329 N.L.R.B. 355, *; 1999 NLRB LEXIS 724, **;
163 L.R.R.M. 1245; 1999-00 NLRB Dec. (CCH) P15,317

1 of 11 DOCUMENTS

Regal Recycling, Inc. and Local 813, International Brotherhood of Teamsters, AFL-CIO n1

n1 Local 445, Laborers International Union of North America, AFL-CIO intervened in Case 29-RC-8020. We correct the case caption to accurately identify the Charging Party.

Cases 29-CA-16739, 29-CA-16870, 29-CA-16951, 29-CA-17056, 29-CA-17131, and 29-RC-8020

NATIONAL LABOR RELATIONS BOARD

329 N.L.R.B. 355; 1999 NLRB LEXIS 724; 163 L.R.R.M. 1245; 1999-00 NLRB Dec. (CCH) P15,317; 329 NLRB No. 38

September 30, 1999

NOTICE:

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

PRIOR HISTORY:

[1]** Original ALJ-Decision can be found at 1994 NLRB LEXIS 328.

COUNSEL:

James Kearns and Laura Kriteman, Esqs., for the General Counsel.

Gary Cooke, Esq. (Horowitz & Pollack, P.C.), of South Orange, New Jersey, for Regal.

Joseph Scantlebury, Esq. (Eisner, Levy, Pollack & Ratner, P.C.), of New York, New York, for Local 813.

Larry Cole, Esq. (Cole & Cole, Esqs), of South Orange, New Jersey, for Local 445.

JUDGES: By John C. Truesdale, Chairman; Wilma B. Liebman, Member. J. Robert Brame III, Member, concurring in part and dissenting in part.

OPINION:

DECISION AND ORDER

[*355] On May 17, 1994, Administrative Law Judge Steven Davis issued the attached decision. * The Respondent and the General Counsel filed exceptions and supporting briefs, and the Charging Party filed an answering brief.

* We correct the following errors in the judge's decision: at various locations, the judge refers to the Intervenor as Local 455 rather than Local 445; at p. 17, par. 6, add the surname "Bobadillo" after "Maynor Lima;" at p. 17, col. 2, par. 5, change "June 28" to "July 28."

[2]**

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, n2 and conclusions and to adopt the recommended Order as modified and set forth in full below. n3

n2 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.

n3 We modify the Order to conform to the violations found and to our decisions in *A.P.R.A. Fuel Oil Buyers Group*, 320 NLRB 408 (1995), enfd. 134 F.3d 30 (1997), discussed below, and *Indian Hills Care Center*, 321 NLRB 144 (1996). We have substituted a new notice to conform to the changes in the Order.

[3]**

1. The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging seven employees because of their activities on behalf of Local 813. The Respondent contends that it did not discharge the employees, but lawfully laid them off until they could produce documentation demonstrating their eligibility under the immigration laws to work in the United States. n4 We agree with the judge that the Respondent unlawfully discharged the employees.

n4 The Immigration Reform and Control Act (IRCA), 8 U.S.C. § 1324 et seq., requires employers to complete INS Form I-9 for each employee after reviewing documents produced by the employee showing identity and eligibility to work in the United States.

The relevant facts follow. Employee Edgar Pineda contacted Teamsters Local 813 in late June 1992. n5 On July 13, Local 813 representatives met with 13 of the Respondent's employees, and the employees signed authorization cards. Four days later, representatives of Local 813 **[**4]** informed the Respondent that they had obtained authorization cards from a majority of the Respondent's employees and requested that the Respondent sign a recognition agreement. Angelo Reali (Angelo), one of the Respondent's owners, refused to sign the agreement, asserting that the Company already had a collective-bargaining agreement with Laborers Local 445.

n5 All dates are in 1997 unless otherwise indicated.

After this discussion with the Local 813 representatives, Angelo and supervisor David Rios interrogated several employees about whether they had signed authorization cards. Rios told some employees that he already knew who had signed cards. He further told Pineda that Angelo and Michael Reali (Michael), who was also an owner and the vice president of the Respondent, wanted to know who had contacted Local 813 and that they were angry.

