

W. C. Babcock Construction Company, Inc. and International Union of Operating Engineers, Local Union No. 150, AFL-CIO. Cases 25-CA-22036, 25-CA-22074, and 25-RC-9158

July 27, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The issues are whether the judge properly found that the Respondent violated Section 8(a)(3) for discharging employee Todd Stevens and whether the judge properly sustained the challenge to the ballot of Tim Kryshak.¹

The Board has considered the decision in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions³ and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified, and orders that the Respondent, W. C. Babcock Construction Company, Inc., Rensselaer, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

1. Insert the following as paragraph 1(g) and reletter the subsequent paragraphs.

“(g) Promising unspecified benefits for voting against the Union.”

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

IT IS FURTHER ORDERED that Case 25-RC-9158 be remanded to the Regional Director to open and count

¹On February 24, 1993, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent filed exceptions and a brief, the Charging Party filed an answering brief, and the General Counsel filed limited cross-exceptions.

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

³We find, in agreement with the judge, Tim Kryshak is a supervisor within the meaning of Sec. 2(11) of the Act and sustain the challenge to his ballot. We, therefore, find it unnecessary to decide whether, even assuming Kryshak is not a supervisor, the parties had agreed to exclude Kryshak from the unit description in the Stipulated Election Agreement.

the challenged ballots of William Carter and Todd Stevens and take further appropriate action consistent with this Decision and Order.

APPENDIX

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

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

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the International Union of Operating Engineers, Local No. 150, AFL-CIO, or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT create the impression that your union activities are being watched.

WE WILL NOT promise you a pay raise or future wage increases for voting against the Union.

WE WILL NOT threaten to discharge union supporters.

WE WILL NOT threaten to keep you on layoff or threaten the loss of jobs, layoffs, or reduced working hours if you vote for a union.

WE WILL NOT promise you unspecified benefits for voting against the 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 Todd Stevens immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify him 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.

W. C. BABCOCK CONSTRUCTION COMPANY, INC.

Joanne C. Krause, Esq., for the General Counsel.
Todd M. Nierman, Esq. (Baker & Daniels), of Indianapolis, Indiana, for the Respondent.
Pasquale A. Fioretto, Esq. (Baum and Sigman), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. These cases were tried in Rensselaer, Indiana, on December 1–3, 1992.¹ The charges were filed by the Union in Case 25–CA–22036 on July 6 and in Case 25–CA–22074 on July 23 (amended September 14) and a consolidated complaint was issued September 23 and amended November 24. On November 4 the Board adopted the recommendations in the Acting Regional Director’s October 13 Report on Objections, consolidating the representation case with the complaint cases.

On May 22, 2 days after 7 of its 10 production and maintenance employees signed union cards, the Company discharged a union supporter and engaged in conduct alleged to be coercive. On May 27, the day after the Union sought recognition, the Company temporarily locked out the employees (the subject of an earlier charge). During the election campaign, the Company supplemented its literature and meetings with one-on-one conversations with employees.

The primary issues in the complaint cases are whether the Company, the Respondent, (a) discriminatorily discharged mechanic Todd Stevens and (b) engaged in coercive conduct at the time of his discharge and in the one-on-one conversations, violating Section 8(a)(1) and (3) of the National Labor Relations Act.

In the representation case the petition was filed May 26, the Stipulated Election Agreement was approved June 16, and the election was held July 10. The vote was four for and five against union representation, with three challenged ballots, a sufficient number to affect the outcome of the election. The Union filed timely objections.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Company, and Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, operates a quarry in Rensselaer, Indiana, where it annually ships crushed stone valued over \$50,000 to customers, each of whom annually receives goods valued over \$50,000 directly from outside the State. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5).

¹ All dates are in 1992 unless otherwise indicated.

² The General Counsel’s unopposed motion to correct the transcript, dated January 20, 1993, is granted and received in evidence as G.C. Exh. 19.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview

The Company uses in its quarry old equipment that requires much maintenance, particularly during the winter shut-down, when Superintendent Randy Cook and some production employees assist in making the repairs (Tr. 13, 54, 56, 377, 410, 598, 677). It operates without any replacement equipment except a spare payloader, necessitating rapid repairs during breakdowns to limit downtime (Tr. 264, 678–679).

At some point after Superintendent Cook discharged the Company’s mechanic in October 1991, the Company decided to employ two mechanics instead of one for the next season (which usually begins the first of March). Some repairs on the heavy equipment require two persons working together. (Tr. 49–50, 53, 56, 136, 166, 777–778, 796–797.) On January 28 it hired Todd Stevens, a recent auto diesel school graduate who had no experience working on heavy equipment (Tr. 106–107, 226–227).

For the other mechanic, General Manager Larry Jenkins was planning to rehire Scott Zickmund, an experienced mechanic formerly employed at the quarry. Zickmund was then employed at a John Deere dealer, where he was “unhappy” with the type of machinery on which he was working and was wanting to return. But, as Jenkins explained at the trial, Zickmund “had some health problems” and said “he wanted to wait until that got done [presumably while he had insurance coverage] . . . it drug on” and “he didn’t actually come to work until [May 2].” (Tr. 49–50.) The Company provided paid health insurance for management, not the production and maintenance employees (G.C. Exh. 10; Tr. 468).

After May 2 the two mechanics—one higher paid (\$8 an hour) skilled mechanic and one lower paid (\$6.50 an hour) novice (G.C. Exh. 10)—worked together until May 22, when Stevens was summarily discharged without warning, 2 days after he voiced his support for the Union.

The Union’s organizing effort began May 15 (Tr. 183, 303). It is undisputed that on Wednesday morning, May 20, Zickmund (who was antiunion) worked with Stevens in the pit on loader operator William Carter’s payloader. Carter handed Zickmund a union authorization card and Stevens, in Zickmund’s presence, asked Carter if he had another card. Carter said he did not have one with him and asked pit truckdriver Emmet Lovely if he did. Lovely asked Stevens if he would be interested in the Union and Stevens said yes. Lovely said he did not have any cards with him, but there were some in his truck and he would get Stevens a card at the end of the day. (Tr. 231–232, 350–352, 450–451, 688.)

That afternoon near quitting time, both Carter and Lovely went to the mechanics shop. Carter asked Zickmund if he had a chance to fill out the card. Zickmund said he had not, but promised to fill it out and take it to the union meeting that night. A short distance away, Lovely gave Stevens a card and cautioned him not to sign it there. Stevens put the card in his pocket and signed it on the way home. Stevens admitted at the trial that he did not know if Zickmund had seen him take the card. (Tr. 233–235, 299, 353–354, 451–452). By that evening, 7 of the 10 employees had signed the authorization cards (G.C. Exh. 17; C.P. Exh. 2; Tr. 319).

Zickmund, instead of signing the union card and going to the meeting as he promised, reported the union activity to

Cook that evening. Cook, when asked on cross-examination if Zickmund told him about other employees' union conversations, gave evasive answers (Tr. 660–662). When specifically asked about stating in a pretrial affidavit that Zickmund reported hearing “they were trying to get a union in,” Cook answered that “one evening . . . I don’t know when,” Zickmund reported Carter’s saying, “Hey, I hear they’re trying to get a union in.” Finally, after being shown his affidavit, Cook admitted that Zickmund told him about the union activity that evening, Wednesday, May 20. (Tr. 663–664, 674.) Two days later Stevens was discharged.

