in determining whether a person is an agent under the Act. Such principles incorporate the doctrine of apparent authority.

> Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief. Two conditions, therefore, must be satisfied before apparent authority is deemed created: (1) there must be some manifestation by the principal to a third party, and (2) the third party must believe that the extent of the authority granted to the agent encompasses the contemplated activity. [Citations omitted. *Pratt Towers, Inc*., 338 NLRB 61, 72 (2002).]

Anderson clearly had some position of authority at the jobsite. Braun testified that Anderson was the "contact person" with Active Removal Corp. for which the Respondent performed work at the location. I credit the uncontradicted testimony of Siemak that Anderson discharged Foreman Yakobowsky, and I also credit Ortega's testimony that Anderson had checked her work. Under the above-standard, therefore, by permitting Anderson to take personnel actions relating to its employees, the Respondent caused employees to believe that Anderson acted in its behalf. In discharging employees and checking their work, Anderson acted in effect as a supervisor of the Respondent. Anderson therefore acted with apparent authority in firing Sokol. *Maumee Stone Co.*, 259 NLRB 1168, 1171 (1982).

It is particularly important that the Respondent did not disavow Anderson's discharge of Sokol or reverse it. Alvarez did not attempt to stop Anderson from firing Sokol. In this regard, I understand that Alvarez stated that she was "shocked" at the

[6] Sokol also testified that when he called the office he was informed that he was fired. I find that it is more logical that Sokol called and told the office that he was fired.

discharge by someone unknown to her. However, she could have asked Sokol to remain at the jobsite while she checked with Braun. Although she could not contact Braun immediately, Alvarez could have had him delay his departure until she reached Braun. Further, when Alvarez told Braun that Sokol had been fired, he told her to "stand by" and that he would find out what the "problem" was. He obviously then learned why Sokol had been fired and then told Alvarez that nothing could be done about it.

> Ratification is defined as the affirmance by a person of a prior act that did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.
>
> Affirmance is defined as either (a) a manifestation of an election by one on whose account an unauthorized act has been done to treat the act as authorized, or (b) conduct by him justifiable only if there were such an election. An affirmance of an unauthorized transaction can be inferred from a failure to repudiate it. *Service Employees Local 87 (West Bay Maintenance),* 291 NLRB 82, 83 (1988).

It is obvious, therefore, that Braun, having learned that Sokol was fired for distributing union flyers, was satisfied that he had been discharged. Braun ratified and acquiesced in Anderson's conduct in firing him by doing nothing to overrule the discharge of his employee or reinstating him to his former position. "The Board has held that an employer's failure to disavow and/or discipline an employee for conduct engaged in with company knowledge may warrant an inference of apparent authority." *Dentech Corp*., 294 NLRB 924, 926–927 (1989). In addition to being responsible for Anderson's conduct under the doctrine of apparent authority, the Respondent's affirmance of and failure to repudiate his actions constituted ratification of those actions. *Dentech,* above, at 928. See *Richlands Textile, Inc*., 220 NLRB 615, 619 (1975), where a state legislator with no connection to the respondent wrote a letter to its employees threatening that the respondent would close its operation in the event of its unionization. The legislator was found to be an agent of the respondent where the employer did not disavow his actions.

c. Andrej Siemak

Pursuant to the apparent practice in the industry, Siemak presented his license to his supervisor, Miguel Marco, at the beginning of the workday on April 19.[7] He distributed flyers with Sokol at lunch that day as set forth above, and stated that Braun did not see him doing so.

Siemak returned to work at about 1:30 p.m., and was removing asbestos while wearing a suit and mask. Fifty minutes later, Braun entered the containment area not wearing a suit or mask and approached Siemak. According to Siemak, Braun had foam in his mouth, "wild eyes," and screamed "f–k you, f–k you, get out now, no more that's it" while at the same time shaking his fist at him. Braun was holding Siemak's license and then pushed Siemak, who left the area and turned to see Braun tear up the license. Siemak picked up the pieces and put them in his pocket. In rebuttal testimony, Siemak stated that when he was fired by Braun he asked Braun to return his license. Braun then tore it up.

Outside the containment area, Siemak attempted to wash his hands at a fire hydrant, which according to him was a legal requirement before leaving a contaminated area, but Braun pushed him, preventing him from using the hydrant, demanding that he "go, go, go out." Siemak put his tool belt on the floor and removed his suit and mask. When he reached for the tools, Braun said that they were his tools, but Siemak grabbed them. Siemak also tried to take his hard hat but Braun pushed him away.

It is the Respondent's defense that it fired Siemak for having an improper license. The license Siemak presented to his supervisor each day that week prior to his Friday discharge was a Xerox paper copy of a current license which was due to expire the following month, in May 2002. Sometime prior to the expiration of a license, the asbestos handler must take a "refresher" course. Siemak had taken such a course, and had a document from that course which he presented on April 19, to his supervisor with the Xerox copy of his license. He did not present his original license to his supervisor that morning because it had been mailed to Albany for the issuance of a renewal license upon the expiration of his current license.[8] The original license is encased in plastic and bears the stamp of the New York State Department of Labor (DOL).

Siemak was aware of no rule of the Respondent which required that the employee must have an original license or a duplicate in plastic with a DOL stamp on it.

Siemak stated that Braun's destruction of the copy of his license prevented him from working elsewhere since the original license from which he made the copy was in Albany.

Alvarez testified that on April 19 Braun visited the worksite and asked to see the licenses in order to determine which employees were absent. He noticed a paper copy of a license and asked who the worker was. Alvarez said that she did not know. Braun took the license and approached Siemak.

Alvarez testified that she was permitted to work at other asbestos removal companies with a paper copy of an asbestos license similar to Siemak's, but that the Respondent did not permit employees to work with such a copy. Rather, a duplicate license having a DOL stamp is required to work for the Respondent. Armando Questa, however, said that when his license was being renewed he presented a paper from the refresher course together with a copy of his license to the Respondent's supervisor, and he was permitted to work. Those appear to be the same documents that Siemak presented to his supervisor and with which Siemak was permitted to work in the days before his discharge.

DOL Regulation 56-2.2 states: "Any person employed by a contractor on an asbestos project shall have an appropriate asbestos handling certificate or a copy thereof in his/her possession at all times during his/her work on the project."

Alvarez stated that from the time she began work with Extreme she was aware of the Respondent's policy that such a

[7] Marco was replaced by Alvarez before lunch that day.

[8] Albany, the capital of New York State, is the headquarters of the DOL.

stamped copy was required. She stated that Braun frequently checked licenses to make sure that the licenses were current. She further stated that if a paper copy was presented the worker would be sent home with instructions that he could return when he had an original license or a duplicate with a DOL stamp. Braun sent home about four employees who did not have the license he required. Alvarez stated that during her 9 years of full-time employment with other companies that Braun was involved with, prior to her work for Extreme, this policy of requiring original licenses or duplicate licenses with a stamp did not exist. Alvarez has a personal policy of advising workers at least 1 month in advance of the expiration of their license. She does that so that they can obtain the proper license that Braun requires. Of course she did not do that in this case with Siemak because Siemak was fired on her first day at work.

2. Betsey Arruda

Arruda worked at PSPC from March 18 to May 29. She testified that in about late March, admitted Supervisor James Noel asked her if she was a member of Local 78 and whether she had a union book. She said, "Yes," adding, however, that a union was not needed and "the union goes bad over here."

Arruda further testified that 2 months later, on Friday, May 17, Noel was preparing a list of employees who would perform weekend work. He told her, "I want you to say that if you are in the union. If Emil Braun finds that out you're going to have to go home and it's going to happen to you what happened to the Polish workers the same thing will happen to you. I'm letting you know because I have to make a lot of calls tonight. And it's going to be found out if it's true or not that you're in the union." Arruda replied that the Union did not send her to work for the Respondent but Noel could do whatever he wanted.

One week later, at lunchtime on May 24, Arruda and coworker Maria Ortega put on shirts and caps which bore the union logo. They approached their coworkers, gave them the same flyers as Sokol and Siemak had handed out, and told them that if they belonged to a union they would have the benefits set forth in the flyer, including a better salary. Arruda also gave them a petition which would "unite for a union." Ten or twelve employees signed the petition.

During this activity, Alvarez and Moposita were eating lunch in a company truck some distance from the other workers. Arruda stated that Alvarez saw her distributing the flyers but could not see the petition-signing activity. When the lunch period was ending, Alvarez called Arruda and Ortega to the truck and asked what they were doing. She also asked to see the flyer. Arruda gave her one and said that they were engaging in this activity in order to obtain better benefits and a union salary. She added that since this was their lunch hour they were not doing anything wrong. Arruda quoted Alvarez as saying "don't you remember what happened with the two Polish men. If Emil Braun finds out he would throw us out." Alvarez told the two women, however, that she would not tell Braun about their union activities. Ortega testified that Alvarez said that what they were doing was their problem.

