JD–35–05
St. Louis, MO

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ADB UTILITY CONTRACTORS, INC.

and

Cases 14-CA-27386,
14-CA-27570,
14-CA-27677

LOCAL 2, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO

Paula B. Givens, Esq., Counsel for the
General Counsel.

Lawrence P. Kaplan, Esq. and *Joshua M.
Avigad, Esq. (Kaplan Associates, LLC)*,
of St. Louis, MO, for Respondent.

Christopher N. Grant, Esq. (Schuchat, Cook & Werner),
of St. Louis, MO, for the Charging Party.

DECISION

Findings of Fact and Conclusions of Law

Benjamin Schlesinger, Administrative Law Judge. This is a *Gissel*[1] case involving, among other alleged unfair labor practices, the discharges of 13 persons, many of whom were leaders in the attempts to organize on behalf of Local 2, International Brotherhood of Electrical Workers, AFL-CIO (Union), the employees of Respondent ADB Utility Contractors, Inc. Respondent denies that it violated the Act in any manner and particularly contends that of the 13 persons discharged, 8 were supervisors within the meaning of *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).[2]

Respondent, a Missouri corporation, has its principal office and a place of business in St. Louis, Missouri, and other facilities located in Jacksonville, Florida, and Kansas City, Missouri, where it has been engaged in aerial and underground installation and maintenance of cable and fiber optics. During the 12-month period ending November 30, 2003, Respondent purchased and received at its St. Louis facility goods valued in excess of $50,000 directly from points

[1] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[2] The relevant docket entries are as follows: The Union filed its unfair labor practice charge in Case 14-CA-27386 on April 16, 2003, and amended it on June 19, 2003. It filed its charge in Cases 14-CA-27570 and 14-CA-27677 on September 16, 2003, and December 2, 2003, respectively. Complaints issued on June 26, October 9, and December 9, 2003; and hearings were held in St. Louis, Missouri, on 16 days between August 4, 2003, and February 5, 2004.

outside the State of Missouri. I conclude, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude, as Respondent also admits, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

The Union unsuccessfully attempted to organize Respondent in 2001 and engaged in a prevailing wage protest against Respondent at its Parkton subdivision job commencing in August 2002. It ceased picketing in November 2002, but its Business Agent, John Atchison, continued to speak to Respondent's employees at Parkton and nearby jobsites until about Christmas 2002; and the Union referred several out-of-work employees to Respondent, including alleged discriminatees Ed Schreit and Matt Bridges, with the object of organizing Respondent from the inside. On March 29, 2003,[3] the Union held its first meeting with 11 of Respondent's employees; and at the end of that meeting, the employees agreed to talk to their fellow employees, with the hopes of obtaining greater interest, and to meet again on April 7, when 30 attended. Schreit, Bridges, Jeremy Farris, and Adam Williams (all of them were subsequently fired) sat at the head table at this meeting, helped employees to complete authorization cards, collected authorization cards (all of the employees signed), took notes, and answered employees' questions. The Union gave employees American flag pins at this meeting to see if Respondent would make them take them off, with the plan to later wear union pins. Once again, the employees agreed to talk to other employees in an effort to gain even more support, and to meet again on April 15.

In the morning of the day that the next Union meeting was to be held, Chris Eirvin, Respondent's general manager, held a meeting of all his employees and delivered the following speech, which was, unknown to him, tape-recorded:

> Good morning guys. You have to bear with me, gotta little bit of a head cold. It must sound like I'm havin' a hard go here. I'm gonna keep this real short and sweet. I'm gettin pretty good at this one - this is my fifth attempt at the same subject. There's been some talk about some of the folks in here have been wantin' go union - either Local 1 or Local 2. I wanna say a couple of comments on that - and make sure everybody's on the same page with us. First off, I want everybody in here to understand that this place is not gonna go union and I'm gonna tell you why.
>
> First off is, our biggest customer, that's involved with the electric here in Missouri, is not gonna tolerate them being put over a barrel again on having this issue of crossing picket lines because a union will respect a picket and will not cross the line. They did this once with Sachs Electric, and they got theirselves in a hell of a jam, and since then, we've had the damn thing ever since and they won't get in that same position again.
>
> Item number 2 - if we go union, the union agreements with Ameren UE state that, and I'm sure that for those that've been in a *couple of meetings, uh that the union have had*, the union hasn't brought this up. The agreements that Ameren UE had with the union is that if the work is to be subcontracted out, and the contractor is a union contractor, according to the contract, guess who gets first shot at the work? Anybody wanna take a stab at this? The Ameren UE union employee. Does anybody in here believe that they would bypass the union

[3] All dates are in 2003, unless otherwise indicated.

gentleman who paid his dues for 20 years, and hand it to a union sub-contractor first? Does anybody in here believe that? I'm here to tell you, it ain't gonna happen. They're not gonna put theirself out there and get the shit sued out of them by, by bypassing over union people to give you guys the work. Flat out if this shop votes union, the Ameren UE work goes away. We don't have a choice in the matter - it's that simple really gentlemen.

But I can tell you because some of you all aren't up for this, when it comes to vote, I wanna share some wisdom [two words inaudible] you feel a little bit at ease. We're not gonna become union. Those of us that don't want to [be]come union are not gonna be out of a job - alright. I'm not gonna get creative and let the cat out of the bag, but the bottom line is, legislation is passed to keep the unions from ruining guys like us. We're gonna keep going - if this union is voted in - yes we will shut the doors. We'll be, we'll be done - no - we're gonna keep going - we're not gonna have some internal big friction thing going on between the union and non-union guys. I don't want nobody harassing anybody. I'm not up for that - I've got a lot of good guys in here that for some reason - you know what - hell all of us went to church once in a while - this is sorta the same kinda deal . . . you give me a lot of shit for so long I start buying it . . . reality is gentlemen, I don't bullshit anybody, but I don't want each other and you guys getting into it - givin' each other a hard time - that ain't what it's about. This place is not gonna go union. I bullshit none of you. We're not gonna single people out here that are sized up to the program, but it's not gonna be voted through either. I want everybody in here to know, we are not even gonna recognize any union attempts at all.

So for those that think they got this effort figured out, we're not even gonna recognize it. Have the union attorneys figure that one out. For those of you guys that are just so adamant about being union - that's your right, absolutely, I've got a few arguments for you guys - so don't no animosity towards anybody. There's two companies that do this work - take you and your abilities over to Sachs or Perkins. They're both looking for qualified individuals, especially on a directional drilling rig. These guys are union shops. They'll give you a real good taste of what it's all about on the other side. Uh, one more thing - Mike - there ya are, I need this documented that we're having this meeting as soon as we're done here give me an e-mail as well.

One more thing gentlemen, uh, I want everybody to understand, that according to the ADB employee handbook, there's a protocol for the ADB uniform if you will, with the ADB shirts. If anybody decides to pull any shit with any pin or anything else, I'm gonna help you understand what that handbook stands for, okay? So feel free to do what you need to with that.

Bottom line is we're not gonna go union, guys. The first quarter kicked us right in the ass - I really don't look forward to dedicating a lot of my time to this cause - I look forward to making the next quarter back on track. It's gonna be a good year for all of us, you know, regardless. Any questions? (Exhale) High winds today gentlemen, be careful, have a good day. [Emphasis supplied.]

That speech was important to this proceeding in a variety of ways. First, it unquestionably demonstrates Respondent's animus regarding the union activities of its employees. Second, Eirvin's testimonial description of his speech, before being confronted with

the fact that the speech was recorded, demonstrates that he has no regard for the truth. Although much will be written below about his fabrications—and I add to this that he was frequently evasive and argumentative—I found particularly outrageous his denial of any knowledge that the employees had attended two Union meetings, particularly when his speech referred to "a couple of meetings . . .that the union . . . had." His attempt to explain that his speech resulted from "[l]ittle group gatherings" and the facts that some employees were talking about the Union and that a few employees had conducted "little meetings" at the Parkton subdivision was utterly improbable. There is a sense of urgency in Eirvin's speech. It was not caused by something that occurred in November, five months before. There was something recent that caused him to spew forth his threats of closure; and his denial of knowledge of the Union meetings is particularly belied by his own acknowledgement of the "couple of meetings," two, being exactly the number of Union meetings held, not picketing at Parkton. His reference to the employees' wearing of pins was particularly telling. He had seen the American Flag pins, but that is not what he was referring to. He was referring to the Union pins that were to follow—"If anybody decides to pull any shit with any pin"—which he could have known about only if someone told him what had transpired at the April 8 Union meeting. Furthermore, his threats came at a particularly appropriate time, the morning of the Union's next intended meeting. Finally, the fact that Respondent fired the 4 employees who sat at the head table during the April 8 meeting and 9 of the 11 employees who attended the first meeting on March 29 was no mere coincidence. Eirvin knew exactly who headed the Union drive, and his testimony about his lack of knowledge of the Union meetings was patently false.

In addition, Eirvin, who was called to testify by the Counsel for the General Counsel as her first witness, stated that he had almost no knowledge of any Union adherents, despite the fact that Respondent was presented with a demand for recognition on April 16 and a list of Union supporters on April 23 and despite the fact that Williams read the names on the list aloud in the hallway on April 23, well within the range of Eirvin's hearing. Both Project Managers Ernie Nanney and Rich Robinson denied seeing the list, despite the fact that copies of the list were left in conspicuous places. Nanney and Robinson were aware of Eirvin's feelings about the Union, yet neither, nor Eirvin, according to their testimony, was at all interested in the names of the employees who were organizing, a threat to Respondent's existence. Even without the fact that so many Union activists and adherents were fired or transferred, I find that improbable and do not believe any of them.

Rather, many of Respondent's actions against the organizers were purposely fabricated in order to rid Respondent of the Union threat. The prime example involved Jason Lohman, who was ultimately discharged as a result of alleged complaints by Ameren UE, a St. Louis area electric company that provides Respondent with approximately 40 percent of its business, and various homeowners. The various customers, all of whom testified that they did not make the complaints that would have caused Respondent to investigate, and take copious photographs of, Lohman's malfeasance, as well as the testimony of Ray Pour, Ameren UE's construction supervisor, who denied having complained of Lohman's work, persuade me that Respondent was out to get Lohman. There is nothing that Lohman did that would so infuriate Respondent, other than his union activities, knowledge of which Respondent's representatives refused to admit. They were not telling the truth when they testified that they had no knowledge. They were similarly not telling the truth when they refused to admit seeing any of the Union pins worn by their employees. Strangely, they admitted seeing their employees wearing smaller American Flag pins. But anything to do with the Union, which Eirvin so abhorred that he threatened that he would close Respondent rather than deal with the Union, was somehow purposefully ignored and paid no attention to, which is utterly improbable, because Respondent fired or transferred only those who attempted to support the Union.

Perhaps Eirvin's most outrageous misstatement of fact occurred on the fourth day of the hearing. The Counsel for the General Counsel had subpoenaed Pour to testify that day. At the beginning of that hearing, Respondent's counsel represented that Eirvin had told him the day before that he wished to correct the testimony he gave on the first day of the hearing that Pour's complaint about employee Rodney Hanephin's putting a 90-degree bend on the wrong side of an electrical pole, not directly under the transformer, caused Eirvin to terminate Hanephin. Instead, Eirvin wanted to amend that testimony to make clear that Respondent had found the mistake itself. Counsel's offer to enter into a stipulation was rejected by the Counsel for the General Counsel, and Eirvin was then recalled to testify about his new recollection.

Witnesses can make mistakes, and I could certainly excuse Eirvin's error; but his new testimony resulted from the fact that he learned from a conversation that he had with Pour earlier that morning that Pour was going to testify that day. He must have suspected that Pour was being called to testify about something that was unfavorable to Respondent's cause. So Eirvin attempted to conceal that he had spoken to Pour that morning and denied under oath that he had. Pour, who had no reason to fabricate, testified that Eirvin had indeed called him on his Nextel radio; and they had spoken, and Pour told Eirvin that he was going to testify that morning.

