Adco Electric Incorporated *and* International Brotherhood of Electrical Workers, Local Union No. 480, AFL–CIO. Case 15–CA–11329–4

June 30, 1992

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On October 4, 1991, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.[1]

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.

[1] The General Counsel filed a motion to strike the Respondent's Appendix A which was attached to the Respondent's brief in support of exceptions. The General Counsel contends that Appendix A—transcript pages from an earlier representation hearing involving the Respondent—was initially attached to the Respondent's posthearing brief and was struck by the judge in his decision because the judge found: (1) it constituted new evidence and should have been introduced by a motion to reopen the record; (2) the submitted pages could be taken out of context; and (3) the General Counsel was not a party to the earlier hearing and thus was unable to cross-examine witnesses. The General Counsel contends that Appendix A should be struck for the same reasons as stated by the judge. We find merit to the General Counsel's contentions, agree with the reasons cited by the judge in his decision, and grant the General Counsel's motion to strike.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (195), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. III,C,1,a, of his decision, the judge speculates about the absence of Electrician Foreman Raymond Langford's name from the October 31, 1990 Decision and Direction of Election and the subsequent November 15, 1990 Erratum. We note that Langford was discharged on August 17, 1990, before the petition was filed, and well before the date of the Decision and Direction of Election.

[3] The judge found, and we agree, that the Respondent failed to carry its burden of showing that Raymond Langford was a supervisor within the meaning of the Act. See, e.g., *Health Care Corp.*, 306 NLRB 63 fn. 1 (1992) (party alleging supervisory status bears the burden of proving an individual is a supervisor). In support of its position on this issue, the Respondent relies, inter alia, on its job descriptions for electrician foremen and journeymen electricians. The judge rejected the job descriptions as demonstrating supervisory status, concluding that the Respondent's job descriptions, if accurate, effectively conferred supervisory status on virtually all employees (including journeymen), save a few apprentices. He thus impliedly found, and we agree, that the Respondent's job descriptions were an inaccurate reflection of Langford's duties and powers. Moreover, we note that the judge credited Langford's testimony that he never received a job description.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Adco Electric Incorporated, Jackson, Mississippi, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Ronald K. Hooks, Esq. and *Kathleen McKinney, Esq.*, for the General Counsel.

Emile C. Ott, Esq. and *Jerrald L. Shivers, Esq. (Fuselier, Ott, McKee & Shivers)*, of Jackson, Mississippi, for Respondent Adco Electric.

C. L. Tucker, Business Manager, of Jackson, Mississippi, for IBEW Local 480.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. ''We have here for decision the aging but nevertheless persistently vexing problem of whether or not an employee is a supervisor.'' *NLRB v. Security Guard Service*, 384 F.2d 143, 145 (5th Cir. 1967). (Circuit Judge Goldberg's opening line from the court's opinion.)

During an organizing campaign by IBEW Local 480, Adco fired two workers, Electrician Foreman Raymond Langford and apprentice electrician Eric Muncy. Adco gives mixed reasons and afterthoughts for discharging Muncy. Adco admits firing Langford because he was assisting in the Union's organizing campaign. Thus, the sole issue as to Langford is whether he was a statutory supervisor when Adco fired him. Finding that Adco failed to carry its burden of proving Langford's supervisory status, and that Muncy's discharge was pretextual, I order Adco to offer each of them full and immediate reinstatement and to make them whole, with interest.

I presided at this hearing in Jackson, Mississippi, on June 24–25, 1991, pursuant to the January 31, 1991 complaint issued by the General Counsel of the National Labor Relations Board through the Acting Regional Director for Region 15 of the Board. The complaint is based on a charge filed November 23, 1990 (and later amended), by International Brotherhood of Electrical Workers, Local Union No. 480, AFL–CIO (Union, Local 480, or Charging Party) against Adco Electric Incorporated (Adco, Respondent, or Company).[1]

In the complaint the General Counsel alleges that Adco violated Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), about July 24 by coercively interrogating its employees; on October 4 and 5 by orally promulgating a rule prohibiting employees from discussing the Union; and about November 15 by informing its employees that they could not be given a pay increase because of the Union.

The complaint also alleges that Adco violated Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3), by terminating

[1] All dates are for 1990 unless otherwise indicated.

Raymond Langford about August 17, by terminating Eric Muncy about September 17, and by issuing a verbal warning to LaFrance Smith about October 4, 1990.

By its answer Adco admits certain factual matters but denies violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel[2] and Adco,[3] I make the following

FINDINGS OF FACT

I. JURISDICTION

A Mississippi corporation headquartered in Jackson, Mississippi, the Company (Respondent Adco) is an electrical contractor in the building and construction industry. During the 12 months ending December 31, 1990, Adco purchased and received, at various Mississippi jobsites, goods and materials valued at $50,000 or more direct from sources located outside Mississippi. Although Adco denies the allegation, I find that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

Subject to its contention that Local 480 has a conflict of interest in this case (acting as a competitor of the Company), Adco admits that, otherwise, Local 480 is a labor organization within the meaning of Section 2(5) of the Act. (1:15–16.)[4]

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. The Company

a. *Organization*

Whit Adams, as Adco's president identifies himself (1:34; 2:430), identified a 39-page handbook (G.C. Exh. 8) which Adco distributes to its employees. (1:37.) The second page summarizes Adco's history. Adams founded Adco in 1978 as an electrical contractor doing residential and small commercial electrical construction. Since then Adco has progressed to much larger commercial projects, with its largest single customer being Government at all levels. New employees are advised, ''One day you may be working in the trenches of a pumping station in rural Smith county. The next day you might be helping restore a historic building in downtown Jackson.''

From its Jackson headquarters, Adco performs work at jobsites located up to 225 miles away. (2:302–303, 440.) Employing both ''inside'' (including service electricians) and ''outside'' (the construction electricians) personnel (2:433), Adco's outside contingent reached a high, within the last 5 years, of about 49 and a low, its current number, of 14. (2:330, 364, 434–435.) The current low has prevailed since about October 1990. (2:363–364, 460.) The number in the summer of 1990, Superintendent Buie testified, was about 20. (2:363–364.) In 1989 the number was about 30. (2:364.) The number reduction accelerated in 1990 and 1991. (2:363.)

Adco's outside personnel are under the overall direction of a general superintendent, William Richard Buie. (1:35; 2:295, 434.) As Adco's organization chart reflects (G.C. Exh. 8 at 29), the general superintendent reports direct to Adams. Reporting to Buie are the job foremen. (2:303, 434; G.C. Exh. 8 at 29.) When Buie is to be absent, either he or Adams designates one of the foremen to be the acting superintendent. Whichever foreman is most available in his work, Buie testified, is selected. (2:321, 380–381, 444.)

Job foremen are journeymen electricians, although an apprentice may substitute in an emergency or unexpected absence of the job foreman. Buie testified that Adco seeks to retain its job foremen on the payroll, and that in layoffs apprentices and electricians (journeymen who are not job foremen) are laid off before job foremen. (2:365–366, 370.) That retention policy, combined with Adco's personnel reduction over the last couple of years, perhaps explains the fact that the Company's current outside staff of 14 includes 5 job foremen. (2:460.) When the outside staff numbered about 20 (in the summer of 1990), that number included 6 to 8 job foremen, about the same number as when the staff was at its normal average of about 30. (2:330, 370.)

A construction crew normally consists of a foreman (journeyman) and a helper (apprentice) (1:91, 105), although, as Adco's organizational chart reflects (G.C. Exh. 8 at 29), in some instances, as Adams implies, there will not be a designated job foreman. (1:40–41.) Indeed, the instant case involves an apprentice, Eric Lott, who substituted 1 week for injured Job Foreman David Lewis. General Superintendent Buie describes Lott's substitution as being in the capacity of a leadperson. (2:335.) For single-crew jobs the foreman normally will have no more than 4 others, electricians and apprentices, on the crew (2:439), although such a crew can number a many as 15. (2:300.)

On some jobs Adco assigns several crews involving up to 26 employees. Each year, on average, Adco has about 10 to 13 of these multicrew projects. (2:300.) Job foremen spend about 50 percent of their time on the multicrew projects, Buie testified. (2:300–301.) When there are several crews on a job, Superintendent Buie explains, with each crew under the direction of the crew's job foreman, Adco designates one foreman as the job foreman. That foreman then is known as the general foreman. On such multicrew jobs, Buie holds the general foreman responsible for the job. (2:301, 305, 370–371.) The basic reason for such responsibility is that the other foremen, with their crews, are reassigned to other jobs regularly, working no more than 10 to 70 percent on the job of the multicrew project. (2:306.)

Adco's employee handbook (G.C. Exh. 8) refers at various points to employees' ''immediate supervisor.'' Adams testified that the job foreman at Adco is that immediate supervisor. (2:436–439.) The relevant question in this case is whether Raymond Langford was a job foreman and, if so, whether he was a statutory supervisor. That is so because

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[2] The General Counsel attached a proposed order and a proposed notice to the Government's brief.

[3] Adco attached to its brief, as Appendix ''A,'' copies of certain pages from the apparent transcript of a September 19, 1990 hearing in Case 15–RC–7553 involving the Union and Adco. For the reasons I give later when describing Case 15–RC–7553, I shall strike and disregard Adco's Appendix A.

[4] References to the two-volume transcript of testimony are by volume and page. Exhibits are designated G.C. Exh. for the General Counsel's and R. Exh. for Respondent Adco's.

Adams frankly concedes that Adco fired Langford because he was soliciting for the Union. (1:42.) If, contrary to the General Counsel's position, Langford was a statutory supervisor, then he is not directly protected by the Act, and the General Counsel makes no allegation nor argument that he is indirectly protected in this case.

b. *Union philosophy*

Adco opposes unionization. The handbook states it, and President Adams candidly acknowledges that his firm's policy is to remain nonunion. (1:46.) The handbook's statement reads (G.C. Exh. 8 at 5):

5. A FEW WORDS ABOUT UNIONS

> There is always a chance that in the future a labor union organizer will try to persuade some of our employees to sign union authorization cards. For this reason, it is important that you understand our position concerning unions.
>
> To say it simply and clearly, although you have the legal right to join a labor union, you also have the legal right NOT to join a labor union. We prefer to work with our employees informally, personally, and directly, rather than through third party outsiders intervening between us. We think you agree. So we will make every effort that is legally permissible to retain our status as an ABC Merit Shop, NON-union contractor.
>
> We have the ability, the desire, the expertise, and the personnel to solve our problems and move forward by working together in the Merit Shop Way -- without interference from union outsiders. Based on these facts, we believe a labor union is unnecessary and unwanted here at Adco Electric, Inc.

