

**Rogers Electric, Inc. and International Brotherhood of Electrical Workers, Local Union No. 5, AFL-CIO, CLC.** Case 6-CA-33880

February 24, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN  
AND SCHAUMBER

On March 21, 2005, Administrative Law Judge John T. Clark issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions as modified and to adopt the recommended Order as modified.<sup>2</sup>

Overview

We unanimously agree with the judge, for the reasons set forth in his decision, that the Respondent violated Section 8(a)(1) of the Act by threatening employees with job loss and discharge, and by laying off employees Eric Bailey, Sam Eddinger, Rodney Ellinger, Jacob Hunsinger, Roy Melius, and Brian Smith because of their protected concerted activities.<sup>3</sup> Members Liebman and Schaumber further agree, for the reasons set forth below, that the Respondent violated Section 8(a)(1) by creating an impression that its employees' protected activities were under surveillance. However, as explained below, Chairman Battista and Member Schaumber disagree with the judge's findings that the Respondent violated Section

<sup>1</sup> 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.

<sup>2</sup> We shall modify the judge's recommended Order to conform to the violations found. We shall also substitute a new notice in conformity with the Order as modified.

<sup>3</sup> We agree with the judge that the Respondent's contention that Smith was laid off because he submitted a request for a voluntary layoff was pretextual. The Respondent's president, Bradley J. Rogers, admitted that at least one other employee, Greg Buck, had requested a voluntary layoff during the same time period but was not laid off at that time. Yet the Respondent laid off Smith. As the judge found, the Respondent has not offered any credible explanation for this disparate treatment. Accordingly, we agree with the judge that the Respondent violated Sec. 8(a)(1) by laying off Smith.

In finding that the layoffs violated the Act, Member Schaumber does not rely on the judge's characterization of the Board's position in *Reynolds Electric, Inc.*, 342 NLRB 156 (2004).

8(a)(1) by disparaging its employees' concerted complaints and by indicating that those complaints were futile.

The Alleged 8(a)(1) Statements

Factual Background

The Respondent provides electrical contracting services in the construction industry in Pennsylvania. The Respondent's president is Bradley J. Rogers. The Respondent bids only on electrical contract work that is subject to the Pennsylvania Prevailing Wage Act (PWA). The Pennsylvania Department of Labor & Industry (L&I) is charged with enforcing compliance with the PWA.

In 2003,<sup>4</sup> the Respondent performed electrical work at Lewistown Elementary School. Mike Dilworth was the supervisor on the project. The Respondent's employees on the jobsite were concerned that the Respondent was withholding their fringe benefits and not depositing the withholdings in the employees' retirement accounts. The employees discussed this concern among themselves and with Dilworth. In late September or early October, Rogers held a meeting with employees at the jobsite. During the meeting, employee Brian Smith complained to Rogers that the Respondent was handling the employees' fringe benefits unfairly. Rogers replied that he had the right to withhold the money and not deposit it, because of shoddy workmanship at other jobsites.

Following the meeting, Smith spoke with Dilworth, who agreed that Rogers was wrong about the fringe benefit issue. Dilworth suggested that Smith call L&I, and proceeded to read L&I's phone number to Smith from a notice hanging in the jobsite trailer. Smith called and informed an L&I investigator of the employees' fringe benefit concerns and requested several complaint forms. Smith received the forms and gave them to employees and to Dilworth. The employees completed the forms and returned them to L&I. A meeting was arranged between employees and L&I for November 6.

On October 27, L&I officials informed Rogers that at least one employee at the Lewistown project had filed a complaint concerning the Respondent's handling of the employees' fringe benefits. L&I further informed Rogers that, as a result of the complaint, the Lewistown project was being investigated.

On November 5, Rogers met with all the Lewistown project employees. Rogers stated that he knew that a Lewistown employee had called L&I from the Respondent's trailer on company time. He held up a phone bill with highlighted phone numbers and said that there were phone numbers for L&I on the bill. Rogers further stated

<sup>4</sup> All dates hereafter refer to 2003.

that there was a right way and a wrong way to bring things up and that “going to L&I was the wrong way to do it.” Rogers told employees that the complaints were a “thorn in my side,” that “we got to do everything we can to compete in this market,” and that “these complaints don’t help us.” Rogers stated that the employees who are “discontent with the way we do business, can just exit,” that he only had to answer to God, and that because of the complaints “we could see less work, and layoffs due to specific situations like this.”

### Analysis

#### I. IMPRESSION OF SURVEILLANCE

We agree with the judge that the Respondent created an unlawful impression of surveillance when Rogers held up the highlighted telephone list and told employees that he knew calls to L&I had been made from the jobsite.<sup>5</sup>

The Board’s test for determining whether an employer has created an impression of surveillance is whether the employees would reasonably conclude from the statement in question that their protected activities were being monitored. *Mountaineer Steel, Inc.*, 326 NLRB 787 (1998), enfd. mem. 8 Fed. Appx. 180 (4th Cir. 2001). Applying the test here, we agree with the judge that the employees would reasonably assume that their protected concerted activities were under surveillance. In the presence of employees, Rogers threw the phone list on the desk and then held it aloft to ensure that the employees could see the highlighted calls. He then told the assembled employees that he knew that calls to L&I had been made from the jobsite trailer. Rogers testified at the hearing that he intended his actions to serve as a “visual,” “so that everybody knew that I had something here.”

Our dissenting colleague contends that given the open nature of the employees’ protected activity the Respondent’s remarks did not create an impression of surveillance. While the openness of protected activity may be a relevant fact, “[t]he Board does not require employees to attempt to keep their activities secret before an employer can be found to have created an unlawful impression of surveillance. . . . Further, the Board does not require that an employer’s words on their face reveal that the employer acquired knowledge of the employee’s activities by unlawful means.”<sup>6</sup> Moreover, the Board has found that an employer creates an impression of surveillance when it monitors employees’ concerted protected activity in a manner that is “out of the ordinary,” even if the activity is conducted openly. See, e.g., *Loudon Steel, Inc.*,

340 NLRB 307, 313 (2003). Here, Rogers communicated to employees in a dramatic and confrontational manner that he had monitored their phone calls to L&I and he did so in the course of a meeting in which he made unlawful threats. His conduct was clearly out of the ordinary and created a reasonable perception that employees’ protected activities were under surveillance.<sup>7</sup> Accordingly, we find no merit in our dissenting colleague’s position.

#### II. DISPARAGEMENT AND FUTILITY

The judge found that Rogers’ statements that “going to L&I” was the “wrong way to make changes” violated Section 8(a)(1) because it disparaged the employees’ protected concerted activities and indicated to them that such activity was futile. We disagree, and find that Rogers was merely expressing his opinion concerning the employees’ action of contacting L&I.<sup>8</sup>

Section 8(c) provides that “[t]he expressing of any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . , if such expression contains no threat of reprisal or force or promise of benefit.” “Intemperate” remarks that are merely expressions of personal opinion are protected by the free speech provisions of Section 8(c). *Sears, Roebuck & Co.*, 305 NLRB 193 (1991). Further, disparaging remarks alone are insufficient to constitute a violation of Section 8(a)(1). *Trailmobile Trailer, LLC*, 343 NLRB 95 (2004); *Sears, Roebuck & Co.*, supra. Disparaging remarks “that [do] not suggest that the employees’ protected activities were futile, [do] not reasonably convey any explicit or implicit threats, and [do] not constitute harassment that would reasonably tend to interfere with employees’ Section 7 rights” do not violate Section 8(a)(1). *Trailmobile Trailer, LLC*, supra.

We find that Rogers’ remarks did not rise to the level of unlawful conduct. Rogers’ comments amounted to nothing more than his personal statement that formally contacting State government officials was not the best way to get matters changed. Such a statement is no different in kind from one in which an employer tells em-

<sup>5</sup> Members Liebman and Schamber comprise the majority on this issue, while Chairman Battista dissents.

<sup>6</sup> *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999), citing *United Charter Service*, 306 NLRB 150, 151 (1992).

<sup>7</sup> Compare *Northeast Iowa Telephone Co.*, 346 NLRB No. 47 (2006), where the Board found that an employer that routinely reviewed employee usage of company-provided cell phones nonetheless created an unlawful impression of surveillance when a manager took the unusual step of confronting an employee about calls placed to the union even though the employee had not exceeded the designated monthly cap on call minutes. In assessing whether conduct is “out of the ordinary,” the Board looks to the employer at issue, not to employers’ practices generally. In this case, there was no evidence the Respondent ever monitored nonbusiness calls placed from jobsites, apprised employees of such a practice, or brought such calls to the attention of employees, much less in the dramatic and confrontational fashion engaged in by the Respondent’s owner and president here.