Not only did Eirvin blatantly lie about this fact: his memorandum supporting the discharge of Hanephin, containing the lie about Pour calling him to inform of Hanephin's error and dated before Hanephin's discharge—"on 4/24 Ray Pour called me complaining of a 90% bend" put on the wrong side of a utility pole—was a document that Eirvin fabricated, undoubtedly for this proceeding. Similarly, Eirvin's testimony on the first day of the hearing—that it was Pour who called, that it was Pour who was irate, that Pour "was pissed because they [Ameren UE] had sent a crew out there and they couldn't energize it because it was on the wrong side of the pole," that the photographs that Respondent took had to be dated correctly (April 24) and, as a result, that Pour had called him on April 23—all of this was false, a carefully fabricated, fictitious scenario to support the sinful, treasonous conduct of Hanephin and justify Respondent's reaction (discharge) to it. Eirvin's testimony was no mistake or inadvertent error. It was deliberate, calculated lying, which Robinson joined in by corroborating Eirvin's initial fabricated testimony that Respondent was notified of Hanephin's alleged mistake by Pour

Even after Eirvin had supposedly corrected the record, he lied. He placed the date of his memo as a week after Hanephin's discharge, which could not possibly be accurate, because the memo states: "it's a very serious issue and I believe we will have to release him." The difficulty with that is that Hanephin had already been discharged. Eirvin also testified that Nanney first told Pour of the alleged mistake, while Pour testified he first learned of Hanephin's alleged mistake from Eirvin while at Respondent's facility. In either event, Eirvin could not have had a telephone conversation with Pour remotely similar to the one about which he originally testified. Therefore, the much-testified-about telephone conversation never happened. Eirvin further compounded his lies by claiming that, when he spoke to Pour on the telephone about Hanephin's alleged mistake, Pour said he had already spoken to Nanney. This testimony is also false. Pour denied speaking to anyone at Respondent about this issue before Eirvin showed him the pictures at Respondent's facility, and he specifically denied speaking to Nanney about the matter. Most importantly, Nanney, contrary to Eirvin, denied speaking to Pour about Hanephin's mistake and denied telling Eirvin of such a discussion. The result is that I do not credit Eirvin at all, about anything, unless corroborated by an impartial, credible witness. Robinson is complicit in attempting to mislead me, and I do not trust him either. As to both Robinson and Nanney, I found them beholden to Eirvin, who appeared to dominate their testimony; and I trust neither of them.

Turning to the alleged unfair labor practices, I conclude that Eirvin's April 15 speech contains numerous violations of Section 8(a)(1). Eirvin created an impression among its employees that their union activities were under surveillance by telling them of the two Union meetings that were held. *Electro-Voice, Inc.*, 320 NLRB 1094, 1094–1095 (1996). He threatened the employees with termination if they selected the Union as their bargaining representative by telling them that if they voted in the Union, the Ameren UE work, which constituted approximately 40 percent of Respondent's business, would disappear. There was no factual basis for that comment. *NLRB v. Gissel Packing Co.*, 395 U.S. at 618–620. By repeatedly telling the employees that Respondent was not going to be a union facility, Eirvin threatened the employees that it would be futile to select the Union. Eirvin also unlawfully threatened employees with the closure of its facility if employees selected the Union as their bargaining representative. He unlawfully solicited employees who supported the Union to quit and to obtain employment with two Union facilities, Sachs and Perkins. By April 15, some employees were already wearing American flag pins, with the eye toward wearing Union pins later. Eirvin's speech was directed toward banning the wearing of pins, particularly in light of the ongoing union organization, and impliedly threatened the employees with discipline for wearing pins demonstrating support for the Union. Notwithstanding his reliance on Respondent's handbook, there is nothing in the handbook regarding pins. Accordingly, his threat served no legitimate business concern and was made solely to hamper union organization. M*eijer, Inc.*, 318 NLRB 50 (1995).

On April 18, Respondent mailed and gave the following letter and agenda (emphasis in the original) to the employees with their checks; and Robinson read both documents to the employees who were engaged in work for Ameren UE:

> To the Employees and Families of ADB,
>
> IBEW Local 2 is once again attempting to unionize the company. I'm writing this letter to clarify the company position on the union issue for all of us.
>
> As most of you know, ADB went through some tough times over the last two years because of the problems in the telecom and broadband industries. We have successfully survived by implementing many cost saving measures and securing other customers **while keeping us employed thanks to our status as a non-union company.**
>
> Many of our utility customers employ the services of ADB only because we are a non-union company. They firmly believe we can do the job more efficiently and economically than their own union workers because of our flexible multi-functional crews. We will lose our edge in a very competitive market and our ability to generate new customers by unionizing. **The bottom line is many or all of us will very likely be looking for work elsewhere due to a decreased volume of work by eliminating our competitive edge in electing to unionize the company.**
>
> We all are painfully aware that the current job market is poor at best. I find it amazing that any of our employees would want to take a chance on jeopardizing the security of their well paying jobs, superior insurance, and a matching retirement plan by voting to unionize. The employees of our FEW union competitors have been sitting in union halls across the country for sometime without weekly paychecks. The truth is that IBEW Local 2 is interested in organizing ADB in order to make ADB less competitive with those companies

already represented by the IBEW. In other words, ADB would secure less work, the other union companies would keep a little more, **AND THE REAL REWARD WOULD GO TO OUR NON UNION COMPETITION.** Local 2 is interested in large numbers of members and currently represents employees of very large companies. ADB's St. Louis – Jacksonville – Kansas City employee base is relatively small, do you think the IBEW is interested in your welfare or will you become just another number? The union is trying to protect their large membership by taking the non-union competitive edge away from ADB.

ADB has been successful because of our ability to work flexibly with small multi-functional crews in an extremely competitive market. **Our competitors are non-union, and we must remain non-union in order to compete equally with them.** Many of our competitors have not survived in this economy, and we must do everything we can to keep this company healthy. **Putting a union in our company may kill it.**

ADB will fight all attempts to bring a union into our company even if it takes years. The cable, telephone and many other industries we serve have proven many times that unions don't fit their construction needs.

LOCAL 2 COULD DESTROY ADB AND OUR JOBS!!
HELP US KEEP ADB UNION FREE

Sincerely,

(sgd.) Chris Eirvin, General Manager

AGENDA

ADB will never unionize!
-you can vote
-you can strike
-we will replace
Bottom Line: we will NEVER recognize a UNION at ADB

Industry is non union
-our markets are non union
-look at our competition . . . nationwide it is non union
-these individuals will ruin it for 200 people and their family livelihoods

Rough Economy and Job Market
-I project to spend $100K+ to fight
-This is part of your bonus money
-ADB pays above industry standards
-The Best insurance and retirement plans + year end bonus
-How many non rain days can you afford to miss because of a picket?
-How many of your friends are out of work?

Union does nothing . . . and can't make promises happen
-How many people are sitting at the hall
-12 months vs 15 hours per week....

-Will you be a number or part of a team and a company to be proud of
-Talk to people who have been union . . . there are many at ADB
—if your [sic] convinced you want UNION I will setup an interview at Gerstner
Bottom Line: Leave on your own terms you will lose and so will innocent others

Data
-42% of votes win . . . ours won't with regional offices
-16% get a contract . . .84% fail
-7% actually bargain for better packages than existing . . . 93% don't
——not good percentages
-Are you willing to risk this . . . . how about your family?
-If you strike will you be replaced or have a job?

Lastly
ADB will subcontract more work
ADB will fill positions for strikers
ADB will never recognize a union
ADB and Their Families will prosper
Do you want to be a part of the best utility company?

The complaint alleges that these two documents contain a multitude of unfair labor practices in violation of Section 8(a)(1) of the Act. I agree. They threatened the employees that they would lose their jobs by selecting the Union as their bargaining representative, because they owed their employment to the fact that Respondent was nonunion. Somehow, but not explained by objective fact, if that status should change, Respondent would lose its competitive edge, and that would result in the loss of employment. Indeed, putting a union in Respondent might kill it, according to Eirvin, resulting in loss of not only employment but also insurance and Respondent's retirement plan and Respondent's "destruction." Those are unlawful threats. *NLRB v. Gissel Packing Co. Inc.*, 395 U.S. at 618–620.

By telling employees that it would fight all attempts to bring in a union, even if it took years, and that it would never unionize and would never recognize a union, Respondent unlawfully threatened its employees that it would be futile for them to select the Union as their bargaining representative. Respondent unlawfully invited its employees to resign their employment and promised to arrange for an appointment at a union company. It unlawfully threatened to "subcontract more work" if its employees selected the Union as their bargaining representative. It unlawfully threatened the employees with the loss or reduction of their year-end bonus money, because it would spend that money on fighting the Union. Yet another unfair labor practice related to the letter and agenda occurred when Project Manager Kevin Sellers read them to his employees, adding that, no matter what the employees might do, Respondent would never go union. That is similarly an unlawful threat of futility.

Finally, on April 23, 2003, the day that many employees distributed lists of the union supporters at Respondent's facility, Eirvin stopped Lohman in the hallway and asked if his name was on that list. Lohman said that it was, and Eirvin said that that was all he needed to know. In the context of the many other unfair labor practices that Respondent was committing, including the threats of closure and the advice that Union supporters should move elsewhere, and the fact that the question was asked by Respondent's highest ranking official, this constitutes illegal, coercive interrogation. *Medicare Associates, Inc.*, 330 NLRB 935, 939–940 (2000); *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

The remainder of the complaint alleges that Respondent violated Section 8(a)(3) by discharging or unlawfully transferring employees, but Respondent contends that the following "crew leaders" are not employees but are supervisors within the meaning of Section 2(11) of the Act: Williams, Bridges, Farris, Lohman, Hanephin, Nathan Schaffer, John Shipp, and Matt Sutton. Section 2(11) provides:

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

In *Kentucky River*, 532 U.S. 706 (2001), the Supreme Court found erroneous the Board's rejection of a nursing home's proof of supervisory status of nurses with respect to directing patient care. It stated, 532 U.S. at 712–713, that Section 2(11) of the Act sets forth a three-part test for determining supervisory status:

> Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "in the interest of the employer."

Where the Board went astray, held the Court, was the Board's interpretation of the second part of the test, "that employees do not use 'independent judgment' when they exercise 'ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards.'" 532 U.S. at 713. The Court rejected that interpretation, noting that, in analyzing the statutory term "independent judgment," while the Board was free to examine, within reason, the degree of discretion required for supervisory status, and that that discretion "may be reduced below the statutory threshold by detailed orders and regulations issued by the employer," 513 U.S. at 713–714, the Board could not categorically exclude without statutory basis certain kinds of judgments. The Board's categorical exclusion "turns on factors that have nothing to do with the degree of discretion an employee exercises," the Court held, 513 U.S. at 714, and reasoned that there was no supervisory judgment worth exercising that does not rest on professional or technical skills or experience. Furthermore, the Board's attempt to limit "its categorical exclusion" to professional judgment applied "'in directing less-skilled employees to deliver services'" (532 U.S. at 715) failed because it was "directly contrary to the text of the statute." Id. Every supervisory function must require the use of independent judgment before supervisory status will obtain; yet, the Board would limit "independent judgment" to only 1 of the 12 listed functions: "responsibly to direct." 513 U.S. at 715–716.

Although Respondent made much of its *Kentucky River* defense at the hearing, insisting that various employees were supervisors under *Kentucky River*, it wrote very little in its brief. Indeed, Respondent relies more on a traditional claim of supervisory status, as is shown by one of the only two decisions it cites,[4] and not a claim, which parenthetically is not urged by the

[4] In *Arlington Masonry Supply*, 339 NLRB No. 99 (2003), the employee prioritized jobs, assigned employees to work on specific trucks, decided what type of maintenance work needed to be done, inspected all work, approved time off, and recommended suspension. He was held to be a supervisor. In *Sheet Metal Workers Local 101 (Comfort Conditioning Co.)*, 340 NLRB No. 149 (2003), although the

Continued

General Counsel or the Union, that the crew leaders have such professional or technical backgrounds or are so experienced that their decisions or their direction to less experienced employees would not be supervisory. And thus *Kentucky River* is not particularly relevant to the disposition of whether the crew leaders are supervisors within the meaning of the Act, at least as of the moment of the issuance of this Decision.[5]

Kentucky River is helpful, however, in setting forth some guidelines to determine this issue. First, Respondent, by claiming that certain employees are supervisors, bears the burden of proving the challenged employees' supervisory status. 532 U.S. at 711, approving *Masterform Tool Co.*, 327 NLRB 1071, 1071–1072 (1999). Second, the Board maintains the reasonable discretion to resolve the question of the degree of judgment which alleged supervisors exercise by focusing on the "clerical" or "routine" nature of the judgment. 532 U.S. at 714.

The supervisory issue here concerns, except for Lohman and Sutton, crew leaders among the laborers, machine operators, and locators who are engaged in underground work, either boring through the ground with a boring machine or digging trenches in the ground with a backhoe or similar equipment to insert pipes or conduits from one location to another and pulling wire or cable through the pipes. That is accomplished by boring or drilling the conduit underneath the ground, performed by the boring crew, typically comprised of an operator of a boring machine, a locator for that operator, and perhaps a laborer, or by digging a trench and laying the conduit into it, performed by the backhoe crew, comprised of the backhoe operator, who is the crew leader, and a laborer, sometimes two. In a boring crew, the locator is the crew leader. I do not credit Eirvin's testimony that the operator would be the crew leader if he had more experience. Robinson knew of no operator on a boring crew who was designated a crew leader and testified, although the transcript is somewhat garbled, that on a boring crew, the locators were always the crew leaders, not the operators.