Following lunch that day, Arruda returned to work in the basement with Ortega, William Leon, and Douglas. Arruda testified that Alvarez walked by with Noel who asked why she undertook "the work of getting into the union," adding that if Braun were to learn that they were working for the union "he was going to throw us out." Noel also said "see what happened to the Polish people." Noel added, however, that if they become union members they could continue to work and Noel and Alvarez would not tell Braun. Noel asked Arruda to promise that she would not "do it again." Alvarez told her that if Braun knew employees were "infiltrating into the employer from the union the persons responsible within the company would be dismissed like the Polish workers." Arruda and Ortega replied that if they would not tell Braun that would be "fine." Alvarez received a call on her radio and she and Noel left.

Moposita stated that he was present when Noel spoke to Arruda, but did not know if that was on May 24. He did not hear Noel ask her if she was a union member.

Ortega testified that she heard Noel ask why Arruda has done what she was doing to him, saying that he believed that they were friends. Noel asked her to promise that she would not continue to organize for the union. They agreed. Ortega stated that the call Alvarez received was from Braun who then left the area. A short time later, Ortega and Arruda were told by Alvarez that Braun knows "everything" and that she had told him that they were organizing for the union during lunch. However, Alvarez told the workers that Braun said that they could continue working.

Arruda testified that on the same day, May 24, she asked Alvarez for permission to be absent from work the following Tuesday, May 28, because of a court appointment. Alvarez agreed, saying that she should report to work on Wednesday, May 29. Ortega testified that she heard Arruda tell Alvarez that she would not come to work the following day because of a court appointment.

Arruda did not work on May 27, Memorial Day. She stated that in the morning of Mary 28, she gave Ortega a notice of hearing from the Workers Compensation Board which stated that she was to report for the hearing on May 28 at 11:30 a.m.[9] Ortega testified that she gave the document to Noel that morning. At hearing, the Respondent produced Arruda's personnel file, which contained the original notice of hearing.

Arruda reported to work on May 29, and was greeted by Alvarez and Braun. This was Arruda's first workday following her distribution of union flyers. Braun said that she did not work the day before. Arruda replied that she had a court date and had received permission from Alvarez to take the day off. Braun responded that she should "go look for work at court because I have no more work for you here." Arruda explained that she had evidence that she asked for permission. Braun answered that it did not matter and that she should go home. Arruda told Alvarez that she sent the document with Ortega who gave it to Noel. Alvarez replied that was Braun's problem.

Arruda testified that on the same day that she was absent, employee Telmo Moncayo was also absent. They both returned to work the following day, May 29. She was discharged, but

[9] Arruda's pretrial affidavit stated that she gave the letter to the Respondent. That clearly is an error. Arruda corrected the mistake at hearing by testifying that she told Alvarez that she would send the letter with Ortega.

Moncayo was asked to return the next day with proof of why he had been absent. The Respondent's logbooks support that testimony. They show that Moncayo did not sign in on May 28 or 29, but on May 30, he signed in, thereby proving that he did not work on May 28 or 29, but was permitted to work on May 30.

Ortega testified that in about late May, prior to her distribution of the flyers, she requested and received permission from Alvarez to take a day off to pay a summons. Ortega returned to work the following day and received no discipline. She was also not required to provide proof of the reason for her absence.

Alvarez testified that at lunchtime on May 24, she saw Arruda and Ortega give flyers to employees, and that they offered her a flyer. Moposita also testified seeing Arruda distribute flyers. Alvarez denied seeing any employees sign a petition. Alvarez told them to do whatever they had to since it was their lunchtime and she did not care. However, she added that "I don't think the boss would like to know that somebody is spying in here." She defined "spying" as "going to the union to create problems in here." She further explained that she did not believe that Braun would like the fact that they were creating problems at the jobsite, reporting problems to the Union, "because the union is put in to create a problem." Alvarez also told them that she did not believe that Braun would appreciate that they were being paid $15 per hour by the Respondent and then receiving from the Union the difference between that amount and the Union's rate.[10] Alvarez told the two women that they could do whatever they wanted, and that although she knew what they were doing she would not tell Braun. Further, Alvarez denied telling the two women that Braun knew what they were doing or that they would be "thrown out." Alvarez also denied telling Braun what she observed that day.

Alvarez stated that on May 28, Braun called her and asked whether all the employees were present. Alvarez replied that Arruda was absent. Braun answered that they need to get the job done and they "need people" so she would not be employed there any longer. Alvarez told him to "come and take care of that problem yourself." When Arruda reported to work the next day, Alvarez was busy signing in the workers and giving them directions. She saw Braun and Arruda speaking and did not involve herself in their conversation.

Alvarez testified that she has the authority to give employees permission to take a day off, and that Arruda told her that she had to pay a summons in court and needed to take a day off. However, according to Alvarez, Arruda did not mention that she needed a specific day off, did not tell her that she would be absent on May 28, to appear in court. As a result, Alvarez did not give her permission to take that day off. Alvarez denied seeing the notice of hearing and further testified that Noel was not present at PSPC that day.

Employee Iveth Tapia testified that she knew of no employee who was discharged for being absent from work.

3. Maria Ortega

Ortega was employed from March 27 to June 15, as an asbestos handler. She testified that on her first day of work she attended a meeting with about 60 employees at which Noel and Braun spoke. Noel told the workers that if the union came in they would "all wind up going home." Braun told them that if the union came in they would all go home and there would be no more work. None of the employees responded to those comments. Noel did not testify. Braun did not deny those remarks.

On May 24, Ortega and Arruda distributed flyers and obtained signatures on a petition as set forth above. Ortega stated that in mid-June, she was discharged by Alvarez who said that she was told to do so by Braun. Thereafter, Alvarez asked a coworker for Ortega's phone number. There was some difficulty establishing contact but ultimately, according to Ortega, she called Alvarez who told her that there was no more work for her.

Foreman Moposita testified that in about June 2002 he and Alvarez were in the work area when they heard Ortega tell her coworkers that they were working too fast, and they must work slower. At first, Moposita testified that Alvarez made no comment about Ortega's statement, but then testified that Alvarez told him that they should be "careful" about that type of comment. Ortega was employed for another 3 weeks before she was discharged. Alvarez testified that she and Moposita approached an area where employees were working in a containment area wearing suits with hoods and respirators which covered their faces. She heard Ortega telling coworkers Leon and Vargas that "we are working too fast. We have to slow down" because the job would soon be over. Moposita asked Alvarez if she heard that comment. Alvarez said she did and agreed that Ortega made that statement. Alvarez then said, "[W]e have to be careful with that."

Ortega testified that while she was working in the basement with Leon and Vargas, Alvarez, and Moposita approached their work area. Ortega denied telling her two coworkers that they must work slower. Ortega denied speaking to Alvarez on the day before her discharge concerning how fast she was working.

Alvarez testified that Ortega was a "pretty good worker" when she started work, however her work deteriorated for some unknown reason. Alvarez stated that when demolition began to be done at the jobsite she deemed that work too difficult for the three female employees to perform so she gave them a "couple of days off" until after the heavy work was done. Alvarez recalled the other two women, Castillo Piedad and Sonia Rivera, to work after 1 or 2 days' layoff.

In contrast, Alvarez stated that she told Ortega not to return until she was called back because there was no work for her and because she "needed to fix the staff," but that she would recall her when there was work. At hearing, Alvarez testified that the reason she told Ortega not to come in was because decontamination work was being done at that time and there were not enough decontamination showers for everyone. Alvarez stated that she was going to recall Ortega 1 or 2 weeks after her layoff but was told by other employees that she was already working someplace else in Pennsylvania. Alvarez did not try to call her. Alvarez stated that shortly thereafter, employees called to quit work giving various excuses. She was told that Ortega took them to work in Pennsylvania.

[10] Alvarez was aware that the Union offered employees who act as in-plant organizers the difference between their salaries with the Respondent and the Union wage rate.

4. Caryl Vargas

Vargas was employed from mid-May to late June 2002. He testified that in late May, he rode in the Respondent's truck with Foreman Moposita and William Leon. During the trip, Moposita asked him if he was a union member. Vargas replied that he was. Moposita then warned him to be careful, adding that if Braun finds out that he was a union member he was "powerful and could throw us out of the company." Moposita also said that Braun preferred to employ workers who were recently licensed as opposed to older employees since the new workers do not have a union. Leon testified that during the trip, he asked Moposita how long the work at the site would last. Moposita replied that it would last at least 1 year "if the union doesn't bother us" but that the union would not be a problem since Braun was a "very powerful person." Leon heard Moposita ask Vargas if he was a union member and also heard Vargas say that he was.