The following Tuesday, May 26, Union Organizer David Fagan filed a representation petition (G.C. Exh. 2) and hand-delivered to Cook a bargaining request (C.P. Exh. 3; Tr. 306). The next morning, May 27, Jenkins—before obtaining legal advice—locked out the employees, stating that he heard about the Union trying to come in, that he figured he could not afford it, and that he felt he had nothing to do but lock the doors (Tr. 184–185, 324–325, 458).

That same day, May 27, the Union file a charge in Case 25–CA–21977 (C.P. Exh. 5), alleging the discriminatory lay-off of all 10 bargaining unit employees. (Laborer Anthony Garcia had been hired in the meantime.) On Thursday, May 28, the Union went on strike. Fagan and Business Agent Ray Connors then met with Jenkins and proposed voluntary recognition. Jenkins said he wanted to talk to his partner (half-owner Roger Ward) and would get back to the Union by the next day, Friday. The employees returned to work. On Tuesday, June 2, after Jenkins declined to recognize the Union, stating that he was contacting an Indianapolis attorney, the Union resumed the strike. (Tr. 307–311, 329–330, 537, 562; G.C. Exh. 10M.)

On June 18 the Company and Union signed a settlement agreement in that case (C.P. Exh. 6). The employees ended the strike the next day and returned to work the following Monday, June 22 (Tr. 311, 330, 613–614). The settlement provided for the payment of backpay for the 2 days of lost time to nine production and maintenance employees, including Garcia and Zickmund, neither of whom had joined the May 28 strike (Tr. 328), but excluding the 10th employee, welder Howard Jenkins, General Manager Jenkins’ father.

The employees receiving backpay under the settlement for the loss “suffered as a result of their layoff on May 27, 1992” were four pit employees (loader operator William Carter, jaw crusher operator Jerry Luttrell, and pit truck-drivers Emmet Lovely and Terry McElroy), four plant and shop employees (loader operator Vurnie Hayes, bin truck-driver William James, plant operator William McElroy, and mechanic Scott Zickmund), and newly hired laborer Anthony Garcia (C.P. Exh. 6; G.C. Exhs. 10; Tr. 254–255, 521).

The June 18 settlement agreement contained a non-admission clause, but provided:

The parties further stipulate that this Settlement Agreement does not preclude the use of evidence supporting the allegations settled herein as background evidence in proceedings on any other charge of unfair labor practice.

I have considered evidence of General Manager Jenkins’ decision to lock out employees on May 27, before he obtained legal counsel, as background in determining his moti-

vation for deciding to summarily discharge Stevens on May 22, likewise before consulting counsel.

B. Discharge of Todd Stevens

1. Lack of promised training

When the Company hired Todd Stevens on January 28, directly out of auto diesel school without any experience working on heavy equipment, it promised to give him on-the-job training—telling him he was going to work with Superintendent Cook until he “learned the ropes of the heavy equipment” (Tr. 106–107, 226–227). This was about a month before the usual spring startup at the quarry (Tr. 53). Cook, who was performing maintenance on the heavy equipment during the winter shutdown, would be available to work with Stevens during February, and when rehired, experienced mechanic Zickmund would be available to continue Stevens’ training (Tr. 52).

These plans went awry. Because of “extremely nice” weather and the low stockpiles, the Company began crushing stone the first week in February. Cook had been working with Stevens only 3 or 4 days. As Cook admitted, “I pretty much put [Stevens] on his own.” (Tr. 54, 126, 126, 227–228, 265–266). Then, as a result of the delay in rehiring Zickmund (because of his health problems), the inexperienced Stevens continued working as the sole mechanic until May 2, with little training.

As could be expected—with a novice mechanic attempting to perform, usually alone, all the required maintenance without close supervision—the Company experienced shortcomings in the quality and quantity of the maintenance. Yet, when the Company evaluated him on March 25, they gave him a satisfactory evaluation and on April 1 gave him the same 50-cent raise that he gave most of the other employees (G.C. Exhs. 7, 10; Tr. 59–63, 230–231, 252–253). It is undisputed, as bin truckdriver William James credibly testified, that Cook said Stevens “was trying to do his job and had the willingness” and that Cook “thought he would make a No. 1 mechanic once he got further along in experience” (Tr. 194).

On April 1 the Company inaugurated a formal disciplinary program, with a “Employee Disciplinary Report” form that could be used for a verbal warning, written warning, suspension, or discharge for such offenses as “substandard work,” “safety violation,” and “attendance” (Tr. 111–114; C.P. Exh. 1). The Company’s written rules and policy adopted on that date (G.C. Exh. 4; Tr. 14–15) state: “If you receive two warnings in one week your future employment with this company will be reviewed and dismissal is possible.”

Also on April 1 the Company instituted a policy of placing notes of management and employee complaints in employees’ personnel files (Tr. 118, 774, 795–796). The Company never gave Steven any oral or written warning. The only notes in his personnel file were two informal post-it pad notes. They were dated April 15 and 23, over a month before his May 22 discharge. (G.C. Exh. 5, 6; Tr. 19, 24, 28–30, 118, 251–252.)

As discussed later, when Zickmund learned that Stevens was discharged after they had worked together about 3 weeks, Zickmund expressed his general satisfaction with Stevens’ performance by stating that “it was working out real well with two mechanics.”

2. Fabricated testimony

General Manager Jenkins, when first called as an adverse witness, clearly gave fabricated testimony to justify his decision to summarily discharge mechanic Stevens on May 22, without any prior warning.

a. *Air compressor belt not replaced*

Jenkins testified on the first day of the trial (Tr. 34–35):

The night before [Stevens] was fired, the loader in the hole, when they brought [it] up, it had a belt broke on it.

And it was about in the vicinity of [4:45 or 4:50 p.m.].

And Mr. Cook—

I was there. And Mr. Cook told Mr. Stevens to get it fixed and that the auto parts [store] did not . . . close until 5:30, so he had time to run up and get a belt, get it on, so they could start running first thing in the morning.

And I left. And then the next morning I would see him working on the loader.

[Stevens] told [Cook] that he did not have time to get the belt, because auto parts closed.

So then it cost us roughly an hour of production in the morning, because [Stevens] didn't do that job that he was specifically told to do.

That was part of the reason that I just was filled up with that sort of thing at that time. [Emphasis added.]

For several reasons, I find that this testimony was fabricated. First, Jenkins' claim that "I was there" that Thursday afternoon (May 21) is false. On the third day of the trial Jenkins admitted (and office secretary Peggy Anslover credibly corroborated the fact) that Jenkins and Anslover were out of town that week, attending a church assembly in Ohio. Jenkins did not return to town until Thursday evening and did not return to the quarry until Friday morning, May 22. (Tr. 616–619, 630, 724–725; R. Exhs. 2, 4, 5.)

Second, Superintendent Cook did not tell Stevens "to get it fixed and that the auto parts [store] did not . . . close until 5:30, so he had time to run up and get the belt." To the contrary, Cook did not know that the belt was broken when he left work "shortly after five o'clock." Cook revealed (Tr. 146) that

it would be [May] 21st, that evening. [Loader operator] Carter brought the loader up out of the hole, out of the pit.

