

**Diversified Enterprises, Inc. and Mid-Atlantic Regional Council of Carpenters, West Virginia District, United Brotherhood of Carpenters and Joiners of America.** Case 9-CA-43110

March 26, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On July 27, 2007, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions, a supporting brief, and a brief answering the Respondent's exceptions.

The National Labor Relations Board<sup>1</sup> has considered the decision and the record in light of the exceptions and briefs<sup>2</sup> and has decided to affirm the judge's rulings, findings,<sup>3</sup> and conclusions and to adopt the recommended Order as modified below.<sup>4</sup>

<sup>1</sup> Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

<sup>2</sup> The General Counsel's answering brief asserts that the Board should not consider the Respondent's exceptions because they fail to comply with Sec. 102.46(b) of the Board's Rules and Regulations. We find that the Respondent's exceptions are sufficient to satisfy the "substantial compliance" standard, and thus we have considered them. See, e.g., *Pennant Foods*, 352 NLRB 451, 451 fn. 1 (2008).

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

In addition, the Respondent argues that the judge erroneously relied on hearsay testimony, specifically employee Robert Hornsby's testimony that Supervisor Brian McMahan told Hornsby that Jack Whitaker, the Respondent's president and chief executive officer, had told Supervisor Warren Houchins to "lay off or get rid of" employees. We disagree. The finding of an 8(a)(1) violation in this regard is based on Hornsby's nonhearsay testimony about a threat that a supervisor made directly to him. See, e.g., *Buckeye Electric Co.*, 339 NLRB 334, 334 fn. 1 (2003), affd. mem. 116 Fed.Appx. 709 (6th Cir. 2004).

Further, we reject the Respondent's argument that the judge denied it due process by failing to enforce its subpoena duces tecum with regard to witness affidavits. Pursuant to Sec. 102.118(b)(1) of the Board's Rules and Regulations, the Respondent was provided with witnesses' affidavits prior to its cross-examination of those witnesses, and it had an opportunity to cross-examine those witnesses about their prior statements. See, e.g., *Success Village Apartments*, 347 NLRB 1065, 1065 (2006).

In adopting the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by demoting Hornsby and removing certain benefits

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Diversified Enterprises, Inc., Mount Hope, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

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

"(b) Threatening employees because they engage in activities on behalf of or in support of the Mid-Atlantic Regional Council of Carpenters, West Virginia District, United Brotherhood of Carpenters and Joiners of America, or any other union."

2. Delete paragraphs 1(d), (e), and (f), and reletter the subsequent paragraphs.

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

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from him, we disavow his reliance on *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1984), cert. denied 455 U.S. 989 (1982). *Wright Line* does not apply here because the Respondent concedes that its actions were motivated solely by Hornsby's protected activities. The Respondent's sole defense was that Hornsby was a supervisor. As the Respondent acted on a purported, but erroneous, belief that Hornsby was a supervisor, it violated the Act as alleged. See, e.g., *Barstow Community Hospital*, 352 NLRB 1052 (2008).

In adopting the judge's findings that the Respondent's supervisors made statements that violated Sec. 8(a)(1), we find it unnecessary to pass on his finding that Houchins' statement that employees' union activities had opened up a "can of worms" was an unlawful threat, as such a finding would be cumulative of other threats found in this case. We also find it unnecessary to pass on the judge's finding that the stipulated supervisors were the Respondent's agents even if they were not supervisors within the meaning of the Act. Further, we note that the Respondent's exceptions are very limited. In this regard, the Respondent argues that some of the supervisors' statements were noncoercive *only* because the supervisors did not have the authority to actually effect the threats that they conveyed. However, the fact that they may not have had the authority to actually make those decisions does not render their statements noncoercive. Moreover, the judge found that the supervisors here did have the authority to convey discipline and discharge decisions.

<sup>4</sup> The General Counsel's cross-exceptions request that the Board alter its current practice of awarding only simple interest on backpay and other monetary awards and instead adopt a policy of compounding interest on a quarterly basis. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See *Sawgrass Auto Mall*, 353 NLRB 436 fn. 3 (2008).

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 on your behalf with your employer
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT threaten employees because they engage in activities on behalf of or in support of the Mid-Atlantic Regional Council of Carpenters, West Virginia District, United Brotherhood of Carpenters and Joiners of America, or any other union.

WE WILL NOT inform employees that employees have been demoted because they have engaged in union activities.

WE WILL NOT inform employees that they are working less favorable shift hours because they have engaged in union activities.

WE WILL NOT demote employees, or take away their company vehicles, gas cards, or their lodging expense reimbursements because they engage in union activities.

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

WE WILL make Robert Hornsby whole for any loss of earnings and loss of benefits, including taking away his company truck, gas card, and lodging expense reimbursements, suffered as a result of the discrimination against him in the manner set forth in the Board's decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful demotion and loss of benefits, including taking away his company truck, gas card, and lodging expense reimbursements, of Robert Hornsby and, within 3 days thereafter, notify him in writing that this has been done and that the demotion and loss of benefits will not be used against him in any way.

DIVERSIFIED ENTERPRISES, INC.

*David Ness, Esq.*, for the General Counsel.  
*Robert Dunlap, Esq.*, of Beckley, West Virginia, for the Respondent.  
*Brian Prim Esq.*, of Hurricane, West Virginia, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Beckley, West Virginia, on May 29, 2007. The charge was filed on September 15, 2006, by the Mid-Atlantic Regional Council of Carpenters, West Virginia District, United Brotherhood of Carpenters and Joiners of America (the Union) against Diversified Enterprises, Inc. (Respondent).<sup>1</sup> The complaint issued on March 30, 2007, as amended at the hearing, alleges Respondent violated Section 8(a)(1) of the Act by making various statements to employees concerning their union activities on about August 29 and September 5 and 6; and that Respondent violated Section 8(a)(1) and (3) by on August 29, demoting employee Robert Hornsby, and taking away Hornsby's use of a company credit card, company truck, and travel benefits because of his union activities.<sup>2</sup> The complaint also alleges that: Jack Whitaker, Respondent's president and CEO; Jack Scott, construction manager; Warren Houchins, on-site supervisor; and Brian McMahan, project manager are supervisors and agents of Respondent within the meaning of Section 2(11) and (13) of the Act. Respondent admits that Whitaker is its supervisor and agent; and that Scott, Houchins, and McMahan are supervisors within the meaning of Section 2(11), but it denies that the latter three are Respondent's agents within the meaning of Section 2(13) for the statements attributed to them in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following<sup>3</sup>

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, has been engaged been engaged in providing general contracting for water and sewer development services for private and public entities from its principal office in Mount Hope, West Virginia. During the past 12 months, in conducting these operations, Respondent performed

<sup>1</sup> All dates herein are in 2006, unless otherwise stated.