2. The Union

a. *Case 15–RC–7553*

In early August 1990 Lavern Tucker, IBEW Local 480's business manager, contacted Raymond Langford. Langford informed Buie that Tucker wanted to talk with him. Two union meetings followed, cards were signed, and on August 14 Tucker hand-delivered a letter (G.C. Exh. 7) to Adco advising Adams that his construction employees were engaged in the protected activity of organizing. (1:33, 41, 106–111, 144.) In the letter, Tucker lists (in alphabetical order) nine employees who ''wish to be identified as members of the organizing committee.'' Those named are:

Jeffery Calender	John D. Newell
Raymond Langford	Orby C. Renfroe Jr.
David Lewis	LaFrance Smith
Eric Lott	Cory D. Williams
Eric Muncy	

Later we see that three of those named were job foremen: Raymond Langford, David Lewis, and John D. Newell. (Newell testified as a witness called in this case by Adco.) That same August 14 Langford and others began wearing union organizer badges (G.C. Exh. 11) and caps, which Buie observed that day. (1:112–115.) As I discuss below, 3 days later, on August 17, Adco fired Langford. Before me Adams testified that Langford was fired solely because he was soliciting for the Union. (1:42.)

On August 27 Local 480, by Tucker, filed an election petition in Case 15–RC–7553 seeking to represent ''All employees of the employer doing electrical work.'' (G.C. Exh. 2; 1:27.) NLRB Region 15 issued an October 31 Decision and Direction of Election (DDE; G.C. Exh. 3), followed by an Erratum (G.C. Exh. 4) on November 15, finding, among other things, that Adco's electrical foremen (the job foremen), are statutory supervisors and excluding them from the unit. (G.C. Exh. 3 at 8.) Region 15 directed an election in the following unit (G.C. Exh. 4 at 9):

> All employees employed by the Employer including electricians, electrical apprentices, shop men, and service men; excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act.

By Order dated March 22, 1991, the Board denied Adco's request for review. (G.C. Exh. 5.) On April 1 the Board issued a correction order to reflect Member Raudabaugh's partial dissent. (G.C. Exh. 6.) No election has been held because of the blocking charge. (1:14–15; 2:408.)

Earlier, at footnote 3, I postponed giving my reasons for striking Adco's Appendix A, attached to its posthearing brief, as an outside-the-record hearsay document improperly submitted. *First*, any proposal to reopen the record to receive newly discovered and previously unavailable evidence should be by motion with copies and notice to opposing counsel rather than by attachment to a brief. (The procedure is the same as for exceptions at the Board level. For the procedure there, see *Oregon Steel Mills*, 300 NLRB 817 fn. 3 (1990), and Board Rule 29 CFR 102.48(d)(1).) *Second*, a proper context for the four pages of testimony submitted could well require many additional pages. (Although purported page numbers are given, Br. at 26, the attached copies slice off the page numbers in the photocopying process.) Compare *Reeves Bros.*, 277 NLRB 1568, 1573 (1986), where the entire transcript from the representation case was introduced as a joint exhibit.

Third, as the General Counsel was not a party to Case 15–RC–7553, the purported excerpts of testimony are hearsay as to the General Counsel who had no opportunity to cross-examine the witness, apparently General Superintendent Buie. *Fourth*, the testimony there was not given before me, and I would be unable to assess the demeanor of the witness. Although this reason may not be, by itself, a basis to strike if a submission is otherwise proper, it definitely is a factor which must be considered when weighing a motion to reopen. *Finally*, although I may take official notice of Board proceedings on proper request, official notice, even if taken of transcript pages or exhibits submitted from the record in Case 15–RC–7553, would not overcome all the deficiencies I have enumerated.

b. *Any conflict of interest irrelevant*

As mentioned earlier, Adco disputes that the Union can be classified in this case as a labor organization. This is so, Adco contends, because Local 480 subsidizes Adco's competitors. Company's argument is irrelevant in this discharge

case. Some background description will assist in understanding Adco's position.

At the hearing on the Union's election petition in Case 15–RC–7553, as the DDE reflects,[5] Adco made an offer of proof that the Union operates a job targeting program in which the Union shares with a union contractor the cost of wages on certain projects where the union contractor is competing against a nonunion contractor for the work. That creates a conflict of interest between Local 480 and Adco, Company asserted, making Local 480 ineligible to represent Adco's employees.

Citing and quoting from cases which define a disqualifying interest, the DDE goes on to find that there is no disqualifying interest here because if the Union is certified Adco would no longer be a nonunion contractor and the Union would no longer be in competition with Company. Although Adco's offer of proof included a contention that it would not be allowed to participate in the Union's job targeting program, the DDE found no basis in the offer of proof for that conclusory claim. (G.C. Exh. 3 at 2–4.)

Before me Adco also sought, by subpena duces tecum (R. Exh. 1), to obtain the Union's records on this issue. I sustained the objections of the Union and the General Counsel that the matter is irrelevant. (1:8–21.) Whether clarifying its representation offer or simply reiterating it, our record does not show, but Adco's offer of proof before me states, in part (1:21–26; R. Exh. 2):

> If the witness [C. L. Tucker, Local 480's business manager] were allowed to testify, he would say that the union has a job targeting program in accordance with the program attached hereto in Exhibit A and that the union would exclude respondent from its job targeting program until and unless respondent agreed to join the multi-employer bargaining unit and agreed to be bound by the union's agreement with the multi-employer bargaining association. Respondent would further establish through the testimony of this witness that if respondent refused to join the multi-employer unit, or if respondent was vetoed from becoming a member of the multi-employer unit (by either the union or a participating employer), the union would continue to subsidize respondent's competitors through the job targeting program.

It was on this issue that Member Raudabaugh partially dissented, as reflected in the Board's April 1, 1991 order correcting (G.C. Exh. 6):

> I would grant the Employer's Request for Review of the Regional Director's Decision and Direction of Election. Contrary to my colleagues in the majority, I would accept the Employer's offer of proof.
>
> The Employer sought to show that the Petitioner subsidizes the wages of contractors who, as part of a multi-employer unit, are parties to a multi-employer contract with the Petitioner. The purpose of the subsidy is to permit such contractors to compete with contractors who are not parties to such a contract. If the Petitioner were certified and if the Employer chose to exercise its statutory right to refrain from joining the multi-employer group [footnote 1 omitted], the Employer would not receive a subsidy but its direct competitors would do so. Blessed with such a competitive advantage, the competitors would be in a position to effectively underbid the Employer for jobs, thus injuring not only the Employer but also the very unit employees ostensibly represented by the Petitioner.
>
> In view of the above, I would permit the Employer to adduce the evidence.

At the instant hearing I rejected Adco's offer of proof. (1:26.) That ruling is based on my earlier ruling sustaining the objections of the General Counsel and the Union and, in effect, quashing the subpena duces tecum. (1:19–20.) That is, I sustained objections that the matter is irrelevant. This case alleges discrimination because of protected concerted activities; there is no refusal to bargain allegation.

Nevertheless, Adco's point is interesting and, counsel asserts, unprecedented. (1:19.) Adco's argument is that the union activities of the employees are not protected because the union, Local 480, for whom the employees were organizing, stands in the position of being a competitor of Adco. Counsel concedes he has no authority for the proposition, and the General Counsel asserts that even if Respondent's competitor contention were true it would not render the organizing activities of the employees unprotected. (1:18–19.)

Adco does not expressly contend that the organizing activities of the employees constitute disloyalty (assisting Adco's competitors while drawing paychecks from Adco) so as to render unprotected their concerted activities. On the topic of disloyalty as unprotected activity, see Morris 1, *The Developing Labor Law*, 160–164 (2d ed. 1983, ABA), and its fifth supplement, 1982–1988 (1989, ABA) at 73–76. Rejecting Adco's conflict-of-interest argument as irrelevant in the context of this case, I find that Adco has failed to show the organizing activities here to be unprotected.

B. *Allegations of 8(a)(1) Coercion*

1. General Superintendent W. R. Buie

a. *Allegation*

Complaint paragraph 7 alleges that about July 24 Adco, acting through General Superintendent Buie at a jobsite, ''interrogated its employees regarding their union membership, activities and sympathies.'' Electrician apprentice Eric Muncy testified in support of this allegation.

b. *Facts*

Eric Muncy worked as an electrician apprentice for Adco for less than 2 months, from July 26 to September 17, 1990. (2:236.) About July 24 Muncy interviewed with superintendent Buie in Buie's office. (2:236–237, 296.) When applying for employment with Adco, Muncy named a union contractor, Thompkins Electric, as a former employer. (2:237, 274–275, 297.)

Seeing the reference to the nonunion contractor, Buie admits, Buie told Muncy that Adco is a nonunion contractor. Buie so advised Muncy because Buie did not think Muncy knew that fact, and he denies asking Muncy his feelings

[5] The DDE does not give the date of the hearing. For the limited purpose of reporting the date, I note that in Adco's November 13, 1990 request for review (part of R. Exh. 2, rejected), Adco states that the representation hearing was on September 19, 1990.

about unions or whether Muncy was a union member. (2:297.)

Buie acknowledges that when interviewing new hires he covers several items, including company policy—Adco's employee handbook. (2:299, 352.) As quoted earlier from that handbook, Adco's stated policy is to remain nonunion. Although the record is unclear whether Buie covers the handbook policy with applicants before or after he tells them they are hired, that point has little relevance here because Muncy was hired. The issue here is whether Buie's procedure tends to corroborate Muncy's version or that of Buie. I find that it tends to support Muncy.

Muncy testified that Buie, observing the union contractor's name on the application, asked Muncy his feelings about unions. Muncy answered that he had nothing for or against them. Buie stated that at Adco unions were disliked and would not be tolerated. Buie then asked if Muncy currently was a member. ''No,'' replied Muncy. Buie then hired Muncy as an apprentice to start July 26. (2:237.)

Noting that Buie's admissions, along with his procedure of covering the company policy handbook with new hires, tend to corroborate Muncy's version, and observing that Muncy was a more persuasive witness than was Buie, I credit Muncy over Buie.

c. *Analysis and conclusions*

Asserting (without articulation) that, even if Muncy is credited, Buie's questions are not coercive, Adco (Br. at 22) relies on *General Motors Corp. v. NLRB*, 596 F.2d 1295, 1309–1310 (5th Cir. 1979), and *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). Assuming that the Board's ''totality of circumstances'' test is to be applied (similar to the Fifth Circuit's *Bourne* factors),[6] it must be applied while recognizing the special situation of job applicants. Muncy was a job applicant, and the Board has long recognized that job applicant ''may understandably fear that any answer he might give to questions about union sentiments posed in a job interview may well affect his job prospects.'' *United L-N Glass*, 297 NLRB 329 fn. 1 (1989).

Under any test Buie's questions are coercive. Practically every one of the *Bourne* factors calls for a finding of a violation. Only factor 5, ''the truthfulness of the employee's responses,'' does not compel such a result here because it is not clear Muncy lied in responding. The first factor, history of the employer's attitude toward its employees, contains no findings of violations of the Act, but Adco's nonunion policy positions the Company at the edge of a slippery slope.

Factor number 2, the type of information sought, points toward unlawfulness because it was Muncy's statutory rights inquired about in the context of a job interview. Factors 3, questioner's rank, and 4, place and manner, are adverse to Adco. Buie is, and was, the hiring superintendent and second only to owner Adams. The interview was held in Buie's office and was conducted in the formal manner of a job interview rather than in the manner of a casual conversation between friends on the shop floor.