Moposita testified, denying that he told the men that the job would last more than 1 year if the union did not bother them, or that the Employer is powerful and the Union could do nothing. However, he conceded speaking about the union with them during the trip. He said that they told him that they were members of the Union. They asked him why the Union would not let them work without bothering them, and complained that the Union did not give them work, but rather they had to look for work. Moposita said that he did not "exactly" ask Vargas if he was a member of the Union. Rather, they all spoke about their union memberships (although Moposita did not tell them which union he belonged to), and Vargas volunteered that he was a member of the Union. He further conceded that he told them that the job would last "for a while."

In June, Vargas signed a petition for the Union given to him at lunch by Arruda, set forth above. He did not wear a union shirt or hat to work.

Vargas stated that the bathrooms at PSPC were some distance from the work area. On the day before Vargas' discharge, Moposita told all the workers that someone had defecated in the work area. Moposita did not identify the person, but Vargas learned from his coworkers that it was Luis Moran. No one had actually seen who had defecated. Moposita told Vargas to clean it up. Vargas did not protest that Moran should perform that task, and Moposita did not accuse him of defecating. That same day, he was asked by Alvarez "why don't you work?" Vargas replied that he was working.

The following day Vargas was discharged. He stated that he and Leon were fired by Alvarez who said that she did not need their services. Moran was also fired at that time. Vargas stated that on the day of his discharge, he and his coworkers were told by Moposita to remove asbestos from a work area. Moposita told them that whether they remained employed depended upon their performance at this task. After completing the job, Moposita checked the work and said it was "fine." However, Alvarez said the work was no good.

There was some evidence that the men used the "wet method" to remove the asbestos—by wetting down the area to prevent the spread of asbestos fibers pursuant to Moposita's instructions. Later, Alvarez inspected the job and told them that they should not have used the wet method.

Moposita could not recall telling Leon and Vargas that their work was acceptable. However, he did recall telling Alvarez a few times that their work was not acceptable, but that comment was not made on their last day of work.

Alvarez testified that Moposita told her that someone defecated in the work area. She went to the area and asked certain employees who did it. They said that it was Vargas. Those workers had already complained to her several times that they did not want to work with Vargas. Alvarez told Moposita to confront Vargas, and if he was the culprit, to tell him to clean it up.

Moposita testified that he was told by other workers that Vargas defecated at the worksite. He told Vargas that he heard that he had defecated, and that he must clean it. Vargas agreed to clean it and he did.

Moposita denied telling Braun which employees were union members, and he did not know if he saw Alvarez telling Braun the names of workers who were union members.

Alvarez testified that she spoke to Vargas about his slow work performance only a few days after he began work. She told him about three times that if he did not want to work he could leave. She also found that he was not in the area that she assigned him to, and when questioned told her that he was looking for a tool.

5. William Leon

Leon worked for the Respondent for about 1 month from early May to mid-June. He stated that he wore a union sweater on his first day of work. Alvarez told him that if anyone saw him with "that type of insignia" he could have "problems with the boss" and he could be fired. Vargas essentially corroborated Leon's testimony. Leon turned the sweater inside out. Alvarez could not recall if Leon wore the union shirt on his first day of work, but in any event she denied telling him to remove his shirt, and further denied saying that if the boss sees him with the shirt he would fire him. Her only recollection of his first day is that she told him "the job is yours, just work for it. Go to work."

Leon signed a petition with Vargas for the Union at Arruda's request at lunchtime as set forth above. He stated that on his last day at work, Moposita instructed him on the performance of some work. Later, Moposita checked their work and said that it was "fine." They used water to help in removing the asbestos because the work had to be done as quickly as possible. Later, Alvarez checked the work and told Leon that the work he did was not properly done, noting that they did not have to use water to remove the asbestos. Alvarez told Leon that he knew that the job should not have been done with the use of water.

When Leon was fired, he was told by Alvarez that she did not need him but that she would call him in the future. She never called thereafter. Leon testified that prior to Alvarez' criticism of his work on the day he was discharged, he received no other complaints about this work. However, he conceded having been told by Alvarez prior to that time that she wanted him to work faster and that if he did not do so he would have to go home. However, he noted that she said that to nearly all the workers with him at that time. Leon never heard that other employees refused to work with him because he was not a good

worker. He was fired on the same day that Vargas was discharged.

Moposita testified that Leon was a new employee who did not yet have sufficient "mastery or knowledge" of the work. He stated that Leon told him that Alvarez asked him to keep up with the work pace of the other workers. He did not recall telling Leon how to perform his work on his last day on the job.

Alvarez testified that Leon is very young and very slow. She found that he was not familiar with the work that had to be done and she told Moposita to train him and "give him a chance." On one occasion, Leon admitted not knowing how to build a tent but Alvarez excused his lack of knowledge and instructed Moposita to assign him to work with an experienced employee. Thereafter, Leon became more able but, according to Alvarez, still did not want to help. She urged him not to hurry but to work at the rate of speed of his coworkers. She received several complaints from his coworkers who said that they did not want to work with Leon because he was not working at their pace. The workers who complained also complained about Vargas, and said that they did not want to work with him either. Alvarez testified that she told Leon, after 2 weeks of work, that he now has experience and has been trained but he is not working at a "normal" pace with his coworkers. She asked him why his coworkers did not want to work with him. Leon replied that he did not know, but that he would try to improve.

Alvarez testified that she inspected Leon's work on his last day and found that more clean up was needed. She testified that she could no longer handle the many "headaches" she had regarding Leon, including Leon's coworkers' constant complaints about his work, and their refusals to work with him because he "did not want to work." Alvarez told him that there was no more work for him, and that she would call him if there was another job. She did not mention the other employees' complaints or that his work on the last day had been insufficient. Leon told Alvarez that he wanted to work at another jobsite. She offered to call the supervisor at the other site but did not. Her explanation at hearing was that it was up to Leon to apply for the job and it was the other supervisor's decision to accept him or not.

D. The Monroe College Site

Fabio Morales

Morales testified that an employee of Extreme suggested that he apply for work with that company. When he was hired he called Byron Silva, the union representative, and was told that in-plant organizers were needed to help the workers. Silva told him to keep working and that if he observes any safety violations he should call the agency concerned.

Morales was hired by Alvarez as set forth above. He worked as an asbestos handler for only 1-1/2 weeks, from May 6 to 15 on the evening shift, from 7 p.m. to 3:30 a.m.

Two days after Morales began work he called the New York City Department of Environmental Protection (DEP) to report a safety violation. Two days later DEP inspected the premises. Morales stated that he heard Alvarez tell Noel that the DEP agent told him that one of the employees called DEP. Noel wrote in the log book for May 11, that "workers called DEP about work not proper inspection," however Alvarez testified that she did not read that logbook entry and did not speak about that matter with Noel. He just told her that an inspection was conducted and was okay. Alvarez testified that the DEP agent said, "someone is continuously calling them."

Two days later, Morales called the Department of Labor (DOL) to report that not enough micro-traps, which filter the asbestos from the air, were being used. Morales saw a DOL agent at the jobsite that week. Neither DEP nor DOL issued any violations to the Respondent based on those inspections.

One week before he was discharged, Morales called the New York City Department of Sanitation to report that asbestos was in open containers in the street. He did not know if that agency inspected the jobsite. About 2 days before he was fired, Morales called DEP. He reported certain safety violations, however, DEP did not inspect the worksite. Morales also called the Occupational Safety and Health Administration (OSHA) during his final week at work and reported certain safety violations.

Morales stated that a couple of days before his discharge, he was asked by Alvarez and Moposita to enter a containment area and remove certain debris. At the time, Morales was not wearing his protective suit and mask and asked permission to put them on. Alvarez said, "just get in there." Morales refused, Alvarez left, and Moposita told him to put his protective gear on. Morales donned the equipment and performed the assignment.

Morales stated that on May 15 an OSHA agent visited the jobsite at 7 p.m. as the employees arrived for work. Noel and Alvarez were present. Morales testified that he, the OSHA agent, and other employees rode up the elevator together. When they arrived at the fourth floor, Alvarez greeted them and Morales signed in and gave her his license. The OSHA agent told Alvarez that he had the "right" to speak to the workers. Alvarez said that was not a problem. At that point, the OSHA agent spoke in English to a group of about 10 workers, telling them that they should not worry, that he was from OSHA and was there to help them. Morales testified that the workers did not understand English and he translated what the agent said into Spanish. Alvarez, who also understands Spanish, stood next to Morales as he spoke to the workers in Spanish.