About July 20, Rios held a meeting of all employees at which he presented Raphael Griffin, a representative of Local 445. Griffin informed the employees that they did not need to **[**5]** join Local 813 because Local 445 already represented them. The employees responded that they had never signed

authorization cards for Local 445 or seen Griffin before that day. n6 When employee Norman Ortega outspokenly criticized Local 445, he was called to the side of the room, where Angelo told him that he could lose his job for criticizing that Union. In the meeting, Griffin told the employees that Local 445 could secure raises and medical benefits for them, and that they could not sign cards for another union.

n6 The judge found that the employees did not know that they were represented by Local 445 or entitled to benefits under a collective-bargaining agreement, the Respondent never complied with the terms of the agreement, and Local 445 never administered it. In addition, in response to union-security provisions of the agreement, the Respondent paid dues from its own funds directly to Local 445 on behalf of its employees, who of course had not authorized payroll deduction of dues. The judge found, based on the record, that Local 445 was not concerned with the working conditions of the employees, which were net unilaterally by the Respondent, and failed to otherwise enforce or service its contract with the Respondent. Thus, this case is factually distinguishable from *Henry Bierce Co*, 328 NLRB No. 85 (1999), in which the union had no actual or constructive notice that the employer was not complying with the contract. In this case, on the other hand, Local 445 has never asserted that it lacked knowledge of the Respondent's noncompliance with the contract.

[6]**

The following day, the employees went to the Respondent's office and informed Michael that they desired representation by Local 813 rather than Local 445. At a subsequent meeting called by the Respondent, Michael asked the employees why they had signed cards for Local 813, stated that he would close the facility if they selected that union, and informed the employees that they would be required to show him proof the next day that they were entitled to reside and work in the United States. n7

n7 We adopt, the judge's findings that the Respondent violated Sec. 8(a)(1) by, inter alia, interrogating employees concerning their union activities, threatening to close the facility if the employees continued their union activities, and threatening to require its employees to produce documents to establish that they were legally in the United States. The judge stated that only employee Mario Ortiz testified that Michael threatened to close the facility. We note, however, that Pineda corroborated Ortiz's testimony regarding this threat. Pineda's testimony pertained to the meeting initiated by the employees, but the judge found it consistent with testimony about the later meeting called by the Respondent.

[7]**

[*356] On July 28, the Respondent, in individual meetings, gave each of the seven discriminatees a letter stating in part:

You have not produced the proper proof of residence that is required by the federal government which makes you eligible to work in the United States. . . .We have no choice but to ask you to hold off from your employment until such time that the documents are brought into the office.

The discriminatees were unable to produce the required documents and the Respondent did not permit them to return to work.

The record shows, and the judge found, that the Respondent previously had not uniformly required employees to furnish proof of their authorization to work. Indeed, Michael testified that the Respondent would permit employees to begin work if they said that they had documents showing work authorization, and that the employees sometimes failed to produce the documents. The Respondent had not even requested documents from discriminatees Hugo Carillo, Edgar Pineda, or Julio Del Cid before July. Upon his hire, Nery Perez provided a marriage certificate, which is not among the documents listed by the Immigration and Naturalization Service (INS) Form I-9 as an **[**8]** acceptable demonstration of identity or work eligibility. The record shows that the Respondent requested documents from Mario Ortiz, who furnished a work permit. Joel Chinchilla was asked for identification, and he produced a green card. Neither Ortiz nor Chinchilla completed a Form I-9 as required by the INS.

As the judge found, the Respondent also did not consistently apply a policy of verifying eligibility even at the time when it discharged the discriminatees, purportedly for lacking proper authorization. Four employees who did not sign authorization cards for Local 813 remained at work after July 28, despite their failure to produce documents demonstrating their eligibility to work. Moreover, after the discharges new employees were hired without providing appropriate documents.

Two of the discharged employees were rehired in November, after Local 813 failed to receive a majority of votes in the October 30 election. Carillo returned to work after seeking assistance from Local 445 to obtain a work permit, although his application for the permit was still pending even at the time of the hearing in this proceeding. Ortiz, whose discharge the Respondent attributed to the expiration **[**9]** of his work permit, returned to the Respondent's facility initially with a document stating that his permit would be renewed and later with the renewed permit, but the Respondent failed to reinstate him. Like Carillo, Ortiz was ultimately rehired following the intervention of Local 445.

Under the test set out in *Wright Line*, n8 in order to establish that the Respondent unlawfully discharged the seven employees based on their union activity, the General Counsel must show by a preponderance of the evidence that the protected activity was a motivating factor in the Respondent's decision to discharge. Thus, the General Counsel must show that the employees engaged in union activity, that the Respondent had knowledge of that activity, and that the Respondent demonstrated anti-union animus. n9 Once the General Counsel has made the required showing, the burden shifts to the Respondent to demonstrate that it would have taken the same action even in the absence of the protected union activity.

n8 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir.1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 393-403 (1983).