Factors 6 (valid purpose?), 7 (if so, communicated?), and 8 (assurance of no reprisal for union support) are heavily against Adco. Buie's purpose was to see that Muncy conformed to Adco's nonunion policy. In effect, Buie presented Muncy with a ''yellow dog'' contract situation—an employment condition outlawed by Congress 59 years ago with the 1932 Norris-LaGuardia Act. *Eddyleon Co.*, 301 NLRB 887 fn. 4 (1991), not to mention Section 8(a)(1) of our own statute.[7] The purpose communicated therefor, far from being valid, was unlawful—an implied threat of no hire if Muncy answered favorably to unions. (The complaint does not allege an unlawful threat.) Finally, far from assuring Muncy that no reprisals would be taken for support of a union, Buie said unions would not be tolerated at Adco. Any job applicant smart enough to find the restroom would have no trouble understanding that message—no union supporter will be hired by Adco! Accordingly, I find that, as alleged, Adco violated Section 8(a)(1) of the Act by General Superintendent Buie's July 24, 1990 questions of job applicant Eric Muncy.

2. President W. Whitman Adams Jr.

a. *October 1990 gag rule on union talk*

(1) Allegations

Complaint paragraphs 8 and 9, together, allege that about October 4 and 5, ''by verbal announcement,'' Adco promulgated, and has maintained, a rule prohibiting employees from discussing the Union. Adco did so in order to discourage its employees from joining, supporting, or assisting the Union, and from engaging in other concerted, protected activities. By the conduct, it is alleged, Adco violated Section 8(a)(1) of the Act. Complaint paragraph 13, based on this same incident, alleges that a ''verbal'' warning issued to LaFrance Smith on October 4. That warning, it is alleged, violated Section 8(a)(3) and (1) of the Act. Adco denies the allegations. LaFrance Smith testified in support of the allegations. Because the allegations are based on the same incident, I shall address here the discrimination allegation as well as the interference allegation.

(2) Facts

Adco's handbook contains a no-solicitation rule (G.C. Exh. 8 at 25), headlined, in all capitals, ''Obey Our Solicitation And Distribution Rules,'' reading:

> No employee may solicit another employee for any purpose while either employee is on working time. The distribution of hand bills or other literature during working time or in working areas if [is] forbidden.

LaFrance Smith worked for Adco from February 4, 1989, to February 3, 1991, in the shop and also in the field as an electrician apprentice. In August 1990, through the efforts of alleged discriminatee Raymond Langford, Smith began attending union meetings, wearing union insignia, and distributing literature. (1:194–197.)

Smith testified that on October 4 owner Adams approached him at 3:47 p.m. as Smith was loading his truck at the end of the day's work. Adams confronted Smith with the accusation that two of Adams' longtime employees had

[6] The eight factors applied by the Fifth Circuit derive from *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). See *General Motors*, supra, and *Fiber Glass Systems*, 298 NLRB 504 (1990).

[7] See also *Heck's*, 293 NLRB 1111, 1119–1120 (1989), and *La Quinta Motor Inns*, 293 NLRB 57 (1989)

informed him Smith was talking about union activities while on company time. When Smith denied the accusation, Adams told him to consider this ''a verbal warning.'' (1:197–198; 2:218.)

Acknowledging the incident, Adams asserts that he confronted Smith in the parking lot at the front of the office because two of his employees had reported that Smith was making a real nuisance of himself on the jobsite by leaving his work in order to approach other employees, keeping them from working, for soliciting. Adams concedes he told Smith that such conduct would not be tolerated on the job and to consider himself warned, that there would be no other warning. (2:430–431.)

The following afternoon, Smith testified, Smith went to Adams and asked for the names of the two ''perpetrators.'' Adams replied that he would not disclose their names because he was taking no action against Smith. When Smith then asked how he could protect himself from the two, Adams said that Smith was in the gray area, not the black and not the white. (1:199–200; 2:217.) Adams denies there was any second conversation in which black, white, or gray was mentioned. (2:431–432.)

Smith identified a written warning (G.C. Exh. 15) which he received the afternoon of January 10, 1991, from Foreman John W. Harrison. (1:201–202; 2:219.) Smith admits he was tardy by a few minutes that morning according to Harrison's watch. (1:202; 2:219.) The warning describes Smith's unsatisfactory performance as, ''Reporting to job after starting time.'' Additionally, and the part relied on here by the General Counsel, Harrison initially had followed that statement with, ''Talking to fellow employee about union activity instead of working.'' That reason is crossed through. As Smith testified, he told Harrison he would not sign unless Harrison explained what he meant by the allegation Smith was talking about union activities rather than working. When Harrison said it was based on Smith's telling Eric Lott he was going to file an NLRB charge over not receiving a pay raise, Smith told Harrison that report was false because he in fact had received a raise. Harrison then crossed through that part and they both initialed the strike-through. (1:202–204.)

Smith (1:205–206), Eric Muncy (2:264), and alleged discriminatee Cory D. Williams (2:291–293) testified that employees could talk about anything at work. Muncy describes an exception—talking about union on company time. As Muncy makes clear on cross-examination, however, that restriction was given the employees by Union Representative Tucker, perhaps as an overly safe precaution to protect their jobs. (2:264, 273–274.)

Bearing on the credibility and possible bias of Smith are the facts that, just before he was hired by Adco, Smith had been released from prison after serving 3 years of a 15-year sentence for armed robbery; that Adco had terminated him in February 1991 for theft of company property, a charge denied by Smith; and that Adco had filed a criminal charge against Smith over the alleged theft, which charge is currently pending. (2:220–221.)

(3) Analysis and conclusions

I shall dismiss these allegations. First, I credit Adams rather than Smith. As a witness Smith was unpersuasive. Second, complaint paragraphs 8 and 9 allege that Adco promulgated a gag rule on union talk. As Adams' credited version reflects, he orally warned Smith not to leave his work and go interrupt others in his solicitation efforts for the Union. Although the record shows that employees could talk about anything as they worked, there is no evidence Adco has ever tolerated employees' leaving their work to interrupt those who were working for the purpose of talking or soliciting for some cause. Thus, I find that Adams simply was enforcing Adco's valid no-solicitation rule.

Harrison's understanding of Adco's no-solicitation rule may well have been incorrect, but he amended the January 10, 1991 warning to strike that basis. Harrison's isolated, and temporary, reference does not demonstrate that Adams had promulgated an unlawful gag rule in October, although it would have tended to support Smith's evidence had I credited Smith. Moreover, it is clear that much of any confusion among the employees as to what Adco's no-solicitation rule meant came directly from Union Representative Tucker.

The evidence failing to demonstrate any promulgation of a gag rule, I shall dismiss complaint paragraphs 8 and 9. Finding that Adams, on October 4, was merely giving notice that he would enforce Adco's valid no-solicitation rule, I shall dismiss complaint paragraph 13, the ''verbal'' warning allegation.

b. *November 15, 1990 no-pay-raise statement*

(1) Allegation

Complaint paragraph 10 alleges that about November 15 Adams informed employees that ''they could not be given a raise because of the Union.'' Adco denies. Eric Lott testified in support.

(2) Facts

Eric Lott has worked for Adco since January 1988. (1:155, 186.) Lott testified on direct examination that, in November at the McCarty Farms jobsite, he and Adams had a conversation in which he suggested to Adams that Adams recognize the Union so that Adco could get bigger projects. Adams said he was happy with his company, that if Lott ''wanted it to go union that that was fine; the best thing for [Lott] to do was quit and go union. See if they will have you at the hall then.''

Continuing, Lott testified that he asked Adams about a pay raise. Adams said he was unable to give raises at the time because of the cost of the union movement. (1:169.) On August 20, 3 days after his discharge, Raymond Langford returned to Adco and had a conversation with Adams. Langford secretly tape-recorded the conversation. (1:121.) The tape (G.C. Exh. 12) and a 20-page transcript (G.C. Exh. 13) are in evidence. During the taped conversation, Langford stated that ''this'' (resisting the Union's organizing campaign) is costing him (Adco) a fortune. (G.C. Exh. 13 at 12, 20.) (Ironically, much of the tape/transcript amounts to an expanded version of Adco's offer of proof on the union-competitor issue. The tape transcript reflects the bitter comments of Adams in this respect.)

Responding to leading questions on cross-examination, Lott testified that Adams said it would be illegal for him to give Lott a raise at that time, that it would be an unfair labor practice, and illegal to give a raise that had not already been planned or scheduled before the union movement had started.

Moreover, Adams contrasted a raise with the giving of a 401(k) benefit because the latter had already been planned.

On redirect examination Lott initially repeated this, saying he believed Adams ''said it would be unfair; said that it would be wrong because it wasn't planned; something like that.'' (1:189.) Although Lott thereafter concedes that his November 20 pretrial affidavit (G.C. Exh. 14) does not quote Adams as saying it would be illegal or an unfair labor practice to give Lott a raise (1:190–191), re-cross-examination elicits the fact that Lott's November 20 account does quote Adams as saying his ''hands were tied.'' (1:192.)

Acknowledging a mid-November conversation with Lott at the McCarty job, Adams agrees that Lott asked for a pay raise. ''And what I told him,'' Adams testified, ''was that at this time, that I couldn't, that if I changed the wages, hours, or working conditions at any time during this campaign, that it would be an unfair labor practice.'' The 401(k) plan was being changed, Adams explained to Lott, but that had been put into effect before any notice of the union campaign. Adams testified that Adco's established policy is to review wages of journeymen and apprentices every January and June. (2:432–433, 463–464.) Superintendent Buie confirms the January/June review schedule. (2:325–326.)

Lott testified that normally wage increases are given at the first of the year. (1:1284–185.) Alleged discriminatee Langford testified that about mid-July he recommended to superintendent Buie that his apprentice, Sonny Renfroe, be given a pay increase. A month or so later Renfroe received a pay increase and, Langford thinks, so did all the apprentices. (1:94-95.) Neither party offered any pay records.

(3) Analysis and conclusions

An employer violates Section 8(a)(1) if it attributes to a union the employer's failure to grant a benefit. *Hovey Electric*, 302 NLRB 482 (1991). By contrast, there is no violation if the employer attributes the failure to an effort to comply with Board guidelines. *Hovey*, id. Citing *Hovey*, the General Counsel acknowledges that there is no violation here if Adams told Lott he could not be given a raise because it could be interpreted as an unfair labor practice or as a violation of the Board's rules. (Br. at 41.) Arguing that Lott's testimony on cross-examination was given only to please his employer in order to preserve his job, the General Counsel in effect contends that, in light of Lott's November 20 affidavit-version, recorded less than a week after the incident, Lott's version on direct examination should be credited.

Lott's November 20 version reports that Adams said his hands were tied. That, I find, is simply a shortened version of the description Adams gives in his testimony—that it would be an unfair labor practice for him to grant a pay raise at that time. In short, I credit both Lott and Adams. Thus, I find that the first reason Adams gave (before saying his hands were tied, that it could be interpreted as an unfair labor practice) was that he could not afford to give a raise because of the cost of fighting the Union's organizing campaign. Whether Adams then recalled advice from counsel the record does not disclose, but I find that Adams then added the lawful reason.

The first reason—cost of resisting the Union's organizing campaign—places the burden on the Union. That reason is illegal. The second reason is lawful. Perhaps it is instructive to observe that the first reason not only meets the memory rule of primacy, but also the memory rule of an understandable concept—money cost. Those memory factors apparently influenced Lott more than the more difficult concept which Adams then added as the second reason. Adams having poisoned his own answer with an unlawful first reason, Adco may not now escape liability on the basis that the second reason is lawful. Accordingly, I find that, by Adams' mid-November reply to Lott, Adco violated Section 8(a)(1) of the Act, as alleged.