Morales was fired by Alvarez 20 to 30 minutes after this incident, at about 7:30 or 8 p.m. He quoted Alvarez as saying: "You have to leave because I spoke with my boss who told [me you] have to leave." Morales asked why he was being dismissed, and Alvarez told him that Braun said that there were too many employees on the job. Morales stated that no one else was dismissed at that time.

The Respondent's log book in evidence establishes that four employees were hired in the period May 13, 14, and 15,[11] and one other was hired on May 19.[12]

Alvarez testified that she had worked with Morales at a previous job. Although she believed that he did not like taking orders from women and she had him fired from his last job because "we could not work together" and does not follow orders, she agreed to project manager Luther's decision to hire

[11] Jorge Barahona, John Noboa, Manny Ortega, and Daniel Sanchez.
[12] Lorenzo Cruz.

him here. She further stated that Morales frequently offered to help her and she readily agreed to his offer "I don't want to refuse that. Sure you can help me." She assigned him to light work which would not "upset" him.

Alvarez stated that she laid off Morales after the OSHA agent arrived but before the OSHA agent inspected the premises. She stated that Morales signed in that day upon his arrival, but she immediately told him to leave. She told him not to sign the book because he could no longer work there. When Morales protested she told him that he was just being laid off for the present and that she would call him for the next job. She stated that Morales then signed the book without her permission and left. Morales testified, however, that he was not fired upon arriving for work. Rather, he was wearing his protective suit at the time he was dismissed. This is consistent with his testimony that he was discharged 20 to 30 minutes after he arrived at work. Accordingly, he would be expected to be working one-half hour after he signed in.

Alvarez told Morales that she would call him if she had another job for him. Morales accused her of firing him. She denied it, telling him that she was just taking him off the job and that she would call him for another job. At hearing, Alvarez denied calling him thereafter, explaining that she asked Braun what she should do—whether she should assign him to PSPC. Braun said, "no, standby," and that Braun would advise her later.

Alvarez also testified that she laid Morales off because he needed "easy" jobs and there were no such jobs remaining at the jobsite. She stated that he twice refused to perform assignments. She noted that his partner German Tapia complained to her that Morales refused to work. Alvarez told Tapia to "do whatever you have to make him. Let him go." Tapia testified, however, that Morales did not refuse to do any work. Rather, he stated that when he worked with Morales, they worked slowly, and Morales told them that they had to work at a "normal pace. Not too fast."

The second instance involved her asking him to make piles of debris outside. Morales refused to perform such work unless he wore his protective suit and respirator. Alvarez said that he could wear the respirator but not the suit because the public would become frightened. When Morales again refused, Alvarez permitted him to work in a different area. Alvarez said that she told Project Manager Luther that Morales refused that assignment. Luther told her that if she was not "comfortable" with that she should let him go until the next job. She responded that she would see when she did not need him and would tell him to "stand by" until he could be assigned to a different site where she was not the supervisor. In an August 5, 2002 letter to the Inspector General of the U.S. DOL, Braun stated at on May 15, Alvarez "discharged an employee, Mr. Fabio Morales, who had worked for us 7 days and had not been exhibiting the experience or abilities Ms. Alvarez required of her crew."

On May 15, following Morales' discharge, the OSHA inspection took place. The OSHA agent told Alvarez to correct various violations found. Alvarez denied that Morales was involved in any way with the OSHA inspection, and specifically denied hearing him translate comments from the OSHA agent to the employees. She also denied knowing that he was a union member. During the inspection, an agent from DEP arrived. According to Alvarez, the DEP agent stated that a certain document required to be at the jobsite was missing, and demanded that the job be stopped. Accordingly, everyone left, including the OSHA agent.

Braun's letter of August 5 to the DOL, however, states a different reason for the shutdown of the site. Braun stated that the OSHA agents took a 90-minute tour of the work area and then announced that they would perform a 4-hour air-monitoring test. Manager Luther believed that this test was duplicative since the Respondent was already running third party air tests. Accordingly, the Respondent "suggested" that the agents obtain a warrant before "disrupting our operations any further." An agent responded that in cases where a warrant is requested, the inspection is done in a "machine gun" manner. Luther believed that this remark was a threat and asked the inspectors to leave, which they refused to do until the Respondent released all its workers. Accordingly, the site was shut down at that time.

The OSHA inspectors issued certain violations, all of which were corrected during the inspection. They consisted of unguarded live electrical equipment; the use of flexible as opposed to fixed wiring; electrical wiring was not secured high enough; lack of a ladder; and use of a damaged ladder.

Alvarez testified that upon being ordered to leave the premises she was asked by employee Jorge Sanchez what had happened. Alvarez explained that DEP was shutting the jobsite due to a missing document. Jorge Sanchez said the actual reason the job was shut was that Morales was a "spy" who spoke to them about a union and was "making a lot of problems," and that he observed Morales waiting nearby holding a cell phone and watching to see whether everyone left the jobsite.

Jorge Sanchez' testimony differs however. He stated that he worked at the Monroe College site on the day following the OSHA visit. He testified that Alvarez told him and about 10 to 15 other workers including his brother Daniel and Manny Ortega, that Morales was fired because he had called OSHA and because he was a member of the Union. Sanchez also quoted Alvarez as telling the employees at that time that "people who are members of a union cannot work here. They didn't want anyone who was in the union." Sanchez stated that no employer representative told him that he would be discharged if he complained to OSHA.[13]

Employee Carlos Moposita testified that he worked at the Monroe College jobsite on May 15, although his name did not appear in the logbook for that day. He saw an OSHA agent that night, but did not see Morales translate the agent's conversation to the workers. However, he also stated that when the OSHA agent arrived the employees were already working.

Employee Segundo Gustavo Guato testified that he asked Morales to take demolition debris to the truck. Morales refused because the metal was contaminated and he wanted to wear his

[13] I reject the Respondent's argument that Sanchez was biased against it because he quit his employment. Sanchez stated that he was left to work alone on jobs where he needed help. His quitting was voluntary and I do not believe that he would have testified falsely because he was unhappy at work.

protective suit and mask. Guato refused permission and instead told Morales just to work in the area. Guato reported Morales' refusal to go outside without his protective gear to Alvarez.

E. Other Witnesses for the Respondent

The Respondent presented several witnesses[14] who testified consistently that they (a) either wore union shirts at the Respondent's worksites or saw employees wear them, and that the Respondent did not require them to remove them or turn them inside out (b) did not hear Alvarez or Moposita tell any employees that if Braun learned that they wore a union shirt or were union members they would be discharged or could not work for the Respondent (c) did not hear management representatives tell employees that they would be fired for distributing union literature or engaging in union activities or say that it was futile to support the Union. Luis Orbe testified that in about late September 2002, he wore a hard hat bearing a logo from Local 79, a demolition workers union which is not the same as Local 78, the union involved herein. Braun took the hat and told Orbe that his wearing the hat is "no problem."

F. The Alleged Improper Conduct of the Union

The Respondent asserts that the activities of the Union and the employees are unprotected because the Union did not seek to organize the employees or engage in lawful activities, but rather the Union sought to destroy the Respondent.[15]

Supervisor Alvarez testified that in March, about 1 month prior to beginning work for the Respondent, she went to the Local 66 office and met with union representative Byron Silva. She overheard him and another man speaking about Extreme and she asked Silva what the Employer was up to. Silva replied that he wanted to "destroy the company" so that it would be out of business, "like it did in the city," preventing the company from working there. Alvarez asked how that could be accomplished. Silva responded that he needed employees to work for Extreme and asked her if she wanted to work there. Alvarez declined because she was already working elsewhere. Nevertheless, she asked what she could expect from the Union. Silva answered that if she was fired by Extreme the Union would get her a job at another location, adding that she would have to help them "in many ways." Alvarez asked for a description and Silva said that if she decided to take a job with the Respondent he would let her know what to do. Alvarez told Silva that she did not believe that it was easy to destroy a company like Extreme. Silva replied, "If they didn't before it's because they don't know the right procedure to do that. But now, we are prepared. We will do anything to get the company down." Alvarez then left.