The actual performance of the job begins each morning when the project manager gives to the crew leader blueprints for or otherwise explains the jobs that are to be performed that day. The blueprints are of neighborhoods or streets or townships and show basically which pole or electric pad one is going from to which pole or pad the dig is going to. It indicates the address of the dig, the locations of the poles and pads, and the materials that are needed to perform the job. When the employees arrive at the job, they will see paint on the ground (locates), placed there by an outside company, indicating the location of utilities (telephone, gas, electric) which are to be avoided during the digging or drilling operation. The first thing that the crew does upon arriving is to dig the locates. Everyone, the locator, the operator, and the laborer (if there is one) finds a locate and digs, normally one foot holes, up to three feet deep, or at least the depth

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Administrative Law Judge found that Jack Dresser was a supervisor, that was not the crux of that Section 8(b)(1)(B) case. The issue was whether he was "an employer representative" within the meaning of that Section. The Board affirmed that he was not.

[5] Almost two years ago, on July 25, 2003, the Board issued a "Notice and Invitation To File Briefs" in three cases involving supervisors to consider issues raised by *Kentucky River*. Two of the three involve nurses: *Oakwood Healthcare, Inc.*, Case 7-RC-22414; *Golden Crest Healthcare Center*, Cases 18-RC-16415–6; and the third, perhaps critical to the issue in this proceeding, involves leadmen at a manufacturing plant, *Croft Metals, Inc.*, Case 15-RC-8393. I have delayed the issuance of this Decision in the hope that the Board would have disposed at an earlier date of these *Kentucky River* issues, which may impact my resolution of Respondent's contentions, particularly because so many of the alleged discriminatees are alleged to be supervisors and a finding that four of them are supervisors would destroy the Union's claim of majority support for the purpose of its requested bargaining order. Due to personal commitments, I can delay no longer.

needed to find the utility. However, frequently, the locates are not accurate, and the hole must be widened by two feet, until the utility is found.

When the crew completes the locates, if a boring crew, the crew sets up the boring machine, which is a drill, and decides on the initial location of the bore. The boring machine operator inserts a drill rod as much as three feet under the ground. At the end of the rod is a drill head which contains a transmitter or beacon that sends a signal back to the locator box, held by the locator. The operator steers the rod, adding rods as required, to its target, and being guided by the locator, who stands in front of the boring machine with a locator box which shows the depth of the boring head and its pitch. The locator reads the box and tells the operator by hand signals or over a radio transmission to dive deeper or to change directions. The result is that the operator and the locator work together in guiding the rods through the locate holes that they have dug so they can miss the utilities. When the operator gets to the end of the bore or if he runs out of rods, he will pitch the head up and it will pop the rod out of the ground. The head is then removed and a puller is put on. Then the operator pulls the rods back one at a time and pulls their conduit off of a reel at the same time down into the ground and all the way back to where he started. At that point, he is done with that portion of the bore, and the crew will then dig the tie-ins, bringing together or splicing two runs of conduit. If the operator is not through with the bore, he will start a new bore at the end point and proceed, as above, until he reaches a point where there will be a new tie-in or the end of the bore.

The work of the backhoe or open cut crews is not appreciably different from the work of the boring crews, except that they use different equipment, such as a backhoe, and sometimes a trencher, supplemented by digging by hand, to dig because the soil is too hard or rocky for the boring crews to bore or there are too many utilities or a ditch which interfere with an unobstructed underground path for the borer. Backhoes are also used to set hand holes in the ground, install conduit in the ground, tie conduit already in the ground, place plastic bends into the ground (at a 90 or 45 degree angle), and to dig near electrical pads. When the backhoe crew leader arrives at a job, he first walks the job to make sure all the locates are marked, then he unloads the backhoe, and then he and the laborer or, more rarely, laborers, dig locates by hand. Because it is the job of the laborer to dig locates, he always carries a shovel and does not need to be told to dig. When the backhoe operator begins his work with his machines, he cannot see the ground, or at least much of it, where he is digging; and so the job of the laborer is to watch the backhoe bucket to ensure it does not hit unmarked utilities (swamping). If the laborer sees something in the hole, he directs the crew leader to stop, climbs in the hole, and digs with a shovel until he either exposes the suspected utility or satisfies himself there is no utility there. Similarly, when the crew leader feels something in the hole, he asks the laborer to check the hole. If the crew is doing a tie-in, both the crew leader and laborer get the materials and get into the hole to do the work; and they both will backfill the hole. When the drilling or digging reaches the target destination, the cable or wire is then inserted into the opening of the conduit and pulled back.

Most of these crew leaders agreed that they were responsible for production and for getting the job done. In the instance of a drill operator, he cannot see. The crew leader, in that instance, the locator, is the operator's eyes, and the drill operator depends on the locator's skills to keep drilling and can go no faster than the locator can advise him. On the other hand, a backhoe operator can see, but not all that much, and he is the one, with the assistance of the laborer, who is watching for utilities, who ultimately determines how much he will produce. So, in both instances, how much they get done is dependent on how good the crew leader is, which, of course, is impacted by the type of ground they are digging or drilling through, how rocky or not, how many utilities they encounter, and, initially, how many locates must be dug and the accuracy of and the difficulty of digging the locates.

But many of the work conditions of the crew were dictated not by any individual, particularly the crew leader, but by the job. Thus, overtime was limited in part by Respondent's cap on the number of hours that could be worked on an Ameren UE job, 50, but equally important by the consensual decision by all as to whether they wanted to continue to work. Often, the progress on the job, that is, whether they could finish during the daylight, dictated whether the employees would stay to finish. Similarly, lunch was a communal decision; and some employees continued to work through lunch, even though they were not being paid. The issue of rain was subject to some conflicting testimony. Williams testified that he made the decisions that the inclement weather was sufficiently serious to call off work and that the rain had let up sufficiently so that work could be resumed. Edgar Shreit (a crew leader whom Respondent does not claim to be a supervisor), however, insisted that he would have to call his project manager. Bridges testified that he left the decision up to his laborer, Wayne Schaffer, because Bridges was riding in the cab of the backhoe and Schaffer, the laborer, was the one who was getting wet. In addition, Bridges testified that Robinson would always call to see what the weather was, how hard it was raining, and whether Bridges was able to get anything done and that Bridges always called Robinson before leaving because of weather. Robinson did not deny this testimony.

Nanney essentially admitted that the job of the boring crew is routine. Arriving at a job and observing that there are locates, the boring crew knows that the first thing they have to do before they can bore is to dig the locates. It does not matter what order they dig their locates, but typically the boring crews dig their locates from the start of the bore to the end. The duties that they perform, they do day in and day out. The boring crew uses a machine to bore through the ground, an operator operates the machine, and the locater locates. The crew also dig locates. It is routine for them to arrive at a job and communally decide that they are going to start at a certain place, so they would dig the first locate. The digging of the locates is also routine; the crew leader and the operator would dig down until they found and exposed the located utility. If there is more than one locate, they would move on to the next one, on down the line; and after digging their locates, and before they start operating, they have to set up the machine and have to decide where, the options being at one end or the other or, in some cases, the middle. Typically, what determined that was where space was available, such as public or private property, and where the equipment would do the least damage. (And there was credible evidence that the location was determined by the operator and the locator, jointly.) Once the machine is set up, they would start boring, and the routine, as Nanney affirmed, would be that they would bore and it goes fine and they leave. Regularly a boring crew will set up and bore all day long and nothing happens, and they leave and go back the next day. On occasion, however, there are problems, such as they would encounter unlocated utilities or a rock they cannot bore through. For the former, they would call Locate Supervisor Josh Martychenko for a locate. For the latter, they would call Nanney, and normally he would send a bigger drill. The crew leader does not call out a bigger drill without going to Nanney first.

The backhoe work is similarly repetitive and routine. The laborer knows that digging locates and swamping is his job and does not have to be told how or when to do so by the crew leader. On the few occasions when a crew leader is assigned two laborers, one will swamp, while the other will dig locates; but, because both tasks are so routine and repetitive, it does not matter which laborer does which job. When Williams and Bridges, both backhoe operators, had two laborers, Williams told them which laborer would swamp and which would dig locates; but Bridges let them decide between themselves what they wanted to do. Picking between two equally qualified employees to perform a routine and repetitive task is not the type of "assignment" or "responsible direction" contemplated by Section 2(11). *Injected Rubber Products Corp.*, 258 NLRB 687, 689 (1981). On the rare occasion when something unusual happened, such as hitting an unlocated utility, equipment problems, or an absence of locate

paint on the job, the crew leaders called their superintendent or project manager. There were also times that the project manager would actually meet the employees on the job to show them what to do, if the crew was unsure.

In short, what the crew does is basically understood by the crew members: the locates had to be dug, and then the conduit had to be laid and the cable or wire pulled back through it. While some of the crew leaders testified that they were responsible for the productivity and efficiency of their crews, there was in fact no power that Respondent vested in them to do anything to ensure either productivity or efficiency. Furthermore, until the unfair labor practices at issue herein, Respondent presented no evidence that it ever held even one crew leader responsible for the productivity and efficiency of his crew or lack thereof. Rather, whatever decisions that crew leaders make, such as ensuring that the work had been completed, did not result in their directing anyone to do anything and, assuming that they did, were not more than routine and repetitive and not supervisory decisions made "in the interest of the employer."

"It is well settled that the burden of establishing supervisory status rests on the party asserting it." *Armstrong Machine Co.*, 343 NLRB No. 122, slip op. at 1, fn. 4 (2004). "[A]ny lack of evidence in the record is construed against the party asserting supervisory status." *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999), quoted with approval in *Armstrong Machine*, supra, slip op. at 1, fn. 4. By the very nature of the routine, repetitive work performed by the crews, the crew leaders do not responsibly direct the work of anybody. "'[R]esponsible direction' . . . depends 'on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs.'" *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002), quoting *Schnurmacher Nursing Home*, 214 F.3d 260, 267 (2d Cir. 2000). No crew leader ever was.

The most evidence that Respondent presented was conclusionary statements by various crew leaders about their being "bosses" and their responsibility for the productivity of their crews and to see that their job got done. However, conclusionary statements, without supporting evidence, are insufficient to establish supervisory status and authority. *Armstrong Machine*, supra, slip op. at 1, fn. 4, citing *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995), which in turn cited *Sears, Roebuck & Co.*, 304 NLRB 193, 199 (1991). What Respondent omitted from the presentation of its case were the crew leaders' "particular acts and judgments that make up their direction of work." *Armstrong Machine Co.*, supra, slip op. at 1, fn. 4, quoting from *North Shores Weeklies, Inc.*, 317 NLRB 1128 (1995). Finally, because the "Board has a duty not to construe supervisory status broadly because 'the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect,'" *Armstrong Machine Co.*, supra, slip op. at 1, fn. 4, quoting from *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985), enfd. in relevant part 794 F.2d 527 (9th Cir. 1986), the Board has found that only individuals with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen . . . and other minor supervisory employees," *Armstrong Machine Co.*, supra, slip op. at 1, fn. 4, quoting from *Chicago Metallic Corp.*, 273 NLRB at 1688. I reject Respondent's generalized contention that crew leaders exercise supervisory functions by being in charge of production and getting the work done.

Each of the crew leaders, except Lohman, testified affirmatively that he had never been given the authority, in those words, to exercise any of the 12 supervisory functions set forth in the statute. Respondent offered no proof that any of its officers or supervisors specifically authorized the crew leaders to exercise any of those functions. The most that can be said is that, perhaps on occasion, the crew leaders may have told a particular laborer to dig a particular locate. That is, at best, in the circumstances of the facts in this proceeding, routine and not a supervisory, independent judgment. *Hexacomb Corp.*, 313 NLRB 983, 984 (1994).

Respondent, however, cites in its brief certain testimony of the crew leaders to support its contention that they are supervisors. I now consider that testimony of each of the crew leaders. Williams testified that Nanney asked him how a new laborer, Grant Gresham, was working out, and Williams told Nanney that he was not. There was no evidence that Nanney took any action on Williams' reply; and this demonstrates only that an admitted supervisor asked an employee about his opinion of another employee, and not that Williams was a supervisor. In addition, Williams once recommended that Respondent "replace [Gresham] when he hurt his wrist." Nanney, however, did not do so; and Gresham eventually quit about a month later. So, Williams did not effectively recommend that Gresham be discharged. That, however, is not even the test. The authority to effectively recommend generally means that the recommended action is taken without independent investigation by superiors, and not simply that the recommendation is ultimately followed. *Children's Farm Home*, 324 NLRB 61, 61 (1997). Neither Nanney nor the other project managers testified about whether they did, or did not, independently investigate these "recommendations."

Respondent contends that Williams relayed to Nanney the complaint of laborer Steve Mack about having to get into a deep hole that had no shoring. There was no evidence, however, that Respondent authorized or directed Williams to do so or that that was part of Williams' responsibilities. Rather, Williams merely acted as a conduit to relay that complaint, which Williams denied was a "grievance"; and thus this instance does not prove that he had any authority to adjust the grievances of Respondent's employees. *Pine Brook Care Center*, 322 NLRB 740, 748 (1996). I conclude that Williams was not a supervisor within the meaning of Section 2(11) of the Act.