C. *Allegations of 8(a)(3) Discrimination*

1. August 17, 1990 discharge of Raymond Langford

a. *Introduction*

Raymond Langford began working for Adco in mid-March 1989. Adco fired him on August 17, 1990. (1:50.) His termination slip states, ''Fired for solicitation.'' (G.C. Exh. 9.) The sole factual issue respecting Raymond Langford is whether he was a statutory supervisor. Owner Adams admits that the only reason Adco fired Langford was that he was soliciting for the Union. (1:41–42; G.C. Exh. 9.) Adco does not contend Langford's discharge was not unlawful, even if he was not a supervisor, because he violated Adco's no-solicitation rule. Thus, the no-solicitation rule itself does not figure in Langford's case.

Earlier I mentioned the October 31 DDE (Decision and Direction of Election, G.C. Exh. 3) and the November 15 Erratum (G.C. Exh. 4) in Case 15–RC–7553. In that representation case the Union, as the petitioner, sought to include the job foremen in the unit whereas Adco sought to exclude them as statutory supervisors. The job foreman class is there described as consisting of five electrical foremen. Four are named in footnote 6 (added by the Erratum): Bob Buie, Tony Goodwin, David Lewis, and Joe Lewis, with the identity of the fifth job foreman stated as not being clear from the record. Langford is not named in the DDE, as corrected. Neither is John Dewayne Newell who has been a job foreman since being hired, the second time, about June 1989. (2:404, 422, Newell.) Adams includes Newell when naming the job foremen in the outside staff of 14, a staff number prevailing at least since about late 1990. (2:363–364, 460.) Buie also names Newell. (2:379.) Thus, the missing name from the DDE, as corrected, may well have been Newell rather than Langford.

The placement of Jeff Lewis, the temporary project manager, also was disputed in the representation case. The Regional Director excluded Jeff Lewis from the unit as an electrical foreman. (G.C. Exh. 3 at 9.) It is clear that the Regional Director found Adco's electrical job foremen to be statutory supervisors and that he excluded them from the bargaining unit as a group falling within the statutory definition of supervisor.

b. *Applicable law*

Even if the DDE (as corrected) had named Langford among the excluded group of job foremen, the DDE is not controlling here on the issue of Raymond Langford's status as a statutory supervisor. Both parties recognize that fact by citing *Serv-U-Stores*, 234 NLRB 1143 (1978). The Board held there that in cases such as this (that is, not an 8(a)(5) testing of certification), a finding in the representation case

on supervisory status may be relitigated in the complaint case.

The General Counsel takes no position here respecting the job foremen as a class, and litigates only as to Langford. (2:309.) Adco takes the double-barreled approach that Langford is a statutory supervisor because (1) Adco invested job foremen as a class with statutory authority (2:314; Br. at 25), and (2) even in his own right Langford qualifies as a statutory supervisor. Quoting from *Serv-U-Stores*, Adco asserts that the Regional Director's finding should be accorded ''persuasive relevance, a kind of administrative comity.'' (Br. at 26.)

Section 2(3) of the Act, 29 U.S.C. § 152(3), defines ''employee'' broadly, with certain exclusions. Supervisors are one of the exclusions. Once it is shown that an individual works for an employer covered by the Act, any party contending that the worker falls within the statutory exclusion of supervisors carries the burden of persuasion on that issue. *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1073 (1985); *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985), modified on other point 794 F.2d 527 (9th Cir. 1986); *Purolator Products*, 270 NLRB 694, 706 (1984). Compare: *Ohio Masonic Home*, 295 NLRB 390 fn. 7 (1989).

Section 2(11) of the Act, 29 U.S.C. § 152(11), provides:

> (11) The term ''supervisor'' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The enumerated powers in Section 2(11) are to be read in the disjunctive. *NLRB v. McEver Engineering*, 784 F.2d 634 (5th Cir. 1986); *Amperage Electric*, 301 NLRB 5 (1991). However, possession of one or more of the stated powers does not convert an employee into a 2(11) supervisor unless the *exercise* of such authority is not of a merely routine or clerical nature, but requires the use of *independent judgment*. Section 2(11); *Electrical Workers IBEW Local 428 (Kern County Chapter NECA)*, 277 NLRB 397, 408 (1985); *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981).

If a person actually possesses the statutory authority, then he does not lose it by exercising it infrequently or even not at all. *Babcock & Wilcox Construction Co.*, 288 NLRB 620, 621 fn. 3 (1988); *Groves Truck & Trailer*, 281 NLRB 1194 fn. 1 (1986); *Opelika Foundry*, 281 NLRB 897, 899 (1986). Nevertheless, ''paper credentials'' must be accompanied by actual authority. *NLRB v. Security Guard Service*, 384 F.2d 143, 149 (5th Cir. 1967), and mere title and theoretical power are insufficient. *NLRB v. Southern Bleachery*, 257 F.2d 235, 239 (4th Cir. 1958), enfg. 118 NLRB 299 (1957). The status of an individual as a statutory supervisor, or not, is determined by his or her actual duties, not by the job title or classification. *Waterbed World*, 286 NLRB 425, 426 (1987); *Metallic Corp.*, 273 NLRB 1677, 1688–1689 (1985), enfd. on point 794 F.2d 527 (9th Cir. 1986). Thus, assignment of a title and mere theoretical authority does not confer supervisory status. *Amperage Electric*, supra. As the Fourth Circuit phrased it in *Southern Bleachery*, 257 F.2d at 239, quoting from *Southern Bleachery*, 115 NLRB 787, 793 (1956):

> To the extent that the 1950 instructions attempted to delegate to the machine printers power or authority beyond that of a craftsman, the absence, for all practical purposes, of the exercise of such authority negatives its existence.

Exercise of the authority which derives from a worker's status as a skilled craftsman does not confer supervisory status because that authority is not the type contemplated in the statutory definition. *Chicago Metallic*, supra at 1689; *NLRB v. Southern Bleachery*, 257 F.2d 235, 239 (4th Cir. 1958). As the Board wrote in *Southern Bleachery*, 115 NLRB 787, 791 (1956), ''This authority derives from their working skill and from their responsibility for the operation of a complex machine which requires a 7-year apprenticeship to achieve journeyman status as a machine printer. It is not the type of authority contemplated in the statutory definition of a supervisor; it is not the authority responsibly to direct other employees which flows from management and tends to identify or associate a worker with management.'' And id. at 792:

> The Board has therefore continued under the Taft-Hartley Act to treat craft employees as nonsupervisory despite the existence of recommendatory power over their helpers, believing that to do otherwise would be to attribute to Congress a result never intended.

Aside from the craft unit situation, if a person has the statutory authority of a supervisor, the fact he supervises but a single employee is immaterial. *Opelika Foundry*, supra.

Determination of supervisory status is a question of fact. *Monotech of Mississippi v. NLRB*, 876 F.2d 514 (5th Cir. 1989). The powers enumerated in Section 2(11) are termed the ''primary'' indicia. When the issue of supervisory status presents a borderline question, ''secondary'' indicia may be considered. *Monotech*, supra; *NLRB v. Chicago Metallic*, 794 F.2d 527 (9th Cir. 1986). Nevertheless, ''secondary'' indicia alone will not confer supervisory status under the Act. *John N. Hansen Co.*, 293 NLRB 63, 64 (1989); *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1080 (1985); and implicitly so held in *Polynesian Hospitality Tours*, 297 NLRB 228 (1989).

In these cases the Board has a duty to be alert not to construe supervisory status too broadly because the employee who is deemed a supervisor loses his protected right to organize, a right Congress intended to protect by the Act. *Phelps Community Medical Center*, 295 NLRB 486 (1989). *Bay Area-Los Angeles Express*, supra at 1073; *Chicago Metallic*, 273 NLRB 1677, 1689 (1985); and *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981), citing and quoting from *McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932 (9th Cir. 1981), and *Westinghouse Electric Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970).

c. *Facts*

(1) Company documents

Job descriptions are in evidence for electrical foreman (R. Exh. 6) and electrician (G.C. Exh. 18). Owner Adams testi-

fied that he prepared the one for job foreman in about 1984. (2:436.) Presumably he prepared the electrician's at the same time. The two are identical except for some five additional duties for the foreman. Thus, the first eight items of both read:

> 1. Provide safe work place for employees.
> 2. Enforce safety rules and company policy.
> 3. Insure that all work is in compliance with plans, specifications, national electric code, and local codes.
> 4. Be responsible for quality control.
> 5. Maintain good company image regarding trucks, job sites, and personal appearance.
> 6. Be responsible for starting work at 7:00 a.m., breaking 30 minutes only for lunch, and working until quitting time.
> 7. Insure that all materials, tools, and manpower have been requested to keep job progressing for a minimum of two days.
> 8. Return all unused material to shop.

Number 9 on the foreman's description directs the foreman to ''Maintain daily log and time sheet.'' The electrician's description does not have that duty. Both are to ''Help promote good morale.'' (10 on foreman's; 9 on electrician's.) Both are to ''Maintain proper documentation including change orders, extras, and receiving tickets.'' (11 and 10, respectively.) Only the foreman (item 12) is directed to ''Maintain proper crew sizes.''

The foreman's item 13 reads: ''Be responsible for terminating any apprentice or electrician working under you for continuing non-compliance with company policy after ample warning.'' The electrician's item 11 is almost identical, the difference being the absence of ''or electrician'' following ''apprentice.'' Adams testified that the electricians indeed have the authority to ''get rid of'' an apprentice. Even so Adams does not consider a journeyman to be a supervisor if he is not a foreman. (2:454–456.) Both classifications are to ''See that all tools and materials are picked up at the end of each working day by apprentice.'' (Items 14 and 12, respectively.) That concludes the electrician's list, but the foreman's list has three more duties: (15). Be responsible for receiving all materials at job site. (16). Be responsible for having safety meeting weekly. (17). Be responsible for having materials loaded for the next day, the afternoon before.

The *organizational chart* in Adco's company (or employee) handbook (G.C. Exh. 8 at 29) shows four lines of responsibility to the general superintendent. The shop is one. The field has three, simply describing the possible normal jobsite arrangements. The first is the electrical foreman/-electrician/apprentice. Next comes the electrical foreman/apprentice. The third and final is the electrician/apprentice. Adams confirms that the chart means that a (journeyman) electrician, with an apprentice, can be on a jobsite ''by himself.'' (1:40–41.) I understand Adams to mean that on some small jobs there may be no job foreman.

Superintendent Buie identified a single-page *Apprentice Evaluation Form* which Adco uses. (R. Exh. 7; 2:326, 377.) Seven questions inquire about punctuality, work habits, the foreman's rating of his quality and speed, and (7) ''Would you recommend this apprentice for a pay increase at this time? If yes, how much?'' A printed statement advises that the (foreman's) evaluation ''will be used in determining that apprentice's pay rate.'' However, ''His school work [apprentice school, apparently], attendance, and other factors will also be considered.'' A line is provided for the foreman's signature. The major problem here is that there is no contention Langford ever completed one of these forms, and no copy signed by Langford (or any other foreman) was identified or offered. The second problem inheres with the form itself, for it is clear that management will consider several other factors. Thus, this form, without more, hardly constitutes the ''effective'' recommendation specified in the statute.