And he had a belt—it happened to be *an air compressor belt swollen*. And his air compressor wasn't acting right.

So we took it to the shop. We told [Stevens] to tighten the belt. . . .

[The next morning, May 22] I asked [Stevens] why wasn't the loader ready. And he said that the belt broke. [Emphasis added.]

When recalled as a defense witness on the third day of the trial, Jenkins made no effort to explain his false claim that "I was there" when the loader was brought to the shop or his claim that Cook "specifically told" Stevens to get a replacement belt. He testified on direct examination (Tr. 733–734):

Q. Was there anything that was the straw that broke the camel's back, so to speak?

A. Yeah. Well, *when I got back on [May] 22nd*, [Cook] was mad, because he came in, expecting the loader to be fixed. . . .

I don't know why [Stevens] didn't fix it that night. He had a lot of excuses. [Emphasis added.]

The Company ignores in its brief, and makes no effort to explain or justify, Jenkins' obviously false testimony.

Stevens (who impressed me by his demeanor on the stand as a sincere, truthful witness) testified that he did not fix the broken belt that night because "we didn't have the belt in the shop and I didn't have a way to town because the company truck was already gone." The only other persons remaining on the job that afternoon were loader operator Carter and pit truckdriver Lovely, who was giving Stevens a ride home. It is undisputed, as confirmed by mechanic Zickmund, that the Company has a rule against employees using their personal vehicles to get supplies. (Tr. 237–239, 279–280, 682.)

b. *Idle for 45 minutes*

Jenkins unequivocally—and falsely—claimed that the purported 45-minute incident occurred on May 22, the day Stevens was discharged. When called first as an adverse witness, Jenkins testified (Tr. 26, 28):

The day that we fired [Stevens], he was told, and I was standing right by [Cook]. We had bought another truck. It was an older truck. And we brought it in and it needed some work done to it so that we could get it to the hole.

And [Stevens] was told to drain all the fluids and refill the fluids and do some exhaust work on it.

And also, [Cook] said that [Howard] Jenkins would be up in the bed [of the truck], doing some welding, and [Stevens] may have to hold some pieces for him. . . . So [Howard Jenkins will] holler when you need to go up.

So I watched. And I thought it was strange that [Stevens] never come out of that—he was in the bed of the truck with [Howard] Jenkins.

. . . So I watched him for 45 minutes, stand there and watch [Howard] Jenkins cut. And he didn't do anything. [Howard] Jenkins didn't ask him to help. He wasn't ready for him yet because he was cutting things out before he needed to put them back.

And so it was just kind of *the straw that broke the camel's back*. . . .

Q. But this particular problem, did you discuss it with Mr. Stevens?

A. No, *I just told [Cook] to fire him or I would.* [Emphasis added.]

Jenkins emphasized that this incident occurred when the truck was delivered (Tr. 40, 42):

A. Well, he was specifically told to . . . drain the oil. Because *we had just gotten this truck in.*

. . . .
A. . . . that was the *morning* he was fired, [May 22].

. . . .
We had just gotten this truck in. It had just been delivered to us. We had bought it in Kentucky. [Emphasis added.]

. . . .
A. I told [Cook] to fire him, or I would. [Cook] discussed it with him. He told him why he was being fired.

In fact, the incident occurred weeks earlier—not on May 22, the day Stevens was discharged.

Cook confirmed that the incident occurred “shortly after this truck was purchased . . . when [Jenkins] wanted to put it into production.” Cook estimated it was sometime in “early May.” (Tr. 143–144.) He testified that “No, it wasn’t the day of [Stevens’ termination]” because then “The truck was already in production” and Stevens “was not working on the truck. He was working on a loader that day . . . getting parts off of a spare loader that we have.” (Tr. 168–169.)

When later recalled as a defense witness, Jenkins admitted that the older truck had *not* been delivered at the time of Stevens’ May 22 discharge, but a month earlier *on April 20* (Tr. 734). He attempted to reconcile his testimony with Cook’s (as well as Stevens’, discussed below) by claiming that there were two incidents when he watched Stevens standing idle in the back of the truck (Tr. 734–737, 769–773). He claimed (Tr. 734–735):

I think the confusion lies because there are, basically, two different times that same situation happened. . . . [My dad, Howard Jenkins] was still working on the same project that he was working on then because he didn’t have time to finish it, basically. Howard Jenkins did not testify.

I deem it most unlikely that if the purported incident had happened twice, Jenkins would have emphasized at first, as he did, that on the morning of Stevens’ discharge, “We had just gotten this truck in. It had just been delivered to us.” There was in fact a purported 45-minute incident that occurred weeks earlier. I deem it unbelievable that there were two incidents, both lasting 45 minutes.

The Company argues in its brief (at 17 fn. 4) that “The confusion in the record on this point should in no way reflect on Jenkins’ credibility.” I disagree and discredit as a further fabrication Jenkins’ claim that the incident occurred twice. (When giving much of his testimony, Jenkins appeared by his demeanor on the stand to be willing to fabricate whatever testimony might help the Company’s cause.)

Stevens credibly testified that on May 22, after replacing the broken air compressor belt that morning, he started about 9 o’clock removing brakes from the junk loader (Tr. 240,

281–282, 289). As found above, Cook agreed that Stevens was working on a loader that day, “getting parts off of a spare loader” (Tr. 169).

Stevens positively testified that it was not on the morning of his termination that Howard Jenkins was welding in the back of the truck (Tr. 289). He recalled that the purported 45-minute incident occurred “probably late April, early May maybe,” after he had changed the oil on the truck and checked the fluids. Then, “I was holding the metal while [Howard Jenkins] was getting it ready to weld and if he’d cut something off I’d hold it so it didn’t fall. And if he wasn’t cutting metal or something I was scooping out the bed.” (Tr. 248–250.)

Stevens admitted that on that occasion, weeks earlier, Jenkins called him down and told him that Jenkins had been standing there 45 minutes and had not seen him doing anything. In response, as Stevens credibly testified, he protested that Jenkins was not there 45 minutes and that “I was helping [Howard Jenkins]. I was doing what [Howard Jenkins] told me to do.” (Tr. 249, 289.)

Jenkins admitted that although the Company began on April 1 issuing employee disciplinary reports and placing notes of management and employee complaints in employees’ personnel files, he did not give Stevens a written warning at that time or place a note in his file (Tr. 118). (As found, Stevens had explained that he was doing what Jenkins’ father had told him to do.)

In summary, on the first day of the trial, Jenkins gave fabricated testimony to support the Company’s contention (in its brief at 16) that two incidents, “straws that broke the camel’s back,” precipitated Stevens’ discharge. Concerning the first incident (Stevens’ failure to replace the belt), credited evidence shows that Stevens was not at fault. Jenkins’ later admission clearly reveals that he falsified the claim that he was present when the assignment was made. Concerning the second incident (Stevens accused of standing idle for 45 minutes), Jenkins gave false testimony that the incident occurred on the day of the discharge, rather than weeks earlier.

