

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

ALLSERVICE PLUMBING AND
MAINTENANCE, INC.

and

CASES 15-CA-19433
15-CA-19456
15-RC-8819

UNITED ASSOCIATION OF
JOURNEYMEN AND APPRENTICES
OF THE PLUMBING INDUSTRY OF
THE UNITED STATES AND CANADA,
LOCAL 198

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Zachary E. Herlands, Esqs.,*
for the Acting General Counsel.
Corey Orgeron, Esq. (Orgeron Law Firm),
for the Respondent.
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Cangemi, APLC),*
for the Charging Party.

DECISION

Statement of the Case

ROBERT A. RINGLER, Administrative Law Judge. This case was tried in Baton Rouge, Louisiana, from June 22 to 24, 2011. The original charge¹ in this proceeding was filed by the United Association of Journeymen and Apprentices of the Plumbing Industry of the United States and Canada, Local 198 (the Union) on February 9, 2010.² The consolidated complaint (the complaint) alleged that Allservice Plumbing and Maintenance, Inc. (the Company or Respondent) violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act) by, inter alia: engaging in surveillance of, threatening and interrogating its employees; posting a security guard at a representation election; laying off Brady Barbour, Doug Diamond, and Michael Grimes because of their Union activities; laying off Barbour because he was

¹ I find that the underlying charges were appropriately filed and served. (GC Exh. 1).

² All dates herein are in 2010, unless otherwise stated.

subpoenaed to testify in a representation case hearing conducted by the National Labor Relations Board (the Board); and laying off Grimes because he was identified in an unfair labor practice charge. See (GC Exh. 1(f)).

5 In addition to the above-described charges, the Union filed several objections to a representation election conducted by the Board on February 19. These objections were based upon the same evidentiary record as the complaint and were, as a result, heard simultaneously.

10 On the entire record,³ including my observation of the demeanor of the witnesses, and after considering the parties' briefs,⁴ I make the following:

Findings of Fact

I. Jurisdiction

15 At all material times, the Company, a Louisiana corporation, with an office and place of business in Baton Rouge, Louisiana (the facility), has been a plumbing contractor, which performs residential and commercial construction. (GC Exh. 2). In 2010, in conducting its operations, it provided services valued in excess of \$50,000 for North Oaks Health System, an enterprise located within the State of Louisiana that was directly engaged in interstate commerce. (GC Exhs. 1(aa), (qq)). In addition, the Company annually purchases and receives from Coburn's Supply, an entity located within Louisiana, supplies valued in excess of \$50,000, which were received from points located directly outside of Louisiana. (GC Exhs. 1(qq), 2, 7)). Based upon the foregoing, I find, that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

30 ***A. Background***

The Company provides commercial and residential plumbing services to public school

³ Prior to the issuance of the complaint, the Acting General Counsel commenced an enforcement action in U.S. District Court for the Eastern District of Louisiana, which sought to compel the Company's compliance with an investigatory subpoena. This action resulted in the U.S. District Court issuing a protective order. (GC Exh. 1(jj)). An analogous protective order was issued by the undersigned at the hearing, which sealed all documents previously covered by the U.S. District Court's protective order. (Judge's Exh. 1).

⁴ Counsel for the Acting General Counsel was granted 7 days from the close of the hearing to submit copies of certain voluminous exhibits, i.e. GC Exhs. 85–88, 90–92, that were produced at the hearing, which he was logistically unable to photocopy at the hearing site. These exhibits were inspected, offered, and admitted at the hearing, and timely submitted thereafter. Respondent's counsel was granted 7 additional days to inspect GC Exhs. 85–88, 90–92, and then file a motion, if appropriate, to supplement these exhibits with any inadvertently omitted pages. The Company, subsequently, and without explanation, attached several, apparently new, unmarked documents to its brief, which did not appear to be pages omitted from GC Exhs. 85–88, 90–92. The Company's submission was unaccompanied by a motion to: further supplement the record; seek judicial notice; or reopen the record. These exhibits are, therefore, rejected. Thus, although the Company's brief and accompanying spreadsheet summary were considered, the attached exhibits were not.

systems, health care facilities, and retail and commercial operations. Luke Hall is the vice president, general manager and master plumber,⁵ and his spouse, Janice Hall, is the president and operations officer.⁶ The Company’s workforce, which consists primarily of plumbers, apprentices, laborers, and helpers, ebbs and flows with business demands, and ranges from 10 to 15 employees at a given time. The Company hires staff on temporary and permanent bases. The key distinction between temporary and permanent employees, however, is not temporal in nature;⁷ the primary distinction is that permanent employees receive health insurance and other benefits.