<sup>8</sup> Chairman Battista and Member Schamber comprise the majority on this issue, while Member Liebman dissents.

ployees there is no need to call a union in to resolve issues. The statement amounts only to a personal opinion, protected by Section 8(c), that the employees do not need a union.<sup>9</sup>

Similarly, in this case, Rogers' statement expressed only his view that the employees did not need to go to L&I to resolve their complaints. The comment did not disparage the employees or imply that their activity was futile; it simply offered an opinion that this activity was not prudent.

In the same fashion, Rogers' comment that he only answered to God cannot be viewed as anything other than hyperbole or a colloquialism. Rogers did not tell employees that he would refuse to comply with a lawful order issued by L&I. Accordingly, we find that the statement did not violate Section 8(a)(1).<sup>10</sup>

<sup>9</sup> See, e.g., *Howard Johnson Co.*, 242 NLRB 386 (1979) (telling employees that the company was convinced they did not need a union because it would "only make things more difficult for all of us" not violative, since it "merely sets forth [the employer's] views on the disadvantages of unionism and does not impart a threatening meaning").

<sup>10</sup> That Rogers made some unlawful comments in the same meeting with employees does not render the statements under consideration unlawful. We reject our colleague's effort to string together various kinds of statements, some lawful and some unlawful, in order to find that Rogers' statements of personal opinion were unlawful. See *Armstrong Machine Co.*, 343 NLRB 1149, 1153 (2004). Employer statements do not lose the protection of Sec. 8(c) simply because other employer statements are unlawful.

Contrary to the majority, Member Liebman agrees with the judge that the two remarks at issue violated Sec. 8(a)(1) in light of their overall context of unlawful coercion and threat of reprisal.

The Board considers the totality of the relevant circumstances in evaluating whether a statement violates the Act or rather is protected by Sec. 8(c). *Mediplex of Danbury*, 314 NLRB 470, 471 (1994). In a single address to his employees, the Respondent's president, Rogers threatened them with the loss of business, the loss of jobs, and discharge because of their protected appeal to L&I, and created the impression of surveillance of their protected activity as well. The Board agrees that these statements violated Sec. 8(a)(1). Given the unlawful context that Rogers created, telling the employees in addition that their appeal was the "wrong way to make changes," and that he "has to only answer to God" and not L&I, constituted more than simply "intemperate," "disparaging," "hyperbolic," or "colloquial" remarks. They communicated both a coercive sense of futility in the exercise of protected rights and an implicit threat of reprisal for doing so, consistent with the overall message in Rogers' other unlawful statements. See, e.g., *Ebenezer Rail Car Services*, 333 NLRB 167 fn. 2 (2001); *Venture Industries*, 330 NLRB 1133 (2000); *Mediplex of Danbury*, supra. Contrary to the majority's assertion, the surrounding statements are not merely a string of unrelated remarks, but rather statements that carry the same unlawful theme: unionization will result in punishment of the employees, or will at best be an act of futility.

In the cases the majority relies on, an unlawful context is notably absent from the employer statements at issue. See *Trailmobile Trailer, LLC*, 343 NLRB 95 fn. 4; *Sears, Roebuck & Co.*, 305 NLRB 193 (1991); and *Howard Johnson Co.*, 242 NLRB 386 (1979). They are distinguishable from the present case on that basis. In *Armstrong Machine Co.*, supra, the Board found that the respondent's president law-

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Rogers Electric, Inc., Orbisonia, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

"(b) Threatening employees that their concerted complaints would lead to loss of employment, threatening employees by informing them that anyone who is not content with the manner in which business is run should leave, and creating the impression that the employees' concerted activities are under surveillance."

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

CHAIRMAN BATTISTA, dissenting in part.

I agree with my colleagues in all but one respect. Contrary to the majority, I cannot conclude, in the circumstances here, that the Respondent unlawfully created an impression of surveillance.

The facts are undisputed. An employee from the Respondent's Lewistown project made a call to L&I. The call was made on a company phone in the company trailer. Later, during a long talk with employees, the Respondent's president, Bradley J. Rogers, held up a highlighted telephone bill and told employees that he knew a call had been made from a company phone to L&I.

I do not find that this act by the Respondent would reasonably lead employees to believe that their activities were under surveillance. The phone call was made at the Employer's worksite and on a company phone. The Respondent lawfully monitored the phone bill, and merely reported the objective fact that the phone bill showed this activity. In my view, employees who use a company phone can reasonably expect that their call would show up on the Employer's phone bill. Thus, employees would reasonably know that their activity, i.e., the phone call, was not discovered through some act of surreptitious spying, but rather because of the overt nature of their own activity. Accordingly, there was no impression of unlawful surveillance. See, e.g., *Michigan Road Maintenance Co.*, 344 NLRB 617 fn. 4 (2005).<sup>1</sup> I would dismiss the allegation.

fully told employees he believed they were supervisors, but that the issue would be resolved at a hearing. This benign statement did not echo the surrounding context of unlawful coercion, see 343 NLRB at 1150-1153, and is simply not comparable to the related threats and coercive statements Rogers made here.

<sup>1</sup> *Loudon Steel, Inc.*, 340 NLRB 307, 313 (2003), cited by the majority, does not warrant a different result. It is not "out of the ordinary"

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 lay you off, discipline, or otherwise discriminate against you for participating in concerted activities protected by Section 7 of the Act.

WE WILL NOT threaten our employees that their concerted complaints will lead to loss of employment, threaten our employees by informing them that anyone who is not content with the manner in which the business is run should leave, or create the impression that our employees' concerted activities are under surveillance.

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, offer Eric Bailey, Sam Eddinger, Rodney Ellinger, Jacob Hunsinger, Roy Melius, and Brian Smith 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.

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for a company to review its own phone bill and, if nonbusiness related calls are found, to bring that to the attention of the callers. My colleagues say that "out of the ordinary" means past practice of the particular employer. They cite nothing to support such a restrictive view. Nor is such a restrictive view warranted in the circumstances here. Employees are not likely to consider it extraordinary that a company would monitor phone bills. Further, even if the Respondent's actions were "out of the ordinary," they did not give employees the impression that it was engaging in surveillance of their protected concerted activity. Where employees use company telephones to conduct their Section 7 activity, it is unreasonable for them to believe that their activity will be secret and will be discovered only through unlawful surveillance. *Northeast Iowa Telephone Co.*, 346 NLRB 465 (2006), is distinguishable. Unlike that case, the Respondent here did not make reference to the individual whose phone call was in question. The Respondent merely referred to what the phone bill showed.

WE WILL make Eric Bailey, Sam Eddinger, Rodney Ellinger, Jacob Hunsinger, Roy Melius, and Brian Smith whole for any loss of earnings and other benefits resulting from our unlawful action against them, 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 layoffs and reprimands and WE WILL within 3 days thereafter notify each of them in writing that this has been done and that the unlawful layoffs and reprimands will not be used against them in any way.

ROGERS ELECTRIC, INC.

*Clifford E. Spungen, Esq.*, for the General Counsel.  
*R. Stanley Mitchel, Esq. (Dinsmore & Shol, LLP)*, of Pittsburgh, Pennsylvania, for the Respondent.  
*Joshua M. Bloom, Esq. (Koerner, Colarusso and Bloom, PA)*, of Pittsburgh, Pennsylvania, for the Union.

DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. This case was tried in Burnham, Pennsylvania, on July 14 and 15, 2004. The charge was filed January 5, 2004, and the complaint was issued March 26, 2004. At the start of the hearing Rogers Electric, Inc. (the Respondent), moved to amend its answer by admitting paragraphs 1, 4, 5, and 6 of the complaint and the parties jointly moved to amend the date contained in paragraph 8 of the complaint to November 5, 2003. The motions, and a motion to correct the spelling of discriminatee Melius' name, were granted. The complaint alleges that the Respondent, violated Section 8(a)(1) of the National Labor Relations Act (the Act) by disparaging employees' concerted complaints, indicating that complaining about those complaints was futile, threatening employees that their concerted complaints would lead to loss of employment, threatening employees by informing them that anyone who was not content with the manner in which Respondent's business was run should leave, creating the impression that its employees' concerted activities were under surveillance, and laying off employees Eric Bailey, Sam Eddinger, Rodney Ellinger, Jacob Hunsinger, Roy Melius, and Brian Smith.