Respondent contends that, when Bridges was on a job, higher supervision relied upon him to see that the job he was working on got done. There is nothing in the record to support this proposition, except Bridges' *assumption* that that was so. In any event, even if the contention is accurate, the mere fact that higher supervision relies on an employee to see that he is doing his job does not prove that the employee is a supervisor. Rather, Bridges had to get the work done, and he knew, as did the member or members of his crew, what each job entailed because it was so routine and repetitive. Respondent also relies on Bridges' testimony that, when he arrived on a job, he would figure out how the job would be done. That was a reference to a job Bridges had worked with Williams and a laborer, Steve Mack. It is unclear who, Williams or Bridges, was acting at that time as a crew leader; but Bridges' testimony made clear that any decision was a joint one and appears to be based on making the most routine of decisions, such as which end of the job to start on or which locate an employee should dig.

Regarding Respondent's contention that Bridges was responsible to see that all of the proper equipment, tools, and supplies were on the jobsite, the evidence demonstrates that the blueprints that Bridges received each day provided this information. Besides, the fact that an employee ensures that he has the right tools and equipment is not a supervisory function within the plain language of Section 2(11). Finally, Respondent claims that Bridges made the decision that his crew would work nine hours a day. That is accurate, at least to the point that Bridges stated that he wanted to work nine hours per day, and not more. Conspicuously absent is proof that he set nine hours as the workday, or directed employees to work nine hours, when they wanted to work less, or refused to permit employees from working more time. In fact, Bridges' laborer, Wayne Schaffer, had no problem working an hour of overtime each day. In sum, even if I credited Respondent's contentions, I would still find no proof that Bridges was a supervisor; and I conclude that he was not.

Respondent's contention that Hanephin motivated lazy crew members is inaccurate. Clearly, he never gave orders to anyone to move faster or otherwise directed their work. That he

may have trained a new worker is not an indicia of being a supervisor. He had no authority to give breaks. His desire to work 50 hours a week was apparently joined in by members of his crew. He did not order them to work overtime, and he acceded to the wishes of some of his crew to return to the shop at a particular hour. Whether Hanephin considers that he was the boss of a worksite is of no consequence. The question is whether he exercised supervisory authority. As he testified:

> I guess I was just told that I was in charge on the job site. If there was a question about anything, that I made the decisions, but there isn't a whole lot to it. I mean where to dig or where to start digging. I mean there isn't – I don't ever remember being told anything other than, you know, just you are a crew leader and I've been a laborer for years, so I knew basically. Nobody specifically told me anything. It was just play it by ear and that was about it.
> Q. Were you ever told what kind of decisions you had the authority to make?
> A. No.

The record reveals that he is not a Section 2(11) supervisor.

Lohman was the crew leader of the restoration crew,[6] normally consisting of one laborer, whose responsibility was to fill in the holes and trenches dug by the boring and backhoe crews; rake, tamp, and level the soil; lay down sod or, more frequently, plant new grass seed; and cover the seed with straw. Although within the first week of his employment in early April 1999, Nanney told him that he had the authority to fire employees, it subsequently turned out that he did not. He wanted to fire employee Damian, but Nanney told him that he could not, because Nanney was the supervisor. When Lohman recommended that Nanney needed to do something about Damian, because he was sleeping on the job, sleeping on the truck, and was not doing anything, Nanney said that he could not fire him. Although Nanney also told Lohman in April 1999 that, in addition to having the authority to fire employees, he had the right to suspend employees, it is most likely that Lohman did not have that authority. In more than four years, he never exercised it; Nanney admitted that crew leaders were not involved at all in the termination process; no other crew leader had the authority that Lohman thought he had; and, had he exercised what he thought was his authority to suspend employees, it is probable that Nanney would have told him, just as he did when Lohman wanted to fire someone, that he could not, because Nanney was the supervisor.

Respondent contends that Lohman asked that two employees be removed from his crew for poor performance and succeeded in that request. However, one was Damian, and Lohman did not succeed. Respondent also cites the example Vince Vulsteki; but Lohman asked Nanney to take Vulsteki off his crew because he could not get along with him ("He just liked to argue with everybody. It didn't matter who he was with."), and not because of poor performance ("he was a good worker"). Nanney moved him several weeks to a month later. I find that this was not a recommendation for a transfer, exercised with "independent judgment," but only a personality conflict between two employees, and not a reflection of a supervisory function. Indeed, Nanney testified that he tried "to get everybody that gets along, that does a good job and works well with each other, on the same crew." Respondent next contends that Lohman recommended raises for two employees. However, Respondent did not give a raise to laborer Garret Jones, despite Lohman's kind words. Another laborer, Gabe Creswell, who had been employed for six or eight months, told Lohman that he wanted a raise. Lohman relayed that

[6] In addition, Lohman performed some open cut work using a small backhoe, ran a small excavator, dug into electrical pads and poles, pulled electrical wire, and spliced conduit.

request, telling Nanney "that Gabe doesn't need any supervision on any of the jobs. He knows exactly what to do. He can be a crew leader if he wants, if he'll let him do it. He needs a raise." Creswell was "promoted" two weeks later. Lohman was never told that he supervised anyone and believed that the supervisor supervised the laborers. His function, he believed, was just to relay a message from the supervisor to them. His recommendation in this one instance, unsolicited by Nanney and not part of Lohman's normal duties and responsibilities, does not constitute an effective recommendation of a raise. *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994)

Lohman testified that he told his crewmembers that, when they came to work with him, he had been told to get as much done as he could in a day, which was as long as one could work. He acknowledged that as crew leader he had overall responsibility for the performance, effectiveness, and productivity of his crew. He further acknowledged that a crew leader was responsible for the on-the-job training and instruction of all crew members regarding their job functions and work policies. Finally, he conceded that the crew leader was expected to lead by example and make every effort to help crewmembers achieve productivity as often as possible, while thoroughly completing every job safely and professionally. None of these admissions establish Lohman's supervisory status where Respondent never, until the day that it finally trumped up evidence in an attempt to justify his discharge, held him accountable for the actions of anybody on his crew. Equally important, Respondent never offered any evidence, other than the evidence that I have rejected, about the authority Lohman actually exercised, nor any evidence on his independent judgment.

Instead, Lohman's job appears rather routine and repetitive. His laborer normally decided what he wanted to do and performed it without checking by Lohman, unless the laborer was inexperienced. He and the laborer worked until the job was finished, it was too dark, or he and his crew were too tired to work anymore. When it rained, Lohman called Nanney. If the laborer did not want to work overtime, Lohman called Nanney. Every night, before leaving the jobsite, Lohman called Nanney. I conclude that Lohman is not a Section 2(11) supervisor.

Employed for two and one-half months, Matt Sutton spent only some of his time as a crew leader on a pulling crew on the cable/telecommunications side of Respondent's business, installing fiber optic cable into pipe already in the ground. Eighty percent of Sutton's latter portion of his employment was spent working on one particular job, a World Com/MCI job, supervised by Project Manager Sellers, who was at that jobsite daily, from 8 or 9 a.m. until the employees left in the evening. There was nothing on that job that was not supervised by Sellers, with whom Sutton met each morning, who told Sutton what equipment to use; assigned other employees to work with Sutton, without input from Sutton; determined the priority of work; told Sutton where to start each day; shuffled employees around during the day; and determined when employees went home. In addition, Sutton worked about 80 percent of his time on this World Com/MCI job and other jobs with John Langford, a backhoe operator, who was the crew leader. So, for that portion of his work, Sutton was not even a crew leader.

For the other relatively minor portion of his employment, at which Sellers was not present and Langford was not the crew leader, Sutton mostly "proofed duct," which is the process of checking the plastic piping for obstructions and installing a pull wire, accomplished by using an air compressor to blow rope, to which a heavy object, called a rocket, is attached, through the pipe from one hole in the pipe to the next, where a laborer is stationed and radios Sutton to stop the compressor when he sees the rocket. The laborer pulls the rocket out of the hole and wraps the rope around an assist wheel which is used later when the wire is pulled through the pipe. The crew then moves one hole down the pipe and repeats the process, hole by hole, each time the crew proofs duct. Sutton's decisions as a crew leader are to decide where to set up the reel of rope and to tell the laborer which hole to go to. There is no

independent judgment required in telling a laborer which hole to go to where the rope is always blown to the next hole down. Lunch was taken at a good stopping point in the work. Sellers decided whether to send employees home when it was raining, and Sutton never left work for the day before calling Sellers, whom he also called if anything unusual happened, such as an obstruction in the pipe.

In sum, the vast majority of Sutton's time was spent on a crew on which he was not the crew leader. During the much smaller period that he was, he was closely supervised by Sellers and, in any event, engaged in the most routine and repetitive work that required no independent judgment. There is no evidence that Sutton had any authority to exercise independent judgment in directing the work of anybody. I conclude that Sutton was not a Section 2(11) supervisor.

Respondent contends that Farris had the authority to recommend effectively the removal of one of his crew members from his crew. The facts are that Farris was dissatisfied with operator Jason Politte and complained to Robinson that Politte was lazy. Farris asked for a different operator, to which Robinson replied, "Not at the moment," adding, "That's what everybody says about Jason." About two weeks later, Politte was taken off his crew. Farris's complaint was based on the fact that, when he was digging locates, Politte did not like to work when he was with a group of people; he would rather talk, leaving Farris to do the digging. Farris complained "[b]ecause he wasn't being a team player."

Because Robinson did not testify, it is impossible to gauge whether he removed Politte from Farris's crew because he agreed with Farris's recommendation, or whether Robinson already knew of Politte's proclivity to slack off from work, as evidenced by his acknowledgement that others had complained about Politte, or whether Robinson moved him for a reason entirely unrelated to Farris's complaint. Thus, it is unclear whether Farris's comment was an effective recommendation. In order to confer supervisory status, "the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel." *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). Besides, Robinson agreed that he wanted crews to get along with one another, and this was not discipline that was being recommended but a shift of one person because of a personality conflict. Finally, this was merely a complaint by one employee about another, dealing with the compatibility of employees who worked together. Complaints about compatibility do not prove supervisory status. *Armstrong Machine Co.*, 343 NLRB No. 122, slip op. at 2; *Brown & Root, Inc.*, 314 NLRB at 21.

Respondent contends that Shipp had the authority and exercised it to request that Politte, then a member of his crew, be removed and that Nanney removed him. What Shipp actually complained about to Nanney was that he had told another laborer to "to put the carrot (phonetic) inside the pipe, and pull the pipe out that we needed for that job." Politte told that laborer not to do it, because Shipp did not have that authority; Politte was there longer. Shipp told Nanney: "I can't deal with him anymore." This statement was merely a complaint and not a recommendation of anything. Assuming, however, that it could be construed as a recommendation, Nanney did not testify about this incident; and thus the record is barren of proof that he understood what Shipp was stating and that he adopted Shipp's recommendation, without independent investigation, in removing Politte from Shipp's crew. Respondent's only specific contention about Nathan Schaffer was that: "He was aware of his authority as he testified to the fact that another crew leader had a laborer taken off his crew for failing to follow directions." Although Schaffer recalled that the laborer's name was Puhl, it is likely that it was Politte. In any event, once again, Nanney did not testify; and Schaffer's hearsay recollection is meaningless. I conclude that neither Shipp nor Schaffer are Section 2(11) supervisors.

Having found that all the persons who were discharged by Respondent are employees and not supervisors, I turn now to the discharges, each of which are alleged to have violated Section 8(a)(3). On Monday, March 31, two days after the first Union meeting, Eirvin held a meeting of crew leaders to whom he stated that all boring crews should drill 1,000 feet per week and threatened that, if they did not, he would start "getting rid of them" after a month. In the first few days of April, Mike Stankewitz, one of Respondent's project managers, asked Eirvin's brother, Ed, another project manager, if he had heard that Respondent was going to discharge a couple of employees that had started "that union shit in St. Louis." Ed denied hearing that; he had not talked to his brother. On April 14, Nanney threatened Hanephin that, if things kept going the way they were, there was going to be a bunch of people gone from the Ameren UE side in the next few weeks.

Respondent did not wait as long as Nanney threatened and as Robinson suspected, when he warned Farris just after Eirvin's April 15 speech: "Just watch your ass, and don't give Mr. Happy [Eirvin's nickname] a reason." On the afternoon of April 15, within hours of delivering his diatribe against the Union and only two weeks after threatening to discharge crew leaders a month later, Respondent terminated for poor production Farris and Schaffer, two locators, and Edgar Schreit, a boring machine operator, all of whom had attended the Union's first meeting on March 29. At the second Union meeting, on April 8, Farris and Schreit sat at the head table, Farris helping employees complete authorization cards and collecting completed cards, Schreit taking attendance and answering questions of employees. As noted above, Eirvin had knowledge of exactly what was happening at that meeting and had to have knowledge of who had attended and what each did. In fact, in his earlier speech, he specifically directed his remarks to "those of you guys that are just so adamant about being union." Although Eirvin's own words evidence his complete knowledge of the Union drive, the General Counsel also relies on the "small plant doctrine," which permits the inference of knowledge of union activity from the fact that there are 59 employees in this unit. I agree. *Breuer Electric Mfg. Co.*, 184 NLRB 190, 194 (1970); *NLRB v. Joseph Antell, Inc.*, 358 F.2d 880, 882 (1st Cir. 1966), enfg. *Malone Knitting Company*, 152 NLRB 643 (1965). Many employees, including Schreit and Farris, were talking with their fellow employees in an effort to get more of them to attend the Union meetings. While Schaffer may not have actively engaged in soliciting employee support, he nonetheless attended Union meetings before April 15 and signed a Union authorization card.