B. Prior 8(f) Agreements with the Union

The Company and Union have been parties to 8(f) agreements.⁸ (GC Exhs. 3–4). Their first agreement ran from June 4, 2003 to June 30, 2004 (the 03–04 CBA). Their second agreement ran through July 31, 2005 (the 04–05 CBA). During the term of the 04–05 CBA, the Union filed an action against the Company in U.S. District Court concerning its ongoing failure to timely remit dues and benefits payments. A default judgment was consequently entered against the Company, which required payment of its delinquency. (U. Exhs. 1–2; GC Exhs. 5–6). The Company, subsequently, terminated its 8(f) relationship.

C. Union’s Organizing Drive

In late-2009, following the cessation of its 8(f) relationship with the Company, the Union launched a campaign to organize the Company’s plumbing workforce. Its efforts, which included jobsite visits, leafleting, and meetings, culminated in a February 19 election.

I. Jobsite Visits

Charles LeBlanc, Union organizer, testified that, on December 14, 2009, he visited the Company’s North Oaks Medical Center (North Oaks) and South Fork Elementary School (South Fork) jobsites. He recalled advising employees about the Union, and distributing business cards, authorization cards, and informational pamphlets. (GC Exhs. 42–44).

At North Oaks, LeBlanc met with Diamond, Joe Lungrin, Grimes, and others. He recollected Lungrin asking, “what if we don’t want to be Union?” He recalled answering that unionizing was an employee prerogative, with Lungrin succinctly responding that the Company was a nonunion enterprise. He stated that he told Lungrin that there were more Union supporters than he realized, and illustrated his point by having Grimes, a Union member, sign an

⁵ The Company stipulated that Mr. Hall was a 2(11) supervisor and 2(13) agent.

⁶ The Company stipulated that Ms. Hall is a 2(13) agent, but, denied that she was a 2(11) supervisor. It is undisputed that she uses independent judgment to hire, discipline, and discharge employees, and that Mr. Hall considers himself and Ms. Hall to be the Company’s sole supervisors. Based upon the forgoing, I find that she is a 2(11) supervisor.

⁷ Temporary employees are not hired with a set ending date and may remain employed indefinitely. (GC Exh. 6).

⁸ Under Section 8(f) of the Act, the Company, a construction industry employer, granted recognition to the Union, without regard to the establishment of its majority status. See *John Deklewa & Sons*, 282 NLRB 1375 (1987), enf. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F. 2d 770 (3d Cir. 1988).

authorization card in his presence.

5 Grimes confirmed LeBlanc’s account. He testified that, after LeBlanc departed, Lungrin telephoned Mr. Hall and alerted him about the Union’s campaign. He recalled overhearing Lungrin tell him that, “the Union is here trying to get the people to go Union.” After the call ended, he related that Lungrin stated that, “Luke said that he would close his doors before he went Union.” This exchange was witnessed by employees Shannon Batiste and Lance McDaniel.

10 Although Lungrin initially denied telephoning Mr. Hall about the campaign, he ultimately admitted the call. He acknowledged witnessing Grimes sign an authorization card, and stating that, if the company unionized, it would close. He explained, however, that he solely meant that the Company would be unable to afford to pay union scale wages,⁹ and contended that this forecast was solely his opinion.

15 Mr. Hall testified that he was alerted about the campaign by employees, who were approached by LeBlanc at North Oaks and South Fork. He denied threatening plant closure.

20 As a threshold matter, I fully credit LeBlanc’s and Grimes’ testimonies concerning LeBlanc’s North Oaks visit. I found them both to be reliable witnesses, with credible and truthful demeanors. They were each consistent, and equally helpful on direct and cross-examination. Their accounts were largely corroborated by Lungrin.