On the entire record, including my observation of the demeanor of the witnesses, as well as my credibility determinations based on the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole and, after considering the briefs filed by the counsel for the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Pennsylvania corporation, with an office and place of business in Orbisonia, Pennsylvania, is an employer engaged in providing electrical contracting services in the construction industry. During the 12-month period ending December 31, 2003, the Respondent, in conducting its business

operations described above, purchased and received at its Orbisonia, Pennsylvania facility products, goods, and materials valued in excess of \$50,000 directly from points located outside the Commonwealth of Pennsylvania. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Facts

The Respondent only bids on electrical contracting work that is subject to the Pennsylvania Prevailing Wage Act (PWA), these projects are generally public schools. The Pennsylvania Department of Labor & Industry (L&I) is charged with enforcing compliance with the PWA. The Respondent has been audited by L&I on previous occasions. Robert Risaliti, the second in command of L&I's Bureau of Labor Law Compliance, testified that because of the complaint filed herein the chief counsel's office was proceeding with pursuing an "intentional" violation of the PWA. The remedy sought is a 3-year debarment, a fine, and possibly liquidated damages.

The complaint was filed with L&I while the discriminatees were employed by the Respondent at the Lewistown Elementary School project in Lewistown, Pennsylvania, during 2003.<sup>1</sup> Bailey, Eddinger, Ellinger, and Melius were considered the base crew because they were assigned to the job from the beginning. Mike Dilworth was the foreman. Hunsinger and Smith were assigned to the project later in 2003. Although all the employees were concerned about what the Respondent was doing with the fringe benefit portion of their wages that the Respondent withheld, the discriminatees were the most vocal. The topic was discussed among themselves and with Dilworth.

The Respondent was started by its president, Bradley J. Rogers in 1981. The Respondent is jointly owned by Rogers and his wife. Although Rogers was the project manager at the Lewistown jobsite, he was only at the jobsite on alternating Wednesdays. During such a visit in late September, or early October, Rogers held a meeting with the employees in the jobsite trailer. Smith, who attended the meeting along with Bailey, Eddinger, Ellinger, Melius, Hunsinger, and possibly others, told Rogers that it was unfair to withhold the employees' fringe benefit money, but not deposit it in the employees' retirement accounts. Smith and Eddinger testified that in response Rogers became loud, red-faced, and said that he had a right to withhold the money because of shoddy workmanship at other jobsites. Rogers admitted having a similar reaction when questioned individually about the benefit money by Ellinger. Rogers explained that he was unable to control his anger because Ellinger attacked his authority.

Following the meeting in the trailer, Smith spoke with Dilworth, who agreed that Rogers was wrong about the fringe benefit issue. Dilworth suggested that Smith call L&I and he then read the phone numbers to Smith from a notice hanging in the trailer. After speaking with a few people, Smith was transferred to Shirley Davis, an L&I investigator. Smith related the

employees' concerns regarding the fringe benefit issue and requested several complaint forms. Smith gave the forms to Ellinger, Bailey, Eddinger, Melius, Hunsinger, and Dilworth. Bailey, Eddinger, Smith, and possibly other employees, returned the completed forms to L&I. Thereafter, Investigator Davis arranged a meeting with the employees at Hoss' Restaurant in Lewistown, for November 6.

On October 27, L&I officials notified Rogers that at least one employee had filed a complaint over the Respondent's handling of the employees' fringe benefit moneys, and that as a result of the complaint, the Lewistown project was under investigation. On October 28 or 29, Rogers called employees Hunsinger, Bailey, and Doug Buck, and questioned them about taking extended breaks and lunch periods.

Smith told Dilworth of the L&I meeting several days before it was to occur. Melius testified that he regularly commuted with Dilworth and that they often talked about their concerns regarding the fringe benefit money. Melius testified that shortly before the L&I meeting Dilworth told him that Rogers had called and said that he was upset that L&I had been contacted. As a result of the phone call Dilworth said that he did not want anything to do with the L&I meeting.

#### 1. The November 5 meeting

On November 5, Rogers again met with all the Lewistown project employees in the job trailer. Rogers admits being angry when he conducted the meeting. After addressing the excessive breaks and lunchtime issue, he acknowledged that he knew that a Lewistown employee had called L&I from the trailer. For impact he held up a phone bill with highlighted phone numbers. Rogers also admitted that he directed his conversation "directly at Rod Ellinger" and said that there "is a right way and a wrong way to get things brought up." Rogers said that he was looking at Ellinger when he spoke of "the wrong way" because of the previous incident, set forth above, when Ellinger asked Rogers about the benefit money.

Eddinger testified that Rogers said that if the employees wanted to make changes "going to L&I was the wrong way to do it, there is a right way and a wrong way to make changes." Rogers told the employees that the complaints were "a thorn in my side," that "we got to do everything we can to compete in this market" and "these complaints don't help us." Employees who were "discontent with the way we do business, can just exit," that the only person he has to answer to is God, and that because of the complaints "we could see less work, and layoffs due to specific situations like this."

Smith testified to the same general subject matter. He said that Rogers told them that if "you guys want changes going to L&I is not the way to get changes," that there is a right way, and there is a wrong way to make changes, that "these complaints are a thorn in my side," that "we have to do everything to compete in this job market, and these complaints don't help us"; that "the complaints are hurting the company and costing us money," that because of the complaints "we are going to see less work, and layoffs, due to specific situations like this"; and Rogers directed that employees "who are discontent with the way we run our business can just exit."

<sup>1</sup> All dates are in 2003, unless otherwise indicated.

Melius also testified about the meeting. He admitted not being able to recall everything Rogers said, but he did remember that Rogers had discovered that L&I was contacted by someone at the Lewistown jobsite and that “it was a thorn in his side.” He also remembers Rogers stating that “if we don’t like how things were being run, we should leave,” and that “God is the only person he has to answer to, and the only person he does answer to.”

## 2. Events leading to the layoff

Melius, who commuted with Dilworth, testified that sometime between the time when the L&I meeting was scheduled, and when it occurred on November 6, Dilworth told Melius that things had changed. Dilworth said that he had had a 3-hour phone conversation with Rogers, who was upset that L&I had been contacted. Dilworth told Melius that he no longer wanted anything to do with the L&I meeting.

Early on November 6, Smith asked Dilworth if he was going to the meeting with the L&I officials at the local Hoss’ Restaurant. Dilworth asked who would be in attendance. Smith named himself, Bailey, Eddinger, Ellinger, Hunsinger, and Melius. Dilworth responded that he would not attend but to “let me know what takes place.”

Later that afternoon employees Smith, Bailey, Eddinger, Ellinger, and Melius met with officials of L&I at the restaurant. Risaliti, the second in command of L&I’s Bureau of Labor Law Compliance, testified that he attended the meeting and that the employees acted nervous and afraid. They said that they feared that someone might see their vehicles with the Government cars and conclude that they had contacted L&I. The employees explained to Risaliti that they believed that if the Respondent learned of the meeting they would be fired. The next day Dilworth asked Smith, “[H]ow was the meeting,” Smith only replied, “[Y]ou should have gone.”

By November 15, Chris Sodmont had replaced Dilworth as foreman and approximately 15 additional employees were transferred to the Lewistown jobsite.

## 3. The layoff

During the afternoon of November 26, Foreman Sodmont called Hunsinger and Smith into the Lewistown job trailer and told them they were laid off for lack of work. Shortly afterwards Sodmont laid off Bailey, Eddinger, Ellinger, and Melius, thus laying off all the employees who Smith had told Dilworth were going to attend the meeting with the L&I officials. Sodmont told the employees that they were the first to be laid off and would be the last to be recalled. None of the other employees working at the jobsite were laid off at this time, those remaining included Doug and Greg Buck, Andrew Lee, Brett Kozian, and Doug Johnston. Subsequently, several additional employees were assigned to the job.

Dilworth was laid off on December 26, he resigned in January 2004, and relocated to Colorado. His whereabouts are unknown and attempts to subpoena him were unsuccessful. Hunsinger was recalled to work at another project on January 19, 2004.

On January 9, 2004, 2 days after the Respondent received the charge—and 6 weeks after their layoff—Melius and Eddinger

were issued reprimands. In April, Eddinger and Smith received individual letters, informing them that they were permanently laid off.