Adco's evaluation form is not the evaluation form the foreman completes as to the apprentice for the ''ABC'' (Associated Building Contractors) apprenticeship school. Adco participates in the ABC school, and apprentices attend classes there 1 night a week on a 4-year training program. Adco pays one-half the cost of the course if they pass. (2:325, 448; G.C. Exh. 8 at 20.)

As I mentioned earlier in describing Adco's organization, the company/employee *handbook* (G.C. Exh. 8) refers at various points to employees' ''supervisor,'' a person who, Adams testified (2:436–439), is the job foreman.

The handbook advises employees to check with their supervisor if they have any questions. (G.C. Exh. 8 at 6, 21.) A grievance (''problem solving'') procedure is provided, with the supervisor being the first step. Id. New employees serve a 3-month probation. ''Near the end of this period, your Supervisor will discuss your performance with you. A decision will be made, in our Firm's discretion, about granting you regular employee status, extending your probationary period, or terminating the employment relationship.'' (G.C. Exh. 8 at 9.)

Breaks are scheduled at the supervisor's discretion. Id. at 10. If an employee desires to leave a jobsite or premises during working hours, he first must notify and receive permission from his supervisor. Id. Employees are to report any job injury or sickness to their supervisor, and are to present medical releases to their supervisor on returning to work. Id. at 12. To help prevent accidents, employees are to report ''to your Supervisor any condition that you believe is unsafe or unhealthy.'' Id. at 12, 22.

Equipment malfunctioning or needing maintenance is to be reported to the supervisor. Id. at 13. Vacations ''must be scheduled and approved in advance by your Supervisor.'' Id. at 17. Requests for a leave of absence must be presented to the supervisor. Id. at 18. Employees who are going to be tardy or absent are to notify their supervisor. Id. at 26.

Following the organization chart at 29, the handbook begins describing Adco's safety policy. A separate page, 31, is devoted to the supervisor's responsibilities. The text there begins, ''The supervisor represents the entire company to the employee.'' The final pages apparently were added after 1984, for the term used is ''foreman'' or ''job foreman'' rather than ''supervisor.'' Thus, the ''foreman'' shall check fire extinguishers weekly to ensure they remain fully charged. Id. at 37. Anyone violating a safety rule will be disciplined in the following manner. ''1. A verbal warning will be given by superintendent or job foreman.'' Id. at 38. For the second step in the progression, a written warning will issue—but there is no reference by whom. For a suspension (third step) and discharge (fourth step) the same holds true. Id.

The discipline described for safety violations is a separate provision from Adco's disciplinary policy and work rules fully described earlier in the handbook at 21–27. Although employees are there advised to address any questions about the standards of conduct and attendance to ''your Supervisor or Superintendent'' (id. at 21), the possible discipline—anything from an oral counseling to discharge—is not accompanied by naming which level of management may impose which form of discipline. Moreover, no provision states that a supervisor or job foreman may administer any of the forms, even an oral counseling, although authority by supervisors/job foremen to administer oral counselings seems to be implied from the document as a whole.

(2) Authority described

What the handbook fails to state, the job description for the job foreman, as earlier quoted, provides. Thus, item 2 empowers the foreman to enforce safety rules and company policy, and item 13 charges the foreman with the duty to discharge any electrician or apprentice, working under the foreman, who continues, after ample warning, to violate the rules. Owner Adams testified that the job foremen (as a class) have the authority listed in their job description (2:436). Buie testified that all the electrical foremen have the same authority (2:300). Adams agrees. (2:439.) And Buie asserts that the foremen actually perform the duties specified in the job description. (2:307.)

Buie (2:347–348) and Adams (2:452–453) testified that Langford possessed the same authority specified in the job description and by the other job foremen. The irony is that this apparently confirms for the journeymen electricians that they, as their job description states, are empowered—indeed, expected—to fire any apprentice who, after ample warning, fails to comply with company policy. Even if that authority applies only to the small jobs where the journeyman is not a job foreman, the job descriptions ostensibly render nearly everyone a statutory supervisor. For the most part, only the hapless apprentice would be protected by the Act.

Foreman John Dewayne Newell testified that about 6 years ago he fired apprentice Marty Ellington from a 6-man crew because he was talking rather than working, and that he fired apprentice Neal Petigrew about 4 months before the hearing. (2:405, 427–429.) The record does not show whether Newell actually ''vetoed'' the helpers from his crew, leaving it to the superintendent to transfer or to discharge. I note Newell's revealing statement that Buie only ''sometimes'' honors his request to remove someone from his crew. (2:242.) I find Newell's testimony about discharging employees to be unreliable. Serviceman Bill Serber testified that when he was a job foreman, in the days when Danny Steagall was the superintendent, he discharged Mel Windham for poor work performance. That was some 4.5 years ago. (2:385–386.) As earlier noted, the General Counsel did not seek to litigate as to the class of job foreman, but only as to Langford. Thus, the Government made no attempt to rebut evidence about the class.

Adco holds *supervisor meetings* where Buie confers with the job foremen. Adams attends these meetings on occasion. (2:308.) Buie testified that he holds these meetings with all job foremen, including Langford, about three to four times a year. At these meetings, Buie testified, he reports on jobs, on how the Company is doing, and discusses some of the responsibilities of the foremen. (2:308–309, 367–368.) Newell testified that at some of these meetings Adams and Buie told the foremen to ''weed out'' the ''deadwood.'' Newell saw Langford at three or four, perhaps more, of these meetings, he testified. (2:413, 417.) Initially Newell asserted that the meetings are held each month, or 12 a year, with 16 or 17 such meetings while Langford was employed. Later, however, Newell modified this to say that Langford attended all those Newell did, that the meetings were not always every month, and that while they both attended at least 4 of the meetings, the number definitely was not 16. (2:412, 418–420.) Newell tends to exaggerate, and I find him to be unreliable.

Adams agrees that at some of these meetings he has told the foremen to ''weed out'' the ''deadwood,'' and those who would not make good electricians. (2:442.) Langford testified that the only such meeting he attended was on May 15, 1989, as evidenced by his daily log for that date (R. Exh. 5), and that it followed a general employee meeting about insurance. (1:147–149, 151–152.) He asserts that at this foremen's meeting Adams did refer to apprentices who the foremen did not consider good prospects for making electricians. Adams asked the foremen to let him know about these persons so he could ''do something else with them.'' (1:148–149.) I credit Langford, a persuasive witness.

(3) Raymond Langford

(a) *General*

Langford, 45 years old, started his career in this field as an electrician's helper 28 years ago. (1:97.) His Adco job application (R. Exh. 3, signature page not included) reflects that he has a master's license. He applied for the position of ''foreman.'' (R. Exh. 3; 1:134–135.) Langford actually interviewed first, on March 16, 1989, with Adams who said he wanted Langford to come to work for him. (1:50–51.) There is uncertainty in the record concerning his first day at work, and dispute about the job description. Langford recalls that he started work the next day, March 17. He met with Buie, filled out an application form, and Buie gave him a copy of the handbook and a few items to ''read through.'' Buie went over some of the documents, but ''skipped over'' some of the items. Buie told Langford to read the materials and be familiar with them, but a job description was not contained with the papers. Buie never discussed with him any authority, such as any authority to discharge. However, Langford concedes that he was hired as a foreman to ''run work'' for Adco. (1:51–54, 135.)

Buie testified that Adams alerted him to Langford's arrival, that Adams essentially had hired Langford as a job foreman, that Langford completed an application with Buie and Buie went through the new-hire orientation with him, including the handbook ''almost page by page,'' but not all 17 items on the job description, although he did give Langford a copy of the description. (2:347, 351–353.)

A block for ''company use'' on Langford's application form reflects that he was hired on March 16, 1989, a Thursday, with a starting date of March 20, a Monday. Apparently completed by Buie, who signed the block, Buie checked the item showing Langford's job classification as ''Electrician, Supervisor.'' (R. Exh. 3.) Langford apparently had been referred to Adco by Mississippi's employment security office,

for on April 4, 1989, he signed one of their forms affirming that he had been hired as an ''Elec. Foreman'' with a starting date of ''3–20–89.'' (R. Exh. 4; 1:136–139.) To the extent that it matters, I find that Langford's first work day was on March 20, 1989, although he possibly met with Buie and filled out the application on March 17. I credit Langford that Buie did not tender him a copy of the job description.

Langford names and describes the *major jobs* he worked on in his 17 months at Adco (mid-March 1989 to mid-August 1990). Most of the time it was just Langford and an apprentice (different ones) working when Langford had the blueprints and was in charge. At times Buie would determine when extra men were needed and send them over, Langford testified. For example, Langford's first job was at JMS Trucking, and it lasted 3 months. Except for two occasions when Buie sent help, it was just Langford and an apprentice. On one occasion Buie sent out two others to assist. They were there for 3 to 5 days. On the other occasion Buie sent four or five to help pull wire for 1 or 2 days. (1:55–56, 90.)

Langford testified that when he had the blueprints (was in charge of the job) he, as the more qualified person, directed the work of his apprentice. (1:135–136.) There is little evidence in the record about the relationship on Langford's jobs (when he had the blueprints) on those few occasions when one or more other crews (consisting of a job foreman and an apprentice) were sent to the job to help. With a foreman's level of experience being high, presumably either Buie or Langford assigned them a section of the work and that was it.

As for *overtime*, on jobs where Langford was in charge (normally just he and an apprentice), he once or twice held his crew over for 1 or 2 hours to finish the work. But that was to save trip time in accordance with Buie's preset policy. Saturday overtime was at Buie's direction. (1:86–87.) Even foreman Newell testified that management normally made the decision respecting overtime. Only two or three times, ''very rare,'' has he decided on his own without clearing with Buie. (2:425–427.) Of course, Newell may be a statutory supervisor. His status is not litigated here.

Langford and apprentice Renfroe worked at a Hughes Aircraft job in Forest, Mississippi, when foreman Newell was in charge of the job. This was in the period of mid-July to early August 1990. Journeyman Cory D. Williams rode to the jobsite with David Lewis. Although, as earlier noted, Buie and Adams list Lewis as one of the job foremen, Williams knew him only as a journeyman, the same as he knew Langford. Williams observed that Langford worked pulling wire and giving directions on to his apprentice, ''Sonny'' Renfroe. Williams likewise gave directions to his apprentice, Neal Petigrew. (2:278–282.)

On that same Hughes job in Forest, Eric Muncy worked as an apprentice for foreman Newell. Muncy describes an occasion, apparently in early August, when the crews were working Saturday overtime. About 2:30 p.m. Newell told Muncy that Muncy and two other apprentices plus Langford would work later than the other 12 or so employees who were working that day. Although Newell did not say who would be in charge of the four remaining in Newell's absence, Muncy assumed it would be Langford because he was the only journeyman remaining. Muncy, Langford and the others pulled computer or telephone wire until 5:30 p.m. Although Langford gave basic instructions, pulling wire is not skilled work, Muncy testified. (2:238–241, 267–268.)