25 I do not credit Mr. Hall’s denial of the plant closure threat. I found him to be a less than credible witness, who while extremely helpful on direct, appeared argumentative, difficult, and sporadically sarcastic on cross-examination. As will be discussed under my analysis of the layoffs at issue herein, much of his testimony was either implausible or inconsistent.¹⁰

30 2. *Representative Petition*

On January 11, the Union filed a certification of representative petition (the petition) with Region 15 (the Region) of the Board. The petition sought an election amongst the following bargaining unit of employees (the unit):

35 All plumbers, plumbers helpers, and apprentice plumbers . . . but, excluding laborers, clerical employees, and professional employees, guards and supervisors as defined by the Act.

⁹ He testified, “I said Luke Hall can’t afford to go Union, you all want \$30 or \$40 an hour for each man, he’d go under, he’d have to shut the doors.” (Tr. 514).

¹⁰ Along these lines, I do not credit Lungrin’s testimony that the plant closure threat was solely his prediction, and not made by Mr. Hall. First, I found him to be a less than credible witness, who appeared well-rehearsed, and overly eager to avoid attributing an adverse statement to his former employer. Second, I find it likely that Lungrin, who openly admitted disdain for the Union, selectively avoided testifying in a manner that he perceived might be helpful to the Union’s interests. Finally, I find it plausible that the threat, which was made immediately after Lungrin’s call to Mr. Hall ended, was merely a reiteration of Mr. Hall’s commentary.

(GC Exh. 7). The parties ultimately entered into a Stipulated Election Agreement, which set an election for February 19.

3. *Hooters*

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On February 11, the Union held an organizing meeting at Hooters restaurant in Baton Rouge, Louisiana. LeBlanc testified that he arrived at 6 pm, and sat at a 10-person table. He reported that, within minutes of his arrival, Lungrin appeared and sat at another table, within the purview of both his table and the entrance. He stated that Lungrin languished for 30 minutes, and observed who attended the Union meeting. He related that, upon exiting, Lungrin stopped to talk to Grimes and Christopher Donaldson.¹¹

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Grimes testified that Donaldson, his friend, accompanied him to Hooters. He stated that, upon arriving, he encountered Lungrin, who asked whether he was attending the Union meeting.

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Brian Hernandez, a Company plumber, testified that he also came across Lungrin at Hooters. He related that Lungrin approached him outside of the restaurant and asked whether he was a Union member, which he promptly denied.

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Lungrin acknowledged visiting Hooters. He indicated that he accompanied McDaniel, his nephew, who wanted to observe the meeting. He acknowledged seeing Grimes, but, denied asking him whether he was going to the meeting. He failed to discuss conversing with Hernandez.

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I fully credit LeBlanc’s, Grimes,’ and Hernandez’ accounts regarding Hooters. Their testimony was credible, plausible, and essentially uncontradicted. For the many reasons previously discussed, I do not credit Lungrin’s testimony, to the extent that it was inconsistent with their accounts.

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4. *Leafleting*

Leblanc credibly testified that, on February 18, he distributed an organizing handout at the facility. (GC Exh. 45). He stated that, upon receiving the handout, Lungrin responded with a profanity laced tirade. He indicated that, after he replied with additional profanity, Lungrin, who was now at the facility’s entrance, shouted that the Company was, “a non-Union shop and . . . would always be . . .” Lungrin corroborated this encounter.

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5. *February 19 Election*

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i. *Results*

On February 19, the Board held an election at the facility, which the Union lost by a wide margin. The tally of ballots provided:

¹¹ Donaldson, a plumber and Union member, was employed by an HVAC contractor at North Oaks.

Category	Quantity
Approximate number of eligible voters	12
Number of votes cast for the Union	1
Number of votes cast against the Union	6
Number of challenged ballots	7

(GC Exh. 1(rr)). LeBlanc credibly testified that, at the preelection conference, the Company’s attorney wrote on the Excelsior list and stated that he was memorializing his challenges.