[10]**

n9 *Wright Line*, supra, at 1090.

Based on the above facts, we adopt the judge's conclusion that the Respondent unlawfully discriminated against the seven discharged employees based on their union activities. The General Counsel demonstrated that the seven employees were among those who signed authorization cards for Local 813 and informed Michael that they wished to be represented by that Union rather than Local 445. Thus, the Respondent was well aware of their support for Local 813. The Respondent reacted to the employees' union activity with a clear demonstration of antiunion animus, by threatening to close the facility and, in an unprecedented manner, demanding a mass production of work authorization documents.

In agreement with the judge, we further find that the Respondent has failed to show that it would have discharged the employees even in the absence of their union activity. The record does not support the Respondent's assertion that its enforcement of eligibility requirements under IRCA predated the employees' support for Local 813. Therefore, we reject the **[**11]** Respondent's contentions that it had already instructed the employees to produce their documents before the advent of their union activity and had distributed an undated letter in June requiring the documents.

We also reject the Respondent's argument that the employees were not discharged, but merely laid off until they could be employed in compliance with Federal immigration laws. Significantly, the Respondent's attempt at strict compliance with eligibility requirements as to these employees, though arguably proper under immigration law, was contrary to its practice both before and after these discharges, as well as to its contemporaneous treatment of employees who did not support Local 813. To undocumented employees, hired and allowed to continue to work without having to produce authorization papers, an employer's sudden demand for such papers, accompanied by a "layoff" until they are provided, **[*357]** clearly means a permanent, or at least long and indefinite, loss of employment. Moreover, the Respondent's failure to reinstate Ortiz upon presentation of his renewed work permit, until Local 445 intervened at his request, belies the Respondent's contention that its only concern **[**12]** was ensuring proper work authorization. n10

n10 See *Victor's Cafe* 52, 321 NLRB 504, 514-515 (1996) (employer's hasty demand, after learning of employee support for union, that employees produce documents demonstrating work authorization, and discharge of employees who failed to provide documents, violated Sec. 8(a)(3) and (1)). Like the Board in *Victor's Cafe*, we find that this case does not involve an employer's good-faith effort to come into compliance with its statutory obligations under IRCA without regard to its employees' union activities.

For the above reasons, we conclude that the Respondent's discharge of the seven employees violated Section 8(a)(3) and (1). n11

n11 We find it unnecessary to rely on *Future Ambulette*, 293 NLRB 884 (1989), and *Midwestern Mining*, 277 NLRB 221 (1985), cited by the judge.

[13]**

2. The judge ordered the Respondent to offer the seven discriminatees immediate reinstatement with backpay. In *A.P.R.A. Fuel Oil Buyers Group*, supra, 320 NLRB 408, the Board considered the remedies appropriate for discriminatory discharges of employees on the asserted basis of their undocumented status, including whether an employee's ineligibility for employment affects the propriety of reinstatement and backpay. Recognizing that the Board may not order a remedy that would require an employer to violate IRCA, it found in *A.P.R.A.* that an employer's obligation to reinstate allegedly undocumented workers should be conditioned on their satisfaction of IRCA's normal verification requirements. In accord with the decision in *A.P.R.A.*, we shall modify the judge's recommended Order to condition the Respondent's reinstatement obligation on the discriminatees' production, within a reasonable time, of documents enabling the Respondent to meet its obligations under IRCA. We shall further modify the judge's recommended Order to provide that the Respondent pay the discriminatees backpay from the dates of their discharges to the earliest of the following **[**14]** events: their reinstatement by the Respondent, subject to compliance with the Respondent's normal obligations under IRCA, or their failure after a reasonable time to produce such documents.

3. The Respondent excepts to the judge's recommendation that the Board issued a *Gissel* n12 bargaining order to remedy the unfair labor practices. As an initial matter, we find no merit in the Respondent's arguments as to the violations themselves, or its contention that a bargaining order is not appropriate because 3 months passed between the alleged unfair labor practices and the election. In normal circumstances, the violations in this proceeding would prompt the Board to consider a *Gissel* remedy. However, as the Board recently recognized in *Wallace International de Puerto Rico*, n13 excessively long delay at the Board may render such a remedy unenforceable. Here, the delay at the Board exceeded even that in *Wallace*. As in *Wallace*, rather than engender further litigation and delay over the propriety of such an order, we find that the interests of the employees are better served by proceeding to a second election (in the event the tally of ballots from the first election shows **[**15]** that Local 813 has not received a majority of votes).

n12 *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

n13 328 NLRB No. 3 (1999). In that case, the Board declined to issue a *Gissel* bargaining order and instead directed a second election given that the unjustified delay of the case at the Board for almost 4 years had likely rendered such an order unenforceable. C.f., *Garvey Marine, Inc.*, 328 NLRB No. 147 (1999) (Board found *Gissel* remedy appropriate, distinguishing *Wallace* based on the length of delay and extent and severity of the unfair labor practices involved).