In addition to the testimony of Morales, above, that Silva told him to take a job at the Respondent, help organize employees, and report any safety violations to the various agencies, there was other evidence of the Union's efforts to organize the Respondent. Carlos Moposita testified that Silva asked him why he was working at the Respondent if he was a union member. Silva asked him to help their organizing effort by reporting any improper work procedures to the Union. Silva also asked for his last pay stub so that he could see his salary, and also asked if he was given the proper equipment to work with. Silva offered to find Moposita another job if he was fired for helping the Union. Silva also met with Arruda and Ortega and spoke about the Union's organizing effort. The Union has given Arruda two paychecks and she was scheduled to receive another at the time of the hearing. The Union did not promise to pay Leon, Ortega, or Vargas. Silva testified that Alvarez met with him at the union office and offered to help in the organizing effort. Silva told her that he would give her instructions in the future, and that generally the Union paid the difference between the "salt's" wages and the union scale, but in the meantime asked her to produce certain documented complaints she allegedly gave to the DOL.

Silva testified that as part of the Union's organizing campaign the Union sent a letter dated May 1, 2002, to Gerry Wolkoff, the owner of the PSPC property. The letter stated that the Union was monitoring contractors, including Extreme, to ensure compliance with health and safety laws. It identified Extreme as a successor to AIA Environmental Corp which was debarred by New York State. The letter also commented that Extreme is in "substantial debt to many entities" and is at "high risk of collapse." It noted that the Respondent has lawsuits pending against it from building owners, suppliers, and contractors, has outstanding judgments against it of $150,000, and the federal and state governments have liens against it.

The letter warned Wolkoff of the danger that his company faces in using the Respondent's services. Specifically, it said that Extreme's low credit rating would make it difficult for it to acquire the supplies necessary to properly abate his property and he may have to redo the work performed by Extreme. It further said that the more than $1 million total debt outstanding for AIA and Extreme could cause federal investigations and repossession which would "significantly delay the completion of your project." The letter noted that Extreme has been charged with violations of the Act and if its "actions continue, the labor disharmony will cause delay to your project." This was the only letter of this type sent by the Union.

Silva denied telling anyone that his intention was to "destroy" the Respondent. He denied causing any of the Respondent's equipment to cease to function and never told any workers to engage in acts of sabotage or to work slower.

There appears to be nothing improper in the Union's actions in this matter. The Supreme Court, in *Town & Country Electric*, 516 U.S. 85 (1995), found that employees working for a union in organizing employees of an employer are statutory employees and entitled to the protections of the Act. By calling various health and safety agencies to report alleged improper work practices by the Respondent, the Union and the employees engaged in protected conduct. *Systems with Reliability, Inc.*, 322 NLRB 757, 760 (1996); *Beverly California Corp.*, 326 NLRB 153, 156 (1998). Although the Respondent believed that the Union sought to cause its ruin, as noted in its August 5 letter, by filing complaints with OSHA, there is no evidence that

[14] Iveth Tapia, Armando Questa, Carlos Moposita, Marco Martinez, Piedad Castillo, German Tapia, Luis Orbe, Marlene Torres, Segundo Gustavo Guato, Segundo Moposita, and Rosa Alvarez.

[15] I denied the Union's petition to revoke the Respondent's subpoena calling for the production of documents which would purportedly prove this defense.

the Union sought to harm or destroy the Respondent. In addition, its letter to Wolkoff appears to be based upon facts, none of which was challenged at the hearing.

IV. ANALYSIS AND DISCUSSION

A. The Alleged Interference with Employees' Section 7 Rights

I credit Siemak's uncontradicted testimony that upon his discharge Braun pushed him, prevented him from washing up at the fire hydrant, and tore up his asbestos workers license which caused him to be unable to obtain asbestos handling work until he was able to obtain another license. I find that these actions constitute unfair labor practices committed in the course of Braun's illegal discharge of Siemak.[16] *Three Sisters Sportswear Co*., 312 NLRB 853, 854 (1993).

I credit the uncontradicted testimony of Arruda that in late March 2002 admitted Supervisor Noel asked her if she was a member of the Union and whether she had a union book. Noel did not testify. I further credit her testimony that on May 17, she was again asked by Noel whether she was a union member. He also told her that he intended to find out whether she was a member, and warned that if Braun learned that fact she would be fired, as had been the Polish workers. I credit Ortega's testimony that Noel told the assembled workers on March 27, that if the Union came into the shop they would all go home and there would be no more work, and that Braun said that they would all go home. *Gissel Packing Co*., 395 US 575, 711 fn. 31 (1969). The Respondent argues that I cannot credit Arruda's testimony concerning the statements by Noel and Braun at the March 27 meeting because she was the sole witness to testify as to this event. Although apparently other witnesses could have been called to corroborate Arruda's testimony, that procedure was not necessary in that I find that Arruda was a believable witness. The Respondent could have produced Noel or Braun to contradict her testimony but chose not to.

Interrogation is not a per se violation of the Act. *Rossmore House*, 269 NLRB 1176 (1984). 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. For example, 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.

Applying the above principles to the interrogation which occurred here, I find that Noel's questioning of Arruda reasonably tended to interfere with, coerce, and restrain her in the exercise of her Section 7 rights. At the time of the questioning, Arruda was not an open union supporter when she was questioned by Noel an admitted supervisor. In March and on May 17, Noel asked her if she was a union member. The May interrogation was accompanied by a warning that Noel intended to make some calls and determine whether she was a union member. The questioning was also coupled with a threat that if Braun learned of her union membership she would be discharged. "This implied threat to link job [tenure] to an employee's union support would reasonably have caused [Arruda] to believe that Noel's questions could result in an adverse change in [Arruda's] working conditions." *Demco New York Corp.,* 337 NLRB 850, 851 (2002). I accordingly find that Noel's interrogation of Arruda, his threat to conduct an investigation of her union activities, and his threat that she would be discharged if her union membership became known to Braun violated Section 8(a)(1) of the Act.

I also credit Arruda that Alvarez told her on April 19, that Sokol was fired because "he's with the Union," that Braun did not permit union organizers to "infiltrate" the work premises, and that he preferred employees who were not union members. Those statements violate Section 8(a)(1) of the Act because they constitute an implied threat that employees engaged in union activities would be fired or not hired. *Watts Electric Corp*., 323 NLRB 734, 735 (1997).

I further credit Arruda's testimony that on May 24, she was asked by Noel why she and Ortega were working to get into the Union, again threatening that if Braun learned that they were working for the Union he would fire them as he had the Polish workers. Similarly, Alvarez threatened that if Braun learned that union workers were "infiltrating" the company she would be fired as had the Polish employees. At that time, Noel asked Arruda to promise that she would not continue to organize for the Union. Ortega corroborated Arruda's testimony that Noel asked Arruda why she was doing these things, and also heard Noel ask Arruda to promise that she would not continue to organize for the Union. I find that Noel's statements to Arruda violated Section 8(a)(1) of the Act as set forth above, and also his request for Arruda's promise to stop organizing constituted an unlawful conditioning of employees' continued employment on their cessation of union support. *MZ Movers, Inc*., 330 NLRB 309 (1999).

Alvarez essentially corroborated the testimony of Arruda by stating that after seeing Arruda and Ortega distributing leaflets she told them that she did not think Braun would appreciate that they were "spying," which she defined as permitting the Union to create problems in the shop. Alvarez clearly expressed her animus by telling the women that she believed that the Union would create problems.

I credit the testimony of Vargas, which was corroborated by Leon, that in May Moposita asked Vargas if he was a union member, and warned that Vargas should be careful because if Braun learned of that fact he could discharge him. Moposita's denial did not ring true, especially since he conceded speaking about the union with the two men. His testimony that they volunteered that they were union members cannot be credited particularly since his denial was equivocal—he stated that he did not "exactly" ask Vargas if he was a union member.

I find that these statements violate the Act. Although they were made by a low-level foreman, who I nevertheless find to be a supervisor, during a casual drive, Vargas did not bring up the issue of unions. The question was initially asked by Moposita. Vargas was not an open supporter of the Union, and

[16] The complaint alleges that the Respondent threatened employees with physical harm. I find that Braun's pushing of Siemak constituted a physical assault. Although a physical assault was not alleged it is closely related to the allegation of a threat of physical harm and was fully litigated at the hearing.

the questioning combined with an implied threat of discharge clearly would coerce Vargas in the exercise of his Section 7 rights.

I also credit Leon's testimony, which was corroborated by Vargas, that in May, while wearing a union sweater he was told by Alvarez that if he was seen with that shirt he could be fired. Alvarez thus warned him that he could be discharged if his union sympathies became known. The right of an employee to wear union insignia at work is a form of expression protected under Section 7 of the Act. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801–803 (1945). In the absence of special circumstances permitting an employer to prohibit such insignia, demanding that the employee remove it, or warning him about wearing such insignia violates the Act. *Inland Counties Legal Services*, 317 NLRB 941 (1995).