5

ii. Election Security

The Company hired Leonardo Moore, a homicide lieutenant with the East Baton Rouge Sheriff’s Department, to provide election day security. (GC Exh 46). Ms. Hall testified that he brought “order to the process.” Mr. Hall testified that he retained Moore because he was concerned that Leblanc’s and Lungrin’s verbal dispute, which occurred during the previous day, could escalate at the election. He added that both Lungrin and LeBlanc were stalwart individuals, who could potentially cause substantial property damage during a physical altercation.¹²

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It is undisputed that Moore, who possessed a list of potential voters, granted listed voters staggered entry, and denied access to anyone not listed. Although he temporarily denied Barbour and Diamond admission because they were unlisted, they were eventually granted access and permitted to vote under challenge. There is no evidence that anyone else was denied access.

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iii. Voting Area

LeBlanc credibly testified that, immediately before the election, he observed the following slogan posted on the dry erase board directly behind the voting kiosk, “never abandon the owner or the company.” (U. Exhs. 7–8 (photos of slogan)). He added that, although the Board agent directed the Company at the preelection conference to allow employees to only enter through a single door for voting purposes, he observed employees entering through multiple doors.¹³

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Mr. Hall explained that the Board agent asked him to erase certain things from the dry erase board before the election, and he complied. He admitted that the phrase, “never abandon the owner or a contractor,” was posted. He explained, however, that the phrase, “finish your day by communicating to the owner or contractor your plan,” was also posted directly underneath this phrase. He averred that these slogans were posted in order dissuade employees from leaving their assigned jobsites, without notifying anyone about their whereabouts, and had no relationship to the campaign.

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¹² The undersigned notes that both Lungrin and LeBlanc are sizeable individuals.

¹³ He explained that he observed this scenario from the parking lot, while waiting for the election to conclude.

iv. Postelection Conduct

Donaldson stated that, after the election, Lungrin rejoiced at North Oaks and proclaimed that, “we voted that [expletive] down, we told you all we didn’t want it.” Lungrin admitted his celebration, and reiterated that, “[he] thought it was pretty cool that the guys . . . stood up and made their voice heard that they didn’t want that garbage.” He contended that he would have immediately resigned, if the Union won.

Hernandez testified that, on the Monday after the election, Lungrin announced that somebody had taken pictures at the facility and supplied evidence to the Union, and jokingly suggested that Mr. Hall shoot the offender “between the eyes.” He added that Mr. Hall responded by saying that, if he identified the offender, he would have his “balls.” Lungrin admitted the joke, but, denied Mr. Hall’s response. Mr. Hall similarly denied this threat.

I fully credit Donaldson’s testimony concerning Lungrin’s postelection celebration. I found his demeanor to be highly credible. His testimony was uncontradicted, and generally corroborated by Lungrin.

Inasmuch as Hernandez testified that Mr. Hall threatened whoever aided the Union, and both Mr. Hall and Lungrin denied such commentary, I must a credibility determination. For several reasons, I fully credit Hernandez’s testimony. I found his demeanor to be highly credible. He was cooperative on direct and cross examination, and appeared to be putting forth his best effort to accurately describe his recollection. On the other hand, as noted, I found Lungrin and Mr. Hall to be less than credible. I further find the threat at issue was consistent with the many animus laden comments made by the Company during the campaign.

D. Layoffs

1. Barbour’s Employment History

On November 11, 2009, the Company hired Barbour, a plumber, with 13 years of experience, who attended the Union’s apprenticeship school. (GC Exhs. 13–14). Although he was initially hired as a full-time employee with benefits, he was immediately reduced to temporary status, following the Company’s discovery that his driver’s license was invalid. (GC Exhs. 15–16).¹⁴ During his tenure, he was assigned to North Oaks.

On January 18, Barbour was counseled for excessive absenteeism. (GC Exh. 17). His counseling stated that, “[i]f absences continue, termination will occur. . . . absences are the unannounced or unapproved or surprise type.” (Id.)

Barbour testified that, during the campaign, he wore his Union T-shirt to work, signed a Union authorization card, and parked his truck, which displayed Union stickers, in the Company’s lot. He stated that, when he told Lungrin that he was a Union member, he was rebuffed and called “dumb.” He was subpoenaed by the Union to testify at the R-case hearing,

¹⁴ He testified that Mr. Hall told him that his eligibility for benefits would be re-evaluated, once his license was reinstated. See also (GC Exhs. 16, 19).

which was initially set to occur on January 21.¹⁵ (GC Exhs. 1, 18). He credibly testified that LeBlanc served the subpoena upon him at North Oaks on January 20, in the presence of several employees. He added that he notified both Lungrin and Mr. Hall concerning the subpoena on the same date that it was received. On January 22, within 2 days of being subpoenaed, he was laid off. His separation notice, which checked “lack of work,” provided:

[D]ecrease in new jobs temporary position no longer needed.