Although a *Gissel* remedy is not imposed, we find that, in the event that Local 813 has lost the first election, an additional remedy is necessary to dissipate as much as possible any lingering effects of the Respondent's unfair labor practices and to ensure that a fair second election, if needed, can be held. n14 Therefore, we shall in that event **[**16]** order the Respondent to provide Local 813, on request made within 1 year of the date of this Decision, the names and addresses of all current unit employees. n15 The delay in this case, although unfortunate, was no more the fault of Local 813 or of the employees who were denied a fair opportunity to choose whether they desire union representation than it was of the Respondent. Our Order will afford Local 813 "an opportunity to participate in [the] restoration of employee rights by engaging in further organizational efforts, if it so chooses, in an atmosphere free of further restraint and coercion." *United Dairy Farmers Cooperative Assn.*, 242 NLRB 1026, 1029 (1979), enfd. in relevant part, 633 F.2d 1054 (3d Cir. 1980). n16

n14 See *Maramount Corp.*, 317 NLRB 1035, 1037 (1995) (Board has broad discretion to fashion a just remedy).

n15 If Local 813 loses the pending election, Member Liebman believes that additional remedial measures are necessary to dissipate, as much as possible, the lingering atmosphere of fear creased by the Respondent's unlawful conduct and ensure that employees will be able to exercise a free choice in a second election. Specifically, she would order the Respondent to grant Local 813 and its representatives reasonable access to the Respondent's bulletin boards and all places where notices to employees are customarily posted. Member Liebman also would order the Respondent to grant Local 813 reasonable access to its facility in nonwork areas during employees' nonwork time. In her view, these two access remedies would provide employees with reassurance that they can learn the benefits of representation by Local 813 free from the unlawful threats and reprisals they have experienced in the past. Given the judge's finding, adopted by the Board, that the Respondent violated Sec. 8(a)(2) by denying Local 813 access to its employees and facility, while providing such access to Local 445, these additional remedies are carefully tailored to the situation which calls for redress.

[17]**

n16 The Board has previously ordered this remedy in cases where it found that remedial measures in addition to the traditional remedies for unfair labor practices were appropriate. See, e.g., *Montfort of Colorado*, 298 NLRB 73, 86 (1990), enfd. in relevant part, 965 F.2d 1538 (10th Cir. 1992); *United Dairy Farmers Cooperative Assn.*, 242 NLRB at 1030; *Haddon House Food Products*, 242 NLRB 1057, 1059 (1979), enfd. in relevant part sub nom. *Teamsters Local 115 v. NLRB*, 640 F.2d 392 (D.C. Cir. 1981), and *Loray Corp.*, 184 NLRB 557, 559 (1970).

This remedy is in addition to Local 813's right to have access to a list of voters and their addresses under *Excelsior Underwear*, 156 NLRB 1236 (1966), after issuance of a Notice of Second Election.

[*358] ORDER

The National Labor Relations Board orders that the Respondent, Regal Recycling Company, Inc., Jamaica, New York, its officers, agents, successors, **[**18]** and assigns, shall

1. Cease and desist from

(a) Interrogating employees concerning their activities on behalf of Local 813, International Brotherhood of Teamsters, AFL-CIO.

(b) Threatening employees with discharge for criticizing Laborers' International Union, Local No. 445, AFL-CIO.

(c) Threatening to require its employees to produce documentation to establish that they are legally in the United States in retaliation for union activities.

(d) Threatening to close the facility if the employees choose to be represented by Teamsters Local 813.

(f) Hiring additional employees in order to influence the outcome of the election.

(g) Denying Teamsters Local 813 access to its employees and facility, while providing access to Laborers' Local 445.

(h) Issuing a discriminatory warning to employee Edgar Pineda because of his activities on behalf of Teamsters Local 813.

(i) In any like or related manner interfering with, restraining, or coercing its 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, make a conditional offer of reinstatement **[**19]** to Maynor Lima Bobadillo, Hugh Carillo, Mario Carillo, Joel Chinchilla, Julio Del Cid, Mario Ortiz, and Nery Perez, offering them 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, provided that they complete, within a reasonable time, INS Form I-9, including the presentation of the appropriate documents, in order to allow the Respondent to meet its obligations under the Immigration Reform and Control Act of 1986.