I credit Jorge Sanchez' testimony that on May 15, he was told by Alvarez that Morales was fired because he had called OSHA and because he was a member of the Union. Sanchez also quoted Alvarez as telling the employees at that time that "people who are members of a union cannot work here. They didn't want anyone who was in the union." Such statements violate the Act. *Watts Electric,* above.

I have essentially credited the employees' testimony over that of the supervisors who denied making the alleged comments, for the following reasons. First, Noel, an admitted supervisor, did not testify and accordingly did not deny the statements attributed to him. Similarly, Braun, who did testify but only as to issues of jurisdiction, did not testify about, and thus did not deny the statements ascribed to him.

I have credited the testimony of those employees who have testified regarding Alvarez' remarks. The statements made by Alvarez are more believable when considering Alvarez' admitted union animus. Thus, Alvarez testified that she was aware that employees would be acting as "salts," being paid by the Union to work at the Respondent's facility. She candidly expressed her belief that such employees were "spying" and permitting the Union to "create problems." Accordingly, it is reasonable to infer that Alvarez would have made the statements attributed to her—that Sokol and Morales were fired because they were union members; that Braun did not permit union organizers to "infiltrate" the work premises; that he preferred employees who were not union members; that if Braun learned that the union workers were "infiltrating" they would be fired; and that if Braun saw Leon wear a union shirt he could be fired. For the same reason I credit the mutually corroborative testimony of Vargas and Leon that Moposita threatened that if Braun learned that Vargas was a union member he could be fired.

In addition, I believe that it is clear that the Respondent's supervisors expressed the convictions of Braun. His August 5 letter to the Inspector General of DOL set forth his belief that OSHA was entertaining a "fraudulent complaint" or was engaged in a "harassment campaign through a conspiracy with" the Union against the Respondent. Braun's complaint referred to the OSHA inspection of May 15 and the discharge of Morales which was apparently made the subject of a whistleblower complaint. Braun complained that OSHA was spending much time, money and resources "in an effort to aid and support a union . . . in its ultimate goal of driving us out of business." As set forth above, OSHA's May 15 inspection resulted in the issuance of several violations, all of which were corrected during the inspection.

With reference to the above, it is apparent that the Respondent's supervisors took their "cue" from Braun, being adamantly opposed to the Union and its efforts to organize the employees of the Respondent. The supervisors could be expected to know Braun's feelings concerning the Union and the Respondent's position as to its unionization. It is significant that many of the comments attributed to the supervisors made reference to Braun's desire to avoid unionization, threats to discharge employees who were members of the Union, and his preference for employees having no union affiliation.

I have considered the testimony of employee witnesses for the Respondent to the effect that employees wore union tee shirts without being reprimanded for doing so, and that they did not hear Respondent's supervisors threaten or warn employees about engaging in union activities.

First, the testimony of the witnesses is unreliable because of the manner of their preparation. The employee witnesses were asked questions and prepared for their testimony in a room in which Braun was present. The Respondent failed to give them the assurances required under *Johnnie's Poultry*, 146 NLRB 770, 774–775 (1964). "The Board is very strict in this requirement, for it is the only safeguard against coerced testimony." *Pratt Towers, Inc*., 338 NLRB 61, 97 (2002). The fact that the Respondent's counsel gave such assurances when they testified did not cure the fact that the "interrogations were held in a coercive atmosphere, with . . . the person who hired them, present." *Pratt*, above. Similarly, Braun's presence in the room during their questioning by counsel must have had the intended impact of ensuring that they would testify consistently with the Respondent's position.

In addition, none of those witnesses testified that a union shirt was worn before Sokol and Siemak did so. Accordingly, there is no showing that such activity was permitted or went unchallenged before the unlawful discharges of Sokol and Siemak. If, indeed, wearing of union tee shirts was permitted after the fact that may have been simply a ruse to make it appear that the Respondent harbored no animosity toward the Union. The union animus in this case makes it obvious that discriminatory actions were taken against employees because of their union activities.

Furthermore, the fact that none of the employees heard the Respondent's supervisors threaten or warn employees does not mean that such activities did not occur. As set forth elsewhere, I have credited those witnesses who testified that they were threatened and warned concerning their union activities.

B. The Alleged Discharges

1. Legal Principles

In order to establish a violation of Section 8(a)(1) and (3) of the Act, the General Counsel must establish four elements by a preponderance of the evidence.

> First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove

> that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a motivational link, or nexus, between the employee's protected activity and the adverse employment action. [*American Gardens Management Co*., 338 NLRB 644, 645 (2002).]

Once the General Counsel has made the showings required above, the burden shifts to the employer to demonstrate that it would have discharged the employee even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083 (1980).

a. Jerzy Sokol

It is undisputed that Sokol engaged in union activities on April 19, by wearing a shirt and cap identifying him as a union organizer, and distributing flyers promoting the Union to his coworkers. It is also undisputed that supervisor Alvarez saw this activity and received a flyer.

Alvarez testified that she was not aware that Sokol was an employee since that was her first day on the job, but she nevertheless was quickly advised that Sokol was a worker when he was discharged by Anderson. Alvarez was present at his discharge and admittedly heard Anderson tell Sokol that he did not want anyone doing anything on his property without him knowing about it. The real reason for the discharge was Sokol's distribution of flyers as evidenced by Anderson's demand that Alvarez produce the person who was "handing out the flyers," and his advice to her that anyone who did this would be fired.

It is abundantly clear that the reason for Sokol's discharge was his distribution of the union flyers. Anderson discharged him for that reason. This reason was confirmed by Alvarez by her informing Arruda that Sokol was fired "because he's with the union. It's not permitted to speak about the union." Alvarez also told Arruda that Braun "did not permit the people from the union to infiltrate the work premises."

Sokol was discharged for distributing flyers concerning the Union to his coworkers. In response to a subpoena demanding the production of all written company rules, the Respondent's counsel stated that there are no such documents. There is no evidence that the Respondent maintained any oral rules prohibiting solicitation or distribution. Even assuming that the Respondent had a rule prohibiting solicitation and distribution during lunchtime, such rule would be overly broad and unlawful. *Triangle Electric Co*., 335 NLRB 1037, 1051 (2001); *Poly-America, Inc*., 328 NLRB 667, 674 (1999).

> As a general rule, an employer may not prohibit solicitation by employees during their nonworking time, nor proscribe the distribution of literature on nonworking time in nonworking areas. *Ford Motor Co*., 315 NLRB 609, 610 (1994).

I have found, above, that Anderson is an agent of the Respondent. As an agent, Anderson discharged Sokol in behalf of the Respondent.

Accordingly, I find that the General Counsel has established that the union activities of Sokol was a motivating factor in the Respondent's decision to discharge him. I cannot find that the Respondent has met its burden of demonstrating that it would have discharged Sokol even in the absence of the protected conduct. *Wright Line*, above. The Respondent's defense to Sokol's discharge is that Anderson is not employed by the Respondent. I have rejected that argument and have found that Anderson acted with apparent authority and his discharge of Sokol was ratified and affirmed by the Respondent.

b. Andrej Siemak

Siemak solicited employees and distributed union flyers on April 19, with Sokol, as set forth above. Alvarez witnessed those activities. The Respondent argues that Braun had no knowledge of Siemak's union activities, having come to the jobsite to check employee licenses, and when he looked through the licenses found Siemak's paper license and then asked Alvarez whose it was. Alvarez denied knowing who Siemak was when Braun took his license, and by implication denies that she advised Braun that Siemak had been engaging in union activities.

In *Dr. Philip Megdal, D.D.S., Inc*., 267 NLRB 82 (1983), the Board held that if a supervisor's testimony that he did not inform management of his knowledge of the union activities of employees is credited, such knowledge may not be deemed to have been conveyed, as a matter of law. The Board noted that a determination must be made as to whether the supervisor's denial was credible. In making such a determination, all the circumstances of the case must be considered.

"The Board has not hesitated to infer an employer's knowledge of employees' protected activities where the circumstances reasonably warrant such a finding." *Matthews Industries*, 312 NLRB 75, 76 (1993); *Dr. Frederick Davidowitz, D.D.S.*, 277 NLRB 1046 (1985).

> Knowledge need not be established directly, however, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn. . . . The Board has inferred knowledge based on such circumstantial evidence as: (1) the timing of the allegedly discriminatory action (2) the respondent's general knowledge of union activities (3) animus and (4) disparate treatment. The Board additionally has relied on factors including the delay between the conduct cited by the respondent as the basis for the discipline and the actual discharge, and-in the case of multiple discriminates—that the discriminatees were simultaneously discharged. *Montgomery Ward & Co*., 316 NLRB 1248, 1253 (1995).