Although Respondent made much of the fact that various locators were responsible for production and thus were supervisors, Respondent discharged Schreit for lack of production, in spite of the fact that he was a boring operator and not responsible for his crew's production. Indeed, I have found above, in partial agreement with Respondent, that the bore could go no faster than the locator was able to locate, and in that sense the locator was responsible for the production of the crew. Respondent offered no explanation for its discharge of Schreit, other than Eirvin's testimony that poor production is the crew leader's responsibility "unless it is the operator's fault," an explanation which is so general as to be meaningless.

What makes Respondent's defense worse is Eirvin's claim, on examination by the Counsel for the General Counsel, that Schreit was one of the "three individuals we'd change people around on to give them the better people to see if they'd come up to par." Eirvin claimed that Respondent swapped Schreit "around with several other people and he wasn't getting it." Very simply, that was not so. Even Robinson did not agree with Eirvin, denying that he obtained any help for Schreit or even considered doing so ("He had time – they had time, as crews, to get their production up.") Rather, Respondent assigned Schaffer, whom it subsequently discharged for poor production, when Schaffer was promoted from operator to locator on about February 10; and, as a new locator, Schaffer's regular operator was Schreit, except for one day, when Schreit was the operator for Shipp, who had even worse production that Schaffer and was also

fired later for low production. Finally, although Robinson wrote on Schreit's personnel appraisal the word "production," he never discussed that with Schreit, whom he otherwise graded as a good operator, an opinion that he confirmed in his testimony.

Having found that Respondent's explanation for this one of three discharges on April 15 was false and concocted, I turn to the other two discharges, which I find to be pretextual. First, I rely on their timing, the same day as Eirvin's antiunion tirade. Second, I rely on my earlier credibility findings and refuse to believe Eirvin and Respondent's supervisors. In fact, regarding Schaffer, Eirvin supplied the same kind of lies that he did in attempting to justify the discharge of Schreit, claiming that he attempted to help Schaffer, a brand new locator, by placing weekly as many as two or three of the best operators "to try to bring him back up to speed . . . and he still didn't cut it." Eirvin named his better operators as David Farris, Clifford Krause, Steve Gordon, and Jerry Benetatos; yet none of them, including Krause, whom he specifically named ah having worked with Schaffer, spent a full week or any time with Schaffer sometime after Eirvin decided that Schaffer was not producing. Robinson, in addition to failing to corroborate much of Eirvin's testimony, knew of no plan to help Schaffer locate better and offered Schaffer no help to improve his production.

Similarly, Eirvin's claim that he put Farris "with several different people [a]nd it never did click" was false. It is true that Farris worked with Krause, but he did so very early in his employment, before Farris's "production problem" allegedly came to Respondent's attention. But later, from about the middle of February, Farris was assigned Politte, who was a legitimate problem employee, and Bartle, neither of whom were among Respondent's best operators. Thus, Robinson's claim that "[w]e tried to move people around and get [Farris's] production up" cannot be sustained.

The General Counsel's final argument to demonstrate Respondent's discrimination against Farris and Schaffer rests on disparity, that Respondent retained Shipp, another locator, whose union activities were not as significant as Farris's and Schaffer's. His production was lower, averaging 138 feet per day, against the average of 158 feet for Schaffer and 151 feet for Farris. Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the General Counsel has presented a prima facie case of Section 8(a)(3) discrimination. Respondent knew of the union activities of all three employees, it was intensely opposed to the Union, it had no cause at all to discharge Schreit, and its reason for discharging Schaffer and Farris was suspect, because Respondent had never previously discharged crew leaders for lack of production. Their production was used by Eirvin as a pretext, and his discharge of them was disparate, in light of the General Counsel's showing that Shipp's production was even worse.

Under *Wright Line*; *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); and *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), Respondent may overcome the General Counsel's prima facie case by demonstrating that it would have taken the same action, even in the absence of the union activities of the three discharged employees. It did not do so. I note particularly Eirvin's lack of any credible reason that he discharged Farris and Schaffer, rather than Shipp. Furthermore, Respondent's explanation of the process of terminating the three employees was unpersuasive. Although testifying that he met with Eirvin to discuss the terminations, Robinson could not recall how many months of production sheets they had at this meeting, how long the conversation lasted, or if time and material work, for which Respondent credits employees with three times their footage for boring in rock or hand-trenching, was part of the discussion. Eirvin and Robinson could not agree on when they noticed that Farris's production became so poor, and, although the evaluations of many of the employees noted

problems with production, the problem never became so important that it was ever actually discussed with Farris and Schaffer, no less a warning that they risked termination. Indeed, at one point, when Robinson was asked the reason that he did not reassign Farris to be an operator, Robinson said: "He was let go for low production. If he had a bad attitude about something, he would have a bad attitude anywhere he was at." That inadvertent switch from "low production" to "bad attitude" revealed Robinson's real concern about Farris's union activities. *James Julian Inc. of Delaware*, 325 NLRB 1109 (1998); *Armstrong Machine Co.*, 343 NLRB No. 122, slip op. at 1, fn. 4 (2004).

The lack of clarity of Robinson's testimony, together with the credibility problems previously discussed, persuades me that this testimony was a fiction and that a cogent discussion of the work failures of these three employees never occurred. Respondent had no history of terminating operators or locators for poor production, and Eirvin's claim that "multiple" locators had been fired for poor production was false. Even Nanney and Robinson disagreed with Eirvin, and Respondent produced no documents to support Eirvin's testimony about "multiple" locators. In addition, Eirvin admitted that Respondent has reassigned poorly performing locators to other positions rather than terminating them, but failed to justify his refusal to treat Schaffer and Farris similarly. I conclude that Respondent's discharge of these three employees violated Section 8(a)(3) and (1) of the Act.[7] *D&F Industries, Inc.*, 339 NLRB 618, 622 (2003).

Hanephin attended the Union's first and most of the other meetings, talked to other employees to drum up Union support, and wore a "Union Yes" pin on his shirt everyday at work for a week or two before his termination. His name was on the list of Union supporters and the Union's request for recognition. He was the one whom Nanney told that there was going to be a bunch of people gone from the Ameren UE side of Respondent's business in a couple of weeks; and, when Nanney told him on April 24 or 25 that he wanted a great big bumper sticker and a "Union Yes" pin, Hanephin replied that he knew where he could get them. Despite Nanney's awareness of Hanephin's feelings about the Union, Eirvin did not admit that he had knowledge that Hanephin was a union supporter. Instead, he testified: "I did not know for sure Rodney was a union supporter. I assumed . . . by his attitude."

Whether Eirvin "assumed" or knew, and I find that he knew, on April 25, Hanephin gave him the perfect excuse to get rid of him. As I have found above, Eirvin seized on the fact that Hanephin brought conduit out of the ground on the non-transformer side of a utility pole, fabricated a document to support Hanephin's discharge, and repeatedly testified falsely at the hearing. That is a classic case of a pretextual discharge and needs nothing more to prove a violation of Section 8(a)(3) and (1) of the Act. In addition, Eirvin, knowing, according to his own admission, of Hanephin's "attitude," assumed that no one of his employees would commit the kind of mistake that Hanephin did, unless he did it as a result of "treason." That kind of mindset is the epitome of antiunion bias and prejudice.

The General Counsel makes a number of other arguments to support the finding of a violation. Hanephin, a two and one-half year employee with an impeccable reputation

[7] Strangely, both Schaffer's and Schreit's personnel files contain employee warning reports that indicate that they were discharged for hitting a located gas line. However, the reports were dated March 17, and both employees were actually discharged on April 15. Respondent did not rely on the incident in defending its action; and I reject the General Counsel's contention that Respondent's defense shifted or was inconsistent and that I should conclude, for this reason, that no legitimate reason existed for the discharges.

(according to his February 14 evaluation: "Rodney Works Hard Every Day Finds A Way To Get The Job Done Right The 1st Time & In A Timely Manner. He Makes Good Decisions Without Being Prompted."), testified that he had placed conduit bends near a telephone pole 100–150 times and, when Nanney was his supervisor, he sometimes told him that he wanted the bend on a specific side of the pole and, other times, there would be paint clearly indicating where the bend was to be placed. In this instance, Hanephin believed that the red paint on the other side of the pole from where he put the bend signified an existing electrical utility, which he erroneously thought was a little bit off on their mark. He explained that there was no other locate mark near that pole so he figured that was for the electric wire running up the pole.

Respondent issued no written document detailing the place for the wire on a pole and never told its employees at meetings or otherwise that they always had to run the wire on the transformer side of the pole. Lohman testified that there was no industry standard as to the meaning of red paint on a utility pole, and no one was called by Respondent to refute that testimony. Hanephin testified that he placed the conduit to save time and money and less hand digging, because the wire was left by the boring crew sticking out of the ground about four feet from that side of the pole (the opposite side of the pole from the paint and transformer above), and denied that he had made this mistake purposefully, as an act of sabotage. I believe that his denial was truthful and sincere. All the credible evidence (and that excludes Eirvin's, the only testimony to the contrary) indicates that Hanephin was never told that the conduit was to be brought out of the ground and up the pole on the transformer side of the telephone pole.

Despite Eirvin's claim that Hanephin was the only employee to have brought a 90 degree bend out of the ground on the wrong side of a pole, Nanney admitted having done so and not being terminated. Pour testified that Hanephin's mistake was not the first time one of Respondent's employees had put a bend on the wrong side of the pole. Lohman testified he put a 90 degree bend on what turned out to be the wrong side of a pole at least five times without discipline; and, at least ten times, he also moved conduit that had been put on the wrong side of the pole by others. On other occasions, employees placed the conduit too close or too far away from the pole or bored them too deep or too shallow, all of which had to be corrected; and no employee was disciplined. Nor were employees discharged for jack hammering through a parking garage, tearing the awning off a McDonald's restaurant, damaging a golf course, or committing mistakes that cost Respondent thousands of dollars.

The General Counsel made a more than ample prima facie case under *Wright Line*, and Respondent made no credible case that, but for Hanephin's union activities, it would have treated his mistake in any manner different from the mistakes of its other employees, whom it did not discipline. The day before Hanephin was fired, he was called into Eirvin's office, where he explained what he had done. Eirvin said that this was the first time he had ever had him in the office so he did not want to fire him, but noted "just consider yourself lucky you are not fired with these buttons and bumper stickers and a magic list floating around." Eirvin felt that Hanephin had a bad attitude because of "all this union activity," so that Eirvin turned Hanephin's mistake into an act of "sabotage," showing how deeply affected Eirvin was by the union organizing drive. I infer from the falsity of Eirvin's testimony about Hanephin's discharge that there is another unlawful reason for the discharge, the source of Hanephin's "bad attitude," union activities. *Shattuck Denn Mining Corporation v. NLRB*, 362 F.2d at 470. I conclude that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Hanephin.

On the same day that Eirvin fired Hanephin, Friday, April 25, Sellers and Respondent's Safety Director, Mike McElligott, met with pulling crew leader Sutton and his crew, Ryan Adams, Clarence Williams, Rocky Lucas, and John Langford. Sellers said that the work in St. Louis had run out and that he needed three employees to go to Jacksonville, Florida. The move was

permanent, the employees would not be given a raise or relocation fee, and they needed to be in Florida in three days, on Monday. He called on each of them, and each declined. He then told Langford and Lucas to go back to what they had been doing the day before and told Sutton, Williams, and Adams that they were laid off. An internal memorandum and Respondent's termination report ("Matt was offered a position in Florida but declined. Matt was terminated due to his decision.") indicate, however, that they were terminated.

The three who were terminated supported the Union. Langford and Lucas were the only employees on this crew who did not engage in any union activities.[8] When Sutton was being interviewed for his job (he started two and one-half months before, on February 10), Sellers said that there would be no lay offs; that the previous year he kept employees working 40 hours; and that, if things did slow down, he would find work around the yard for Sutton to do, but he expected things to pick up. Sutton informed Sellers that he could not travel because his wife worked Monday and Friday nights and he had trouble getting babysitters for his child. Sellers said that Respondent could work with that and that Sutton's inability to travel would not be a problem; he would be able to keep Sutton working around the shop.

At the end of his employment, Sutton worked primarily on a large MCI job and was aware that the job was about to end. On April 17 or 18, he asked Sellers what he would do when the MCI job ended. Sellers said that the crew was to go to Blue Springs, Missouri next. Sutton asked what Sellers was going to do with him because he could not travel with his wife working nights and not having a babysitter. Sellers said he would find him work with another crew so that he could stay busy. Despite Sellers' commitment and assurances, Sutton was terminated.