<sup>2</sup> Respondent amended its answer at the outset of the hearing to raise the defense that Hornsby was a supervisor within the meaning of Sec. 2(11) of the Act.

<sup>3</sup> In making these findings, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), reversed on other grounds 340 U.S. 474 (1951). All testimony has been considered, if certain aspects of a witness' testimony are not mentioned it is because it was not credited, or cumulative of the credited evidence or testimony set forth above. Further discussions of the witnesses' testimony and credibility are set forth throughout this decision.

services valued in excess of \$50,000 in States other than the State of West Virginia. Respondent admits and I find Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. ALLEGED UNFAIR LABOR PRACTICES

Robert Hornsby started working for Respondent on September 11, 2001, as a foreman, a position he maintained until he was demoted on August 29. Hornsby quit his employment on December 14. Hornsby was hired by Whitaker and he was told when he was hired that, as a foreman, Hornsby was going to receive a gas card, and one set of tires for his personal vehicle per year. Hornsby used the gas card to purchase gas for his personal vehicle for his commute to and from work, as well as for on the job gas expenses. Hornsby testified that around 2-1/2 to 3 years after he was hired, he was given the use of a company truck because he hauled tools including a generator and a vibrator around for the Company, and he would have to unload them from his personal vehicle when he went home over the weekend. Hornsby brought this problem to Respondent's then Vice President Mike Danette's attention, and Danette gave Hornsby the use of one of Danette's personal trucks to use as a company truck. The truck was a 1991 Ford pickup. Hornsby testified there were foremen on other jobs who received a gas card, and tires for their personal vehicles, but Hornsby was the only foreman who had the use of a company truck since he had to haul heavy equipment to and from the jobsite as a requirement of his job. Hornsby testified that while he was a foreman when he traveled out of town Respondent compensated him for a portion of his hotel expenses. This benefit ended when Hornsby was demoted from the foreman position on August 29, as did his use of the company truck to drive to and from work and the gas card. Hornsby still had the use of the company truck to haul things on the job, but he could no longer take it home. Hornsby testified that after Hornsby's August 29 demotion, Hornsby no longer gave his crew assignments on the job, that Houchins gave the crew their assignments. Hornsby sustained a back injury on September 15, at which point he stopped working for the Company for about 6 weeks. Hornsby returned to work and then quit on December 14.

During 2006, Hornsby worked for Respondent at the Cool Ridge Flat Top PSD project (PSD site) near Ghent, West Virginia. Hornsby began working on that job as a foreman in January. Respondent was a contractor at the project where it was building a sewage treatment plant, including the concrete tanks and office buildings. Hornsby reported to Houchins at the PSD site, and Houchins reported to Whitaker. Hornsby testified that Houchins met with the crew in the morning and then "I was pretty much left in charge up there when he left." Hornsby testified there were days when Houchins gave crew members specific assignments, and some days when Hornsby gave the crew members their assignments without any input from Houchins. Hornsby estimated that he gave the crew assignments by himself around 2 to 3 days a week. Hornsby testified he could not approve time off for crew members. Rather, they had to fill out a form to be turned into the office, and Hornsby referred their requests to Houchins for approval.

Hornsby could not approve overtime. Hornsby attended Monday morning safety meetings which were attended by every employee of the Company. Hornsby opened the gate to the jobsite most mornings.

Hornsby testified his work for Respondent was building sewage plants and water treatment plants. Hornsby testified that he was given a copy of the blueprints for the job, which he read, and that he gave people their assignments at the site based on what was in those blueprints. He testified that after he gave people their assignments that Hornsby himself performed hands on work. He testified that he laid out all the steel and forms for the buildings. Hornsby testified he performed carpentry work including, tying steel, pouring and finishing concrete, pulling wire, helping electricians pull wire, setting manholes, pump stations, and other "routine work that happens on a plant." He testified he spent all day working with his tools. Hornsby testified Houchins came to the job in the morning, during lunchtime on some days and in the evenings to check on the crew to "see how we did." Hornsby and Houchins each had company cell phones allowing them to communicate during the course of the day.

Hornsby testified that a project such as working on a tank would take 2 or 3 months, and that, "once you started it that's what you worked on." Hornsby testified when Houchins arrived in the morning he brought in blueprints and reviewed with Hornsby what Houchins wanted the crew to do. Hornsby testified Houchins gave Hornsby's crew its assignment. Hornsby testified, "Then I would tell the—we would split the guys up, because I'd worked with them and I knowed what kind of duties they were qualified as, what they could do. Then we'd just split up and do that work." Hornsby testified in terms of the employees assignments that "Houchins told me what he wanted done and then I would send the guys to do the certain things." Hornsby testified he made his assignments based on, "Which ones was qualified, yes, to do that kind of work." Hornsby testified there were four or five people on his crew, each with different skills, and he picked the person with the best skills to do a particular job. Hornsby testified, "I've been doing this type of work for four or five years and when you work with these people you know what they can and can't do. If Rodney was an operator, you needed an operator, you'd send him. You know what I mean? Doing carpenter work or—once you work with a person you can tell what he can and can't do."

Hornsby testified there were carpenters, concrete finishers, and operators on his crew. Hornsby and Mark Treadway were carpenters, and Treadway was also a concrete finisher. Hornsby testified that, "Rodney Herndon was our operator and Jody Satterfield would operate, too, if we needed him." They operated excavators, backhoes, rollers, and dump trucks. The carpenters were not trained to operate those pieces of equipment. Hornsby testified operators usually operated equipment the whole day, "unless we like were pouring concrete then everybody worked on that." Hornsby testified they poured 300 to 400 yards of concrete at a time, it was an all day project, and the whole crew worked on it. He testified that everyone could help by doing such things as handing tools to someone, or dragging the cord around for a vibrator. He testified, "[T]hey wouldn't be exactly finishing the concrete, but they would

help.” Hornsby testified carpenters and laborers had the skills to finish concrete. He testified, “[O]nce we started pouring you could tell who was qualified for what.” Hornsby testified that, “Most of these guys I worked with them at the last plant and I knowed what they could and couldn’t do.”

Hornsby testified that getting a site ready for a concrete pour, the operators would bring in 10 steel bars at a time, and while the carpenters were tying in the 10 bars, the operators would be retrieving 10 more bars. In addition to the steel bars, the operators would carry forms, material, and anything else the carpenters needed to the pour location. Houchins would set the time of when the pour should be made, and then the crew would work to prepare the site for the pour, the site preparation being a 2- to 3-week project.

In mid-August, Hornsby contacted the Union and spoke to Business Agent Luke Begovich. Thereafter, Hornsby spoke to employees on his crew about the Union. Hornsby then went to the Union’s office in August accompanied by crew members Mike Ice, Satterfield, and Treadway. Begovich gave Hornsby a letter, dated August 15, on the Union’s letterhead stating Hornsby was a “volunteer organizer,” and that he planned to exercise his “rights in regard to organizing.”