## III. DISCUSSION

### A. *The Supervisory Status of Dilworth and Johnston*

The complaint alleges that Dilworth and Johnston are supervisors within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act. The Respondent denies the allegation.

The burden of proving that an individual is a supervisor within the meaning of the Act is with the party asserting it. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–712 (2001). The party asserting supervisory status must establish it by a preponderance of the evidence. *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999). Section 2(11) of the Act defines “supervisor” as:

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 to responsibly 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.

In *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474 (2004), the Board stated:

An individual need only possess *one* of these indicia of supervisory authority as long as the exercise of such authority is carried out in the interest of the employer, and requires the use of independent judgment. Significantly, it is not required that the individual have exercised any of the powers enumerated in the statute; rather, it is the *existence* of the power that determines whether the individual is a supervisor. [Citations omitted.]

Based on the foregoing, I find that the counsel for the General Counsel has met his burden of proving that Dilworth and Johnston, as well as the other individuals employed by the Respondent in the classification of foreman, are supervisors within the meaning of Section 2(11).

The Respondent’s employee handbook (GC Exh. 20) contains a specific “Foreman’s Section” that defines the duties and responsibilities of the foremen. It states that “[t]he position of foreman is a supervisory one,” and the foreman is “responsible for every aspect of your project. This includes customer relations, job makeup, quality of work, conduct of employees, safety, paperwork, tool management and material ordering.” Additionally, a foreman is responsible to “work every project with as few workmen as possible.” If successful, the foreman is awarded a bonus between \$250–\$500.

“Being in a supervisory position, foremen are responsible for the conduct of the employees working under them. If an employee’s attitude or conduct is not what it should be and is damaging to the Company’s image or to fellow workers, you have the right to remove that employee from the job.” However “[i]f you choose not to remove an employee from a job

whose conduct is not what it should be, both the employee and the foreman in charge will be held responsible for any problems resulting from this employee's poor conduct."

Chris Mantini, a foreman for the Respondent, testified that he is responsible for overseeing the project, delegating duties, coordinating site work, inventory, and representing the Respondent at various meetings. Eddinger credibly testified, without contradiction, that Dilworth assigned Eddinger his duties, it was Dilworth that Eddinger sought out when material was needed and to resolve work problems, and it was Dilworth who authorized Eddinger to leave work early. Mantini corroborated Eddinger's testimony that foremen assign work because they knew what needs to be done next.

Mantini testified that the foremen met annually to discuss the retention of employees. If three foremen voted not to retain an employee he was laid off. The minutes of the January 2004 foreman's meeting support his testimony. Rogers also testified that he did not rely on "his own opinion" regarding the decision to permanently layoff Eddinger and Smith that was made at the January 2004 meeting. He did, however, rely on the opinion of Dilworth to permanently layoff Eddinger, and of Dilworth and Johnston to permanently layoff Smith. Although neither of the men attended the meeting their views had previously been solicited. (CP Exh. 3, 1-2.)

Based on the foregoing I find that the evidence establishes that the Respondent's foremen have the authority to suspend employees from the jobsite, assign work, and direct the work force, and effectively recommend the discharge of employees. I also find that they exercise independent judgment when performing those functions. Thus, a foreman exercises independent judgment in deciding to suspend an employee, should his judgment be faulty, the foreman is held accountable. Independent judgment is required to assign work in a manner necessary to complete the project with as few employees as possible and thus be awarded a bonus. The testimony also establishes that foreman exercise independent judgment when voting to permanently layoff or retain an employee. *Mountaineer Park, Inc.*, supra.

Moreover, the Respondent's foremen possess numerous secondary indicia of supervisory authority, including the designation of the foreman position as supervisory, attendance at supervisory meetings, job responsibilities, authority to grant time off, and that, except on rare occasions, the foreman is the Respondent's highest ranking official at the jobsite. E.g., *Flex-Van Service Center*, 228 NLRB 956, 959 (1977); *Mays Electric Co.*, 343 NLRB 121, 125 (2004).

Based on the foregoing I find that the Respondent's foremen, including Dilworth and Johnston, are statutory supervisors within the meaning of Section 2(11) of the Act.

#### B. The Alleged 8(a)(1) Statements

The statements in issue were made by Rogers at the November 5 meeting in the Lewistown jobsite trailer. Rogers stated that he was notified by L&I Investigator Davis on October 27, that she had received a complaint from the Lewistown jobsite. On October 27 or 29, Rogers received a telephone call from Chris Sodmont. Sodmont testified that his title was that of project manager and that it would be fair to say that he was one

of Rogers' righthand men. Sodmont also testified that to the best of his knowledge he had never been to the Lewistown jobsite before reporting there in mid-November as the foreman. Nonetheless, Rogers says that Sodmont "informs me that there is excessive breaks and lunches being taken at the jobsite. He also informs me of a Labor and Industry call being made from the jobsite." Rogers did not say how Sodmont obtained his information. Sodmont never corroborated Rogers testimony that it was he who informed Rogers about the breaks and the phone call. It is against this backdrop that the November 5 meeting occurs, only 1 day before the employees scheduled meeting with the L&I officials.

The complaint alleges that Rogers made statements at the meeting that: (a) disparaged employees' concerted complaints concerning their wage and fringe benefit payments; (b) indicated that employees' concerted complaints were futile; (c) threatened employees that concerted complaints would lead to loss of employment; (d) threatened employees by informing them that anyone who was not content with the manner in which Respondent's business was run should leave; and (e) created the impression among employees that their protected concerted activities were under surveillance.

The Respondent does not dispute the statements, but argues that they do not contain any threat of reprisal or force, or promise of benefit, and when the statements are viewed under the totality of the circumstances they do not reasonably tend to coerce employees in the exercise of their statutory rights. The Respondent also contends that the statements are within the parameter of Section 8(c), the "free speech" section of the Act.

A reading of Section 8(a)(1) and 8(c) together permits an employer to communicate with its employees as long as the communication does not contain a "threat of reprisal, or force, or a promise of benefit." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-618 (1969). It is also well settled

that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not depend on an employer's motive nor on the successful effect of the coercion. Rather, the illegality of an employer's conduct is determined by whether the conduct may reasonably be said to have a tendency to interfere with the free exercise of employees rights under the Act. [Footnote omitted.]

*El Rancho Market*, 235 NLRB 468, 471 (1978).

The General Counsel's witnesses' credibly testified that Rogers coupled "going to L&I" with the "wrong way to make changes." Rogers testified that he was referring to a prior confrontation between himself and Rod Ellinger concerning the pension money. Rogers did not testify, nor is there any evidence, that his point of reference was ever explicated to the employees at the November 5 meeting. Accordingly, I find that an employee could reasonably conclude that Rogers' statement was disparaging the employees' protected concerted activity, specifically their attempts to effectuate change in their working conditions by complaining to L&I.

Rogers also stated that he has to only answer to God. I find that the employees could conclude, by inference, that the Respondent would not allow itself to be held accountable by L&I and thus that the employees' concerted complaints were futile.

I also find that telling the employees that complaining to L&I was the wrong way to get change, also indicates to the employees the futile nature of their protected concerted activity.

Rogers told the employees that the complaints to L&I “are a thorn in my side,” and that “the complaints are hurting the company and costing us money.” Smith testified that Rogers said that as a result of the complaints “we are going to see less work, and layoffs, due to specific situations like this.” Eddinger testified that Rogers said that “we could see less work.” The Respondent contends that the loss of employment statement is a statement of objective fact based on conduct beyond Rogers’ control and protected by Section 8(c). As evidence of this objective fact the Respondent cites L&I official Risaliti’s testimony that a potential penalty under the PWA is debarment from bidding on public works contracts. I disagree. I find that under either version the statement is an unlawful threat of job lost attributable to the employees’ protected concerted activity of filing complaints with L&I. Obviously the “objective fact” is clearly within the Respondent’s control, it only need comply with the applicable laws of the Commonwealth. Nor does the truthfulness of the threat make it any less a threat. In that regard I note that the Respondent’s prognostication of layoffs was fulfilled, not by the intervention of L&I, but solely as a result of the Respondent’s actions.

Rogers also told the employees that those who were discontented with the way the business was run “can just exit.” The Respondent argues that although that statement would be an implied threat of discharge in a union organizing context, because there is no current organizing campaign, the statement is “no more than a truism that if one is unhappy where they work they can always work somewhere else.” The Respondent’s contention is incorrect. E.g., *McDaniel Ford, Inc.*, 322 NLRB 956, 962 (1997).