The General Counsel has proved a prima facie case under *Wright Line*. The three who were terminated were Union adherents: the two who were not terminated were not Union supporters. Sutton attended all the Union's meetings; he talked to the employees on his crew about the Union; he signed an authorization card; he wore a "Union Yes" pin on his hat at work in the presence of Eirvin, Nanney, Robinson, and Sellers; and his name was on the list of union supporters and request for recognition that various employees delivered to Respondent. On April 23, two days before his discharge, Sutton gave Sellers a copy of the Union's request for recognition, which Sellers refused to accept and which Sutton left face-up on Sellers' desk. A promise had been made to Sutton that he would not be transferred but would continue to be employed by Respondent at the same place. Sellers had committed that the two other Union adherents would be transferred to another job in Missouri. There is no credible evidence that Respondent terminated employees for refusing to accept permanent transfers to Florida. There is evidence that Respondent was hiring three laborers on a concrete crew, work that Adams and Clarence Williams could have done or trained to do.

Respondent did not overcome the General Counsel's prima facie case. In particular, Sellers never testified about any lack of work for Sutton or the reason that he did not find work for him, as he had promised earlier. There still remained cleanup and restoration work on the MCI job. There was no testimony that Clarence Williams and Adams, both laborers, were not qualified to do the concrete work. I do not believe Eirvin's testimony to the contrary, because a laborer hired on April 24 had absolutely no concrete experience. Besides, the evidence was overwhelming that, of all the employees for whom Respondent had need, it constantly needed

[8] That they may have had more seniority than the other three employees is irrelevant. No one testified that Respondent followed seniority when it transferred or laid off its employees.

good laborers. In fact, Respondent rehired Williams and Adams on May 27 and June 2, respectively. I conclude that these three discharges violated Section 8(a)(3) and (1) of the Act.

I have previously discussed Respondent's blatant and unconscionable fabrications of customer complaints to support the discharge of Lohman, a known Union adherent, on April 28.[9] Those fabrications came specifically from Martychenko and Robinson, who must have been following Eirvin's orders. The customers whom the latter two identified as having made complaints denied that they had done so. They, unlike Respondent's representatives, were not biased and prejudiced and had no reason to lie. I credit them. Even Respondent's alleged documentation was faulty: it tried to blame Lohman for jobs that he had not completed or had no part in the alleged faulty restoration work. Added to that is Robinson's questionable claim that Respondent had been receiving customer complaints about Lohman's restoration work for six months, the number and dates of which he was unsure and the written of record of which was absent. Indicative of the falseness of his testimony was the fact that his February 14 evaluation of Lohman not only omitted mention of all these complaints but also praised Lohman for his work (he "takes pride in completed jobs"). Lohman testified that no one had discussed any customer complaints with him, which is consistent with Respondent's lack of customer complaints (other than fabricated); and I believe him.

The General Counsel's prima facie case under *Wright Line* was overwhelming. To the contrary, Respondent made no showing that it would have terminated Lohman absent his union activities. Before April, Respondent had always permitted Lohman to repair whatever the customer had complained about.[10] Robinson could testify only that he did not know the reason that Lohman was not permitted to make the new repairs, as well, which, as found above, were no more than Respondent's contrivances. Eirvin's insistence that Respondent had a history of terminating employees for poor restoration was false. Both Robinson and Nanney contradicted him, and Respondent, despite having an opportunity to do so, introduced no documentary proof to support Eirvin. Another employee, Doug Kutter, left his job in much worse condition than Lohman was accused of, albeit falsely, and was only warned. For all these reasons, I conclude that Respondent violated Section 8(a)(3) and (1) of the Act.

From early December, Adam Williams had been the crew leader of a two-man crew, the other member being laborer Steve Mack, performing open cut work. After April 15, somewhere about April 17–24, Bridges was put on the crew. On Thursday, May 8, Robinson and McElligott met with the three employees.[11] Robinson told them that the open cut work in St. Louis had dried up and gave them the choice of going to work, starting Monday, in Florida, which would be a temporary assignment on which they would hand dig, or being laid off, which, in light of all the facts, meant "terminated." The employees would have to find their own means of transportation (when transferring to Florida, Ed White's crew had been permitted to drive a company truck); motel expenses would be paid; the employees would be paid an extra dollar per hour, as was usual for out-of-town work; but they would not be paid for their time driving to Florida, which was

[9] The General Counsel contends that Respondent presented a shifting or inconsistent defense when it opposed Lohman's application for unemployment benefits on the ground that "he was offered work in Florida and chose not to go." I find that that opposition, prepared by one of Respondent's clerical employees, was an inadvertent mistake.

[10] By this finding, I do not imply that Lohman did his work poorly. Sometimes, for example, despite throwing down sufficient grass seed, the planting is disturbed by a violent storm, which washes away the seed.

[11] The testimony of the employees differed in numerous respects. The narration of these discharges is based on the probabilities of what actually happened, and when, and not on any particular employee's recollections.

not Respondent's usual practice. Bridges declined the assignment and was terminated on May 13.

Mack and Williams agreed to go and were given the telephone number of the project manager in Florida, Mike Stankewitz, who said, in the first telephone call that Williams made, that he had no work for them until May 18 and, in the second, that he would not be ready for them on May 18. That prompted Williams to speak to Eirvin, who denied Williams' accusation that they were being transferred because of the Union and said that they would be in Florida until work in St. Louis picked up and that, if they did not go to Florida, they would not be called back and would be fired. Williams threatened that, if he went to Florida, he would try to organize the facility there. Williams and Mack never went to Florida. On the day that they were supposed to leave for Florida, sometime about May 18, Mack backed out, because he feared being laid off in Florida because of his union activities. Williams then decided that he would not go, because he could not afford to take the trip alone.

Respondent knew that Bridges, Williams, and Mack were Union supporters. Eirvin so admitted; except for Mack, Robinson did, too. Employee Harold Armstrong was interrogated by Eirvin on about April 15 and identified both Bridges and Williams as being at the April 7 union meeting. On April 16, Bridges presented the employees' request for union recognition to Eirvin, which he rejected, stating that he had told the employees the day before that he would not recognize the Union. It was only after that event that Bridges was first assigned to work with Williams and Mack.

The reason for their layoff is suspect. First, I find it difficult to believe that open cut work simply disappeared, as Respondent told the employees. The employees were in the middle of their job, with just a bit more work to finish (it began to rain midday, so they could not continue to work), on the very day that they were given the transfer option. Other employees had to be sent back to that job to finish it, which the three employees could have finished. Furthermore, they had been working regular overtime; and, within several weeks prior to their transfer option, Respondent had contracted out a substantial amount of open cut work. It is undisputed that the soil in Missouri is filled with rocks, and the rocks prohibit the use of equipment other than the trenchers and backhoes that Bridges and Williams operated. Nanney conceded that Respondent had no idea which of the ten or twenty jobs given to it by Ameren UE, on any given day, week, or month, would hit rock and need to be open cut. After Bridges and Williams were discharged, Respondent had new open cut work and, just one day after it issued its termination letter to Williams, hired Jeremy Warden, another backhoe operator, and John Carrigan to do the same open cut work that Bridges and Williams had previously performed. Respondent shifted Krause from a boring machine to a backhoe. In June it received bills for open cut work that it subcontracted to CSG Utilities (the bills do not show when the work was performed). By July, Respondent transferred Lucas from the telecommunications to the Ameren UE side and had so much additional open cut work that it had to bring to St. Louis Florida Project Superintendent Jay Searles to perform that work.

So there was open cut work in St. Louis that Respondent could reliably predict would be available for these two very experienced operators. Williams could operate a bulldozer, backhoe, track hoe, plow, trencher, cement cutter, and excavator; Bridges, with eight years of underground utility experience, could operate a backhoe, boring machine, trencher, and plow, and he could also locate. Even had there not been work available at the instant that they were offered their choice of Florida or discharge, work in some craft was available to tide them over, certainly the laborers' work of hand digging that they were offered in Florida. Nanney rated Williams as a "[v]ery good operator of anything we have. He will get the product in. Will try anything and succeed UE, water, etc. Does anything we ask him to do." Robinson rated Bridges

"very professional" and a "good operator." In sum, I find that there was work available for these employees.

Second, Respondent's offer was suspect. Bridges was first employed by Respondent on January 13 and expressly told Nanney during his interview that he had been traveling for six years and would not be willing to travel outside of Missouri. Nanney represented to him that Respondent had "a vast amount of open cut work" and that Respondent had enough work in St. Louis that he would not have to travel further than Knob Noster or Kansas City, Missouri. By offering Bridges a transfer to a location that Respondent knew Bridges would not accept, Respondent discharged him. Indeed, Respondent offered no reason that it needed Bridges, a trained and experienced operator and, for that matter, the other two employees, to hand dig in Florida and could not hire manual laborers in Florida, instead, and no proof was supplied by Respondent to show that its Florida operation could not hire persons there.

Third, even Respondent admitted that Mack was one of its best laborers. He was a better performing employee than some (for example, Ryan Lamb) who were retained. Respondent traditionally had trouble retaining its laborers, who had a substantial turnover. There is no reason that Respondent would have wanted to rid itself of one of the few laborers who performed his work well and diligently and for whom Respondent had a high regard. In fact, during his interview in November 2002, Mack was told not to expect any lay offs unless it was raining or snowing. Furthermore, even if the open cut work had dried up, as Robinson told the employees, Mack was experienced in digging locates and performing restoration and concrete work; and because Respondent had a practice of switching employees from one side of its business to another to fill its needs, Mack, but for his Union activities, was certainly in demand. For example, Respondent had an opening for a laborer on a concrete crew on May 8 and could have retained Mack in that position. In addition, after Mack was terminated, Respondent hired numerous laborers, but failed to rehire Mack or call him back.

Fourth, there are documents that reveal that something in this transfer-discharge was amiss. For example, in the three employees' personnel folders was a termination memo, dated May 7, that McElligott wrote regarding the meeting that day, captioned "Termination due to refusal to relocate and due to lack of work." It stated: "All employees were undecided for relocation at this time. So a decision was made as of [sic] for lack of work in the St. Louis area, the employee would unfortunately be terminated at this time with no time frame of re-hire." Obviously, Respondent expected that the very offer of a transfer to Florida would be so unappealing that the employees would reject the transfer, even though only Bridges did immediately. Also included in Williams' personnel file is a memo written by Ed Eirvin the day after the meeting, May 8, about receiving a customer complaint regarding a job Williams performed in 2002. Respondent gave no explanation about this complaint regarding an event that occurred at least five months before, and I infer that Respondent was trying to strengthen its case to justify its discharge of Williams.

Fifth, Respondent had never laid off an employee on the Ameren UE side of the business. Respondent had never forced transfers to Florida, under penalty of termination. Its experience was exactly the opposite. When work slowed down, Respondent moved its employees to another part of its business. Respondent's policy was to avoid layoffs. However, according to Respondent's Treasurer, David Fischer, it has laid off employees from other portions of its business for lack of work; but, when there is additional work, it has recalled them. That was not Respondent's offer here. Its intent was, as Williams' testimony show that he understood, to terminate the three employees, upon their refusal of a transfer. Considering Respondent's union animus and knowledge of the union activities of the three employees, I

conclude that the General Counsel has presented a prima facie case of Section 8(a)(3) discrimination.

The burden then shifts to Respondent to show that it would have transferred these three employees even in the absence of their union activities. Respondent did not meet that burden. Respondent did not demonstrate the necessity of transferring these employees to Florida, a transfer it knew Bridges would not accept. Nor did Respondent produce evidence to show, assuming that work was not available, the reason that it did not offer the employees a layoff and wait for work to pick up, as it assuredly did. Finally, Respondent did not even prove that it had no work. Eirvin testified that Respondent probably had documents to demonstrate that the open cut work dried up and that Nanney should have sheets that showed the open cut jobs that were left. However, Respondent produced nothing. Nanney did not testify about the issue, nor did Robinson, who, Eirvin alleged, told him that "the open cut work was all done." Thus, Respondent never proved that it had any need to transfer the three employees to Florida or to lay them off. It did not meet its burden of proof under *Wright Line*, and I conclude that it violated Section 8(a)(3) and (1) of the Act.

In so concluding, I reject Respondent's contention that the three employees conspired to give false testimony in this proceeding, that their testimony should be disregarded, and that they should be disqualified from being granted any remedy. The Counsel for the General Counsel asked Mack whether he had ever talked to Bridges and Williams about making up some reason to give at the hearing in this proceeding that he or they did not go to Florida. Mack's answer, on which Respondent relies, was that he wanted to say "yes" but could not recall. That is certainly not a definitive answer, as Respondent suggests. With their different recollections and different reason for rejecting Respondent's offer, all of which make at least some sense, I find the notion of perjury in these circumstances quite impossible. Finally, the three employees are not on trial. Although Respondent may question the reasons that Mack and Williams gave for not going to Florida, that is not the point. The issue is why Respondent tried to transfer them there in the first place.