I therefore find that these two so-called “straws that broke the camel’s back” are pretexts for Jenkins’ decision to discharge Stevens.

3. The summary discharge

General Manager Jenkins and Superintendent Cook gave conflicting testimony about the decision to discharge Stevens, although both claimed that the decision was made on the morning of May 22.

According to Jenkins, as found above, that morning he watched Stevens standing idle for 45 minutes and told Cook “to fire him or I would”; then Cook discussed it with Stevens and told him “why he was being fired.”

According to Cook, however, the decision to discharge Stevens was not made on the spur of the moment. Cook testified that he and Jenkins discussed the discharge back and forth and that he had an input in the decision. Cook revealed that they discussed Stevens’ “work record . . . his attendance record, his performance.” Cook listed a number of previous incidents that were in his mind when he discussed the termination with Jenkins, including Stevens’ attendance: “He was late quite a few times. . . . frequently. . . . Several times . . . I didn’t keep track of it. It’s on the . . . timecards.” (Tr. 127–150.)

Cook testified he knew that “when we was discussing there that morning, on May the 22nd, [we discussed Stevens’] *attendance*, his attitude and his work” (emphasis added). After being shown Stevens’ timecards, however, Cook admitted that no, he did not recall Stevens being late anytime between April 1 and the time he was terminated on May 22. (Tr. 155–156.)

Contrary to both versions, Cook’s statements to Stevens later that day reveal that the decision to discharge him was not reached until that afternoon and that Jenkins’ claim that he told Cook that morning “to fire him or I would” is yet another fabrication.

It is undisputed, as Stevens credibly testified (Tr. 240–241), that around 1 or 2 p.m.,

[Cook] told me . . . that my work performance was not up to their standards and that they was either going to have to get me some sort of training or . . . someone in there that would help train me.

Q. Did you say anything to Mr. Cook?

A. I told him that I was doing the best I could since I had never been trained on the heavy equipment like that.

Q. Did Mr. Cook give you any indication . . . about what he was going to do about getting you trained, or having someone else?

A. He just said he would have to talk to [Jenkins].

Later that afternoon, around 3 or 3:30 (Tr. 241–242),

[Cook] walked up to me and said, well . . . I talked it over with [Jenkins] and he said . . . to just go ahead and let you go today, to punch out at 5:30 and today would be your last day.

Q. Did he tell you any specifics about your work performance?

A. Not at that time.

Q. Did you ask him anything?

A. No. I was upset and disgusted and I just went back and worked on the loader again.

Stevens finished the day working on the loader and Zickmund gave him a ride home. Stevens credibly testified, and it is not specifically disputed, that when Stevens told Zickmund that he had been fired, Zickmund appeared “kind of upset, saying that *it was working out real well with two mechanics* [emphasis added] because he could be working on something and I could be working on something, and then if we needed help we could help each other out.” (Tr. 242, 683–684.)

When recalled as a defense witness, Jenkins changed his testimony about when the discharge occurred. He testified on direct examination (Tr. 773–774):

Q. Okay. And you don’t know what time Randy Cook told Todd Stevens he was terminated, correct?

A. No. Not for sure. I *figured* it was in the area of ten o’clock [that morning]. . . .

Q. But you don’t know what time he told him?

A. No, I don’t know exactly what time that was that [Cook] actually told him, other than what he [Stevens ?] said here [at the trial].

Q. And you instructed Cook to let Stevens work through the end of the day?

A. Yes.

. . . .

A. *That’s probably why* [Cook] didn’t tell him before that, *I suppose*. [Emphasis added.]

Having found that Jenkins made the discharge decision that afternoon, I conclude that his “I suppose” answer is another fabrication.

4. Knowledge of union activity; coercive conduct

As found, General Manager Jenkins falsely testified that he instructed Superintendent Cook on the morning of May 22 “to fire [Stevens] or I would,” whereas in fact, the discharge decision was made that afternoon.

I infer that by giving this false testimony and by claiming (as discussed below) that he was first aware of union activity about 4 p.m. that day, Jenkins was attempting to conceal his knowledge of mechanic Zickmund’s May 20 report to Cook about Stevens’ union support.

After much evasion, as found, Cook finally admitted that on Wednesday evening, May 20, Zickmund reported to him Carter’s statement (according to Cook) that “Hey, I hear they’re trying to get a union in.” It is undisputed that earlier that day, in Zickmund’s presence, Stevens had asked Carter for a union authorization card and had told Lovely he would be interested in the Union, whereupon Lovely said he would get Stevens a card at the end of the day. Later, near quitting time, Lovely went to the shop where Stevens and Zickmund worked and gave Stevens a card—although Zickmund may not have seen the actual passing of the card from Lovely to Stevens.

Instead of signing one of the cards and going to the union meeting, as Zickmund promised Carter he would do, Zickmund reported the union activity to Cook that evening. In view of Zickmund’s acknowledged opposition to the Union (Tr. 688) and the admitted reports that he made to Cook on upcoming union meetings (Tr. 660), I deem it most unlikely that he would merely have told Cook (as Cook claimed) that “Hey, I hear they’re trying to get a union in.” Contrary to Cook’s and Zickmund’s discredited denials (Tr. 672, 676), I infer that Zickmund reported to Cook that Stevens (Zickmund’s junior mechanic) had indicated his support for the Union, by stating his interest in the Union that morning and asking for a union card to sign.

Jenkins was not present at the quarry that Wednesday or the next day. He returned there Friday morning, May 22. Without stating when he did so, Cook admitted telling Jenkins what Zickmund had said about employees trying to get a union in there, but claimed “I don’t know if I mentioned any names” (Tr. 664–665). I infer that Cook relayed Zickmund’s report about Stevens’ union support upon Jenkins’ return to the quarry that Friday morning—if not the evening before when Jenkins arrived back in town.

Moreover, employees Carter and Lovely credibly testified that in Jenkins’ conversations with them, he made statements that I find confirm this inference that Cook had relayed Zickmund’s report to Jenkins about Stevens’ union support.

Regarding the date of these conversations, I agree with Jenkins that they occurred about 4 p.m., May 22, even though Carter (indicating some doubt about the date) testi-

fied, "I'm *pretty sure, relatively sure* [emphasis added]" that this occurred on Thursday, May 21 (Tr. 411) and even though Lovely (also indicating some doubt) testified, "I *think* [emphasis added] it was on the 21st" (Tr. 453), but later testifying, "No," it could not have been on Friday, "it was on the 21st" (Tr. 489).

Lovely (who impressed me as a truthful witness) recalled that Jenkins drove up to where they were hauling stone, motioned him to come over, and discussed another matter with him. Then Jenkins (Tr. 455–456)

asked me if I knew anything about a union coming in there, I said no.

Q. Did you say anything else?

A. . . . He says, *Todd Stevens* [and] I think, I know some of the rest that's *mixed up in it*. . . . Bill Carter came up. . . . I left. [Emphasis added.]

Carter (who also impressed me by his demeanor on the stand as a truthful witness) credibly testified (Tr. 355):

I went around the front of [Lovely's] truck . . . I just heard something about a union and [Lovely] said that he didn't know anything about a union coming in.