The Board has also inferred knowledge where the reasons for the discipline are baseless, unreasonable or contrived so as to raise a presumption of wrongful motive, or where the "weakness of an employer's reasons for adverse personnel action can be a factor raising a suspicion of unlawful motivation." *Montgomery Ward*, above at 1253.

Applying the above criteria, I find that the evidence warrants the inference that Braun knew of the union activities of Siemak, and that it discharged him because of those activities in violation of the Act. That Siemak was discharged for that reason is supported by the credited testimony of Arruda that Alvarez and Noel warned her about her union activities, reminding her about "what happened to the Polish workers."

I cannot credit Alvarez' testimony that she did not know Siemak when Braun asked for all the licenses. She admittedly

saw Siemak when he distributed flyers. When Braun came to the jobsite after Sokol was discharged, Alvarez admittedly told him that Sokol was fired. Her concession that she told him "what happened" implies that she told him that Sokol was fired for engaging in union activities by distributing flyers for the Union. Alvarez, well aware of the Respondent's antipathy toward the Union, a fair inference may be drawn that she told Braun at that time that Siemak also distributed flyers at the same time as Sokol, and pointed him out to Braun. Thereupon all that remained was for Braun to seize upon some reason to discharge Siemak, which he found in the allegedly improper paper copy of his license.

The aggressiveness with which Braun discharged Siemak and the timing of the discharge coming less than 1 hour after he engaged in conspicuous union activity supports a finding that the reason for the discharge was his activities in behalf of the Union. Braun, in a rage, cursed at Siemak demanding that he leave, and pushed him. At the same time, Braun tore up his asbestos handler's license, sought to prevent him from taking his tools, confiscated his hard hat, and prevented him from using the fire hydrant to wash his hands. The alleged offense of not having a proper license should not have warranted this extreme conduct.

There is no evidence that others who allegedly possessed paper licenses were treated in this offensive manner. Rather, it appears that Braun was motivated in his discharge of Siemak by some other reason. Braun's animus toward the Union being well established, it is fair to assume that the other reason was his activities in behalf of the Union which occurred shortly before his discharge. Accordingly, I find that Siemak's union activities were a factor in the Respondent's decision to discharge him.

I reject the Respondent's defense that it fired Siemak because he lacked a proper license. First, Braun did not mention to Siemak the reason why he was being fired. At hearing, Alvarez stated that the Respondent has a rule requiring workers to have a duplicate copy of their license with a DOL stamp affixed. This apparently is a rule unique to the Respondent, and apparently applied to this jobsite only. Alvarez testified that there was no such rule at other jobsites in which Braun had an interest, and indeed she stated that other employers in the industry permit their employees to work with a paper copy of a license with no DOL stamp, as Siemak possessed. In addition, the DOL regulation permits employees to work with a copy of a license.

If it was Braun's policy, that workers have such an original duplicate, Siemak did not know of it, and it is apparent that during Siemak's employ with the Respondent that policy was not enforced. Each day of the week he was discharged his paper license was accepted by his supervisor. Even assuming that the Respondent had such a policy, it was enforced disparately. Thus, Alvarez stated that if an employee presented a copy of a license he would be sent home, but permitted to return to work when he had the proper license. Here, Siemak was not given that option. He was angrily discharged, leaving no doubt that he could not return to work. Moreover, Siemak was not told why he was being fired and was therefore given no opportunity to return to work with a proper license. Accordingly, I reject the Respondent's argument that there was no reason why Siemak could not return to work once he provided proper documentation.

There was no evidence that any employee other than Siemak was discharged for failure to have a duplicate original license. It should be noted in this regard that the Respondent refused to produce subpoenaed documents which would show the licenses of all its employees, payroll documents, and logbooks which would show when other employees' licenses expired and whether they continued to be in the Respondent's employ. I therefore draw an adverse inference that had such licenses been produced they would have been unfavorable to the Respondent's position that paper copies of licenses were not permitted. *Teamsters Local 776 (Pennsy Supply),* 313 NLRB 1148, 1154 (1994). I accordingly find that the Respondent has not established its *Wright Line* defense.

c. Betsey Arruda

As set forth above, Arruda had been the subject of 8(a)(1) violations by Noel who (a) interrogated her about her union membership, (b) threatened her with an investigation as to her union membership, (c) threatened her with discharge, and (d) asked her to promise to abandon her union activities.

Thereafter, on May 24, she engaged in open union activities with coworker Ortega by wearing union shirts and caps and distributing flyers promoting the Union and asking her coworkers to sign a petition. Alvarez, who was given a flyer, asked Arruda to "remember what happened with the two Polish men," and that if Braun learns what they were doing he would fire them. That same day, Alvarez told Arruda and Ortega that Braun "knows everything" and that she had told him that they were organizing for the Union.

Notwithstanding that Alvarez also told her that Braun said they could continue working, it does not seem to have been the case. She was fired on her next workday. I cannot credit Alvarez' testimony that she did not tell Braun what she observed that day. The timing of the discharge and the 8(a)(1) conduct I have found, coupled with the Respondent's animus toward the Union and the discredited reasons for the discharge, persuade me that Alvarez made Braun aware of Arruda's activities in behalf of the Union.

Accordingly, I find that the General Counsel has established that the union activities of Arruda was a motivating factor in the Respondent's decision to discharge her.

I credit Arruda's testimony that she received permission from Alvarez to be absent on May 28. In addition, Ortega's credited testimony supports a finding that the notice of hearing was delivered to Noel that morning. The original notice of hearing, as delivered by Ortega, was in Arruda's personnel file. Noel did not testify so we do not have his testimony that he did not receive it. Arruda was nevertheless discharged for not appearing at work that day.

Although Arruda told Braun that she had received permission for the absence from Alvarez, who stood nearby, Braun told her that it did not matter. Apparently, an excused absence did matter in the case of employee Moncayo who also was absent on May 28, but then was permitted to return to work with proof of the reason for his absence. It is significant that,

according to Alvarez' testimony, when Braun asked on May 28, who was absent she mentioned Arruda's name and not Moncayo's. Moreover, there was no evidence that Moncayo even had permission to take the day off.

I cannot credit Alvarez' testimony that although she was aware that Arruda requested a day off she did not ask for a specific date. The request was made on May 24, shortly before the requested date of absence. It is obvious that Arruda would have mentioned the upcoming hearing date of May 28.

Accordingly, I find that, especially given the disparate treatment accorded to Arruda when compared to Moncayo, the Respondent has not met its *Wright Line* burden.

d. Maria Ortega

As set forth above, Ortega distributed flyers and obtained signatures on a petition with Arruda on May 24, and was observed by Alvarez doing so. Three weeks later she was discharged. Ortega was the subject of unlawful threats to discharge by Alvarez who said that if Braun learned of her union activity she would be discharged. I have found, above, that Arruda was unlawfully discharged for this activity. Ortega was also prominently involved in distributing flyers for the Union and soliciting for it at the same time as Arruda.

Based on the above, I find that the General Counsel has established that the union activities of Ortega was a motivating factor in the Respondent's decision to discharge her.

The reason given for her lay off was that Alvarez deemed the upcoming work to be too difficult for women to perform. Accordingly, Alvarez laid off three female workers. However, the two other women were recalled after 1 or 2 days. In contrast, however, Alvarez admittedly did not intend to recall Ortega until 1 or 2 weeks after her layoff. In fact, Alvarez admittedly never contacted Ortega to return to work. No credible reason was given for the difference in treatment between Ortega and the two other women.

The Respondent offered various versions of Ortega's departure from the Respondent. Its answer to the complaint admitted that it discharged her. At hearing, however, its position as set forth by Alvarez was that she was laid off. Alvarez gave varied reasons for allegedly laying off Ortega. First, as set forth above, she stated that the work was too arduous for female workers. Then she testified that there was no work for her and she "needed to fix the staff." Third, Alvarez testified that decontamination work was being done and there were not enough decontamination showers for everyone. "The Respondent's varying rationales for its conduct lead to the inference that the real reason for the layoff is not among those asserted by the Respondent." *Jacee Electric, Inc*., 335 NLRB 568, 569 (2001). It is reasonable to infer that these shifting defenses have been advanced to mask the Respondent's unlawful conduct. *Caguas Asphalt,* 296 NLRB 785, 786 (1989).

Nevertheless, Alvarez did not even try to recall Ortega. She stated, without corroboration, that other employees told her she was employed elsewhere in Pennsylvania. It is possible that had Alvarez contacted her she may have been willing to return to work with the Respondent.

There was testimony that Alvarez and Moposita allegedly heard Ortega telling other workers to slow down. First, it is questionable whether this occurred since all participants in this conversation were wearing hazardous materials suits with respirators and hoods covering their faces. In addition, Alvarez was separated from the workers by an opaque tent. Even assuming Alvarez heard Ortega's alleged remark, that does not appear to be the basis for her discharge or layoff.