Buie (2:321) and Adams (2:445, 465) testified that the job foreman is the one who determines the staffing level. He conveys that need to Buie who supplies more men, or finds a place to transfer those no longer needed. One reason for this is the job completion bonus. Only the job foremen are eligible to receive the job completion bonus, and then only if the job is completed timely and under budget. (2:304–305, 373, 376, 441.) As Buie (2:322) and Adams (2:445) testified, if too many persons are working on the job the budget will be exceeded. Langford admits he was told at his hiring about the completion bonus policy, but he never received one. (1:142–143; 2:331.)

Foremen receiving a bonus have the discretion whether to share it with anyone on their crew. The common practice is for them to do so. (2:394–395, Serber.) The handbook does not mention a job completion bonus. It does describe a bonus plan for which all regular full-time employees are eligible. It is paid at Adco's discretion, and when business warrants, ''to individuals judged as responsible for company profitability.'' (G.C. Exh. 8 at 15.) That bonus is in addition to Adco's profit sharing plan, in which employees become 100 percent vested after 10 years. Id.

Langford's second job was at the United Way office where he worked intermittently for 6 months with an apprentice. Three times the work force there expanded when Buie assigned extra people. The largest the force became was six, with three foremen and three apprentices there for a day or two. The longest time any extra help worked was for about 2 weeks when an additional crew of a foreman and apprentice was there. (1:58–60.)

Langford worked several Hughes' jobs. One was in July 1990 (telephone and data system). Just he and an apprentice worked there. It was the second of only two Hughes' jobs where he was in charge. (1:64–65.) On one Hughes' job, installing lights in a mezzanine area, Job Foreman Newell was in charge. At one time there were four crews on the job, four foremen plus four helpers. Langford worked there for a week or two in May or June 1990. (1:75–76.)

The other Hughes' job where Langford was in charge lasted just 2 days and involved working on a circuit pump. The mechanical contractor for the job was Zia Corporation. With Langford were Doug McDonald, an electrician, and Orby Renfroe, an apprentice. (1:74, 140.) On all his jobs Langford filled out the timesheets for his crew, and, when more than one crew was present, the other foreman did the same for his crew. (1:87; 2:326.)

Buie testified that he spends about half his time visiting the jobs where he confers with the foreman, giving him the paychecks to distribute, ascertaining whether the foreman needs anything, generally checking the job, and possibly talking with the job's owner. (2:303–304, 328.) Langford testified that at first Buie visited his jobs two or three times a week, but then that dropped off to once a week. Adams visits on occasion. (1:98–100.) Apparently at least some of Langford's time was spent on jobs outside Jackson. Adams testified that he spends only 1 to 2 percent of his time on the jobs, and when he is there he devotes most of his time to meeting with the general contractor or owner. (2:440–441.)

Langford spent 90 percent of his time working with the tools, and the other 10 percent on paperwork and explaining things to his apprentice. (1:91–92.) Buie testified that on small jobs of just the foreman and his apprentice the foreman may work with the tools 85 percent to 90 percent of the time, and on larger jobs with a lot of people under him he may not work at all with the tools. Buie could not name a job where Langford did not work with his tools. (2:329, 362.) To the extent Buie's version differs from Langford, I credit Langford who testified more persuasively.

Turn now to some specific incidents which, Adco contends, reflect Langford's exercise of statutory indicia.

(b) *Specific*

1. Hiring

Adco contends that Langford effectively recommended the hiring of two individuals, journeyman Doug McDonald and apprentice Ricky Chappel. According to Buie, he hired McDonald and Chappel based on the recommendation of Langford who said he had worked with them. Although Buie went through a new-hire orientation with each one, his decision to hire was made based (solely is implied) on Langford's recommendation. (2:310-311.)

Langford testified that in about May 1990, while on a Hughes job that was shorthanded and being run by Foreman Newell, he recommended Doug McDonald either to Buie or to Adams. Langford had worked with McDonald in previous years and knew him to be a good electrician and a hard worker. After a call from McDonald that he was looking for work, Langford reported these facts to Buie or to Adams and recommended him as someone worthy if they needed to hire. McDonald came out, spoke with Adams or Buie, and was hired. (1:76-81, 139-140.) McDonald later worked as a journeyman on Langford's crew on the 2-day job working on a ground circuit pump for Zia/Hughes. (1:74, 140.) Langford did not address whatever recommendation he made as to Chappel. (Testifying for the General Counsel before Buie testified during Adco's case-in-chief, Langford was not called in rebuttal.) The record does not disclose when Chappel was hired.

I find that Langford made his recommendations to Buie as a skilled craftsman referring and recommending others from a pool of qualified craftsmen. In the McDonald situation, Newell, not Langford, was the job foreman. Even had Langford been the job foreman, Adco's own job description (R. Exh. 6) contains nothing about the foreman hiring or recommending for hire. Initially responding that he did not tell Langford (at his new-hire orientation) that Langford had authority to recommend for hire, Buie then modified that to say he does not recall. (2:354.)

I do not believe Buie when he testified, in effect, that he hired solely on the recommendation of Langford. Buie did not testify persuasively. I find that, although Langford's recommendation was an important factor, Buie also made his own evaluation during his interviews of the two applicants. If a worker were converted to supervisor merely by recommending someone he knows to be skilled, even if the employer did no independent review, then any experienced rank and file worker would be converted to a statutory supervisor. Such is not the law because the worker is not exercising authority, in the interest of the employer (part of the worker's job function), plus independent judgment as contemplated by the Act.

2. Vetoing/discharging

Adco next contends that Langford exercised his authority to ''veto'' two apprentices—Gary Worzalla and Frank Allen—from his crew, actually discharging Allen. The ''veto'' power, Buie testified, is the foreman's authority to remove someone from his crew and send him back to the office for reassignment or other action by Adco. Langford ''vetoed'' Worzalla from the JMS Trucking job in the summer of 1989. (2:307, 315, 378.) Shortly after he reassigned Worzalla, Buie testified, Worzalla quit. (2:358.) Langford acknowledges sending Worzalla, who had no electrical experience, back to the office for reassignment. Although Langford had trouble getting Worzalla to follow his work instructions, he did not recommend that Worzalla be terminated. (1:56-57.)

Frank Allen, Langford testified, had some experience, and he did not follow Langford's work instructions on the United Way office job. When Langford told Allen that Allen was not doing the work the way Langford had instructed, Allen ''bows up, and we have a few words. And that is when I told him to get his tools, that I would take him back to the shop.'' (1:60–61.) Buie testified that Langford had complained earlier to him about a personality conflict with Allen and that Allen was not a good worker. When there is simply a personality conflict, but the apprentice is a good worker, Buie will try to swap apprentices on the crews. (2:356–357.)

On this occasion Langford went to call the office to report that he was bringing Allen back to the shop. (1:60.) Buie confirms that Langford made the call. Understanding that to mean Langford was terminating Allen, Buie filled out ''the termination sheet'' that Langford had terminated Allen and turned it in with the timesheets. Conceding that on ''vetoes'' by other foremen when conflicts arose he did not assume the foremen had fired the apprentices, Buie testified that here he ''took it'' that Langford was terminating Allen because Allen was insubordinate and not a good worker. (2:318, 355–356.)

While Langford was calling Buie, Allen got in Langford's company van and drove to the shop. (1:60; 2:318, 459.) Serviceman Serber (2:387–388, 396–397) and foreman Newell (2:405–406) testified that Langford commented later on the United Way job that he had fired Allen. Confirming (on cross-examination) an account in his pretrial affidavit, Adams testified that in the shop Langford told him, in the presence of employees, that he had reprimanded Allen and threatened to let Allen go ''if Allen continued.'' When Allen became belligerent Langford told him to call someone to come get him. (2:456, 458, 466–467.)

Testifying that he did not intend to fire Allen (although he would have made that recommendation), and did not fire him, Langford concedes that he may have told others that he had done so. (1:61, 149.) I find that Langford said that to Serber, and to Newell, and essentially that to Adams, but that he did not tell Buie he was terminating Allen or that he wanted Allen fired. Buie, I find, terminated Allen because Allen did not fit Adco's profile of an apprentice eligible for reassignment.

3. Evaluating for pay raises

Earlier I described Adco's bland ''apprenticeship Evaluation Form.'' Buie (2:326) and Adams (2:448–449) testified that the foremen evaluate their employees for pay raises and can ''veto'' a raise for an employee. Although Buie asserts that Langford ''had evaluated apprentices,'' and ''knew that he had the authority to recommend raises,'' he admits ''I can't recall specifically when I asked him to evaluate an apprentice, though.'' He further admits that he is not sure Langford ever filled out a form on an apprentice. (2:360.) I find that any evaluations Langford did were for the ABC apprenticeship school, that he never completed an Adco form for an apprentice or journeyman and was never asked to complete one during his 17 months at Adco.

However, Buie testified, in the summer of 1990 Langford did orally recommend that his apprentice, Orby Renfroe, be given a pay increase. (2:360–361.) Langford acknowledges that in mid-July 1990 he told Buie that he thought Renfroe was doing a good job and needed a raise. Langford did not recommend a specific amount, and Buie was noncommittal. Nothing happened until a month or so later when apparently all the apprentices got a raise. Renfroe's was 50 cents per hour. (1:94–95.) Buie does not explain how Langford's recommendation as to Renfroe figured, if at all, in the overall pay raise a month or so later for all the apprentices. As Buie testified only that Langford had recommended, and omitted describing what weight, if any, he gave that recommendation, I find that Langford's recommendation as to Renfroe carried little, if any, weight.

(c) *Other indicia*

Already I have mentioned some of the secondary indicia—the handbook provisions, the foreman's job description, the foreman's title, the apprentice evaluation form, eligibility for job completion bonus, completion of timesheets for crew, and distribution of paychecks to crew. These indicia at least are designed to indicate supervisory status. The evaluation form, however, suggests a lack of supervisory status as to Langford because the only one in evidence is blank, and there is no evidence that Langford ever submitted one. Supervisory meetings I have mentioned. Because Langford attended only one, this factor indicates a lack of supervisory status. Adams' request at that meeting for the foremen to let him know if their apprentices do not appear to be good prospects for making electricians merely confirms the status of Langford as a skilled and experienced senior electrician reporting his opinion on the aptitude of his apprentices. Adams concedes as much by asserting that the foreman ''is to train, train apprentices.'' (2:448.)

There are other examples. Langford was furnished a company van (1:92–93, 140–141), and he was second only to David Lewis as the highest paid foreman. (1:97–98; 2:322–323.) The ratio of supervisors to workers is another secondary factor that the Board has considered in the past. Recently the Board has expressed a disinclination to consider ratio as a useful factor, *Phelps Community Medical Center*, 295 NLRB 486 fn. 15 (1989):

> Even if it were possible to conclude that a 1 to 18 ratio is unreasonable and a 1 to 3 is reasonable, it would not change our conclusion because such a ratio is not a factor that the Act directs us to consider. It is not the province of the Board to determine the ''proper'' number of supervisors. Sec. 2(11) determines the factors that, in conjunction with the exercise of independent judgment, indicate supervisory status for the purpose of this Act, and it is the Employer who determines how its business is operated and what kind of responsibility to give to its various employees.