Q. Did you hear anything else?

A. Then [Jenkins] . . . looked at me and said, well, *I know Todd Stevens is involved* and I've got a pretty good idea of the others that are and they're not going to be around here long. We're going to get this stuff straightened out. [Emphasis added.]

Although Cook admits telling Jenkins about Zickmund's May 20 report on union activity, Jenkins has never admitted that Cook did so. He claimed that he had no knowledge of any union activity until about 4 p.m. that Friday, after Stevens' discharge, when Cook casually referred to union talk. He testified that he went to the office and Cook was complaining about the two pit truckdrivers stopping in the road, halting production. "So on the way out the door, [Cook] said [Zickmund] said they was probably talking about union. So I went out [and] got in my car." (Tr. 723–724.) He further claimed (Tr. 729–730) that

when I drove back that way, Frank Lovely acted like he wanted to talk to me. . . . I told them with Mr. Carter standing there . . . I don't want you guys talking about union or anything else on my time, I need production. And then *Mr. Carter said how about Stevens* and I said he's gone. Because we'd just fired him that morning. . . .

Q. Did you make any statement in that conversation or any other time that you knew Stevens was involved with the union?

A. Absolutely not, because I didn't know it. [Emphasis added.]

I discredit, as further fabrications, this version of what happened when Jenkins talked to Carter and Lovely. Stevens had not been fired that morning. He had been discharged that afternoon shortly before this, and he remained at work in the shop. Carter was not aware of the discharge (Tr. 413) and he had no reason to ask "how about Stevens."

On cross-examination, Carter credibly denied having asked about Stevens in that afternoon conversation and further testified (Tr. 413):

Q. Okay. How would Mr. Jenkins have known Todd Stevens was involved in the Union, any idea?

A. Yeah, I've got an idea. I believe that it was from Scott Zickmund . . . the one that told [Jenkins] about it.

Carter explained why he had that belief (Tr. 413–414):

Because Scott Zickmund was totally against the Union. I gave him the card Wednesday morning to sign and . . . I tried to get it back off of him later that afternoon and he said that he would bring it to the [union] meeting . . . that night.

And he didn't show up . . . and then the next day he didn't want to hear any talk about the Union

. . . .

Zickmund remained working . . . when we was on strike.

The Company argues in its brief (at 19) that "There is absolutely no evidence in the record" that the Company knew that Stevens had "signed a union card or had engaged in any union activity, apart from Jenkins' alleged statement" to employees Carter and Lovely that he knew Stevens "was involved in union activity, that he had a pretty good idea of the other employees that were involved, and they were not going to be around very long."

The Company disputes any conclusion that "the termination of Stevens was motivated by the fact he signed a union card." It relies on Jenkins' denials that he made these statements and makes the unpersuasive argument that Lovely and Carter cannot be credited because they falsely "alleged, *with absolute certainty*, that they spoke to Jenkins" on May 21, the day before Stevens was discharged and when Jenkins was out of town.

To the contrary, I have credited the testimony by Carter and Lovely about what Jenkins told them, despite their faulty recollection of the correct date. Moreover, I find that even if Jenkins' statements to them are disregarded, the evidence supports the inference that Cook had relayed Zickmund's report to Jenkins about Stevens' union support.

Knowledge of Union Activity. I discredit Jenkins' denials and find that he was aware of Stevens' union support when he decided to discharge him.

Coercive Conduct. Having credited the testimony by employees Carter and Lovely, I also find that on May 22, shortly after Stevens' discharge, Jenkins (a) coercively interrogated Lovely about the union activity, (b) unlawfully created the impression that the employees' union activities were under surveillance by telling Lovely and Carter that he knew Stevens was involved in the union activity and that he had a good idea which other employees were involved, and (c) threatened the discharge of employees by stating that the other union supporters were "not going to be around here long." I find that particularly in the context of the discharge of Stevens that day, this conduct was clearly coercive and violated Section 8(a)(1) of the Act.

5. Concluding findings regarding discharge

General Manager Jenkins gave fabricated testimony about two incidents, “straws that broke the camel’s back,” to justify his decision on Friday, May 22, to summarily discharge Stevens without any prior warning. In fact, Stevens was not at fault in the first incident, and the second incident did not occur on the date of the discharge. It occurred weeks earlier. As found, these two so-called “straws that broke the camel’s back” are pretexts for discharging Stevens.

By that Friday morning, as inferred, Jenkins had been informed by Superintendent Cook of mechanic Zickmund’s Wednesday evening report that Stevens was supporting the Union. Thus, contrary to Jenkins’ denials, he was aware of Stevens’ union support at the time of the discharge. Furthermore, shortly after Stevens’ discharge, Jenkins told two employees that he knew Stevens was involved in the Union and stated that the other union supporters were “not going to be around here long.”

In view of these findings, it is clear that the General Counsel has made a strong prima facie showing that Stevens’ union support was a motivating factor in the Company’s decision to discharge him. Therefore, as held in *Wright Line*, 251 NLRB 1083 (1980), the burden shifts to the Company to demonstrate that it would have discharged Stevens even in the absence of his union support.

To justify the discharge, Jenkins and Cook related various instances of Stevens’ shortcomings (Tr. 28–39, 43–47, 55–57, 129–145; G.C. Exh. 5, 6), almost all of which referred to the period before May 2. These earlier incidents, even if accurately related, occurred when the Company was awaiting the delayed arrival of its experienced former mechanic, Zickmund, who was taking care of his health problems before returning. The Company knew that Stevens was inexperienced, yet it assigned him to work largely “on his own” as the sole mechanic, without the promised on-the-job training.

Concerning Stevens’ performance after Zickmund was rehired, Jenkins claimed when testifying as an adverse witness that Zickmund came to him “Probably three or four times” and complained about Stevens’ performance (Tr. 109). When recalled as a defense witness, Jenkins went further and claimed that Zickmund “was complaining *all the time* [emphasis added] . . . about having to redo things and, basically, [Stevens] not doing what he was told” (Tr. 731). Jenkins added that when he had a complaint from Cook or Zickmund about Stevens, he would mention it to Stevens (Tr. 740)—whereas Zickmund testified that he never saw or heard Jenkins or Cook talk to Stevens (Tr. 680). (As indicated, Jenkins appeared by his demeanor on the stand to be willing to fabricate whatever testimony might help the Company’s cause.)

Zickmund (who, as found, falsely denied telling Cook that Stevens was involved in union activity) first claimed that he spoke to Jenkins or Cook probably “a dozen” times about Stevens’ “taking too long or not doing the things it was explained to him” and later claimed that he complained to them “Once or twice” about Stevens’ “Not getting stuff done that I asked him to do” (Tr. 679–680).

I find that this testimony by Jenkins and Zickmund is at least exaggerated. The statement made by Zickmund upon hearing about Stevens’ discharge (that “it was working out

real well with two mechanics”) indicates that Zickmund was generally satisfied at the time with Stevens’ performance.

Undoubtedly if Stevens—who worked as a junior mechanic under Zickmund from May 2 to 22—had performed as poorly as Jenkins and Zickmund claimed at the trial, something would have been placed in his file, reinforcing the two notes Jenkins placed there on April 15 and 23 when Stevens was the sole mechanic in the shop. Yet, no oral or written warning was ever given Stevens, and not a single note was placed in his file during this period of nearly 3 weeks (Tr. 19, 118, 251–252, 796).