Hornsby gave the Union’s letter to Whitaker on August 29, between 6:30 to 7 a.m. They were in Respondent’s office in Ghent. Hornsby testified that he, Whitaker, Houchins, Brian McMahan, a project manager for Respondent,<sup>4</sup> and Ken Browning, an inspector for L. A. Gates Engineering (Gates) were in the office. Gates performed engineering work for the PSD site. Hornsby testified when he gave Whitaker the letter that Hornsby told him, “You need to read this.” Hornsby testified that, Whitaker “looked at it for a few minutes then he told me that I could not do that. He said I was a supervisor.” Hornsby replied that he was not a supervisor, that he was a foreman and did not have the duties of a supervisor. Hornsby testified Whitaker said that Hornsby could not do that, and that Hornsby needed to turn in his company truck and company gas card. Hornsby testified that Whitaker said that Hornsby “needed to get out of his face before he went off on my ass.” Hornsby responded that he was not in Whitaker’s face. Hornsby asked if he could take the truck to the jobsite and unload the tools. Whitaker agreed and Hornsby left the office.<sup>5</sup> Hornsby estimated that he was about 4 or 5 feet apart from Whitaker when Hornsby presented the letter to Whitaker. Hornsby denied being in Whitaker’s face. Hornsby testified he handed Whitaker the letter and that Hornsby stood back. Hornsby testified, “I was nowhere near his face at the time. I ain’t never got in his face.”

After Hornsby’s meeting with Whitaker on August 29, Hornsby went to the PSD site. Hornsby arrived there at 7 a.m.,

<sup>4</sup> McMahan is also Whitaker’s son-in-law.

<sup>5</sup> Hornsby carried a recorder in his pocket at the time he gave Whitaker the letter on August 29, because Hornsby thought he would receive negative feedback at the time he tendered the letter. Respondent’s counsel represented he received an inaudible CD from the Union in response to a prehearing subpoena. Counsel for the General Counsel represented that the CD was the tape of the conversation between Whitaker and Hornsby and that it was not entered into evidence due to its lack of clarity.

which was starting time, and Houchins came up behind Hornsby as the crew was loading tools. Hornsby, Treadway, Ice, Satterfield, and Herndon were at the tool trailer. Hornsby was outside the trailer, along with Ice and Treadway. Satterfield and Herndon were inside. Hornsby testified that Houchins stated that, “You didn’t know what you was getting yourself into. Look what it’s got you now, got you demoted.” Hornsby testified Houchins stated, there was nothing wrong with the Union, and that Houchins was in the Union for 13 years. Then Houchins told the crew what needed to be done that day and left.<sup>6</sup>

Hornsby testified that around noon on August 29 McMahan drove up to where Hornsby and Treadway were working. Hornsby testified he asked McMahan if Whitaker was in a bad mood when Hornsby gave him the letter. McMahan said, “No, he seemed like he was in a good mood.” McMahan said Whitaker told Houchins to lay them off or get rid of them, and he did not care how Houchins did it.<sup>7</sup> Similarly, Treadway testified that McMahan said, “Well, Jack made it clear to Warren Houchins that he wants rid of you all.”

Hornsby testified Houchins came out to the jobsite again on the evening of August 29, while the crew was putting tools away at the tool trailer. At that time, Treadway handed Houchins a letter from the Union stating that Treadway was a voluntary union organizer.<sup>8</sup> Hornsby testified there were several people there and that Hornsby did not hear all of the conversation between Houchins and Treadway. However, Hornsby saw Treadway give the letter to Houchins, and he heard

<sup>6</sup> Treadway testified he started working for Respondent in 2004, and he was laid off on December 11. He started working at the PSD site in February and was working there at the time of his layoff. Treadway was laid off when the project had reached substantial completion. Treadway was the last carpenter to work on the project. Treadway testified Hornsby talked to him about going union in August 2006. Treadway testified he saw Houchins around 7:30 to 8 a.m. at the tool trailer on August 29. Treadway testified Hornsby was talking about turning in his letter and Whitaker taking away the company truck and gas card. Treadway testified Houchins made the comment, “that’s what you get.” Treadway testified Houchins is a supervisor in that he has the ability to fire and discipline someone.

<sup>7</sup> Hornsby testified there were times when McMahan was Hornsby’s supervisor. Hornsby testified, “if he comes to my job I’m to answer to him.” Hornsby testified McMahan was not working the job where Hornsby was working. Rather, McMahan was at the Flat Top Lake jobsite. However, Hornsby testified McMahan is a supervisor and that Hornsby answered to him “on any job.” Hornsby testified that if McMahan needs something done at the Lake, “then we go do it. When we set the pump stations on the Lake that was McMahan’s job and I went over there to set them. They took me over there to assist.” Hornsby testified that if McMahan came to the plant, “we answered to him. Everybody, not just me.” Hornsby testified McMahan was visiting the PSD jobsite every day in that McMahan needed pipe, fittings, and tools. McMahan’s crew was building the pipeline for the sewer plant that Hornsby’s crew was working on, which was in close proximity to where Hornsby’s crew was working. Hornsby testified when McMahan’s crew did not have any work they then worked along side of Hornsby’s crew.

<sup>8</sup> Treadway testified he met with Begovich in early August, and he received a letter from the Union dated August 15, stating Treadway was a voluntary organizer.

Houchins say, “You guys are opening up a can of worms.” Similarly, Treadway testified that he gave the Union’s letter announcing Treadway was a voluntary organizer to Houchins on August 29 at 4:30 p.m. Treadway testified Satterfield was there, that Ice was a couple of feet behind them, and Hornsby was there. Treadway testified, “I told him I was waiting to give my letter to Jack, but Jack never showed back up so I was going to give it to him. He said he’d just hoped we knewed [sic] what can of worms we were opening up.”

Hornsby testified that on Tuesday, September 5, Hornsby had a phone conversation in the evening with Construction Manager Scott. Hornsby testified that he was driving his personal vehicle at the time, and Ice was with him. Scott called Hornsby. Scott told Hornsby that Whitaker was pissed off and that Whitaker was going to put them on a \$15-an-hour job and take them off the prevailing wage job they were on. Hornsby asked if Whitaker could do that, and Scott replied, “He’s the president of the company, he can pretty much do what he wants.” Hornsby testified the prevailing wage job was paying between \$30 and \$38 an hour. Hornsby testified Scott said, “He said he was going to do us like that to make us quit.” Hornsby testified Scott said, something like, “It got you demoted.”