Langford discusses safety with his apprentice (1:87–88), and Langford orders and return materials. (1:92; 2:327, 447.) Buie (2:329) and Adams (2:446) testified that the foreman must closely coordinate the installation of materials with the work of the other trades. Langford testified that the logical progression of all the work is preset by the blueprints and by a ''job progress.'' (1:92.) Moreover, Adco has project managers, or estimators, who Adams classifies as management. The appear to have a substantial role respecting material purchases even if the foreman is present at the preconstruction meeting. (2:435, 447–448, 465–466.) Moreover, as I have summarized, Buie visits the jobs once a week and confers with the owner and, presumably, the general contractor. Adams sometimes visits and also confers with the general contractor and the owner. What coordination is left for the foreman, I find, is simply that expected of a skilled craftsman who is the senior journeyman at the jobsite.

Other than the company van furnished to foremen and the foremen's eligibility for a job completion bonus, all other benefits are the same for Adco's employees. (1:95–97.) Buie testified that the foremen have keys to the crew room and to the gate. (2:324.) Even if that is true for the other foremen, Langford did not have these. (1:94.) Finally, the foremen have no separate breakroom from the other employees they work with (1:98), and the foremen wear no distinctive clothing, hats, or insignia marking them as separate from the other employees. (1:90.)

(d) *Analysis and conclusions*

I find that Adco has failed to carry its burden of showing that foreman Raymond Langford was a statutory supervisor. The specific evidence bearing on the primary indicia is limited. One example relates to Langford's recommending that journeyman Doug McDonald and apprentice Ricky Chappel be hired, and to Langford's authority to ''veto'' someone, normally an apprentice, from his crew. As I have summarized, I found the evidence showed that Langford's role was nothing more than that of a skilled craftsman recommending persons from a pool of capable workers, and that Buie made his own evaluation of whether to hire them. Thus, this factor does not indicate supervisory status as to Langford.

The ''veto'' power fares no better because, at least as to Langford, it is nothing more than the skilled craftsman's authority to send back to the office any crew member, normally an apprentice, whose job performance or conduct is causing problems. The decision at the office on whether to reassign, suspend, terminate, or whatever, is that of Buie or Adams. In the two instances involved here, Gary Worzalla and Frank Allen, superintendent Buie, I have found, made the decision to reassign or, in Allen's case, to discharge.

The record is unclear whether the ''veto'' authority is the same or different from the job description's termination authority. A nonforeman journeyman has the same authority on

those infrequent occasions when he is in charge of an apprentice. This factor, I find, fails to indicate that Langford had supervisory status.

Langford directed the work of his apprentice, and apparently that of a journeyman on those infrequent occasions when Langford's crew had more than Langford and an apprentice, but this was from his position as a skilled craftsman. Overtime was controlled by Buie's preset instructions. Thus, the directing work factor does not indicate supervisory status.

Finally, evidence respecting Langford's recommending a pay raise in the summer of 1990 for apprentice Renfroe is ambiguous. The evidence can be interpreted as showing that Buie ignored Langford's recommendation, or that Buie carried it back to Adams and they decided, a month later, to give all apprentices a raise. The latter event shows that Langford's recommendation was equivalent to an employee's dropping a note into an employee suggestion box. In short, none of the primary indicia reflects supervisory status as to Raymond Langford.

Turning now to the secondary indicia, I observe again the Board's admonition that secondary indicia alone will not satisfy Adco's burden here. *John N. Hansen Co.*, 293 NLRB 63, 64 (1989). Moreover, the secondary indicia mentioned, including such matters as handling timesheets, conducting safety meetings, or ordering materials, are clerical or otherwise of only routine authority not requiring the exercise of independent judgment. *Hansen*, supra; *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). Thus, the secondary indicia fail to carry Adco's burden.

In finding that the evidence falls short of establishing Raymond Langford to be a statutory supervisor, I am mindful not only of the expressed concern that the Act is not to be construed too broadly, lest a person be denied employee rights the Act is designed to protect, but also the correlative question: Would my finding be the same if Langford stood accused of interrogating, threatening, and discharging in violation of the Act? The facts dictate a yes answer. Accordingly, as Langford was an employee whom Adco's owner and president admits discharging because of his union activities, I shall order Adco to offer Raymond Langford immediate and full reinstatement and to make him whole, with interest.

2. September 17, 1990 discharge of Eric Muncy

a. *Introduction*

Complaint paragraph 12 alleges that Adco terminated Eric Muncy about September 17, 1990. Adco admits that, but denies terminating Muncy because of his union activities.

At the time of his testimony Muncy had just begun his second year in the Union's joint apprenticeship school. Muncy testified that he worked for Adco from July 26 to (Friday) September 14, 1990. (2:235–236, 247–248.) During that time he was laid off on August 24 for 1 week from Adco for lack of work. (2:249, 268.) Muncy signed a union authorization card at the union meeting of Sunday, August 12. (1:110; 2:252–253.) As shown earlier, Muncy's name is one of the nine listed on the letter Business Manager Tucker delivered to Adco on August 14. Thereafter Muncy openly displayed his support of the Union, including wearing a union organizer badge (G.C. Exh. 17) and union ball cap. (2:254–255.)

From his late August layoff, Muncy returned to work in early September still displaying his union insignia. (2:255–256.) That first day back Muncy was assigned to work at McCarty Foods in Forest, Mississippi, where he worked until his discharge the morning of Monday, September 17. (2:249, 260; G.C. Exh. 10.)[8] As we see in detail later, there is some discrepancy is the record concerning the reason(s) advanced for Muncy's discharge. The principal one or ones relate to Muncy's failure to work overtime on Saturday, September 15.

b. *Eric Lott becomes leadperson*

David Lewis was Adco's foreman on the McCarty Foods job before Muncy arrived. Eric Lott had been working as his apprentice. Muncy and Cory Williams were added to the job, with Muncy being an apprentice and Williams a journeyman. (2:249, 269, 276.) Williams had joined Adco on July 11. (2:278.) Lewis injured his back the weekend before Muncy arrived at the job, and Lewis did not return to work until Monday, September 17. (1:157; 2:250, 335.) During the 1-week absence of Lewis, apprentice Lott, Buie testified, functioned as a leadperson, with just Lott, Williams, and Muncy working at the McCarty job. (2:335.) Lott confirms that he ran the job in the absence of Lewis, although no one told him to do so. (1:157, 179–180, 187.) At the time of the McCarty job Lott was a fourth-year apprentice and had been working at Adco since January 1988. (1:155–156, 186.)

McCarty Foods, Buie testified, processes chicken. The plant usually operates all week through Saturday. Construction consisted of an expansion, adding a breakroom and office space. Adco could not run a ''feeder'' over the work area to the construction when McCarty's employees were processing the food. Accordingly, Buie testified, when McCarty canceled work for Saturday, September 15, it was imperative that Adco work that day. (2:332, 348–349.)

Sometime between Tuesday, September 11, and Thursday, September 13, Buie told Lott that the crew would need to work overtime that Saturday, September 15. Ott relayed this information to Muncy and to Williams. The actual date and phraseology are disputed, but it is clear that no later than Thursday Muncy and Williams were alerted. Both Muncy and Williams told Lott that they could not work that Saturday. Lott testified that Muncy said it would be a cold day in hell before he would work that Saturday, and that if Buie asked him he would just laugh in his face because he had to work on his car to get it ready for a vacation he had planned. (Without contradiction Muncy testified that about mid-August Buie had essentially approved Muncy's taking off work 3 days beginning Wednesday, September 19, for a vacation trip to Florida. (2:250–251.) Williams said he had plans to visit an aquarium in New Orleans. Lott concedes he gave no warning of discipline if they did not work. (1:162–163, 177.)

[8] Although the transcript renders the town's name as Forrest, the atlas shows that to be a county about 90 miles southeast of Jackson. Forest is a town about 50 miles east of Jackson according to the Rand McNally atlas. Moreover, Adco spells it Forest. (Br. at 11.) That is the spelling I shall use.

c. *Friday, September 14, 1990*

When Buie delivered the paychecks to Lott the afternoon of Friday, September 14, he asked Lott if everyone was set to work that Saturday. Lott informed him that Muncy and Williams said they had other plans. Well, Buie said, Lott had planned to go to a ballgame but had canceled his plans. ''Tell them be here,'' Buie instructed. When Lott distributed the paychecks to Muncy and to Williams he told them that Buie said for them to ''be here tomorrow.'' Muncy repeated his cold-day-in hell remark, but Williams, Lott testified, uttered very abusive language. (1:164–165.) Muncy denies that Lott told them Buie said ''Be here,'' and claims that Lott quoted Buie as asking that they work. (2:273.) Williams acknowledges that Lott relayed a ''Be here'' message from Buie. (2:290.) Crediting Lott, Buie, and Williams on this point, I further find that no disciplinary consequences for any failure to work Saturday overtime were described or conveyed to Muncy and Williams.

Apparently rather shaken by Williams' outburst, and fearing that he might react in a manner he later would regret, Lott told the two, ''Let's go,'' and the three left work that Friday around 3 p.m. Lott logged all their timesheets as leaving at the regular quitting time of 3:30 p.m. (1:167.) Buie testified that he returned to the job about 3 p.m. to 3:05 p.m. and discovered the three were gone. McCarty's guard told him the three had left 5 to 10 minutes earlier. (2:339–340.) That Saturday neither Muncy nor Williams worked. Lott joined with several others who were sent (foreman Tony Goodwin) or volunteered to work Saturday overtime at the McCarty jobsite. (1:165, 167–168; 2:337.)

d. *Eric Muncy discharged September 17, 1990*

On Monday morning, September 17, Buie telephoned foreman David Lewis and told him to send Williams to the shop. Buie was firing Williams for ''cussing on the job.'' (1:158, 167; 2:291.) Williams was one of the nine named on the Union's August 14 letter to Adco. He and the other three on the McCarty job, including foreman David Lewis, wore union insignia, although not on McCarty's premises. McCarty Foods apparently had expressed disapproval and Tucker, the Union's business manager, to avoid problems for the men, suggested they not wear the insignia on McCarty's premises. (1:178–179, 186; 2:269.) The complaint does not attack the discharge of Cory Williams.

After Buie discharged Williams, Lewis relayed a message from Buie to Muncy that Muncy was fired for not working the previous Saturday. Because Muncy had no transportation, Buie drove to the jobsite to get him around 11 a.m. (1:167; 2:260, 340.) Buie asserts that when he arrived at the jobsite he asked Muncy why he had not come to work. Because Muncy had told Lott that he would be unable to be there, Muncy replied. Did Lott tell Muncy that he was to be there, Buie asked. Muncy did not answer, Buie testified. (2:339–340.) Muncy was not called as a rebuttal witness.

As they drove back to Jackson, Muncy testified, Buie asked why Muncy had not called in. Because, Muncy replied, Buie already knew. Muncy still should have called, Buie responded. Why had Muncy not called him on Friday afternoon, Buie inquired. Because Buie would have been gone, Muncy answered. Why not call him at home, Buie persisted. Because Muncy did not have Buie's home number, Muncy replied. (2:260–261.) Buie does not challenge this account.