(b) Make Maynor Lima Bobadillo, Hugh Carillo, Mario Carillo, Joel Chinchilla, Julio Del Cid, Mario Ortiz, and Nery Perez 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 of the date of this Order, remove from its files any reference to the unlawful discharges and warnings, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges and warnings will not be used against them in any way.

(d) In the event that Local 813 loses the pending **[**20]** election, supply Local 813, on its request made within one year of the date of this Decision and Order, the full names and addresses of current unit employees.

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

(f) Within 14 days after service by the Region, post at its Jamaica, New York facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 **[**21]** 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 July 23, 1992.

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

IT IS FURTHER ORDERED that Case 29-RC-8020 is severed and remanded to the Regional Director of the purpose of opening and counting the challenged ballots of Hasan Abdool, David Baksh, David Gustman, Joel Macilla Chinchilla, Julio Del Cid, Nery Perez, and Edgar Pineda. Thereafter, the Regional Director shall prepare a revised tally of ballots. If the tally shows that Local 813, International Brotherhood of Teamsters, AFL-CIO has received a majority of ballots cast, the Regional Director shall issue a certification of representative; if the revised tally shows that Local 813 has not received a majority of the ballots, the Regional Director shall set aside the election and conduct a second election.

Dated, Washington, D.C. September 30, 1999

John C. Truesdale, Chairman **[**22]**

Wilma B. Liebman, Member

DISSENT:

Member Peter J. Brame, concurring in part and dissenting in part.

I agree with my colleagues that the Respondent unlawfully interrogated its employees in violation of Section **[*359]** 8(a)(1). I reach this conclusion, however, by analyzing the interrogations based on the factors set out by the Second Circuit Court of Appeals in *Bourne v. NLRB*, 332 F.2d 47 (1964). I also agree with my colleagues that the Respondent violated Section 8(a)(3) and (1) by discharging seven of its employees because of their support for Local 813. In addition, I agree with my colleagues' adoption of the judge's decision in all other respects, except for his recommendation to issue a bargaining order, which I join my colleagues in denying. n1 I dissent, however, with respect to the backpay remedy that my colleagues grant to the discriminatees, in view of their undocumented alien status at the time of their discharges. I also dissent concerning the majority's award of special remedies, which I find unwarranted.

n1 I agree with my colleagues that this case is factually distinguishable from *Henry Bierce Co.* 328 NLRB No. 85 (1999), in which I dissented as to the appropriateness of the bargaining order. I note, moreover, that in the present case the employees have the opportunity to express their desires concerning representation through an election.

[23]**

1. The interrogations arose out of an organizing drive by Teamsters Local 813 at the Respondent's recycling facility. n2 Representatives of Local 813 met with the Respondent's employees on July 13, 1992, n3 and the employees signed authorization cards for that Local. The Respondent claimed that the employees were covered by a collective-bargaining agreement with Laborers Local 445. The judge found that within days after the employees signed authorization cards for Local 813, these officials began extensive interrogations of employees as to who had contacted Local 813 and if the employees had signed cards. Employee Joel Chinchilla testified that shortly after he signed an authorization card, Rios told him that Angelo wanted to know which employee had called Local 813. Employee Julio Del Cid stated that 4 or 5 days after the July 13 card signing. Angelo, with Rios serving as translator, asked him if he had signed a card. Del Cid did not answer, and Angelo proceeded to speak with all of the other employees. The next day, Rios approached some employees, including Del Cid and Nery Perez, while they were eating, and stated that he knew that they had signed cards. The employees did not **[**24]** reply. Despite his assertion that he knew they had signed cards, Rios went on to ask the employees who had contacted. Local 813 and who had signed cards. The employees said that they did not know.

n2 The facts regarding the interrogations of employees by supervisor David Rios and owner Angelo Reali (Angelo) are uncontested, because neither Rios nor Angelo testified.

n3 All dates are 1992 unless otherwise indicated.

Shortly after employee Hugo Carrillo signed his authorization card for Local 813, Rios began interrogating him about whether he had done so. Carrillo denied signing a card. After repeated questioning by Rios during the next 8 days, however, Carrillo finally admitted signing a card, because he believed that the Respondent would find out anyway.