Ice testified Hornsby spoke to him about the Union around August 16 or 17.<sup>9</sup> Ice accompanied Hornsby and Treadway to the union hall on August 30 and spoke to Begovich. Begovich gave Ice a letter on the Union’s letterhead, dated August 30, announcing that Ice was a voluntary union organizer. Ice testified that he handed the Union’s letter to Houchins on September 5, in the morning when Ice arrived at the jobsite. Ice testified that prior to Labor Day, which was September 4; the employees on his crew were working four 10-hour shifts a week. Ice testified he did not work on Monday, September 4. He testified he thought his scheduled changed during Labor Day week to five 8-hour shifts a week. Ice testified that on September 6 he had a conversation with Houchins. Ice was finishing concrete and Houchins came by. Herndon, an operator, was helping Ice. Ice testified he asked Houchins about the change in their shift schedule. Houchins said that was the way it was going to be. Houchins said they brought it on themselves because of the coming out letters that they handed him and it was Whitaker’s way of showing them who was the boss.<sup>10</sup>

#### *A. The Testimony of Andrew (Jack) Whitaker*

Whitaker testified that, at the time of the hearing, Respondent had 800 employees at one of its projects and 200 employees at another project, and that Respondent usually had between 600 to 800 employees. Whitaker testified Whitaker hired Hornsby in September 10, 2001, as a foreman, and that as a

<sup>9</sup> Ice worked for Respondent as a laborer from September 2005 until he quit on September 7, 2006. Ice started working at PSD site around April 2006, at which time Hornsby was the foreman on Ice’s crew. At the time he quit, Ice was finishing concrete at the PSD site.

<sup>10</sup> Ice testified that he thought the change in schedule was due to his union letter, because when the letter came out everything changed. Ice testified that he had worked construction for about 5 years and that hours can shift at the end of the summer for day light purposes. There was no allegation before me that the shift change was violative of the Act.

foreman there was a superintendent with Hornsby at all the times. Whitaker testified that when Hornsby received the use of a company truck that Hornsby became an assistant superintendent or superintendent on various jobs. Whitaker testified Hornsby became a supervisor the day he received the company truck. Whitaker testified he had two contracts at the Flat Top job. Whitaker testified that Hornsby’s primary function at Flat Top was contract 1, where Hornsby was Whitaker’s concrete superintendent. Whitaker testified that if he had a major concrete pour, he always wanted Hornsby there. Whitaker testified Hornsby may have also performed some work helping out at contract 2 at Flat Top.

Whitaker testified there is no difference between a superintendent and assistant superintendent, except the latter has someone like Whitaker or his brother coming to the jobsite every morning. Whitaker testified Hornsby was paid by the hour stating, most of Whitaker’s superintendents were paid by the hour and given travel time in addition to their hourly pay. Whitaker could not recall if Hornsby received a raise when he was made assistant superintendent.<sup>11</sup> Whitaker testified that if Hornsby was a foreman he would not have received a gas card, a company telephone, or a company truck. Whitaker also testified Hornsby is one of the best concrete superintendents in his field.<sup>12</sup>

Whitaker testified Hornsby had the authority to direct other laborers. Whitaker testified Houchins would go over with Hornsby what they wanted done, and he would make sure it got done by directing the other employees that were working under him.

Whitaker testified as follows:

Q. You were pleased with his duties as a supervisor?

A. Actually, he was—I rated him as excellent.

JUDGE FINE. So, why was his truck taken away?

THE WITNESS. Because he can’t be a supervisor and be organizing a Union. He can’t wear both hats on my project.

Whitaker testified he took away Hornsby’s truck because Hornsby handed Whitaker a piece of “paper saying he was

<sup>11</sup> While he initially testified in a somewhat ambiguous fashion about Hornsby’s rate of pay, Whitaker later testified that, prior to the hearing, Whitaker had reviewed Respondent’s financial records which disclosed Respondent was paying Hornsby at a carpenter’s rate of pay during the course of Hornsby’s employment. Whitaker testified that while Hornsby was being paid at a carpenter’s rate the other carpenters only received that rate for doing carpenter’s work. Yet, Hornsby received carpenter’s pay no matter what he was doing, including shoveling snow. Whitaker claimed that Hornsby earned more than Scott, Houchins, and McMahan.

<sup>12</sup> Whitaker’s claim that Hornsby was a superintendent is not supported by Respondent’s records. Hornsby’s written performance evaluation for the period September 10, 2001, to October 1, 2005, lists him as a carpenter foreman. Hornsby signed the document on October 19, 2005, next to the designation marked, “Employee’s Signature.” Respondent published an employee phone list dated January 13, 2006. On the list, Whitaker is listed as president and his brother Bill is listed as vice president. McMahan and Scott are listed as project managers, and Houchins is listed as 1 of 17 supervisors. Hornsby is listed as one of eight foremen.

going to be organizing the Union. He can't be a supervisor and a Union organizer." Whitaker testified he told Hornsby, "[Y]ou cannot be a supervisor and organize a Union at the same time. You can't do that."<sup>13</sup> Whitaker testified Hornsby's job title when Whitaker took away his company truck and gas card was superintendent, not foreman. However, Whitaker testified in a contrary fashion in his prehearing affidavit taken in February 2007, where he stated the following:

I did tell Hornsby when he gave me his letter that he could not be in the Union and be a supervisor. When I told him this Hornsby got mad and he told me that the Union guys promised me that if I got the men organized he would be able to get a job with them. Because he was mad over not being able to be involved with the Union when he became a supervisor I decided to take his truck and gas card from him. I actually thought he was quitting by what he said about the Union getting him a job, but he never did quit in September 2006. Hornsby was not a supervisor when he told me he was involved with the Union. I was telling him that he could not be a supervisor and involved in the Union. I did not take the truck away because he was involved with the Union, but only because he was mad at me.

Whitaker stated in the affidavit that "Hornsby was the supervisor in training and he worked with the crews." Whitaker also stated in his affidavit, "There are other supervisors in training at other job projects, but Hornsby was the only supervisor in training that I gave a truck to. He had a truck because I liked him and I was trying to improve his lifestyle." Whitaker stated in the affidavit, "I would not consider Hornsby a supervisor with any authority over those he worked with because he was in training. If Hornsby wanted someone to do a specific job, he would go to Houchins and request it and Houchins would tell the employee what to do." Whitaker stated in the affidavit that, "Hornsby was like the lead guy on the crew and his experience enabled him to tell others what needed to be done. I cannot give examples of what type of instructions he gave. Mostly Hornsby just worked and they followed. Any type of changes in the blueprints or the construction of the building had to be approved and decided by the engineers."

Whitaker testified concerning the alleged 8(a)(1) statements attributed to Scott, Houchins, and McMahan that:

A. Those were their opinions and, you know, I can't do anything about their opinions, but they did not have the authority to make a statement for Diversified Enterprises. They don't have the authority to discipline anybody without getting permission from me or my brother.<sup>[14]</sup>

Whitaker denied their statements were reflective of his or Respondent's views. Whitaker testified that Houchins, Scott, and

McMahan were still working for Respondent at the time of the hearing. However, Respondent did not call them to testify.