Buie testified that as they drove back to Jackson he asked Muncy what time they had quit work the previous Friday. At 3:30 p.m., Muncy answered. When Buie said he had come to the job at 3:05 p.m. and no one was there, Muncy said he doubted that. Buie asked if he doubted the fact or whether Buie had witnesses. Muncy said he had witnesses, too. (2:340–341.) Buie confronted Lott the next day, Tuesday, about the matter, and Lott admitted they had left early, possibly at 3 p.m. Buie told Lott that if he had lied he was prepared to fire him. (2:341.) Lott confirms this, except that, in response to a leading question, Lott testified that the conversation occurred on Monday. (1:181–182.)

The termination form (G.C. Exh. 10) which Buie completed for Muncy on September 17 (obviously after the ride back to Jackson with Muncy) gives as the termination reason:

> Missing work Sat. without letting me know. Lying about the time he worked Friday 9–14–90.

Adams testified that he discussed Buie's decision to discharge Muncy with Buie, and that the reasons stated on the form are the *only* reasons Muncy was fired. (1:42–43.) (Emphasis added.) I find that Adams and Buie, aside from any earlier discussion, discussed the matter that afternoon after Buie had transported Muncy back to Jackson.

Lott testified that when he spoke to Buie on Thursday discussing the job, and Buie mentioned the overtime for Saturday, Lott also reported that Muncy and Williams were not working to capacity. Lott asserts that he orally reprimanded the two that week because of their (undescribed) performance. He assertedly discussed these unspecified shortcomings with Buie in their Thursday telephone conversation. (1:160, 175–176, 180.) Buie testified that Muncy's union activities had nothing to do with his discharge (2:345–346), and that even aside from Muncy's no-show on Saturday, Buie would have fired him for the misconduct he learned about after he already had decided to fire him. The other misconduct, Buie asserts, was: (1) leaving early on Friday, (2) lying about it, and (3) poor job performance for ''the whole week that they had worked there.'' (2:346–347.) No specifics are given to support the allegation of poor job performance.

Both sides offered evidence of other examples of how overtime was handled. The General Counsel adduced evidence concerning foreman Newell's handling of overtime at the Hughes Aircraft job, also in Forest, Mississippi. Williams testified that on two occasions, once in July and once in August, Newell told him to ''be there'' for Saturday overtime. Although Williams did not show for the overtime work, no discipline followed. (2:282–287.) Lott described a similar instance in July, except he quotes Newell as saying ''everybody that can, be here.'' Because he needed time off during a painful divorce, Lott did not report to work. The following Monday Newell orally counseled him about the need for everyone to pull together at work despite personal hardships. Lott describes the Hughes job as bigger (more personnel) than the McCarty job. (1:170–174, 183.) The record confirms Lott.

Buie (2:342–344) and Newell (3:408–410) describe an overtime incident in May at the Hughes Aircraft jobsite in

Forest in which Buie, responding to an emergency situation, told Newell that the crew would have to work late that day. Newell, apparently a little later, informed Buie that apprentice Ricky Chappel was refusing to work the overtime. Buie personally went to Chappel and warned him that if he left rather than remaining to work overtime he could ''stay gone.'' Chappel left and never returned. Buie testified that anyone who ever refused his orders in these circumstances to work overtime was fired.

e. *Analysis and conclusions*

Finding, as I do, Adco's reasons for discharging Eric Muncy to be pretextual, I find merit to the Government's allegations.

As I have found, Lott relayed Buie's ''tell them to be here'' message to Muncy and Williams. Nevertheless, the fact remains that Lott informed Buie that Muncy and Williams said they had other plans and would not be there to work on Saturday. Unlike the similar situation on the Hughes Aircraft job in May when Buie personally confronted Ricky Chappel, here Buie—although at the jobsite to deliver the paychecks, as he had been at the Hughes job—failed to confront Muncy and Williams. If anything the situation here called more for Buie's personal intervention than in the Chappel situation. John Newell was a general foreman on the Hughes Aircraft job. (2:408–409.) Buie easily could have relied on general foreman Newell to notify Chappel that he must work overtime or ''stay gone.'' Indeed, Buie asserts that Newell, as the general foreman, ''runs the job; it is his job to run. He runs it as he sees fit.'' (2:345.) Yet Buie personally confronted Chappel.

By contrast, Lott was merely an apprentice, not even a journeyman, not a foreman, and certainly not a general foreman. He was far below Newell's status. Yet Buie chose to relay messages through Lott rather than to personally confront Muncy and Williams. Buie knew that Muncy wanted to prepare his car for a vacation which Buie essentially had approved several weeks earlier. Buie's failure to speak to Muncy and Williams suggests that Buie had a different motive from any managerial desire to simply relay instructions through ''leadperson'' Lott. That different motive, I find, was to seize this occasion as an opportunity to fire them because of their open support of the Union.

Turn now to the stated reasons for the discharge. Muncy understood foreman Lewis to say that Buie was firing Muncy for not working Saturday overtime. (2:260.) When Buie arrived at the jobsite 2 hours or so later to pick up Muncy, Buie's first concern was why Muncy had not reported to work. As they drove to Jackson Buie's concern shifted to asking why Muncy had not called him—implying that had Muncy called then perhaps the discipline would have been no greater than the oral counseling Newell had given Lott.

Adco's official reasons (confirmed by Adams at the hearing as the only reasons, 1:43–44) are those stated by Buie on the September 17 termination slip (G.C. Exh. 10.) Buie obviously prepared the form after transporting Muncy back to Jackson, for it was not until the ride that Buie learned Muncy was ''lying'' about the time the crew had left that Friday. The first of the reasons stated on the form adopts the concern Buie had expressed during the trip—missing work on Saturday ''without letting me know.''

There is no evidence Buie had ever notified employees to call him personally rather than conferring with their foreman or, in this instance, their ''leadperson.'' Indeed, Adco's evidence in Langford's portion of the record is just the opposite—that employees are to take all matters to their job foreman short of using Adco's ''open door'' option. Thus, Buie's first stated reason is based on a rule tailored just for Muncy. This stated reason demonstrates that Adco was seeking to select a reason that it perceived as more likely to withstand scrutiny than a strict interpretation of Adco's overtime policy. Adco's handbook does not specify that overtime is mandatory, but it does provide that Adco will establish the overtime hours and assign the employees. (G.C. Exh. 8 at 10.)

Owner Adams concedes that he and Buie discussed the matter, asserting that it was Buie's decision to terminate Muncy. (1:42) I find that they conferred (not necessarily the first time) about the matter after Buie transported Muncy back to Jackson and before Buie completed the termination form respecting Muncy. This unprecedented first reason, I find, was fashioned for Muncy because he openly supported the Union.

Before me Adco, through Buie, sought to shift the basis for the discharge to the bare fact of Muncy's no-show and to offer the lying factor as an after-discovered ground which Buie would have fired Muncy for even had he worked that Saturday. Indeed, at the hearing Buie added two more misconduct reasons—leaving early on Friday and poor job performance—to the official version. (2:346.)

The lying ground stands unrebutted by Muncy. I find that Adco adopted it as a pretext. Adco did not discipline Lott for falsifying the timesheets. As between Lott's positive action, and Muncy's defensive coverup, clearly Lott's is the more serious offense. By failing to punish Lott for his more serious offense, Buie forfeits any credibility which might otherwise attach to this ground. Thus, I find that Adco advanced this reason in bad faith.

The first of the afterthoughts expressed at the hearing, leaving work early, has no merit because it was Lott, the person in charge, who told the crew, ''Let's go.'' Moreover, Lott was not disciplined for this and, so far as the record shows, it was not offered as a basis for Williams' discharge. (Indeed, not even the failure to work Saturday or failure to call Buie was given Williams as an additional ground for his discharge.) I find that Adco distorted this fact in a pathetic effort to find a makeweight to bolster a defense it rightly perceived to be weak. Adco advanced this pretextual reason, I find, to mask its real and unlawful motive. Moreover, I find that Adco would not have disciplined Muncy, in the absence of his union activities, by relying either on this factor or the lying ground.

The second afterthought added at the hearing, the poor performance ground, also stands unrebutted. Nevertheless, disbelieving both Buie and Lott, I find that Adco also advances this reason in bad faith. Buie and Lott offered only generalities. I have found Buie an unreliable and unpersuasive witness. Lott clearly was a friendly witness to Adco for his cross-examination. For example, in the (unobjected to) hearsay conversation with foreman David Lewis on the foreman's return to work, Lott answered a series of leading questions in the affirmative, including (1:180):

Q. Did you then tell him [Foreman Lewis] that you didn't care if those guys were in the Brotherhood or not; if they weren't going to work you didn't need them on the job?

A. That was probably a quote. Yes, sir.

Note also that although Lott supposedly reported the poor performance matter to Buie in their Thursday telephone conversation, Buie never mentioned it to Muncy on Monday and did not include it on the official termination form. Indeed, Lott omitted the item when first describing his Thursday conversation with Buie (1:159–160), adding it later only after being prompted. (1:175–176.) Again disbelieving Lott and Buie, I find this afterthought to be completely false, and added in a blatant attempt to bolster a defense perceived by Adco to be inadequate.

In short, Adco's reasons are either pretextual or false. I infer that they were advanced to conceal another motive—the unlawful motive of ridding itself of one of the Union's organizers. *Shattuck Denn Mining Corp.*, 362 F.2d 466, 470 (9th Cir. 1966.) It is true that Lott had been an open supporter of the Union, and that Adco did not seize this opportunity to fire him as well over falsification of the timeslips. Whether Adco weighed its chances in that respect I need not decide, for the Government need prove only the alleged discrimination. Its case against an employer respondent is not defeated simply because the employer has not fired all known union supporters. Accordingly, I shall order Adco to offer Eric Muncy full and immediate reinstatement to and make him whole, with interest.

CONCLUSIONS OF LAW

1. Adco has failed to carry its burden of demonstrating that Raymond Langford was a supervisor within the meaning of 29 U.S.C. § 152(2) when it discharged him on August 17, 1990 because of his activities on behalf of IBEW Local 480.

2. By interrogations, threats, and disciplinary actions, Adco has engaged in unfair labor practices affecting commerce within the meaning of 29 U.S.C. § 158(a)(1) and (3) and 29 U.S.C. § 152(6) and (7).

REMEDY

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

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Adco Electric Incorporated, Jackson, Mississippi, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating any employee or job applicant about union support or union activities.

(b) Threatening employees that they could not be given a pay raise because of the International Brotherhood of Electrical Workers, Local Union No. 480, AFL–CIO organizing campaign.

(c) Discharging or otherwise discriminating against any employee for supporting IBEW Local 480, or any other union.

(d) 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) Offer Raymond Langford and Eric Muncy 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, and make them 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.

(b) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharge will not be used against them in any way.

(c) Preserve and, on 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.

(d) Post at its Jackson, Mississippi facility copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that complaint paragraphs 8, 9, and 13 are dismissed.

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[9] 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.

[10] 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.''

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 coercively question you or job applicants about your union support or activities.

WE WILL NOT threaten you that we cannot give a pay raise because of an organizing campaign by IBEW Local 480, or any other union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting IBEW Local 480, or any other union.

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

WE WILL offer Raymond Langford and Eric Muncy 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 and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

ADCO ELECTRIC INCORPORATED