Beginning about July 20, Rios told employee Edgar Pineda that Angelo and his fellow owner Michael Reali (Michael) wanted to know who had contacted Local 813 and that they were angry. Pineda said that he did not know. Rios repeated his question to Del Cid, Chinchilla, **[**25]** and Carmello Calderon, who also asserted that they did not know. Rios continued his questioning of Pineda one or twice per week through August, and Pineda continued to claim not to have an answer.

On July 20, while these interrogations were ongoing, the Respondent called a meeting of its employees to inform them that they were already represented by a union, Local 445, and to introduce Local 445 representative Raphael Griffin. The employees had not previously known of this representation, a collective-bargaining agreement between the Respondent and Local 445, or the benefits to which the agreement entitled them. When employee Norman Ortega openly criticized Local 445 at the meeting, Angelo warned him that he could lose his job for such criticism. After the employees informed Michael that they preferred to be represented by Local 813, the Respondent convened another meeting with employees, at which Michael notified them that, if they continued to pay attention to Local 813, they would be required to bring in proof that they were eligible to live and work in the United States. The Respondent had previously been lax about requiring such documentation from its employees, many of whom **[**26]** were recent immigrants to this country. Ultimately, as the judge found, the Respondent discharged some of the employees who were unable to provide the requested proof.

In *Bourne*, supra, the Second Circuit recognized that interrogations of employees are not per se threatening, and identified five factors to be considered in determining whether an interrogation violated Section 8(a)(1). These factors are:

(1) The background, i.e., is there a history of employer hostility and discrimination?

(2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?

(3) The identity of the questioner, i.e., how high was he in the company hierarchy?

(4) Place and method of interrogation, e.g., was employee called from work to the boss's office? Was there an atmosphere of 'unnatural formality'?

(5) Truthfulness of the reply. n4

n4 Id. at 48. The Board cited the *Bourne* test with approval in *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), in which the Board declared:

Our duty is to determine in each case whether, under the clauses of Section 8(a)(1), such interrogations violate the Act. Some factors which may be considered in analyzing alleged interrogations are: (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation.

Rossmore House, supra, at 1178 fn. 20. See also *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985) (*Rossmore House* standards apply to questioning of employees who are not open union supporters).

[27]**

[*360] Applying these factors to the interrogations by Rios and Angelo, I conclude that the interrogations violated Section 8(a)(1). Regarding the background, here the Respondent maintained a sham collective-bargaining relationship with Local 445, and did not provide employees benefits included in its alleged collective-bargaining agreement with that Union. Moreover, the Respondent committed serious unfair labor practices, including threats of job loss and closing, and mass discriminatory discharges, when the employees demonstrated support for Local 813.

The information sought in the interrogations clearly tended to convey to employees that the Respondent intended to retaliate against individual employees. Angelo and Rios asked employees specifically whether they signed authorization cards, which could indicate their support for Local 813, and who had contacted that Union. Although such an inquiry, standing alone, might not tend to be coercive, Rios additionally told some employees that Angelo, or Angelo and Michael, wanted to know, and further informed Pineda that Angelo and Michael were angry. In addition, during the same period when the interrogations were taking place, Angelo **[**28]** warned Ortega that he could lose his job for criticizing Local 445, and Michael, in a meeting of employees, also threatened that if they continued their support of Local 813 they would have to produce

documents showing that they were legally in this country. Thus, the employees would reasonably conclude that they risked discharge or other adverse action if they supported that local.

The interrogations were conducted by supervisor Rios and by owner Angelo, who represented the highest echelon of the company hierarchy. Although the questioning took place at the employees' work stations and in their break area, the questions were asked pointedly and repeatedly over the course of a number of weeks. The employees consistently denied knowing who had called Local 813 as well as signing authorization cards. Only Carrillo, after several interrogations, admitted signing a card because he believed that the Respondent would find out anyway. The Respondent's continual return to the subject of whether the employees had signed cards would tend to make reasonable employees think that the Respondent intended to retaliate against them for doing so. The employees' uniform reaction of concealing their **[**29]** own union activity and denying knowledge as to who had called Local 813 illustrates their fear that the Respondent would retaliate if it learned the truth. Based on all of these factors, I conclude that the interrogations by Rios and Angelo were coercive and therefore unlawful.

2. Although, like my colleagues, I find that the Respondent acted unlawfully by discharging seven employees after they failed to present proof of their authorization to work legally in the United States, I do not agree with the backpay remedy ordered by the Board in *A.P.R.A. Fuel Oil Buyers* Group n5 and by my colleagues in this case. In my view, and in agreement with Member Cohen's dissent on this point in *A.P.R.A.*, the discriminatees are not entitled to backpay except for periods for which they can establish their eligibility to work legally in the United States.

n5 320 NLRB 408 (1995), enfd. 134 F.3d 50 (2d Cir. 1997).