Respondent discharged Shipp on September 16 for low production. There is no question that his production was low at the time of the discharges of Farris, Schreit, and Schaffer; and I have already used his low production, which was lower than Farris's and Schaffer's, to support my finding that Respondent violated Section 8(a)(3) when it discharged the two higher-producing employees. My finding that he had low production prior to April 15 does not mean that he, anymore than Farris and Schaffer, should have been discharged. It means only that Respondent's justification for those discharges was false. The issue now becomes, as of September 16, whether Respondent was again motivated by Shipp's work performance, rather than his union activities.

If Respondent had not known of Shipp's union activities on April 15, it certainly learned of them, despite Eirvin's incredible denial that he heard Shipp's name mentioned, during the first two weeks of the hearing in this proceeding in August and the first week of September. Shipp began to wear a "Union Yes" pin at work only on April 16, the day after the first three discharges; and an argument could be made, as the General Counsel impliedly does, that Respondent discharged Shipp to justify the discharge of Farris, Schreit, and Schaffer, knowing that the General Counsel was relying on its failure to discharge Shipp. In any event, there is more than ample evidence of Respondent's knowledge of Shipp's union activities by September 16, as well as its union animus.

I turn then to Respondent's motivation. McElligott, the safety director, was the one who actually fired Shipp. He told Shipp that he was told by upper management to release him that

day for poor production and bad work habits. McElligott apparently knew nothing more of Shipp's work. He did not testify about Shipp, at all. Nanney, Shipp's supervisor, said that he was not the one who made the decision to fire Shipp. Eirvin testified that he terminated Shipp because of "low production and being real low in production and not doing any better and not improving." That is essentially the same explanation that he used in justifying the discharges of Farris and Schaffer, which I have discredited; and I do not believe the current one, either, on the basis of Eirvin's general lack of credibility. I, therefore, conclude that his reason was false and that there was an unlawful reason that Eirvin was trying to conceal. That conclusion is consistent with well-settled law that, when the asserted reason for an action fails to withstand scrutiny, the Board may infer that there is another reason—an unlawful one which the employer seeks to conceal—for the discipline. *Shattuck Denn Mining Corp.*, 362 F.2d 466, 470 (9th Cir. 1966); *Painting Co.*, 330 NLRB 1000, 1001 fn. 8 (2000).

My conclusion is independently supported here by Eirvin's untruthful testimony, as shown by the lack of consistency between his testimony and that of Nanney and Martychenko, as well as the lack of credible corroboration of his testimony. The "not doing any better and not improving" rationale for the discharge got Eirvin into trouble. As he did in justifying the discharges of Farris and Schaffer, his thesis was that, once he was told by Nanney and Martychenko in July of Shipp's need to improve his "super low" production (conversations that neither Nanney nor Martychenko corroborated), he told them, "Bring him up to speed, and put some people with him." Contrary to Eirvin's testimony that Shipp was assigned laborers to help with the digs and speed them up, Respondent's records reveal that a laborer was assigned for only two days, September 3 and 4. Contrary to Eirvin's testimony that Shipp was given three quality operators to improve his production, he could recall none but Benetatos, whom Eirvin had earlier identified as one of his better operators and who started with Shipp on July 24. What Eirvin did not say was that, when Benetatos started with Shipp, he, according to Nanney, whose objectivity is suspect, may have had only a few days' experience operating the Vermeer 1620 boring machine, which was being used on Shipp's assignments. Shipp had to teach Benetatos how to operate his machine.

When asked the reason that a more experienced operator had not been assigned to Shipp, Nanney answered that he assigned Benetatos more to motivate Shipp, rather than to give him an operator of more experience, and that he talked with Shipp about how Benetatos was doing, and Shipp replied that he was doing fine, so he did not think that there was "a big issue." One would have thought that, instead of asking Shipp, the allegedly poor producer, about how the fine operator was doing, Nanney would have asked Benetatos, the "better" operator, whether Shipp was more motivated. Singularly curious about Respondent's whole story is the fact that Robinson evaluated Shipp in February and found him "[m]otivated," that he "tries hard," and that he was a "Good Accurate Locator." While the evaluation also indicated that Shipp needed to improve his production, Robinson appeared to write that on many of his evaluations and otherwise did not discuss production with the employees, particularly Shipp, during his evaluations.

In fact, Respondent never warned Shipp about his production or told him that Benetatos had been assigned to him to improve his production. Nanney testified that he knew two weeks before Shipp's termination that Shipp was not improving, but he never gave Shipp any kind of warning. Not only that: he did not go even then to Eirvin to recommend Shipp's discharge. Instead, he waited. "I think I am pretty fair, and I was just trying to hang in there with him." But, at some point, according to Nanney, he either went to Eirvin's office, or Eirvin called him into the office, and Eirvin "had all of the numbers there, and it was right there on the paper. It was low." When asked what the documents were, Nanney quickly retracted, testifying that he did not know that he had any. "[W]e were just discussing the low production." Eirvin, however, originally

claimed that he did not speak to anybody before deciding to terminate Shipp; later, he testified that he did. In addition, Eirvin originally testified that he reviewed Shipp's weekly production reports and a spreadsheet that Martychenko had created; then he denied doing so.

Even as to Shipp's low production, Respondent's case was unconvincing; and it seemed to me that Eirvin was making it up as he testified. Respondent keeps records of the footage that each crew produces daily. But not all footage is equal, and certainly not for billing purposes. For example, Respondent charges a per-foot price for boring based on the thickness of the conduit and the type of soil. Respondent has a minimum requirement of 150 feet bored and on jobs less than 150 feet charges the customer the difference. Where a boring crew bores through rock, Respondent charges three times the normal boring price and credits its employees with three times their footage for boring in rock or hand-trenching. Respondent also charges a flat high kourly rate for time and material work, which is crew work other than boring and which, Eirvin testified, "is also a factor of production." Yet, Eirvin's testimony made it unclear that he considered Shipp's time and material work, or his days off work for personal reasons, or his assignment to restoration work.

The lying, the change of testimony, and the lack of credible corroboration persuade me that the General Counsel has proved a prima facie case. Respondent did not overcome it by showing that it would have terminated Shipp but for his union activities. Respondent has not shown that it ever discharged a locator for poor production other than the discriminatees in this proceeding. In addition, Eirvin testified that, if Shipp had bored 570 feet per week, he would not have been terminated. However, the Counsel for the General Counsel's brief contended that Shipp averaged 570 gross feet per week during the seven weeks before he was fired. Respondent did not contest those figures. I conclude that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Shipp.

The final discharge occurred on November 26. Eirvin terminated Wayne Schaffer (Wayne), until then a highly rated laborer ("Wayne is A Very Hard Worker[.] Crew Leaders Want Him on their Crew. He Gets Along with others & Does His Job To the Best of His Ability[.] He Cares & I[s] A Very Good Employee For ADB."), according to Respondent's termination report, for the following reasons:

> Termination Due to Racial Harassment; Amplified & Displayed on Rear of Personal Vehicle in St. Louis Parking Area; Having To Subject others to view same as above mentioned. Does Not Constitute Freedom Of Speech Act. (Photos available)

Respondent stipulated that Wayne was a known Union supporter. He was referred to repeatedly in the earlier sessions of this proceeding, was at the time of his discharge one of only three employees still employed who attended the Union's first meeting, and was cited by Eirvin on the second day of the hearing as "part of the union problem" at Respondent. Thus, knowledge of Wayne's union activities and Eirvin's union animus is clear. Regarding motivation, McElligott testified in great detail that employee Tony Williams, an African-American, had complained that he found a bumper sticker or stickers with the Confederate flag on Wayne's car "very offensive." McElligott did not tell the truth. Williams, called as a witness by the Counsel for the General Counsel, denied that he said any such thing to McElligott. Rather, he testified that he had never seen Schaffer's bumper stickers and, therefore, never told McElligott that he had found them offensive. This current employee had no reason to fabricate; and McElligott, one of Respondent's supervisors and agents, had ample reason.

But somebody may have made a complaint about a bumper sticker at some time.[12] Courtney West, a boring machine operator, had a "Heritage Not Hate" bumper sticker on his car that included a Confederate flag since he was first hired on June 15. He was neither discharged nor threatened with discipline. Instead, six months later, Ray Door, a project manager, called his son, Jeff, another boring machine operator, about mid-November, and asked if West had any bumper stickers on his car, specifically a Confederate bumper sticker. Jeff answered that he had; and Ray said that Eirvin had told him that someone was complaining about that bumper sticker and that Eirvin said that West needed to take it off his car.

That evening, Jeff told Wayne and West that Eirvin wanted West to remove the Confederate bumper sticker; and the three were upset with what Eirvin had said, Wayne believing that Eirvin violated West's First Amendment right of freedom of speech. So, on Saturday, November 22, to demonstrate support for West, Jeff and Wayne purchased their own Confederate stickers and placed them on their cars.[13] The following week, beginning November 24, Jeff drove his car directly to his jobsite, where it was in clear view of Robinson. In fact, Respondent had photographs of Jeff's vehicle with those bumper stickers. Thus, Respondent was fully aware that the three had the very same sticker or similar "offensive" stickers.

Yet, only Wayne, who attended all the Union meetings, including the very first, was discharged. The other two were not even reprimanded and removed their Confederate bumper stickers only after Schaffer was terminated. What distinguishes Wayne was his active Union partisanship, whereas West and Jeff were both hired well after the Union activity in April. West never revealed his union sympathies, or lack thereof, to Respondent, and until November 21, Jeff never wore a Union pin or told anyone about his feelings about the Union. On that day, he put two Union bumper stickers on his car. On that day or the day after, Wayne also put a Union bumper sticker on his car. On Friday, November 28, Ray warned Jeff that, if he and West [still] had any Confederate-flag stickers on their cars, they should remove them because a guy was just fired for it and they could get fired, too, because Respondent considered it racist. Ray also told Jeff that he should get the Union stickers off his car because it was not appreciated, that he could be put under a spotlight because of his involvement with the Union, and that there was the possibility that he could get fired for some other reason, that Respondent would find a reason to fire him, but it would lead back to his involvement with the Union. Jeff and West removed all the Confederate-flag stickers that day; and Jeff removed the Union stickers on Monday, December 1.

The disparate treatment of Wayne is evident. Eirvin knew that West had the "offensive" bumper sticker on his car. He told Ray, a supervisor, who then told Jeff to tell West to take it off. Eirvin did not fire West or, later, Jeff. He fired Wayne, and an arguable reason that he did so was Wayne's earlier union activities. The General Counsel has proved a prima facie case. McElligott's lie about Tony Williams' complaint permits an inference that there was another unlawful reason for Wayne's discharge. *Shattuck Denn*, supra.

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[12] A second person who was alleged to be irate was Tony Ausley, then one of Respondent's project managers, who wrote an e-mail, dated November 26, but did not testify. Another African American, a new secretary named Toni, also allegedly complained, according to McElligott, but she also did not testify and did not corroborate McElligott's testimony.

[13] Wayne's were the same "Heritage Not Hate" sticker that West had and "Never Apologize for Being White." Jeff's were: "Hey dumb ass, it's lack of parenting not guns!," "Confederate American," and the word "Rebel," the latter two having the Confederate flag or written to resemble that flag.

Respondent failed to demonstrate, as it had to do under *Wright Line*, that it would have discharged Wayne absent his union activities. Eirvin, no longer employed by Respondent on February 5, 2004, the day of the hearing of Case No. 14–CA–27677, the case dealing solely with Wayne's discharge, did not testify to his motivation. Respondent offered no excuse that Eirvin was unavailable to testify, and the testimony of Respondent's owner, Rusty Keeley, shows that Respondent knew where Eirvin was. Accordingly, I cannot find that he had a lawful motivation. Without Eirvin, Respondent could not meet its *Wright Line* burden.

The Request for a Bargaining Order

As noted above, the General Counsel requests a bargaining order, which requires an examination of the Union's majority status and the nature of Respondent's unfair labor practices. But, first, I consider the question of the appropriate unit. Respondent's answer and its counsel at the trial contended that the appropriate unit should consist of not only its St. Louis facility, but also its two other offices in Kansas City, Missouri, and Jacksonville, Florida. That opposition seems to have been abandoned because no mention of it is made in Respondent's briefs. Had it been raised, the law is clear that a proposed single facility unit is presumptively appropriate unless it has been so effectively merged into a more comprehensive unit, or is so functionally integrated with employees at another facility, that it has lost its separate identity. To determine whether Respondent has successfully rebutted the presumption, the Board examines such factors as: bargaining history; functional integration of operations; the similarity of skills, functions, and working conditions of employees; central control of daily operations and labor relations; interchange or transfers of employees among sites; and distance between sites. *J&L Plate, Inc.*, 310 NLRB 429 (1993).