It is well settled that an employer’s invitation to an employee to quit in response to their exercise of *protected concerted activity* is coercive, because it conveys to employees that support for their union or engaging in *other concerted activities* and their continued employment are not compatible, and implicitly threaten discharge of the employees involved. [Citations omitted, emphasis added.]

Based on the foregoing I find that the Respondent threatened the employees with discharge.

Smith, Eddinger, and Melius were called by the counsel for the General Counsel and testified about the November 5 meeting. Each related that during Rogers’ angry comments regarding the complaints to L&I he held up a phone bill containing highlighted phone numbers. He told the employees that he knew that there were phone numbers for L&I on the bill. None of them testified that Rogers said anything further regarding the phone bill. Douglas Johnston, and Greg Buck were employees that also attended the meeting and were called to give testimony by the Respondent. Johnston basically collaborated the other witnesses’ testimony but added that Rogers also said that the calls were made on company time, and that if they wanted to do something like that, they should do it on their own time not on his. Buck also stated that Rogers mentioned making calls on working time. Rogers testified that when he started to

address the group he threw the highlighted phone bill on the desk without comment. He stated that he used the bill as a “visual,” the purpose of which was “so that everybody knew that I had something there.” He did not mention the phone bill until he finished his comments about the breaks. At that time he made the “comment that I knew that a call was made to Labor and Industry from the jobsite.” Rogers further stated that “what I wanted to do was, and I believe it was successful was I wanted to let them know that I was—had documentation, that they was not—they was making calls, on unauthorized company time.” Although Rogers testified as to his intention, his testimony stops short of stating that he verbally articulated his intention to the employees. However, much of Rogers testimony was a rambling narrative, sometimes blurring the line between actions taken and those that he should have taken. In this instance I credit Johnston’s testimony as the more complete version of the incident.

[T]he test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement in question that his union activities have been placed under surveillance. *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999); and *United Charter Service*, 306 NLRB 150 (1992). While these cases involved employees engaged in union activity, the Board’s holding would be no less applicable to employees engaged in protected concerted activity. Either way, the freedom employees have to engage in Section 7 rights should be unrestrained by an employer’s surveillance of their activity or the impression of surveillance.

*Wilshire At Lakewood*, 343 NLRB 141, 154 (2004).

Based on the foregoing facts I find the employees would reasonably assume by Rogers’ words and conduct that their protected concerted activity was under surveillance. I find significance in Rogers theatrics of throwing the phone list on the desk, and later holding it aloft to ensure that the highlights could be seen by all, and telling the assembled employees that he knew that calls to L&I had been made from the jobsite. In his own words he wanted a “visual,” “so that everybody knew that I had something there.” I find that Rogers actions created the impression of surveillance from which the employees would reasonably assume that their protected concerted activity was under surveillance. See generally *Double D. Construction Group*, 339 NLRB 303, 303–304 (2003) (The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.). (Footnote omitted.)

Accordingly, based on the foregoing findings, I conclude that the Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

### C. The Alleged 8(a)(1) Layoffs

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act when it laid off employees Bailey, Eddinger, Ellinger, Hunsinger, Melius, and Smith on November 26, 2003, because they engaged in protected concerted activity. In order to establish that the Respondent has retaliated against the employees for exercising their right to engage in protected con-

certed activity, the General Counsel must establish the following: (1) that the employees engaged in protected concerted activity; (2) that the Respondent knew of the concerted nature of the activity; (3) that the concerted activity was protected by the Act; and (4) that the adverse action taken by the Respondent was motivated by the protected concerted activity. *Triangle Electric Co.*, 335 NLRB 1037, 1038 (2001), enf. denied on other grounds 78 Fed. Appx. 469 (6th Cir. 2003).

The evidence shows, and the Respondent admits, that the employees were engaged in protected concerted activity (R. Br. at 12). However, before addressing the remaining three elements of the General Counsel's case it is necessary to articulate certain general principles on which my credibility determinations are based.

### 1. Credibility

As usual in a trial where a fair number of witnesses testify for each side, there are major and minor testimonial variations. My credibility determinations are based on weighing multiple factors. I have fully reviewed the record and carefully observed the demeanor of the witnesses. I have considered the apparent interest of the witnesses; inherent probabilities in light of other events; corroboration or lack thereof; and consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. Testimony that contradicts my factual findings has been considered but discredited. See generally *NLRB v. Walton Mfg. Co.*, 369 U.S. 408 (1962).

Where I have found misstatements to be deliberate, rather than simply a misunderstanding of events, or the consequences of a faulty memory, I have provided the precise reasons for my credibility determination. In those situations I have also found it reasonable to believe the opposite of the witness' testimony and to disbelieve the witness in total. *Id.* I have generally found, in addition to their demeanor, that the testimony of the General Counsel's witnesses were more detailed and explanatory, and therefore more reliable and trustworthy, than the witnesses presented by the Respondent, when testifying about the same subject matter.

### 2. The General Counsel's case

Regarding the Respondent's knowledge of the employees' protected concerted activities, the Respondent does not deny that Foreman Dilworth was present and partook in employee discussions concerning the Respondent's actions regarding their fringe benefit earnings. Smith, Eddinger, and Melius all credibly testified that Dilworth was present during the discussions. Melius, who commuted with Dilworth, additionally credibly testified that he recalled Dilworth "making a couple of phone calls himself to Labor and Industry." Although Melius was unaware of the outcome. In addition to the witnesses' credible demeanor it is also probable that Dilworth took part in the discussion and at least tried to contract L&I. His money was also not being properly deposited.

Respondent's initial argument, which I have dealt with previously, is that Dilworth is not a Section 2(11) supervisor. Alternatively, the Respondent argues that Dilworth's knowledge of the employees' concerted activity is, regardless of his

status, insufficient because the Board has held that it is the personal knowledge of the decisionmaker, here Rogers, that is required. The Respondent relies solely on *Reynolds Electric, Inc.*, 342 NLRB 156 (2004), for that proposition. In *Reynolds*, a panel majority found that "[a]ssuming without deciding that the judge correctly found that [the employee] had engaged in concerted activity, we conclude that it has not been established that the Respondent [identified as a corporate entity] knew that he had done so." *Ibid.* Thus, in *Reynolds*, unlike here, there was no evidence that any corporate officer, or supervisor, was aware of the concerted activity, an essential element of the General Counsel's prima facie case. The Board has long held that it

looks not only to whether the protected activities take place in such a manner as to give the employer the opportunity to observe it, but also to whether the employer made statements or engaged in conduct which make it likely to believe that he gained knowledge of the protected concerted activity.

*Samsonite Corp.*, 206 NLRB 343, 349 (1973). I conclude that *Reynolds* speaks to knowledge in general, and does not require that the decisionmaker must have direct knowledge of the protected concerted activity.

I also conclude that there is direct evidence of Rogers' knowledge of the employees' protected concerted activity. Smith credibly testified, without contradiction, that he raised the fringe benefit issue with Rogers at an employee meeting in Lewistown job trailer in late September or early October. Smith, in front of his fellow employees, told Rogers that he "didn't think it was fair that he was holding our fringe money, not depositing it into our accounts." Rogers "blew up on me" claiming that he had every right to do what he was doing. Rogers based his claim of right on shoddy work at other jobsites. Smith's unrefuted testimony was corroborated by Eddinger. Accordingly, I find that Rogers knew of the employees' concerted activities.

I also find sufficient circumstantial evidence to support such a finding. Supervisor Dilworth was not only aware of the employees' protected concerted activity, he helped Smith make the phone call, accepted a complaint form and, in addition to being told by Smith the names of the employees who would attend the meeting with L&I, was invited to attend the meeting. Melius testified that sometime between the scheduling of the L&I meeting and the actual meeting, Dilworth told him that Rogers had called him and was "pretty upset" about L&I getting contacted. Shortly thereafter, Dilworth informed Smith that he would not be attending the L&I meeting. Immediately after the meeting Dilworth asked Smith "how was the meeting." I infer from the testimony of Melius and Smith, about Dilworth's reaction after he had the 3-hour phone conversation with Rogers, that Dilworth told Rogers that the employees had contacted L&I, and that the employees had scheduled a meeting with L&I officials.

The evidence also supports a finding that the employees' protected concerted activity was not a well-kept secret. Smith credibly testified that it was not only Dilworth who asked him about the meeting but also Doug Johnston. Johnston had been Smith's foreman at another of the Respondent's projects.