At the time of their discharges, the seven employees in this **[**30]** proceeding were unable to comply with the Respondent's requirement that they furnish documents demonstrating their legal authorization to work. The General Counsel acknowledges in his brief that the discriminatees were undocumented aliens when they were discharged, and that it is unknown whether they remain undocumented. The record shows only that the Respondent permitted two of the employees to return to work, at the urging of Local 445 and after they produced documents accepted by the Respondent. n6

n6 I agree with my colleagues, for the reasons they articulate, that the reinstatement of these employees, with the assistance of Local 445, does not demonstrate that the discharges were based on a bona fide desire on the part of the Respondent to verify work eligibility, rather than on the employees' support for Local 813.

The Supreme Court held in *Sure-Tan v. NLRB* n7 that "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when **[**31]** they were not lawfully entitled to be present and employed in the United States." In *Del Rey Tortilleria v. NLRB*, n8 the Seventh Circuit, relying on *Sure-Tan*, determined that in such cases the burden is on the employee "to present evidence that he [was] lawfully present and eligible for employment" during the backpay period. The court found that this rule followed logically from the elementary principle that "an alien who had no right to be present in this country at all, and consequently had no right to employment, has not been harmed in a legal sense by the deprivation of employment to which he has no entitlement." n9

n7 467 U.S. 883, 903 (1984)

n8 976 F.2d 1115 (7th Cir. 1992).

n9 Id. at 1119, quoting Local 512, *Warehouse and Office Workers' Union v. NLRB*, 795 F.2d 705, 725 (9th Cir. 1986) (Beezer, J., dissenting in part).

This principle, that undocumented workers suffer no legal injury **[**32]** by losing employment for which they are not eligible, provides, in my view, the proper benchmark for the Board's backpay remedies for alleged or admitted undocumented alien discriminatees, because it remedies violations of the Act without disregarding Federal immigration statutes and the important policies underlying them. Not only does an award of backpay to an undocumented worker bestow upon him the rewards of a job for which he is ineligible, but it also clearly operates **[*361]** against the Congressional purpose of controlling unauthorized immigration by firmly closing the workplace door. In one stroke, the remedy given by the majority provides a windfall to the individual who has entered the country and worked illegally, as well as an incentive to others to follow the same path. A more appropriate balance between remedying unfair labor practices and promoting compliance with immigration law and policy would be achieved, in my view, by ordering backpay to discharged discriminatees only for periods for which they can demonstrate that they were legally authorized to work in the United States. I would issue such an order in this proceeding.

3. Contrary to my colleagues, I do not **[**33]** find that special remedies are warranted in this case, either to eliminate the effects of the Respondent's violations or to ensure a fair second election. I do not find that requiring the Respondent to provide employee names and addresses to Local 813 is necessary as an alternative to a *Gissel* bargaining order where, as here, excessive delay at the Board may render a bargaining order unenforceable. n10 In fact, the circumstances that militate against the *Gissel* order typically also disfavor the award of other special remedies. In the present case, the passage of 7 years since the violations renders unrealistic and speculative any conclusion by the Board as to whether there remain any "lingering effects" that require a special remedy.

n10 The Board has granted this remedy in other recent decisions in which it declined to issue a *Gissel* bargaining order. See *Wallace International de Puerto Rico*, 328 NLRB No. 3 (1999); *Copper Hand Tools*, 328 NLRB No. 21 (1999); *Comcast Cablevision of Philadelphia*, 328 NLRB No. 74 (1999). Participating in *Comcast*, I found the special remedy unjustified in the circumstances of that case.

[34]**

Moreover, with respect to the objective of ensuring a fair second election, the special remedy of providing employee names and addresses to Local 813 is not well tailored to the circumstances of this case. The bargaining unit involved is small, consisting of fewer than 20 employees. In addition, the record clearly demonstrates that, despite the Respondent's unlawful denial of access to employees on its premises, Local 813 had ample opportunity for personal contact with employees. The Respondent's facility is a garage-like structure directly abutting the public sidewalk, and its offices are located in a separate building on the same street. Thus, employees are easily accessible to union organizers in the public area outside the Respondent's premises. In fact, Local 813 representatives met with employees frequently on an impromptu basis prior to the first election. Therefore, employee names and addresses are not necessary in order to provide Local 813 a method of identifying and establishing contact with unit employees.