The evidence shows no indication that the Company had any intention of discharging Stevens before May 20 when, as found, Zickmund reported Stevens’ union support to Cook.

I find that the Company has failed to sustain its burden of proof that it would have discharged Stevens in the absence of his union support. Accordingly I find that by discharging Todd Stevens on May 22, the Company discriminated against him in violation of Section 8(a)(3) and (1) of the Act.

C. Alleged Preelection Coercion

1. Background

Before the July 10 election, General Manager Jenkins delivered three prepared speeches against unionization in group meetings of employees, showed two antiunion video tapes, mailed two letters to employees’ homes, and posted and handed out other literature (R. Exhs. 6–13; G.C. Exh. 13, 18; Tr. 747–750). The final letter home (R. Exh. 13), mailed July 7, stated (in 2 the second paragraph): “Think about whether you can afford to pay over \$1,300 to [the Union] just to keep your job.” (The complaint does not allege any of this material to be coercive.)

In addition, Jenkins and his co-owner, Roger Ward, engaged in one-on-one conversations with employees. Some of these conversations are alleged to be coercive.

2. Conduct of Larry Jenkins

One of these conversations occurred about July 8 toward the end of the second group meeting after Jenkins stated in his prepared speech that he had been told (incorrectly) that loader operator William Carter “was being paid by [the Union] to organize you.” Carter told Jenkins, as the meeting was breaking up, “that was flat out a lie and me and him both knew it.” The two of them got into a heated argument. Jenkins said several of Carter’s relatives had told him this. Carter said that was a lie, too, and suggested that Jenkins have “one of the other guys call these relatives.” (Tr. 358; R. Exh. 8 p. 3.)

At that point, as Carter credibly testified (Tr. 358), Jenkins said that

he didn’t have to do anything like that. . . . it wouldn’t matter anyway, even if the Union did get in *he could just keep me laid off and sent up to the [union] hall* and I told him that I’d just keep filing grievances and keep [drawing] backpay. [Emphasis added.]

Jenkins admitted having the one-on-one argument as the employees were leaving the meeting, but denied saying that

if the Union got in, he could keep Carter on layoff up at the hiring hall (Tr. 757–758, 780–781). I discredit Jenkins’ denial and find that the threat to keep Carter on layoff was coercive and violated Section 8(a)(1).

Another one-on-one conversation occurred Friday, July 10, shortly before the election was held. Jenkins talked to pit truckdriver Terry McElroy while Superintendent Cook was driving McElroy’s truck. Jenkins handed McElroy a wage survey showing average wages in the county for a number of jobs. As Jenkins was saying that “he talked to several of the other guys earlier that day and they had all changed their minds about the Union,” McElroy was looking over the list of wage rates and commented that he did not “fit in on nothing on the paper.” (Tr. 507–510.)

At that point, as credibly testified by McElroy (who appeared to be an honest witness), Jenkins stated (Tr. 510) “that *if everything would go right*” (referring to a negative vote in the election), “[McElroy] *could be making*” between \$5.65 and \$6.59 an hour (emphasis added). He was then being paid \$5.50 an hour (G.C. Exh. 10). The survey showed that \$5.65 was the average rate for “Janitor/Laborer” and \$6.59 was the average rate for “Machine Tool Operator.”

Jenkins then continued (Tr. 512–513):

He said that [if] the Union come in, that we would all be sitting up at the union hall because they would bring the people down that had four years and more experience in the Union.

. . . .

[He] said if the voting goes right . . . we would be earning more money in the future years.

Jenkins denied telling McElroy anything about making between \$5.65 and \$6.59 an hour. Ignoring the listed \$5.65 and \$6.59 rates on the wage survey, he claimed it does not make sense, “We don’t give raise in pennies.” (Tr. 760, 763.) He also denied telling McElroy that if the voting goes right, the employees would be making more money in the future (Tr. 763).

Jenkins further denied McElroy’s testimony about bringing in union people with 4 years’ experience. He claimed instead that McElroy asked about going to the hall and “about the four year and under thing.” He claimed that he told McElroy that the Union had told him that if someone did get sent back to the hall, “when they call for work out of the hall, they go by the number of years of experience” and “if they’re four years and under, then they, probably, would be in the school or something to that effect.” (Tr. 760–763, 781.)

I discredit Jenkins’ denials. (He again appeared willing to fabricate whatever testimony might help the Company’s cause.)

As alleged in the complaint, I find that Jenkins promised that if the Union was rejected by the employees, there would be a pay raise (for McElroy) and that employees’ wages would be increased in the future, but threatened that if the employees selected the Union, employees’ jobs would be lost. I find that these promises and threat were coercive and violated Section 8(a)(1).

3. Conduct of Roger Ward

McElroy credibly testified (Tr. 504–505, 527–528) that on the morning of July 7, when he went to the office to get a soda pop, Co-Owner Roger Ward spoke to him and said that if the Union came in,

he was going to watch the clock and cut us back to 40 hours a week and some of us would be laid off.

Ward denied that he even spoke to McElroy about the Union (Tr. 577). I discredit the denial (Ward not impressing me as a candid witness) and find that the threats to cut hours of work and to lay off some of the employees were coercive and violated Section 8(a)(1).

At quitting time the following day, July 8, Ward made similar threats to bin truckdriver William James and referred to employees’ union activities. As James credibly testified (Tr. 188–190, 209–213):

[Ward] said that they didn’t want a union in [the Company]. And they didn’t need a union [in the Company] either.

And I told him that I wasn’t the only one he should talk to. I wasn’t the only employee.

And he said that the only one he was interested in talking to was myself, [Emmet] Lovely and [William] McElroy.

He said *if the Union got in, we could expect a lot less working hours and large layoffs.*

. . . .

A. And he said . . . *he knows one, if not all three of us, that did like what we was told not to.* [Emphasis added.]

Ward denied saying that if the Union won the election, he could expect there would be layoffs and claimed that he did “Not specifically” tell James he could expect less hours. He did not deny saying that he knew one, or all three of the employees (whom he had hired) had done “like what we was told not to” (referring to their support of the Union). (Tr. 569–575.)

Having credited James’ testimony, I find as alleged that he threatened layoffs and reduced working hours and that he created the impression that employees’ union activities were under surveillance, violating Section 8(a)(1).

On July 10, about 5 minutes before the election, Ward told pit truckdriver Emmet Lovely “I want to talk to you,” and Lovely responded, “we’re not supposed to talk about the Union.” Then, as Lovely credibly testified, Ward said that he could talk about it and promised that if “your vote goes the right way . . . you’ll be well taken care of.” (Tr. 460.) I discredit Ward’s claim that he merely said to “help me out, buddy” (Tr. 575–576) and find that his promise violated Section 8(a)(1).

I note that the payroll records (G.C. Exh. 10) do not support the allegation in the complaint that in June, the Company granted employees a pay raise to discourage union support. The only pay raise granted was to the new employee, laborer Anthony Garcia, when he was promoted to pit truckdriver.

I also note that the evidence (Tr. 361) does not support the allegation that the Company “threatened its employees

that it would call the police to interrupt a union meeting” (that had already been held).