Although he was not working as a foreman at Lewistown, it is clear that Johnston was perceived by Smith as, at the very least, aligned with management. Thus, in response to the question “[d]id anyone in management talk to you about your Labor and Industry meeting” Smith named Dilworth and Johnston. The record also contains additional evidence demonstrating that Smith’s perception has validity. Johnston, along with Dilworth and Sodmont changed Smith’s layoff status to permanent, not subject to recall (CP Exh. 3 at 2).

Smith credibly testified that the day following the L&I meeting at Hoss’ Restaurant in Lewistown, Johnston approached him at the jobsite and asked, “How was the meeting,” to which Smith replied, “What meeting.” Johnston said that he saw Smith’s vehicle at the restaurant and said, “I am one of you guys,” but then indicated that if Smith wanted to “be like that,” Johnston would let it go. The Respondent called Johnston as a witness. Johnston admitted making the “I’m one of the guys” statement but put it in the context of a response to Smith’s refusal to give Johnston an L&I complaint form that Smith was distributing. Significantly, Johnston did not refute Smith’s testimony regarding Johnston’s knowledge of the L&I meeting, it thus stands uncontested and I credit Smith’s testimony.

Johnston did refute Smith’s testimony regarding another incident. Smith testified about an incident that occurred after he filed his complaint with L&I. Smith stated that there was a weekend when the Respondent brought in 10 or 15 additional employees to work at the site. Smith did not work that weekend but when he returned Johnston told him, “Everybody is mad at you, they want to beat you up, for filing a complaint.” Smith said that the referenced complaint had to be the L&I complaint because it was the only complaint that he filed.

I credit Smith’s testimony over Johnston’s blanket denial. I credit Smith’s testimony about this incident, not only because of his testimonial demeanor, but also because I find his testimony about this incident to be believable. Lewistown was not the only jobsite where employees were having their benefit money withheld, but not deposited in their accounts. As set forth above, Rogers justified the withholding of the Lewistown employees payments based on “shoddy” work at other jobsites, it follows that Rogers would feel even more entitled to withhold money from the employees who, at least in his view, were performing the shoddy work. Rogers admitted at the 2004 annual meeting that “in the past year, we have been unable to (make pension deposits) due to financial struggles.” It is understandable that had employees at other jobsites learned of the L&I complaint, either from Johnston, or otherwise, that they would be hostile to the complainant. As Rogers informed the Lewiston employees, if they kept filing complaints with L&I the Respondent could be debarred from obtaining PWA contracts. If that happened the financial struggles that Rogers alluded to at the 2004 annual meeting might not be resolved and the employees would never have their money deposited in their accounts.

I also find strong circumstantial evidence in Rogers’ statements to the employees at the November 5 meeting; disparaging the employees’ concerted complaints concerning their wage and fringe benefit payments, indicating that the employees’ concerted complaints were futile, threatening employees that

their concerted complaints would lead to loss of employment, threatening employees by informing them that anyone who was not content with the manner in which Respondent’s business was run should leave, and creating the impression among employees that their protected concerted activities were under surveillance. *Samsonite Corp.*, 206 NLRB at 349.

Accordingly, I find that the statements above, all of which I have found violate Section 8(a)(1) of the Act, and the knowledge of Foreman Dilworth, Johnston, and other employees of the protected concerted activity, provide independent bases for inferring that the Respondent gained knowledge of the employees’ protected concerted activities.

The final element of the General Counsel’s case goes to the Respondent’s motivation for taking adverse actions against the employees. Whenever an employer’s motivation for a personnel action is in issue, it must be analyzed using the methodology set forth in *Wright Line*, 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 (1983). Under *Wright Line*, the General Counsel must introduce persuasive evidence that animus toward the protected activity was a substantial or motivating factor in the employer’s decision. Once that has been done, the burden of persuasion shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected activity on the part of the employees. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). To sustain the initial burden, the General Counsel must show (1) that the employees were engaged in protected concerted activity; (2) that the employer had knowledge of the activity; and (3) that the activity was a substantial or motivating reason for the employer’s adverse action. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Direct evidence of unlawful motivation is seldom available and it may be established by circumstantial evidence and the inferences drawn from that evidence. E.g., *Abbey Transportation Service*, 284 NLRB 689, 701 (1987); *FPC Molding, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1994); *Shattuck Denn Mining Corp.*, 362 F.2d 466, 470 (9th Cir. 1966).

As set forth in detail above, the General Counsel has met his burden regarding the initial two elements. The unrefuted statements made by an admittedly angry Rogers to the employees assembled in the Lewistown jobsite trailer during the meetings in September/October and the meeting on November 5, is persuasive evidence that animus towards the employees protected concerted activity was a motivating factor in the Respondent decision to lay off the employees. Thus, in the September/October meeting he blew up at Smith when Smith spoke of the unfairness to all the employees of withholding their fringe benefit money but not depositing it to their accounts. Rogers admitted to exhibiting similar anger when questioned by Ellinger on the same topic. On the day preceding the employees’ meeting with the L&I officials Rogers took the opportunity to disparage the employees’ concerted complaints by telling them that it was the wrong way to make changes. In addition to telling them it was the wrong way to get change he said that he only answered to God, both statements indicate the futility of the employees’ concerted complaints. He threatened the employees with loss of employment if they continued to

engage in their protected concerted activity. He impliedly threatened to discharge any employee who was not content with the manner in which Respondent's business was being run, and finally he engaged in theatrics that created the impression among employees that their protected concerted activities were under surveillance.

Additional evidence of the Respondent's unlawful motivation is the shifting reasons it gave for its actions. By November 26, Chris Sodmont had replaced Dilworth as the foreman at the Lewistown jobsite. During the afternoon of November 26, Sodmont called Hunsinger and Smith into the Lewistown job trailer and told them that they were being laid off for lack of work, not for anything that they did or did not do. Immediately thereafter, Sodmont laid off Bailey, Eddinger, Ellinger, and Melius. He told them that they were being laid off because the project was caught up and there was a lack of work. He also told them that as a disciplinary matter, specifically because of the tardiness and late lunches, they would be the last to be recalled. None of the other employees at the jobsite were laid off at that time. Less than a week later, on December 1, Rogers sent a memo to all employees stating that the November 26 layoffs were "a direct result of the sloppy, substandard work and gross negligence that has occurred at this job site from this 5 man base crew" (GC Exh. 8). Several months later, at the annual meeting in May 2004, Rogers responds to a question from Melius asking why the Lewistown crew was laid off by saying "The Lewistown crew was laid off due to a lack of work" (CP Exh. 1 at 8).

Melius also testified that Rogers opened the annual meeting in May 2004, by saying that "one bad apple can spoil the whole basket." Rogers then went on to announce that Eddinger had asked to attend the meeting, but that he was on permanent layoff. Melius testified that he had seen Eddinger leaving the parking lot and it was his belief that Rogers was referring to Eddinger as the one bad apple. Melius was not cross-examined on this matter. Despite being present during the testimony Rogers did not deny, explain, or in anyway refer to the testimony. Accordingly, the testimony is not contradicted, it is consistent with the minutes of the annual meeting, and I find it credible. (CP Exh. 1; Tr. 79.) The Board has long held that accusing an employee of being a "bad or a rotten apple" is a veiled reference to the employee's protected concerted activities. E.g., *Penn Color, Inc.*, 261 NLRB 395, 405 (1982); *Jackson Packing Co.*, 170 NLRB 1361, 1364 (1968). When referenced in the context of explaining why an employee was discharged, similar remarks have been found to constitute "especially persuasive evidence" that the discharge was unlawfully motivated. *Cook Family Foods*, 311 NLRB 1299, 1319 (1993). Under the circumstances, I find that Rogers' comments connecting Eddinger with a "bad apple" who was on permanent layoff and was not allowed to be present with the "good employees" (CP Exh. 1, 1) indicates that his concerted activities were considered by the Respondent and played a role in the layoff decision.

Based on all the foregoing, I find that the General Counsel has met his burden under *Wright Line* of establishing that the employees' protected concerted activity was a motivating factor in their layoff. The burden of persuasion now shifts to the em-

ployer to show that it would have taken the same adverse action even in the absence of the employees' protected activity. See, *Transportation Management Corp.*, above at 399-403. To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

The advancing of a false reason for the Respondent's action suggests that "there is another motive [for the action that the Respondent] wishes to conceal." *Cell Agricultural Mfg. Co.*, 311 NLRB 1228 fn. 3 (1993), *enfd.* in relevant part 41 F.3d 389 (8th Cir. 1994). Similarly, [s]hifting reasons for discipline, in the presence of a prima facie case, are evidence of, and support, a finding of an unlawful motive. *Scott Lee Guttering Co.*, 295 NLRB 497, 508 (1989).