Centralized control of some labor relations policies and procedures is not inconsistent with a finding that there exists sufficient local autonomy to support the single location presumption. *D&L Transportation*, 324 NLRB 160, 161 (1997). While the record reflects that Eirvin had overall responsibility for Respondent's three offices, that McElligott traveled among the facilities, and that Respondent's handbook applied to all employees (albeit it was not distributed to all employees), there is also evidence of local autonomy. Among the facts that demonstrate that there is "sufficient local autonomy to support the single location presumption," *New Britain Transportation Co.*, 330 NLRB 397, 398 (1999); *Rental Uniform Service, Inc.*, 330 NLRB 334, 335 (1999); local management at each facility is in charge of hiring, overtime, vacations, and leaves; job vacancies are not posted at other facilities; employees do not travel to other facilities for training; and the project managers at the three facilities do not participate in management meetings with each other. In addition, the locations of the St. Louis, Kansas City, and Jacksonville offices are sufficiently far apart to suggest that the single St. Louis facility unit is appropriate. I so conclude.

The parties stipulated at the hearing that, if the unit limited only to St. Louis was found appropriate unit, the unit shall be described as follows:

> All employees employed by ADB Utility Contractors, Inc. at its St. Louis, Missouri facility, EXCLUDING project managers, office clerical, managerial, professional employees, over-the-road truck driver, guards and supervisors as defined in the Act.

Because I have found the St. Louis unit appropriate, I conclude that the above constitutes a unit which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. The General Counsel contends that, because the parties' stipulation also listed the employees who were appropriately included in the unit, and they were all field employees, the

appropriate unit, notwithstanding the stipulation, should be described as including "all field employees." I will not do so, because there is no legal or factual basis in the record for me to cancel or disregard the parties' stipulation.

The General Counsel and Respondent's counsel also stipulated that on April 15, the Union obtained valid signed authorization cards from a majority of employees in the above-described unit authorizing the Union to represent them in collective bargaining, but Respondent, albeit perhaps not in haec verba, withdrew from that stipulation, when he claimed that the crew leaders were supervisors. In any event, I am satisfied that, as of April 15, there were 59 employees in the unit and that 33 signed cards, giving the Union a majority.

Having found that the Union represented a majority of the employees, I turn to the question of the need for a bargaining order. The Board wrote in *Canter State Beef & Veal Co.*, 330 NLRB 41, 43 (1999), enfd. in part 227 F.3d 817 (7th Cir. 2000):

> Under *Gissel*, the Board will issue a bargaining order, absent an election, in two categories of cases. The first category involves "exceptional cases" marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless which nonetheless have a tendency to undermine majority strength and impede the election processes." In this second category of cases, "the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and . . . employee sentiments once expressed [by authorization] cards would, on balance, be better protected by a bargaining order." [*Gissel*, 395 U.S.] at 613-615.

Within two and one-half weeks of the Union's first meeting on March 29, Eirvin delivered his April 15 speech filled with antiunion rhetoric, and, more critically, unlawful threats of termination of employees and closure of the facility and of the futility of selecting the Union as the collective-bargaining representative. He unlawfully solicited employees who supported the Union to quit and threatened the employees with discipline if they should wear pins showing their support of the Union. Those threats were followed by correspondence to the employees, as well of readings of the letters directly to the employees, containing similar threats of loss of jobs and futility of selecting the Union and new threats of subcontracting the employees' work and reduction of their bonus money. Most of these unfair labor practices are "hallmark violations," having lasting effects on bargaining-unit employees that cannot be underestimated. *Garvey Marine, Inc.*, 328 NLRB 991, 994 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001); *General Fabrications Corp.*, 328 NLRB 1114 (1999), enfd. 222 F.3d 218 (6th Cir. 2000). His threats have been recognized as an "insidious reminder to employees every time they come to work that any effort on their part to improve their working conditions may be met with complete destruction of their livelihood." *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 (1996).

Eirvin's speech also created the impression of surveillance, an impression that was entirely accurate. His subsequent discharge of 9 of the 11 employees who attended the March 29 meeting was no accident. He knew exactly who was there. Three employees, two of whom were leaders in the organizing efforts, were fired later on the same day that he gave his speech, threatening the employees with termination. "The discharge of union adherents has long been considered by the Board and the courts to be a 'hallmark' violation of the Act because of its lasting effect on election conditions." *Center State Beef & Veal Co.*, 330 NLRB 41, 43 (1999); *NLRB v. Jamaica Towing*, 632 F.2d 208, 212–213 (2d Cir. 1980).

Respondent's Section 8(a)(1) threats, spoken and written by Eirvin, were made to all the bargaining-unit employees. The discharges, all of which had little or no justification and some of which were concocted with lies and fake documents, continued throughout the year. They directly affected not only the 13 union adherents in a unit of 59 employees, 22 percent of the bargaining unit, who were discharged, but the remainder of the unit, which had to be aware that those who continued to favor the Union were destined to lose their jobs, no matter that they did nothing else but engage in activity protected by the Act. That high percentage warrants a bargaining order, because the possibility of holding a fair election is minimal. *Cogburn Healthcare Center*, 335 NLRB 1397, 1399 (2001); *General Fabrications Corp.*, 328 NLRB at 1115.

In fact, word of the first three discharges was widely disseminated, and Eirvin obtained the result that he sought. At the April 15 Union meeting, after Respondent discharged Farris, Schaffer, and Schreit, employees expressed concern that they, too, might be terminated; employees expressed fear that Respondent would close; and two employees were afraid that they would be fired and refused to sign the request for recognition that many employees signed that night. That the threats were made by Eirvin, Respondent's highest-ranking official, heightened the significance and impact of Respondent's message. *Aldworth Co.*, 338 NLRB 137, 149 (2002), enfd. sub nom. *Dunkin' Donuts Mid-Atlantic Distribution Center v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004); *Cogburn Healthcare Center*, 335 NLRB at 1400.

That Shipp and Wayne Schaffer were discharged during the course of the hearing demonstrates that the unfair labor practices have continued and not diminished and warrant the finding that a fair election is not possible. Eirvin wanted all employees to think that they would lose their jobs if they voted for the Union and hoped that his speech would cause employees to stop engaging in union activities. He got his wish. The Union's organizing effort was gaining momentum before April 15; after then, attendance at Union meetings declined significantly, the only ones ultimately attending being the ones who were unlawfully discharged and two other mainstays. Others who had supported the Union withdrew their support. The granting of a normal cease-and-desist order will not erase the significantly pervasive and lasting deleterious impact of Respondent's unfair labor practices. The possibility of holding of a fair election is improbable. I will recommend that a *Gissel* bargaining order issue.

Remedy

Having found that 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. In addition to bargaining with the Union, Respondent, having discriminatorily discharged employees, must offer them reinstatement, except for Ryan Adams and Clarence Williams, who have previously been recalled, and make all of the discharged employees 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). Because of Respondent's egregious misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring it to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record,[14] including my observation of the witnesses as they testified and my consideration of the briefs and reply briefs filed by the parties,[15] I issue the following recommended[16]

ORDER

Respondent ADB Utility Contractors, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression among its employees that their union activities are under surveillance.

(b) Impliedly threatening its employees with termination if they select Local 2, International Brotherhood of Electrical Workers, AFL-CIO (Union) as their collective-bargaining representative.

(c) Threatening its employees that it is futile to select the Union as their collective-bargaining representative.

(d) Threatening or impliedly threatening its employees with closure of its St. Louis facility if its employees select the Union as their collective-bargaining representative.

(e) Soliciting its employees who support the Union to quit their employment.

(f) Impliedly threatening its employees with discipline for wearing pins demonstrating support for the Union.

(g) Impliedly threatening its employees that selecting the Union as their collective-bargaining representative would result in the reduction or loss of their bonus and loss of their employment.

(h) Threatening its employees that selecting the Union as their collective-bargaining representative would result in the loss of their employment, insurance, and retirement plan.

(i) Threatening to subcontract more work if its employees select the Union as their collective-bargaining representative.

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[14] The Counsel for the General Counsel moved to correct certain errors in the Official Transcript. There being no opposition, the motion is granted; and the Official Transcript is amended accordingly.

[15] Much of the Union's briefs is devoted to a discussion of Respondent's allegedly contrary position and testimony in an earlier representation proceeding. I have not considered that discussion. Although an attempt was made to stipulate the record into evidence in this proceeding, the Counsel for the General Counsel would not join in the stipulation; and the record was not received. Respondent's brief was, and that showed that Respondent did not contend that any of the crew leaders were supervisors within the meaning of Section 2(11). That is interesting, but not determinative.

[16] 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.

(j) Interrogating its employees about their union activities and threatening its employees with unspecified reprisals because of their union activities.

(k) Discharging its employees because of their union activities or sympathies and in order to discourage their membership in the Union or any other labor organization.

(l) Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the unit set forth below.

(m) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of its employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All employees employed by ADB Utility Contractors, Inc. at its St. Louis, Missouri facility, EXCLUDING project managers, office clerical, managerial, professional employees, over-the-road truck driver, guards and supervisors as defined in the Act.

(b) Within 14 days from the date of the Board's Order, offer Jeremy Farris, Edgar Schreit, Nathan Schaffer, Rodney Hanephin, Matt Sutton, Jason Lohman, Adam Williams, Matt Bridges, Steve Mack, John Shipp, and Wayne Schaffer 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.

(c) Make Jeremy Farris, Edgar Schreit, Nathan Schaffer, Rodney Hanephin, Matt Sutton, Ryan Adams, Clarence Williams, Jason Lohman, Adam Williams, Matt Bridges, Steve Mack, John Shipp, and Wayne Schaffer 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.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Jeremy Farris, Edgar Schreit, Nathan Schaffer, Rodney Hanephin, Matt Sutton, Ryan Adams, Clarence Williams, Jason Lohman, Adam Williams, Matt Bridges, Steve Mack, John Shipp, and Wayne Schaffer, and within 3 days thereafter notify these employees in writing that this has been done and that the discharges will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in St. Louis, Missouri, copies of the attached Notice marked "Appendix."[17] Copies of the Notice, on forms provided by the Regional Director for Region 14, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where Notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by Respondent at any time since April 15, 2003.

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

IT IS FURTHER ORDERED that the portions of the record that were placed under seal will continue to be maintained under seal.

Dated, Washington, D.C. May 10, 2005

_____
Benjamin Schlesinger
Administrative Law Judge

[17] 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 Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT create the impression among our employees that their union activities are under surveillance.

WE WILL NOT impliedly threaten our employees with termination if they select Local 2, International Brotherhood of Electrical Workers, AFL-CIO (Union) as their collective-bargaining representative.

WE WILL NOT threaten our employees that it is futile to select the Union as their collective-bargaining representative.

WE WILL NOT threaten or impliedly threaten our employees with closure of our St. Louis facility if our employees select the Union as their collective-bargaining representative.

WE WILL NOT solicit our employees who support the Union to quit their employment.

WE WILL NOT impliedly threaten our employees with discipline for wearing pins demonstrating support for the Union.

WE WILL NOT impliedly threaten our employees that selecting the Union as their collective-bargaining representative would result in the reduction or loss of their bonus and loss of their employment.

WE WILL NOT threaten our employees that selecting the Union as their collective-bargaining representative would result in the loss of their employment, insurance, and retirement plan.

WE WILL NOT threaten to subcontract more work if our employees select the Union as their collective-bargaining representative.

WE WILL NOT interrogate our employees about their union activities and threatening our employees with unspecified reprisals because of their union activities.

WE WILL NOT discharge our employees because of their union activities or sympathies and in order to discourage their membership in the Union or any other labor organization.

WE WILL NOT refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of our employees in the unit set forth below.

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

WE WILL on request, bargain with the Union as the exclusive representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All employees employed by ADB Utility Contractors, Inc. at its St. Louis, Missouri facility, EXCLUDING project managers, office clerical, managerial, professional employees, over-the-road truck driver, guards and supervisors as defined in the Act.

WE WILL within 14 days from the date of the Board's Order, offer Jeremy Farris, Edgar Schreit, Nathan Schaffer, Rodney Hanephin, Matt Sutton, Jason Lohman, Adam Williams, Matt Bridges, Steve Mack, John Shipp, and Wayne Schaffer 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.

WE WILL make Jeremy Farris, Edgar Schreit, Nathan Schaffer, Rodney Hanephin, Matt Sutton, Ryan Adams, Clarence Williams, Jason Lohman, Adam Williams, Matt Bridges, Steve Mack, John Shipp, and Wayne Schaffer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Jeremy Farris, Edgar Schreit, Nathan Schaffer, Rodney Hanephin, Matt Sutton, Ryan Adams, Clarence Williams, Jason Lohman, Adam Williams, Matt Bridges, Steve Mack, John Shipp, and Wayne Schaffer, and within 3 days thereafter notify these employees in writing that this has been done and that the discharges will not be used against them in any way.

ADB UTILITY CONTRACTORS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1222 Spruce Street, Room 8.302, Saint Louis, MO 63103-2829

(314) 539-7770, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (314) 539-7780.