#### B. Credibility

General Counsel witnesses Hornsby, Ice, and Treadway testified in a credible and consistent fashion on direct and cross-examination. Moreover, Respondent did not call admitted Supervisors Houchins, Scott, or McMahan to refute the testimony of the General Counsel's witnesses, although those supervisors were still in Respondent's employ. In fact, Whitaker in essence conceded the statements attributed to the supervisors were made to the employees as alleged when he testified those statements were merely the opinions of the supervisors, but contended the supervisors did not have the authority to make the statements on behalf of Respondent. Accordingly, I have credited Hornsby, Treadway, and Ice, considering their demeanor, with respect to those allegations made in the complaint concerning statements by Whitaker, Houchins, McMahan, and Scott.

In this regard, I did not find Whitaker to be a very credible witness. He claimed at the hearing that Hornsby was given the job title of assistant superintendent or superintendent when Hornsby received the use of a company truck and that Hornsby was a supervisor. This testimony is contradicted in Whitaker's prehearing affidavit in which he repeated several times that Hornsby was not a supervisor, but just a supervisor in training, and that the reason he gave Hornsby the use of a truck was not because he was a supervisor, but because Whitaker felt sorry for Hornsby and wanted to improve his life style. Whitaker's claim that Hornsby was given the job title of assistant superintendent or superintendent when Hornsby received the use of a company truck is also contradicted by documentary evidence. By Hornsby's uncontradicted testimony, Hornsby received the company truck some time in 2004. Yet, Hornsby's evaluation issued in October 2005 lists Hornsby as a foreman, and a phone list published in January 2006 by Respondent lists Hornsby as a foreman. Thus, I have credited Hornsby over Whitaker and have concluded that Hornsby was never made assistant superintendent or superintendent. Rather, Hornsby had the title of foreman during the course of his employment with Respondent, until Hornsby was demoted from that position on August 29.

I credit Hornsby's version of their August 29 conversation over Whitaker's. Hornsby testified when he presented the Union's letter to Whitaker they were two arms' lengths apart and after he gave the letter to Whitaker that Hornsby stood back. Hornsby denied getting in Whitaker's face. On the other hand, Whitaker testified Hornsby stood within 2 feet of him and was in his face. I find Whitaker's testimony extremely unlikely. Whitaker's claim as to Hornsby's behavior would have been out of character for Hornsby who Whitaker otherwise described as a good employee, "mindful of his job," and who wanted to move up in the Company. Moreover, Whitaker impressed me as an individual who in running a large operation was used to getting his way and who would have no problem of forcefully letting a subordinate know his opinion. Whitaker's testimony at the hearing also contradicted his testimony in his affidavit as to the reason Hornsby was demoted. Whitaker testified at the hearing that Hornsby was demoted because he could not be a

<sup>13</sup> Whitaker testified that when he spoke to Hornsby, Hornsby was mad at him and that "he got up in my face." Whitaker testified Hornsby was about 2 feet away. However, Whitaker also testified that Hornsby was a good employee and that Hornsby "was mindful of his job and he wanted to move up in the company."

<sup>14</sup> Whitaker testified they had to get approval from Whitaker and his brother to fire someone. Whitaker testified after they get authorization from him they will tell someone they are disciplined or fired.

supervisor and organize for the Union at the same time. However, in his prehearing affidavit, Whitaker denied that Hornsby was a supervisor or that Hornsby's demotion had anything to do with Hornsby's union activity. Rather, Whitaker claimed he demoted Hornsby because during the conversation in which Hornsby presented Whitaker with the letter from the Union that Hornsby was "mad at me." Accordingly, I have credited Hornsby's testimony in full and in particular over Whitaker's description of the August 29 incident leading to Hornsby's demotion.

### C. Analysis

#### 1. Hornsby's alleged supervisory status

Respondent argued at the hearing that Hornsby was a statutory supervisor because he responsibly directed employees. Respondent maintained this argument in its posthearing brief, and additionally argued that Hornsby exercised independent judgment in the assignment of employees. The burden of proving an individual is a statutory supervisor rests with the party asserting it. See *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711 (2001). Section 2(11) of the Act defines "supervisor" as

[A]ny 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 *NLRB v. Kentucky River Community Care*, supra at 713, the Court stated 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 "[i]n the interest of the employer." [*NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 574 (1994).]

In September 2006, the Board issued its decisions in *Oakwood Healthcare Center*, 348 NLRB 686; *Croft Metals, Inc.*, 348 NLRB 717, and *Golden Crest Healthcare*, 348 NLRB 727, which specifically address the meaning of "assign," "responsibly to direct," and "independent judgment," as those terms are used in Section 2(11) of the Act. The Board in *Croft Metals, Inc.*, supra at 721, in discussing *Oakwood Healthcare*, supra, stated the following:

The authority to "assign" refers to "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. . . . In sum, to 'assign' for purposes of Section 2(11) refers to the . . . designation of significant overall duties to an employee, not to the . . . ad

hoc instruction that the employee perform a discrete task." [Id. at 689.]

The authority "responsibly to direct" is "not limited to department heads," but instead arises "[i]f a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it,' . . . provided that the direction is both 'responsible' . . . and carried out with independent judgment." [Id. at 691.] "[F]or direction to be 'responsible,' the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly." [Id. at 691–692.] "Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." [Id. at 692.]

"[T]o exercise 'independent judgment,' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." [Id. at 692, 693.] "[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." [Id. at 693.] "On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." [Id. at 693.] (citations omitted). Explaining the definition of independent judgment in relation to the authority to assign, the Board stated that "[t]he authority to effect an assignment . . . must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" [Id. at 693; citations omitted.]

In the instant case, Hornsby had the title of carpenter's foreman during the course of his employment with Respondent until his August 29 demotion. Hornsby was paid on an hourly basis at a carpenter's pay rate, regardless of whether Hornsby was actually performing carpenter's work. Hornsby, until his demotion, was given the use of a company gas card and he was allowed to charge gasoline for his commute to work on the card. Hornsby, as a foreman, was provided a portion of his lodging costs when he traveled for Respondent. Hornsby was also given a free set of tires for his personal vehicle until he received the use of a company truck. Hornsby was eventually given the use of a company truck because he was being required to haul heavy equipment to and from the jobsite, and to his home on a nightly basis. As a foreman, Hornsby did not attend management meetings, and he could not approve leave requests or overtime. There is no contention that Hornsby could discipline employees or effectively recommend such

action. There is no contention that Hornsby was involved in the evaluation of employees. In fact, the only evaluation placed into evidence was one for Hornsby covering a 4-year period ending on October 1, 2005. Hornsby's title on the evaluation is carpenter foreman. Item 10 on the evaluation evaluates communication skills with "other employees." Item 11 on the evaluation, discusses leadership concerning "the ability to motivate coworkers to accept and complete assignments in a timely and satisfactory" manner. There is no item in the evaluation showing that Hornsby had authority over or was responsible for the work of others. There is no claim that the evaluation impacted on Hornsby's pay, or ability to retain his job as carpenter's foreman. Hornsby was not listed as one of Respondent's 17 supervisors in its January 2006 phone list. Rather, Hornsby was included in a separate category noted as foreman.