III. REPRESENTATION PROCEEDING

A. *The Issues*

In Case 25–RC–9158 the petition was filed by the Union on May 26, a Stipulated Election Agreement was approved on June 16, and the election was conducted on July 10. The vote was four for and five against union representation, with three challenged ballots, a sufficient number to affect the outcome of the election. The Union filed timely objections on July 17. (G.C. Exhs. 1Q, 2, 3.)

On October 13 the Acting Regional Director issued his Report on Objections to conduct affecting results of the election, recommendations to the Board, order directing hearing, order consolidating cases, and notice of hearing (G.C. Exh. 1Q). He directed a hearing on the three challenged ballots and on the Union’s Objections 1a, 1b, 2, and additional alleged objectionable Conduct. He approved the withdrawal of Objection 1c, recommended that Objection 3 be overruled, and consolidated the complaint and representation cases.

On November 4 the Board adopted the recommendations in the report, ordered that Objection 3 be overruled, and approved the order consolidating cases and notice of hearing (G.C. Exh. 1S).

B. *Challenged Ballots*

1. William Carter

I overrule the challenge to the ballot cast by loader operator William Carter. After lengthy litigation of its contention that Carter was a paid union organizer with no reasonable expectancy of continued employment, the Company concedes in its brief (at 3–4 fn. 2) “that the record evidence will not support its challenge to Carter’s ballot.”

2. Todd Stevens

I overrule the challenge to the ballot cast by mechanic Todd Stevens. As found, he was discriminatorily discharged on May 22. He remained a member of the bargaining unit and was entitled to vote.

3. Tim Kryshak

I sustain the challenge to the ballot cast by Tim Kryshak for the following reasons.

a. *Exclusion from bargaining unit*

As late as June 16 when the Stipulated Election Agreement was approved, the Company and the Union agreed in effect that Kryshak was not a member of the bargaining unit, but was a member of management, along with Superintendent Cook, General Manager Jenkins, and Co-Owner Ward.

Earlier in 1992, in preparation for the inauguration of its new personnel policies to become effective April 1, the Company adopted job descriptions for the personnel, including the superintendent, *drill operator*, and *safety and quality controller* (G.C. Exh. 9). Kryshak, Jenkins’ son-in-law (Tr. 696), performed a combination of functions. As described by Jenkins, “He’s drill operator, blaster, health and safety man,

and he also is quality control man” (Tr. 693). As the blaster (or shooter), he had the responsibility of setting and igniting the dynamite in holes drilled in the rock (Tr. 374–375, 466–467). He was known as the safety supervisor, who enforced safety rules, orally warning employees and signing and issuing employee disciplinary reports for safety violations (Tr. 204, 255, 288, 381–382, 445; C.P. Exh. 8).

Kryshak attended management meetings with Jenkins and Cook (Tr. 470, 707). He participated in employee evaluations in late March, along with Cook and Jenkins (Tr. 230, 270–275, 469–470), contrary to Jenkins’ discredited denials (Tr. 119, 721–722). The emergency alarm system rings first at Kryshak’s home, then at Cook’s, and last at Jenkins’ (Tr. 702). Kryshak used the company pickup, drove it home at night and, with other members of management, was permitted to use gasoline from the Company’s gas tank for his personal use (Tr. 255–256, 388–389, 467–468). He and Cook were given at company expense a CPR (first-aid) class, which the Company refused to give loader operator Carter because “it was for management only” (Tr. 390).

Like other members of management, he was provided paid health insurance, which was not provided any member of the bargaining unit (Tr. 256–257, 388, 468–469, 698). When called as a defense witness, Jenkins testified that mechanic Zickmund also receives paid insurance benefits (Tr. 698, 785)—without pointing out that this did not begin until July, after years of employment (G.C. Exh. 10K; Tr. 50). (I note that on July 6, the Union filed the charge in Case 25–CA–22036, alleging the discriminatory termination of mechanic Stevens, and that Zickmund could then be regarded as an important witness to support Jenkins’ claim that he had no knowledge of Stevens’ union support. I have discredited Zickmund’s denial that he told the Company that Stevens was involved in union activity.)

The job description for the safety and quality controller position that Kryshak held (G.C. Exh. 9i) lists various managerial responsibilities:

1. Keep all aspects of operations in compliance with MSHA [the Mine Safety and Health Administration of the Bureau of Mines] standards.
2. Along with the superintendent he shall write warning slips to any person in violation of MSHA standards and keep records of such.
-
4. EPA standards being adhered to throughout the operation.
-
6. Cost control, getting prices for purchases and issuing purchase orders, which will also be approved by the superintendent and general manager.
-
8. Will do the initial orientation of each new employee, such as going over employee handbook, piece of equipment that person will be operating, and any necessary paperwork.

The bargaining unit, stipulated to be appropriate in the Stipulated Election Agreement, does not include anyone performing Kryshak’s functions. The unit was defined as including seven classifications of production and maintenance employees:

All full-time and regular part-time production and maintenance employees including loader operators, mechanics, welders, truckdrivers, jaw operators, plant operators, and laborers employed by the Employer at its facility located in Rensselaer, Indiana; BUT EXCLUDING all office clerical employees, scale house employees, weighers, dispatchers, *managers*, and *supervisors* as defined in the Act. [Emphasis added.]

None of Kryshak's functions (driller operator, blaster/shooter, or safety and quality controller) was listed. It is clear that the parties agreed to exclude Kryshak as a manager or supervisor, or both.

Meanwhile, between the April 1 adoption of the new personnel policies and the June 18 settlement of the earlier charge in Case 25-CA-21977 (involving the May 27 lockout of the employees), the Company, Union, and employees demonstrated that Kryshak was not understood to be a member of the bargaining unit.

The Union filed the charge (C.P. Exh. 5) on May 28, alleging the discriminatory layoff of 10 employees. At the time, there were 10 production and maintenance employees, working in the 7 classifications later including in the stipulated bargaining unit. Among these employees there were three truckdrivers (two pit and one bin driver) and two loader operators (one each in the pit and "on top," where the plant operator and bin truckdriver work).

When that earlier case was settled on June 18, the parties again demonstrated that Kryshak was not understood to be in the bargaining unit. The settlement provided for the payment of backpay to nine employees for the 2 days of lost time "suffered as a result of their layoff on May 27." This was backpay for all the production and maintenance employees except welder Howard Jenkins, who was General Manager Jenkins' father. No backpay was provided for Cook and Kryshak, despite the shutdown of the quarry those 2 days.

I find that the parties to the Stipulated Election Agreement intended to, and did, exclude Kryshak's position from the bargaining unit, making him ineligible to vote.

b. *Supervisory status*

Despite the small size of the operation, for years the Company has followed the practice of employing two supervisors. Since September 1991, when he replaced Co-Owner Ward as the general manager, Jenkins has spent much of his daytime hours away from the operation, at his real estate office and on the road visiting customers. He usually goes to the quarry in the early morning, just before noon, and late afternoon. (Tr. 33, 466, 691-692.)