"While it is a truism that management makes management decisions, not the Board, . . . it remains the Board's role, . . . to determine whether management's proffered reasons were its actual ones." *Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998). In making that determination, it is appropriate to consider the insubstantial nature of the misconduct. See *Neptune Water Meter Co. v. NLRB*, 551 F.2d 568, 570 (4th Cir. 1977).

### 3. The Respondent's defenses

The Respondent has not satisfactorily reconciled the different reasons offered for the discriminatees' layoff. Thus, on November 26, Sodmont tells all the discriminatees, including the base crew, that their lay off is caused by lack of work. On December 1, Rogers, in a memo to all employees, lambastes the base crew by stating that the layoff "was taken as a direct result of the sloppy, substandard work and gross negligence that has occurred at this job site of this 5 man base crew." Notwithstanding his memo in December, at the annual meeting in May 2004, Rogers answers the question posed by Melius, as to why the base crew was laid off and others brought in, by stating that the base crew was laid off for lack of work.

The Respondent's brief lists 42 items that it contends demonstrates by the preponderance of the evidence that it would have taken the same actions absent any protected concerted activity on the part of its workers. I will address what I consider to be the three reasons advanced by the Respondent, albeit at various times, for laying off and not recalling Smith, Hunsinger, Bailey, Eddinger, Ellinger, and Melius.

Somont and the General Counsel's witnesses agree that Somont told them that they were laid off for lack of work. Notwithstanding the layoff of the work at the Lewistown job continued for at least 2 more months. Several of the employees who continued to work, had only recently been transferred to the site, and others were transferred after the discriminatees were laid off. Dilworth and six other employees continued to work at the site for at least another week.

Sodmont testified that he did not layoff Dilworth because of Dilworth's knowledge of the job. The Respondent offered no evidence that the laid-off employees lacked knowledge, or why the same reasoning would not apply to all of the base crew. All of them had worked on the project from the beginning and it is

reasonable to infer that they, like Dilworth, would have a far greater understanding of what needed to be done than newly arriving employees, such as employees Lee and Storm (R. Exh. 4). Nor has the Respondent given any reason why the discriminatees were laid off, while other employees such as the Buck brothers, who arrived at the site after the discriminatees, not only continued to work at the site, but were later transferred to other jobsites without interruption. *Omahaline Hydraulics Co.*, 342 NLRB 872, 883 (2004).

At one point in his testimony Rogers stated that he “was forced to cut, it was totally lack of work.” The Respondent’s records, set forth above, demonstrate the inaccuracy of that statement. As detailed above, the records show that new employees were being transferred to the jobsite, as the more experienced base crew was being laid off. Moreover, counsel for the General Counsel contends that the Respondent’s failure to provide documentary evidence supporting its claim of economic justification is, itself, evidence of pretext. *Wilco Business Forms, Inc.*, 280 NLRB 1336, 1337 (1986); *T & T Machine Co.*, 278 NLRB 970, 978 (1986). I agree. Additionally, the existing documentary evidence indicates the opposite of the Respondent’s contention. At the January 23, 2004 foreman’s meeting Rogers, reporting on the condition of the Company, says, “We may have to use a temporary labor service again. Otherwise, we may have to work overtime until people drop” (CP Exh. 2 at 2). This does not sound like the statement of an employer who is being forced by economic conditions to lay off employees.

I credit Sodmont’s testimony insofar as he states that in addition to telling Bailey, Eddinger, Ellinger, and Melius that they were laid off for lack of work he told them that they would be the last to be recalled specifically because of the late lunches and the tardiness. Although he may have spoken in general terms about overall problems that were encountered on the project, I reject the contention that he put any of the discriminatees on notice of personal work-related inadequacies, other than the late lunches and the tardiness.

The record is clear that the discriminatees, as well as other employees at the Lewistown jobsite, took long breaks and lunches. Foreman Dilworth not only condoned this conduct, but engaged in it. The evidence is also clear that taking long breaks and lunches was not limited to Lewistown. During the January 2004 foreman’s meeting Rogers commented that “[a]t present, we are losing an hour a day from employees from breaks and lunch. Breaks are overrunning the ten-minute limit. We need suggestions as to how to correct this problem” (CP Exh. 2 at 2). Notwithstanding the prevalent nature of the problem no employee, except for the Lewistown employees who had contacted L&I, were disciplined. Dilworth, who was the individual charged with preventing such transgressions on the jobsite, suffered no consequences for his tardiness or his lack of leadership. This is so, notwithstanding the fact that Rogers showed no reluctance to issue Dilworth a written reprimand for changing the work hours, without first telling Rogers.

Additional evidence that this purported reason is pretextual is provided by a memo from Jerry Brandt to Rogers dated July 16, 2003. Brandt was the overall onsite superintendent for the Lewistown project. He wrote to Rogers that Rogers’ employ-

ees were working very hard, but they were too few. A week later requested that Rogers increase the man-hours worked on the project. Thus, it appears that from Brant’s viewpoint, the length of time taken for breaks and lunch was not a factor in the Respondent’s being behind schedule. Indeed, the evidence shows that it was not unusual for the Respondent to be behind on many of its undertakings. Rogers admitted to being late on at least three projects and on none of those was the base crew laid off.

I also find the Respondent’s statement that the discriminatees performed “sloppy, substandard work and gross negligence” (GC Exh. 8), to be an incredibly gross exaggeration. There is absolutely no documentary evidence that any member of the base crew was ever reprimanded for poor performance, or for any dereliction of duty, until well after the layoff. I also note that the Respondent’s failure to reprimand any of the discriminatees is inconsistent with its amended company policy of September 2003. The memo announcing the change states that employees who continuously fail to work productively, or who are less than competent, will be notified, both verbally by their immediate supervisor, and in writing, that they have been placed on a list of individuals that will be laid off first. The final change mentioned in the memo is that the Respondent “will start issuing written reprimands that will become part of that employee’s permanent record.” (R. Exh. 11.)

Moreover, it would appear that if there was even some truth to the assertion contained in the Respondent’s December 1 memo, Rogers would have included the Lewistown project when he announced, in September/October, that because of sloppy work—at other jobsites, he felt justified in withholding the employees’ pension money.

To the extent that the Respondent suggests that I credit Deborah Rogers’ testimony, claiming that during an exchange between her and Melius at the 2004 annual meeting, Melius said that he did not personally feel that his work at Lewistown was good work, I reject that contention.

Deborah Rogers is the wife of Brad Rogers, coowner of the Respondent, and Respondent’s secretary/treasurer. She stated on direct examination that on two occasions during the open discussion portion of the 2004 annual meeting, Melius acknowledged that he did not personally feel that his work on the Lewistown job was good. She further stated that although Melius was sitting at the farthest point away from her, the room was “very quiet” and that she had no problem hearing him, nor he her.

Melius credibly testified that he remembered her asking the question, but that he answered, “Yes,” that he felt that he was doing a good job. I credit his testimony of this incident. Melius not only exhibited the testimonial demeanor of a witness who was honestly attempting to recollect past events correctly, but Deborah Rogers’ testimony is not corroborated in any manner. Notwithstanding her claim that the room was quiet when the exchange occurred, and that she identified where in the minutes it happened (CP Exh. 1 at 8)—the minutes in no way reflect her testimony. Sodmont, whom she claims was sitting next to her, did not corroborate her testimony, nor did any witness who attended the meeting. *Asaro, Inc.*, 316 NLRB 636, 640 fn. 15 (1995).

On December 11, Melius returned to the Lewistown jobsite to remove some personal effects. He was approached by Rogers who said that Dilworth had told him that Melius had damaged a breaker in the switch gear by not supplying sufficient torque to the breaker. Melius acknowledged that he might have been responsible, but couldn't say for sure because there were a number of people in and out of the switch gear. Rogers said nothing more on the matter, but on January 9, 2004, Melius received a written reprimand in the mail. (GC Exh. 7.)

Melius testified that he had never previously installed the type of breaker used on the Lewistown project. He testified that he had told his foreman of that fact. Nevertheless, the foreman did not provide him with either the specifications for the torque, or a torque wrench, both of which are necessary to properly perform the job.