During 2006, Hornsby worked for Respondent at the PSD site where Respondent was a contractor building a sewage treatment plant. Hornsby reported to Houchins who reported to Whitaker. Houchins met with Hornsby's crew during the morning, at lunch, and sometimes at the end of the day to check on how the crew performed. In Houchins absence, Hornsby was left in charge of the crew. However, Hornsby and Houchins were provided company cell phones to allow them to communicate during the day. Hornsby testified there were days when Houchins gave crew members specific assignments, and some days when Hornsby gave the crew members their assignments without Houchins input. Hornsby was given a copy of the blueprints for the job and he gave people their assignments based on the blueprints. After he gave his crew their assignments, Hornsby himself performed hands on work including laying the steel and forms for the buildings. Hornsby performed carpentry work including, tying steel, pouring and finishing concrete, pulling wire, helping electricians pull wire, setting manholes, and other "routine work that happens on a plant." He spent all day working with his tools.

Hornsby testified that a project such as working on a tank would take 2 or 3 months, and that "once you started it that's what you worked on." When Houchins arrived in the morning, he brought blueprints and Houchins reviewed with Hornsby what Houchins wanted the crew to do. Hornsby testified Houchins gave Hornsby's crew its assignment. Hornsby testified, "[T]hen we would split the guys up, because I'd worked with them and I knowed [sic] what kind of duties they were qualified as, what they could do. Then we'd just split up and do that work." Hornsby testified in terms of the employees assignments that, "Houchins told me what he wanted done and then I would send the guys to do the certain things." Hornsby testified he made his assignments based on, "[w]hich ones was qualified, yes, to do that kind of work." Hornsby testified there were four or five people on his crew, each with different skills, and he picked the person with the best skills to do a particular job. Hornsby testified there were carpenters, concrete finishers, and operators on his crew. Hornsby and Treadway were carpenters, and Treadway was also a concrete finisher. Herndon and Satterfield could operate equipment, including excavators, backhoes, rollers, and dump trucks. The carpenters were not trained to operate those pieces of equipment. Hornsby testified operators usually operated equipment the whole day "unless we

like were pouring concrete then everybody worked on that." Pouring concrete was a whole day project and the whole crew worked on it. Everyone could help by doing such things as handing tools to someone, or dragging the cord around for a vibrator. He testified, "[T]hey wouldn't be exactly finishing the concrete, but they would help." Hornsby testified carpenters and laborers had the skills to finish concrete. Hornsby testified that getting a site ready for a concrete pour the operators would bring in 10 steel bars at a time, and while the carpenters were tying in the 10 bars the operators would be retrieving 10 more bars. In addition to the steel bars, the operators would carry forms, material, and anything else the carpenters needed to the pour location. Houchins would set the time when the pour should be made, and then the crew would work to prepare the site for the pour, the site preparation being a 2- to 3-week project.

Whitaker stated the following in his prehearing affidavit, "I would not consider Hornsby a supervisor with any authority over those he worked with because he was in training. If Hornsby wanted someone to do a specific job, he would go to Houchins and request it and Houchins would tell the employee what to do." Whitaker stated in the affidavit that,

Hornsby was like the lead guy on the crew and his experience enabled him to tell others what needed to be done. I cannot give examples of what type of instructions he gave. Mostly Hornsby just worked and they followed. Any type of changes in the blueprints or the construction of the building had to be approved and decided by the engineers.

I find that Respondent failed to meet its burden of establishing that Hornsby was a supervisor within the meaning of Section 2(11) of the Act. While Hornsby gave his crew members individual tasks those assignments were repetitive in nature and based on skills sets largely defined by the crew member's job classification, i.e., carpenters versus operators. Houchins met with the crew and Hornsby in the morning and informed the crew of its actual assignment. Houchins met the crew multiple times on a daily basis and was in phone contact with Hornsby. Houchins used his judgment for when it was necessary for him to step in and assign the crew members individual tasks which he did during the course of the week. Thus, I find that the level of judgment Hornsby used in assigning tasks did not rise above the level of routine. See *Iron Workers Local 28 (Virginia Assn. of Contractors)*, 219 NLRB 957, 961 (1975), where a group of working foremen and a general foreman were found not to be statutory supervisors when they acted "within a very limited sphere in giving instructions to employees, bounded by the blueprints and instructions from the contractor or his supervisor." Their authority was found to be routine not requiring the use of independent judgment. See also *Electrical Workers IBEW Local 3 (Cablevision)*, 312 NLRB 487, 488-489 (1993) (Monopoli); *George C. Foss Co.*, 270 NLRB 232, 234-235 (1984) (Merrow), *enfd.* 752 F.2d 1407 (9th Cir. 1985); and *Ogden Allied Maintenance Corp.*, 306 NLRB 545, 546 (1992) (Michot), *enfd.* 998 F.2d 1004 (3d Cir. 1993).

I also find Respondent failed to establish Hornsby responsibly directed he crew members. There was no showing that

Hornsby's directions to employees were anything other than repetitive and routine in nature. There was also no showing Hornsby was vested with the authority to take corrective action if his directives were not followed, or that Hornsby was aware of or subject to any adverse consequences based on the lack of performance by his crew members. Respondent has not shown any discipline or reward to Hornsby or any of its foremen for the performance or lack thereof of their crew members. In fact, there was no suggestion that Hornsby had the authority to discipline, effectively recommend such, or evaluate their performance. Hornsby was only evaluated once in 4 years, none of the criteria in the evaluation were tied to the performance of his crew, and there was no showing that the evaluation impacted on Hornsby's rate of pay. See *Golden Crest Healthcare Center*, supra at 732-733.