Jenkins assigned Cook and Kryshak to replace the two former supervisors, Jeff Cook (who was the "overall supervisor" or superintendent) and Danny Johns (who supervised the work in the pit). At the time, as Jenkins explained, Cook "felt that I was going to run" Kryshak (Jenkins' son-in-law) "in and take [Cook's] responsibility away," but Jenkins assured Cook that he would be the superintendent with responsibility both "over the top [the surface plant and shop] and the bottom [the pit]." (Tr. 198-199, 693-697.) Thus, Cook continued to be the overall supervisor, as Jeff Cook had been under Ward.

William Carter, the loader operator in the pit, credibly testified that both Cook and Kryshak were his supervisors, that

Kryshak helped Cook supervise the operation, and that Kryshak was also the "safety supervisor" (Tr. 374, 379). It is undenied, as Carter recalled, Jenkins had told him "because of the insurance and the [MSHA regulations] that [Jenkins] was . . . making [Kryshak] the safety supervisor in charge of safety violations" (Tr. 385). Jenkins claimed, "I usually call him safety man," although he admitted having heard employees refer to him as "safety supervisor" (Tr. 693).

When there was a problem, as Carter further testified, he contacted one of the two supervisors, Cook or Kryshak, about the problem or contacted Jenkins himself (Tr. 387). It is undisputed that a few weeks before the election, Kryshak assigned mechanic Zickmund to operate the payloader in the pit. This happened when Carter told Kryshak that he was sick and needed to go home, and Kryshak "sent Scott Zickmund down to run my loader for me and I left" (Tr. 391-392). Like the employees, both Cook and Kryshak punched timecards (Tr. 387-388).

Another witness working under Kryshak, pit truckdriver Emmet Lovely, credibly testified that he considered both Cook and Kryshak to be his supervisors and that Kryshak "told us all [in the pit] what to do" (Tr. 464). He recalled that on a Friday in early July, Kryshak was the person he informed that he would be absent the following Monday because of a doctor's appointment (Tr. 471). In Lovely's opinion, Jenkins or Ward makes "the important decisions" (Tr. 470), and if Kryshak ever told him anything of any import, he would say Kryshak was relaying Jenkins' (not Cook's) direction (Tr. 488).

The job description for the safety and quality controller (relating part of Kryshak's responsibilities) confirms his discretion in issuing disciplinary warnings on safety violations and in assisting Superintendent Cook in supervising the operation. It provides in part (G.C. Exh. 9i):

2. *Along with the superintendent* he shall write warning slips to any person in violation of MSHA standards and keep records of such.

3. Regularly sample stone being produced and *work closely with the superintendent* to produce quality products. [Emphasis added.]

I find that this evidence shows that Kryshak possessed and exercised the authority responsibly to direct and assign work in the pit, to grant pit employees time off from work, to use independent judgment with Superintendent Cook in disciplining employees for safety violations, and to assist Cook in supervising the operation.

In its defense the Company did not call Kryshak to give first-hand knowledge of his position, but relied largely on the testimony of Jenkins who, as found, fabricated much of his testimony in attempting to justify his decision to discharge mechanic Stevens.

Jenkins claimed that Kryshak had no authority "on his own" to direct employees, although he could get somebody to help him drill and shoot if both Cook and Jenkins were gone (Tr. 711-712). He claimed that Kryshak had no authority to tell people to stop work, unless previously told by Cook. But if a drill broke down, he could go get mechanic Zickmund to fix it. (Tr. 713-714.) When asked if employees would take a complaint or problem to Kryshak, Jenkins

claimed that it would not be “any different than talking to another employee” (Tr. 716). He also claimed that if an employee was sick and could not do his job, he would probably tell “about anybody” that he was going home (Tr. 717).

Jenkins disregarded the written job description, quoted above, that the safety and quality controller has the responsibility, “Along with the superintendent,” of writing warning slips on safety violations. He claimed that only he himself and Cook had that authority (Tr. 717–718).

When asked what Kryshak was supposed to do if he saw someone without a hardhat, safety shoes, or seatbelt, Jenkins claimed that Kryshak “would come and tell either [Cook] or myself,” but would have no authority to deal with the situation (Tr. 719–720)—despite the credited evidence that Kryshak orally reprimanded employees for safety violations. (As when he was testifying about his decision to discharge Stevens, Jenkins appeared by his demeanor on the stand to be willing to fabricate whatever testimony might help the Company’s cause.) I discredit these claims as further fabrications.

I reject the Company’s contention that Kryshak had no supervisory authority and that he was merely “a conduit between Larry Jenkins and Randy Cook and other employees.” To the contrary, I find that Kryshak was a supervisor within the meaning of Section 2(11) of the Act.

Moreover, having found that the parties intended to, and did, exclude Kryshak’s position from the stipulated bargaining unit, I find that he was ineligible to vote, even if he were not a statutory supervisor.

C. Objections

As found, shortly before the election the Company made coercive promises and threats to employees, violating Section 8(a)(1). I find it clear that this conduct, alleged also in the Union’s Objections 1a and 2, interfered with the employees’ free choice of representation.

I overrule Objection 1b, having found no merit to the allegation that the Company threatened to call the police to interrupt a union meeting. I also overrule the additional alleged objectionable conduct, having found no merit to the allegation that the Company granted employees a pay raise to discourage union support.

Accordingly I sustain Objections 1a and 2 and find that the election must be set aside and a new election held, unless it is found after the ballots of William Carter and Todd Stevens are opened and counted, that the Union has received a majority of the valid votes cast.

CONCLUSIONS OF LAW

1. By discriminatorily discharging Todd Stevens on May 22, 1992, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By (a) coercively interrogating an employee, (b) unlawfully creating the impression that the employees’ union activities are under surveillance, (c) promising a pay raise and future wage increases if the employees reject the Union, (d) promises unspecified benefits for voting against the Union, (e) threatening to discharge union supporters, (f) threatening to keep an employee on layoff and threatening loss of jobs, layoffs, and reduced working hours if the employees vote for the Union, the Company violated Section 8(a)(1).

3. The Company did not threaten to call the police to interrupt a union meeting.

4. The Company did not grant employees a pay raise to discourage union support.

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 an employee, it must offer him reinstatement and make him 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 recommended³

ORDER

The Respondent, W. C. Babcock Construction Company, Inc., Rensselaer, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting International Union of Operating Engineers, Local Union No. 150, AFL–CIO or any other union.

(b) Coercively interrogating any employee about union support or union activities.

(c) Creating the impression that the employees’ union activities are under surveillance.

(d) Promising a pay raise or future wages increases if the employees reject a union.

(e) Threatening to discharge union supporters.

(f) Threatening to keep an employee on layoff or threatening loss of jobs, layoffs, or reduced working hours if employees vote for a union.

(g) 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 Todd Stevens immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

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

³If 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.

(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 facility in Rensselaer, Indiana, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 25, 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

⁴If 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."

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

IT IS FURTHER ORDERED that Case 25-RC-9158 is remanded to the Regional Director to open and count the ballots of William Carter and Todd Stevens and to issue a revised tally of ballots and a certification of representation if International Union of Operating Engineers, Local Union No. 150, AFL-CIO has received a majority of the valid votes cast. If the Union has not received a majority, the election conducted July 10, 1992, shall be set aside and a new election conducted whenever the Regional Director deems appropriate.