I accordingly find that the Respondent has not met its *Wright Line* burden.

e. Caryl Vargas and William Leon

I have found that Vargas was the subject of an illegal interrogation regarding his union membership by Moposita, and a threat of discharge that if Braun learned about his union affiliation he could be discharged. Leon wore a union shirt to work and, as set forth above, I have found that Alvarez told him that he could be fired if he was seen wearing that shirt.

Moposita was aware of Vargas' union membership and threatened him with discharge, and Alvarez warned Leon about the danger of wearing a union shirt. A proper inference may be made that Moposita advised Alvarez of Vargas' union connection. Moposita was Alvarez' foreman and was in close contact with her. He admittedly advised her of events occurring in the worksite since Alvarez would not be in the work area at all times. Alvarez discharged the two men. Accordingly, I find that the General Counsel has established that the union activities of Vargas and Leon was a motivating factor in the Respondent's decision to discharge them.

Vargas was discharged 1 day after someone defecated in the workplace. Alvarez testified that she was told that the wrongdoer was Vargas. The fact that he readily cleaned it up without complaint upon Moposita's asking him to do so leaves the strong implication that he was the culprit. In addition, I credit the testimony of Moposita and Alvarez that they complained to Vargas about his work performance. The General Counsel correctly argues that none of the other workers who complained about Vargas' work testified. However, I need not rely on the fact that they did not testify to accept the testimony of Moposita and Alvarez that they received complaints about his work.

As to their last day's performance, although Moposita may have said that their work was satisfactory, Alvarez, as Moposita's supervisor, had the final say as to the performance on their final assignment. Regarding the discrepancy in instructions given concerning the use of the wet method, I find that the determination by Alvarez that their work was not satisfactory, is conclusive. In addition, Luis Moran was also discharged at the same time as Vargas and Leon. There is no evidence that Moran engaged in any union activities. It is unlikely that the Respondent would have fired Moran just to conceal its true motives in the discharges of Vargas and Leon.

As to Leon, he conceded that Alvarez complained to him about his work and admitted that she told him that he must work faster, and if not he would have to go home. I have considered the fact that Leon testified that Alvarez said the same thing to nearly all the employees who worked with him at that time, but that does not lessen the warning, especially since Vargas, who worked with him, was also discharged with Leon.

Alvarez' testimony that she gave concessions to Leon in an attempt to work with him to improve his skills is believable.

She directed that he be placed with an experienced employee, but nevertheless his work did not improve. On his last day he was discharged with Vargas because, according to Alvarez, she had received too many complaints about his work.

I base my decision that the Respondent has met its *Wright Line* burden, in part, on the facts that Vargas and Leon's continued employment was based on their performance on their final job. Alvarez determined that the work was not satisfactory. They, along with Moran were fired that day. I find too that they had been the admitted subjects of comments concerning their poor work performance by Moposita and Alvarez prior to their discharge—Vargas, who Moposita and Alvarez reasonably believed had defecated in the workplace, and Leon, who was warned about his poor work performance. Under these circumstances, and the fact that the 8(a)(1) violations committed against them occurred relatively early in their tenure with the Respondent, convince me that the Respondent has met its *Wright Line* burden with respect to Vargas and Leon.

I do not agree with the General Counsel's argument that Alvarez viewed Vargas and Leon as allies of Ortega since they worked together, and therefore discharged them because of their perceived connection with Ortega's prounion stance. There is no evidence to support this contention. They were coworkers with Ortega and there is no evidence that they engaged in any union activities with Ortega other than their signing a petition which in any event was not witnessed by Alvarez.

I accordingly find that the Respondent would have discharged Vargas and Leon even in the absence of their union activities and I will recommend dismissal of those allegations of the complaint.

f. Fabio Morales

Morales worked for the Respondent at its Monroe College site for only 1-1/2 weeks. During those weeks he was very active in calling various agencies to complain about working conditions. He called DEP, DOL, the New York City Department of Sanitation and OSHA. It came to the attention of the Respondent that an employee was calling these agencies. Thus, Alvarez testified that she was told by the DEP agent that "someone is continuously calling them." Also, Noel wrote in the logbook that "workers called DEP." Indeed, Alvarez also testified that a DEP agent told her that the Union called the DEP.

I credit Morales' testimony that immediately before his discharge Alvarez saw him translating an OSHA agent's introduction to the workers at the jobsite. Alvarez admitted firing him after she saw the OSHA agent in the work area. Morales had already signed in to start work and had been working for 20 to 30 minutes when Alvarez fired him, saying the "boss" told her to dismiss him. The evidence is clear that Alvarez resented Morales' assistance to the OSHA agent and therefore must have believed that he was the employee who had been calling the agencies. In addition, I credit the testimony of Jorge Sanchez that Alvarez told him that Morales was fired because he called OSHA and because he was a member of the Union. It is clear that the Respondent believed that any assistance given by employees to OSHA was in aid of the Union's "fraudulent complaint" and "harassment campaign" designed to "driv[e] us out of business" as set forth in its August 5 letter to the DOL Inspector General.

Based on the above, I find that the General Counsel has established that the union activities of Morales was a motivating factor in the Respondent's decision to discharge him.

It appears that Alvarez gave Morales favored treatment at first based on their previous work together. Although she stated that they could not work together, she readily agreed to his offer to help him at work and she gave him preferential "light work." Nevertheless, she finally let him go allegedly because no more "easy jobs" remained at the worksite. This reason does not ring true, especially since she suggested to Braun that she reassign him to PSPC, but Braun refused.

I also cannot credit Alvarez' testimony that coworker German Tapia complained that Morales refused to work. Tapia testified, denying that Morales refused to work. Further, although Morales stated that he was told by Alvarez that he was being laid off because there were too many workers at the site, the Respondent's records establish that four employees were hired in that immediate period of time. The other testimony that Morales allegedly refused work orders has not been established. First, Morales credibly testified that he wanted to wear his asbestos suit while transporting metal outside the facility because he believed it contained asbestos fibers. Guato permitted him to do so, but Alvarez stated that she reassigned him to work inside. Accordingly, the Respondent assigned him to work and he performed it. Thus it cannot argue that he refused to work or did not perform the work assigned. I accordingly find and conclude that the Respondent has not met its *Wright Line* burden.

CONCLUSIONS OF LAW

1. By physically assaulting an employee, preventing him from washing up at the fire hydrant, and tearing up his asbestos workers license, the Respondent has violated Section 8(a)(1) of the Act.

2. By questioning employees concerning their union membership and activities; by threatening employees with an investigation to discover whether they were members of the Union; by threatening employees with discharge because of their membership in the Union or their activities in support of the Union; and by telling employees that other employees were fired for their union activities, the Respondent has violated Section 8(a)(1) of the Act.

3. By threatening to close the shop because of employees' union activities; by threatening that employees would not be hired or retained if they supported the Union or engaged in union activities; and by conditioning employees' continued employment on their abandonment of their support for the Union and their cessation of activities on behalf of the Union, the Respondent has violated Section 8(a)(1) of the Act.

4. By discharging Jerzy Sokol, Andrej Siemak, Betsey Arruda, Maria Ortega, and Fabio Morales because of their union activities, the Respondent has violated Section 8(a)(3) of the Act.

5. The Respondent did not violate the Act by discharging or laying off Caryl Vargas and William Leon.

REMEDY

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

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Extreme Building Services Corp., Great Neck, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Physically assaulting employees; preventing employees from washing up at the fire hydrant; destroying employees' asbestos workers licenses; interrogating employees concerning their union membership and activities; threatening employees with an investigation to discover whether they were members of the Union; threatening employees with discharge because of their membership in the Union or their activities in support of the Union; telling employees that other employees were fired for their union activities; threatening employees with shop closure because of their union activities; threatening that employees would not be hired or retained if they supported the Union or engaged in union activities; and conditioning employees' continued employment on their abandonment of their support for the Union and their cessation of activities on behalf of the Union.

(b) Discharging or otherwise discriminating against any employee for supporting Local 78, Asbestos Lead and Hazardous Waste Union, Laborers International Union of North America, AFL–CIO, or any other union.

(c) 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, offer Jerzy Sokol, Andrej Siemak, Betsey Arruda, Maria Ortega, and Fabio Morales full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Jerzy Sokol, Andrej Siemak, Betsey Arruda, Maria Ortega, and Fabio Morales whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

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

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

(e) Within 14 days after service by the Region, post at its facility in Great Neck, New York, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, 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 March 1, 2002.

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

[17] 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.

[18] 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."