2. Hornsby was demoted in violation of Section 8(a)(1) and (3)

Hornsby was hired by Whitaker as a foreman in 2001. On the morning of August 29, Hornsby presented Whitaker, in the presence of Respondent officials Houchins and McMahan, a letter from the Union designating Hornsby as a voluntary organizer. Upon reading the letter, Whitaker told Hornsby that Hornsby could not do that because Hornsby was a supervisor. Hornsby replied that he was not a supervisor, that he was a foreman and did not have the duties of a supervisor. Whitaker repeated that Hornsby could not do that, and that Hornsby needed to turn in his company truck and company gas card. While Hornsby was standing a safe distance away, Whitaker said that Hornsby needed to get out of his face before he went off on Hornsby's ass. Hornsby responded that he was not in Whitaker's face. Thereafter, Hornsby was demoted from his foreman's position losing the use of the company truck, gas card, and he was no longer compensated for a portion of his hotel costs when he traveled for Respondent. Hornsby also ceased to give assignments to his crew members. The record revealed Hornsby's union activities, knowledge of those union activities, animus towards those union activities by Whitaker's threat to go off on Hornsby's ass, and that Hornsby was demoted because of his union activities as Whitaker admitted that he rated Hornsby as excellent in his foreman's position but testified that he was demoted because as a supervisor he could not be organizing a union on Whitaker's project.<sup>15</sup> Since I have found that Hornsby was an employee and not a supervisor within the meaning of Section 2(11), Hornsby's demotion for engaging in union activity was violative of Section 8(a)(1) and (3).

3. Respondent's officials made coercive statements to employees in violation of Section 8(a)(1)

Respondent admitted that Whitaker was its statutory supervisor and agent, and that Houchins, McMahan, and Scott were statutory supervisors, but denied they were agents within the meaning of Section 2(13). The Board has held that under Section 2(13) of the Act and employer is bound by the acts and

statements of its supervisors whether specifically authorized or not. See *Sysco Food Services of Cleveland*, 347 NLRB 1024, 1034 fn. 23 (2006); *Ideal Elevator Corp.*, 295 NLRB 347 fn. 2 (1989); and *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986), enfd. 833 F.2d 1263 (7th Cir. 1987).<sup>16</sup> Respondent admitted in its answer to the complaint that Scott had the title of construction manager; Houchins the title of onsite supervisor; and McMahan the title project manager. Scott and McMahan were listed as project managers and Houchins as a supervisor in Respondent's January 2006, employee phone list. In addition McMahan is Whitaker's son-in-law. Hornsby's testimony revealed that Houchins gave his crew assignments on a daily basis. Treadway testified it was his view that Houchins is a supervisor and that he had the ability to discipline someone. Hornsby testified that McMahan was in charge of a neighboring project to the one Hornsby's crew was working on, that McMahan had directly supervised Hornsby in the past, and that if McMahan gave an order the employees on Hornsby's crew had to comply. Hornsby testified that Scott, along with Houchins, gave employees on his crew assignments towards the end of 2006. Whitaker testified that Scott, Houchins, and McMahan had the authority, upon Whitaker's approval, to convey disciplinary decisions including discharge to employees. In addition to their supervisory status, in the circumstances here, Respondent clothed Scott, McMahan, and Houchins with apparent authority to make statements on its behalf to its employees. See *Zimmerman Plumbing Co.*, 325 NLRB 106 (1997), enfd. in pertinent part mem. 188 F.3d 508 (6th Cir. 1999). Moreover, the statements by Respondent's supervisors at issue herein are similar in nature to the acts and statements of Whitaker, Respondent's president and CEO, concerning Whitaker's statements to and demotion of Hornsby. Accordingly, I find that Houchins, McMahan, and Scott, admitted supervisors, are also agents of Respondent within the meaning of Section 2(13) of the Act.

Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Section 7." The test of a violation of Section 8(a)(1) is whether an employer engaged in statements or conduct, which it may be reasonably said, tends to interfere with the free exercise of employee rights under the Act. *Rosdev Hospitality, Secaucus, LP*, 349 NLRB 202, 211 (2007); and *American Freightways Co.*, 124 NLRB 146, 147 (1959). The test of whether a statement would reasonably tend to coerce is an objective one. It requires an assessment of whether, under all the circumstances, the statement reasonably tends to restrain, coerce, or interfere with employees' rights guaranteed under the Act. *El Paso Electric Co.*, 350 NLRB 151 (2007); and *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992). Statements that an employee's union activities were the cause of an adverse action taken against them are coercive and clearly violative of Section 8(a)(1). *Heck's Inc.*, 273 NLRB 202, 204 (1984).

In the instant case, on August 29, Hornsby, a carpenter fore-

<sup>15</sup> See *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

<sup>16</sup> Respondent did not address this issue in its posthearing brief, and has provided no case support for its contention that it is not bound by the statements of its supervisors.

man, prior to the start of his shift handed Whitaker a letter stating that Hornsby was a voluntary organizer. Hornsby presented the letter to Whitaker in the presence of Respondent supervisors Houchins and McMahan. Whitaker responded to the letter that Hornsby could not do that because Hornsby was a supervisor, an assertion which Hornsby denied. Whitaker stated that Hornsby needed to turn in his company truck and gas card resulting in Hornsby's demotion from his foreman's position. Hornsby's credited testimony reveals that Whitaker added that Hornsby "needed to get out of his face before he went off on my ass." Since I have credited Hornsby that he was not in Whitaker's face, but rather Hornsby stood back in a non-threatening posture, I have concluded Whitaker's remarks constituted a threat of physical harm to Hornsby solely resulting from Hornsby's union activity and that Whitaker's statement coming in the context of Hornsby's demotion was coercive and violative of Section 8(a)(1).<sup>17</sup>

After Hornsby's meeting with Whitaker on August 29, Hornsby went to the PSD site. Hornsby arrived there at 7 a.m., and Houchins came up behind Hornsby as the crew was loading tools. Hornsby testified that Houchins stated that, "You didn't know what you was getting yourself into. Look what it's got you now, got you demoted." Treadway corroborated Hornsby's account. I find Houchins attributing Hornsby's demotion, in the presence of a group of employees, to Hornsby's union activities was coercive and violative of Section 8(a)(1). *Heck's Inc.*, supra at 204.

Hornsby's credited testimony reveals that around noon on August 29 McMahan drove up to where Hornsby and Treadway were working. Hornsby asked McMahan if Whitaker was in a bad mood when Hornsby gave him the letter. McMahan said, "No, he seemed like he was in a good mood." McMahan said Whitaker told Houchins to lay them off or get rid of them, and he did not care how Houchins did it. Similarly, Treadway testified that McMahan said, "Well, Jack made it clear to Warren Houchins that he wants rid of you all." I find McMahan's remarks, based on Hornsby's credited testimony, constitute a threat of layoff or termination in response to employees' union activity in violation of Section 8(a)(1).