Dated, Washington, D.C. September 30, 1999

J. Robert Brame III, Member

APPENDIX:

[*361contd]

[EDITOR'S NOTE: THE PAGE NUMBERS OF THIS DOCUMENT MAY APPEAR TO BE OUT OF SEQUENCE; HOWEVER, THIS PAGINATION ACCURATELY REFLECTS THE PAGINATION OF THE ORIGINAL PUBLISHED DOCUMENTS.]

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate our employees concerning their activities in behalf of Local 813, International Brotherhood of Teamsters, AFL-CIO.

WE WILL NOT threaten our employees with discharge for criticizing Local 445, Laborers International Union of North America, AFL-CIO.

WE WILL NOT threaten to demand to see the immigration papers of our employees in the context of a meeting at which we sought to discourage membership in Local 813.

WE WILL NOT threaten to close our shop if our employees selected Local 813.

WE WILL NOT inform our employees that they already had a union, and that they should not join Local 813.

WE **[**127]** WILL NOT hire additional employees to influence the outcome of a National Labor Relations Board election.

WE WILL NOT deny access to our employees and facility to Local 813, while at the same time providing such access to Local 445.

WE WILL NOT discharge our employees or issue warnings to them because of their activities in behalf of Local 813.

WE WILL NOT refuse to recognize or bargain collectively with Local 813 as the exclusive bargaining representative of our employees in the unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment:

All full time and regular part time pickers, sorters and machine operators, mechanic and welder employed by the Employer at its 172-06 Douglas Avenue, Jamaica, New York location, excluding all office clerical employees, guards and supervisors as defined in Section 2(11) of the Act.

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

WE WILL recognize and on request, bargain in good faith with Local 813, International Brotherhood of Teamsters, AFL-CIO as the exclusive collective-bargaining **[**128]** representative of our employees in the unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL offer Maynor Lime Bobadillo, Hugo Carrillo, Mario Carrillo, Joel Chinchilla, Julio Del Cid, Mario Ortiz, and Nery Perez immediate and 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, displacing, if necessary, any newly hired, reassigned, or transferred employees, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them with interest.

WE WILL remove from our files any reference to the unlawful discharges of Maynor Lime Bobadillo, Hugo Carrillo, Mario Carrillo, Joel Chinchilla, Julio Del Cid, Mario Ortiz, and Nery Perez, and notify them in writing that this has been done and that the discharges and suspension will not be used against them in any way.

REGAL RECYCLING COMPANY, INC.

(Employer)

This is an official notice and must **[**129]** not be defaced by anyone. This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, One MetroTech Center, Jay Street and Myrtle Avenue, 10th floor, Brooklyn, NY 11201. Telephone (718) 330-2862.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees concerning their activities on behalf of Local 813, International Brotherhood of Teamsters, AFL-CIO.

WE WILL NOT threaten employees with discharge for criticizing Laborers' International Union, Local No. 445, **[**130]** AFL-CIO.

WE WILL NOT threaten to require employees to produce documentation to establish that they are legally in the United States in retaliation for union activities.

WE WILL NOT threaten to close the facility if our employees choose to be represented by Teamsters Local 813.

WE WILL NOT hire additional employees in order to influence the outcome of the election.

WE WILL NOT deny Teamsters Local 813 access to our employees and facility, while providing access to Laborers Local 445.

WE WILL NOT issue a discriminatory warning to employee Edgar Pineda because of his activities on behalf of Teamsters Local 813.

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 the Board's Order, make a conditional offer of reinstatement to Maynor Lima Bobadillo, Hugh Carillo, Mario Carillo, Joel Chinchilla, Julio Del Cid, Mario Ortiz, and Nery Perez, offering them 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,

[131]** provided that they complete, within a reasonable time, INS Form I-9, including the presentation of the appropriate documents, in order to allow us to meet our obligations under the Immigration Reform and Control Act of 1986.

WE WILL make Maynor Lima Bobadillo, Hugh Carillo, Mario Carillo, Joel Chinchilla, Julio Del Cid, Mario Ortiz, and Nery Perez whole for any loss of earnings and **[*362contd]** other benefits suffered as a result of their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges and warnings of Maynor Lima Bobadillo, Hugh Carillo, Mario Carillo, Joel Chinchilla, Julio Del Cid, Mario Ortiz, and Nery Perez, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and warnings will not be used against them in any way.

In the event that Local 813 loses the pending election, WE WILL supply Local 813, on its request made within one year of the date of this Decision and Order, the full names and addresses of current unit employees.

REGAL RECYCLING COMPANY, INC.