Notwithstanding Rogers presence in the hearing room when Melius testified, Rogers did not mention this incident in his testimony, nor is it addressed in the Respondent's brief. Counsel for the General Counsel suggests that the timing of the reprimand, 6 weeks after his last day of work and 2 days after the Respondent received the Board charge, is evidence of unlawful motivation. Timing is an important factor in assessing discriminatory motivation. See, e.g., *Detroit Paneling Systems*, 330 NLRB 1170 (2000). The timing here is enough to show an apparent link, and significantly, the General Counsel has met his burden. Thus, the Respondent "not only must separate its tainted motivation here from any legitimate motivation, but it must persuade that its legitimate motivation outweighs its unlawful motivation such that the Company would have imposed the discipline even in the absence of [the protected concerted activities]. *Formosa Plastics*, 320 NLRB 631, 648 (1996). This the Respondent has not done.

Eddinger also received a reprimand on January 9, 2004, for neglecting to retrieve anchor bolt caps (GC Exh. 10). Eddinger testified, without contradiction, that he was following an order from his foreman. He also testified that he was never asked about this incident. In addition to the timing, failing to question Eddinger about this incident is additional evidence of unlawful motivation. *Goodman Forest Industries*, 299 NLRB 49, 55 (1990).

At the hearing Rogers also contended, for the first time, that Eddinger was the cause of the Respondent having to pay a back charge of \$216 for failing to clean up his work area after being laid off. Not only was Eddinger never questioned about this incident, but Rogers admitted on examination by counsel for the General Counsel that the Respondent had received much higher back charges on other jobsites and yet no employee was disciplined or permanently laid off as result. Disparate nature of employee discipline is additional evidence of unlawful motivation. *Tubular Corp.*, 337 NLRB 99, 99 (2001).

I also reject the Respondent's contention that its slate is somehow made clean by allegedly having three foremen vote to place Eddinger and Smith on permanent layoff. The Respondent has a policy, as articulated by Rogers, that if "three foremen ask to remove, or do not want to work with an individual, that triggers an automatic action in our office, as management" (Tr. 398). Foreman Mantini testified that he was present at the executive session of the foreman's meeting, along with Brad

Rogers and others, when the foregoing policy was implemented. Mantini initially testified that Rogers made comments regarding the individuals, but did not vote. After being shown the minutes (CP Exh. 3) he changed his testimony to say that Rogers voted. He did so because Rogers is listed as one of the foremen voting to change Eddinger's layoff status to permanent (CP Exh. 3 at 1).

Rogers acknowledged that he was listed in the minutes but stated that he was not relying on his own opinion. Since Rogers had just testified that a vote of the foremen only "triggers an automatic action by management," and Rogers is the Respondent's top management official, it is difficult to understand how he could not help but rely on his own opinion. It also appears that his opinion would be of greater value than that of Dilworth. Dilworth was no longer employed by the Respondent, had been removed from his supervisory position for incompetence, and did not attend the meeting. His "vote" to place Eddinger and Smith on permanent layoff was, however, counted (CP Exh. 3 at 1-2).

Johnston was another former supervisor who was relieved of his supervisory duties because of his "many inadequacies" (CP Exh. 3 at 2), but who nevertheless, along with Dilworth, made up two thirds of the "vote" to permanently change Smith's layoff status to permanent.

I do believe that Rogers made comments about the employees in question. His testimony regarding Eddinger is very similar to the recorded comments at the executive session, this may be why the scribe erroneously recorded Rogers as a vote to change Eddinger's layoff status to permanent. The minutes also include photographs and statements about the back charges as well as a statement that he "has been known to leave work unfinished" (CP Exh. 3 at 1), this appears to be a reference to the incident for which he was reprimanded. I have found that those incidents are attempts by the Respondent to hide its unlawful motive. Accordingly, neither incident can be the basis for additional discipline.

Similarly when asked why Smith was permanently laid off, Rogers said, "Black cloud around him." When asked to elucidate, he replied, "It just keeps following him. The first place he end[s] up, the first thing that happens, people don't like him." In the minutes Smith's attitude is compared to being "similar to that of a black cloud" and he is labeled a "chronic complainer." I find that the reference to people not liking him may be about the threats to his well-being, made by his fellow employees, for filing a complaint with L&I. Regardless, accusing an employee of having a "bad attitude" has long been considered a veiled reference to the employee's protected concerted activities. E.g., *Children's Studio School Public Charter School*, 343 NLRB 801, 805 (2004), and cited cases.

I find that "the vote of three" contributes little to the Respondent's burden to demonstrate that it would have taken the same action even in the absence of Eddinger's and Smith's protected concerted activities.

I find no merit to the Respondent's claim that Hunsinger and Melius, who also filed complaints with L&I, were not permanently laid off. It is well settled that a discriminatory motive, otherwise established, is not disproved by an employer's proof that it did not weed out all of the employees who engaged in

activities that incurred the employer's displeasure. E.g., *Audubon Regional Medical Center*, 331 NLRB 374, 376 (2000), and cited cases.

I find the Respondent's contention that the reason that Smith was laid off first was because he had submitted a request for a voluntary layoff to be a pretext. As set forth below the evidence does not establish that the Respondent was acting on Smith's request when Sodmont laid him off.

Sodmont claims that he confirmed with Smith that Smith had volunteered to be laid off before Sodmont laid him off. I credit Smith's denial that Sodmont never mentioned his request for a voluntary layoff. I do so, based not only on Smith's testimonial demeanor on this issue, but also because Sodmont's statement is not supported by the Respondent's records. Respondent's Exhibit 4 indicates, among other things, why employees left the Respondent's employ. Letter codes are used as designators, "L" is for layoff and "VL" for voluntary layoff. Smith's layoff is designated by an "L" (Tr. 421). This evidence is especially detrimental to Sodmont's credibility on this issue. It was Sodmont who initiated the layoff, it follows that Sodmont is also responsible for applying the correct code.

As further evidence that Smith was chosen for layoff because of his protected concerted activity, Rogers admitted that at least one other employee, Greg Buck, had requested a voluntary layoff, during the same timeframe, but was not laid off until December. Rogers offered no explanation for the disparity.

I find that all the foregoing evidence strongly supports the inference that the layoff of Hunsinger, Smith, Bailey, Eddinger, Ellinger, and Melius and the failure to recall Smith, Bailey, Eddinger, Ellinger, and Melius was in retaliation for their engaging in protected concerted activity. I find that the reasons advanced by the Respondent are pretextual—meaning that they either did not exist or were not in fact relied upon, by the Respondent, thereby leaving intact the inference of wrongful motive established by the General Counsel. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982).

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in the complaint.

#### CONCLUSIONS OF LAW

1. By laying off employees Eric Bailey, Sam Eddinger, Rodney Ellinger, Jacob Hunsinger, Roy Melius, and Brian Smith on November 26, 2003, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By disparaging employees' concerted complaints, by indicating that the employees' concerted complaints were futile, by threatening employees that their concerted complaints would lead to loss of employment, by threatening employees by informing them that anyone who was not content with the manner in which the Respondent's business was run should leave, and by creating the impression that its employees concerted activities were under surveillance, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

#### REMEDY

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

The Respondent having unlawfully laid-off 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 layoff 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). I am aware that Jacob Hunsinger was recalled on January 19, 2004. Nevertheless, I have included him in the recommended Order to ensure that he receives the full benefit of the Board's make-whole remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>2</sup>

#### ORDER

The Respondent, Rogers Electric, Inc., Orbisonia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully laying off, disciplining, or otherwise discriminating against employees because they have engaged in concerted activities protected by Section 7 of the Act.

(b) Disparaging employees' concerted complaints, indicating that the employees' concerted complaints are futile, threatening employees that their concerted complaints would lead to loss of employment, threatening employees by informing them that anyone who is not content with the manner in which the business is run should leave, and creating the impression that the employees' concerted activities are under surveillance.

(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 the Board's Order, offer Eric Bailey, Sam Eddinger, Rodney Ellinger, Jacob Hunsinger, Roy Melius, and Brian Smith 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 Eric Bailey, Sam Eddinger, Rodney Ellinger, Jacob Hunsinger, Roy Melius, and Brian Smith whole for any loss of earnings and other benefits suffered as a result of the unlawful action 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 layoffs and reprimands, and within 3 days thereafter notify the employees in writing

<sup>2</sup> 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.

that this has been done and that the unlawful layoffs and reprimands will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such 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 Orbisonia, Pennsylvania, and at all current jobsites, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of

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<sup>3</sup> 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."

the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 5, 2003.

(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.