Hornsby testified Houchins came out to the jobsite again on the evening of August 29. At that time, Treadway handed Houchins a letter from the Union stating Treadway was a voluntary union organizer. Hornsby did not hear all of the conversation between Houchins and Treadway. However, Hornsby heard Houchins say, "You guys are opening up a can of worms." Similarly, Treadway testified that he gave the Union's letter announcing Treadway was a voluntary organizer to Houchins on August 29 at 4:30 p.m. Treadway testified Houchins said in response that, "he'd just hoped we knowed what can of worms we were opening up." I find Houchins re-

<sup>17</sup> Counsel for the General Counsel argues in his brief, as set forth in the complaint, that Whitaker's statement constituted a threat of unspecified reprisals. To the contrary, I find that Whitaker's threat was specific, and did not leave much to the imagination. Rather, it is a clear threat of physical harm. Indeed, Whitaker tried to justify the remark by claiming Hornsby was in his face and angry. As set forth above, I have not credited Whitaker's assertions as to Hornsby's conduct.

mark, coming on the same day as Hornsby's demotion and the other statements by Respondent's officials, to be coercive. I find it constituted a threat of unspecified reprisals to employees for their engaging in union activities in violation of Section 8(a)(1) of the Act.

Hornsby testified that on Tuesday, September 5, Hornsby had a phone conversation in the evening with Construction Manager Scott. During the call, Scott told Hornsby that Whitaker was pissed off and that Whitaker was going to put them on a \$15-an-hour job and take them off the prevailing wage job they were on. Hornsby asked if Whitaker could do that, and Scott replied, "He's the president of the company, he can pretty much do what he wants." Hornsby testified the prevailing wage job was paying between \$30 and \$38 an hour. Hornsby testified Scott said, "He said he was going to do us like that to make us quit." Hornsby testified Scott said something like, "It got you demoted." Scott's reference to Hornsby's demotion is a clear reference to Hornsby's union activities. Accordingly, I find Scott threatened the transfer of employees to lower paying jobs in order to make them quit because they engaged in union activities and that Scott's remarks were violative of Section 8(a)(1).

Ice testified that prior to Labor Day, which was September 4, the employees on his crew were working four 10-hour shifts a week. Ice handed Houchins a letter on September 5, stating that Ice was a voluntary organizer for the Union. Ice testified he thought his schedule changed during Labor Day week to five 8-hour days. Ice testified that on September 6 he had a conversation with Houchins in the afternoon, in employee Herndon's presence. Ice was finishing concrete and Houchins came by. Ice credibly testified he asked Houchins about the change in their schedule. Houchins said they brought it on themselves because of the coming out letters that they handed him and it was Whitaker's way of showing them who was the boss. I find Houchins informing employees that their shift change was due to their union activities was coercive and violative of Section 8(a)(1).

#### CONCLUSIONS OF LAW

1. Jack Scott, Warren Houchins, and Brian McMahan are supervisors and agents of Diversified Enterprises, Inc. (Respondent) within the meaning of Section 2(11) and (13) of the Act.

2. Respondent has violated Section 8(a)(1) of the Act by:

(a) Threatening employees with physical harm because they engaged in union activities.

(b) Informing employees that employees have been demoted because they have engaged in union activities.

(c) Threatening employees with layoff or termination because they have engaged in union activities.

(d) Threatening employees with unspecified reprisals by telling them they have opened up a can of worms by their engaging in union activities.

(e) Threatening employees with transfer to lower paying jobs in order to make them quit because they engaged in union activities.

(f) Informing employees that they are working less favorable shift hours because they have engaged in union activities.

3. Respondent has violated 8(a)(1) and (3) of the Act by de-

moting Robert Hornsby, taking away his use of a company truck, company gas card, and ceasing to contribute for his lodging expenses for company travel because he engaged in union activities.

4. The unfair labor practices described above affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find Respondent must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondents having unlawfully demoted and taken away certain benefits including his company truck, gas card, and lodging expense reimbursements from Robert Hornsby must make him whole for any losses, computed on a quarterly basis from the date of his demotion until he quit, 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).<sup>18</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>19</sup>

#### ORDER

The Respondent, Diversified Enterprises, Inc., located at Mount Hope, West Virginia, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Demoting employees, taking away their company vehicles, gas cards, and their lodging expense reimbursements because they engage in activities on behalf or in support of the Mid-Atlantic Regional Council of Carpenters, West Virginia District, United Brotherhood of Carpenters and Joiners of America, or any other union.

(b) Threatening employees with physical harm because they engage in union activities.

(c) Informing employees that employees have been demoted because they have engaged in union activities.

(d) Threatening employees with layoff or termination because they have engaged in union activities.

(e) Threatening employees with unspecified reprisals by telling them they have opened up a can of worms by their engaging in union activities.

(f) Threatening employees with transfer to lower paying jobs in order to make them quit because they engaged in union activities.

(g) Informing employees that they are working less favor-

able shift hours because they have engaged in union activities.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

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

(a) Make Robert Hornsby whole for any loss of earnings and other benefits suffered as a result of his demotion, including taking away his company truck, gas card, and lodging expense reimbursements because of the discrimination against him in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful demotion of Robert Hornsby and loss of benefits including taking away his company truck, gas card, and lodging expense reimbursements, and within 3 days thereafter notify Hornsby in writing that this has been done and that the demotion and loss of benefits will not be used against him in any way.

(c) 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 to be 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 back pay and benefits due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Mount Hope, West Virginia, at all of its jobsites copies of the attached notice marked "Appendix."<sup>20</sup> Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. A copy of the notice shall be duplicated and mailed at Respondent's expense to all employees who worked at any of Respondent's Cool Ridge Flat Top locations and who have left Respondent's employ since August 29, 2006.<sup>21</sup> In the event that, during the pendency of these

<sup>20</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

<sup>21</sup> The General Counsel requests in its brief that Respondent mail the notice to any employees who have left Respondent's employ since its commission of unfair labor practices. Whitaker's testimony revealed that Respondent's staff varied in size from 600 to 1000 employees. Hornsby only had about five employees on his crew, and there was testimony that Hornsby's crew on occasion worked beside the other Cool Ridge Flat Top crew and attended weekly safety meetings with that crew and its supervisor. As a result, I have concluded that all employees on those crews became aware of Respondent's unfair labor practices. Given the conduct found violative of the Act herein, and the size of Respondent's work force, I do not find it appropriate to require Respondent to mail the notice to all of the employees who have left its employ since August 29, 2006, save for the employees in the crews at

<sup>18</sup> Counsel for the General Counsel urges for the first time in its brief that the remedy include payment of compound rather than simple interest. Thus, Respondent has not had an opportunity to address the request. Moreover, since this is a request for a change in current Board policy I am leaving this request as an issue to be considered by the Board.

<sup>19</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

proceedings, the Respondent has gone out of business or closed its operations at Mount Hope, West Virginia, the Respondent shall duplicate and mail, at its own expense, a copy of the no-

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issue as described above. Otherwise, I find that a posting of the notice at Respondent's offices and all of its jobsites will be sufficient to remedy the unfair labor practices found herein.

tice to all employees employed by the Respondent at any time since August 29, 2006.

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