(GC Exh. 11(c) (grammar as in original).

Donaldson testified that, in late January, he observed Lungrin installing a water fountain at North Oaks. He stated that he had noticed that Barbour and Diamond were absent, and asked him about their whereabouts. He recalled this exchange:

He said [they were laid off] because they were Union. . . . I asked him . . . how come . . . Grimes wasn’t laid off. And he said, because . . . Grimes is done with the Union. And, I just said, okay, then, if that’s what you think.

He stated that, at that time, the Company had completed only a small portion of the North Oaks job, i.e., Barbour’s and Diamond’s assignment.

During his testimony, Lungrin acknowledged telling Donaldson that Barbour and Diamond had been laid off. He conspicuously failed to disavow that their layoffs were connected to their Union activities.¹⁶ He admitted, however, knowing that Barbour was a “Union hand,” but, denied knowledge of Diamond’s Union relationship.

Mr. Hall discussed Barbour’s layoff, and testified that, when Barbour was first hired, he told him that:

As long as he had a valid drivers’ license and he could perform as we had discussed, he had a full time position.

He added that, when he found out that his drivers’ license was invalid, he gave him some time to remedy this issue. He reported that, once Barbour started missing work, he “started looking for another journeyman to replace him.” He indicated that the Company’s decreased workload also factored his layoff. He also added that Barbour’s work was substandard. He did, however, admit that he knew that Barbour was a Union member.

For several reasons, I fully credit Donaldson’s testimony that Lungrin stated that Barbour and Diamond were laid off “because they were Union.” First, as stated, I found Donaldson to be a highly credible witness, who was equally helpful on direct and cross, consistent, forthright, and seemed to be committed to aiding the proceeding. Second, this key statement was not denied by Lungrin. Third, this statement is consistent with the many union animus laden statements made by Lungrin throughout the campaign. Finally, as will be discussed, this statement is consistent

¹⁵ The hearing was subsequently rescheduled, at the Company’s request.

¹⁶ Specifically, he solely denied that Grimes was laid off because of his Union activities. (Tr. 565).

with the several pretextual explanations that Company proffered in support of the layoffs.

2. Diamond’s Employment History

5 On July 13, 2009, the Company hired Diamond, another plumber, who attended the Union’s apprenticeship school.¹⁷ (GC Exh. 20). On January 22, he was laid off. His separation notice, which checked off “lack of work,” provided:

[D]ecrease in new jobs temporary position no longer needed.

10 (GC Exh. 11(d)). At all relevant times, he was assigned to North Oaks.

Mr. Hall testified that, when Diamond was hired, he had just taken the State licensing examination, and was awaiting his certification. He stated that, once it was determined that he failed the test, neglected to reschedule another exam, and demonstrated poor performance, the Company released him. He admitted knowing that Diamond was affiliated with the Union.

3. Grimes’ Employment History

20 On December 7, 2009, the Company hired Grimes, a licensed plumber with 24 years of experience.¹⁸ (GC Exh. 33). He was initially hired as a temporary employee, with the understanding that his eligibility for full-time benefits would be re-evaluated within 90 days. (GC Exh. 37). His application revealed that he attended the Union’s apprenticeship school, and has been a Union member since 1997. (GC Exh. 34). On January 7, the Company increased his wages from \$18.50 to \$20 per hour, on the basis of “consistent performance.” (GC Exh. 38). On February 11, within a month of his raise, he was laid off. His separation notice provided:

No new work. Workload decreasing temporary position is no longer needed.

30 (GC Exh. 11(f)).

Grimes testified that he was astounded by his layoff, inasmuch as North Oaks, his assigned jobsite, was active and months from completion. He added that, while layoffs are common in the construction field, such actions normally occur when a job nears completion.

35 Donaldson added that, following Grimes’ layoff, he asked Lungrin about the Company’s rationale. He related that Lungrin responded, “you know why, because he’s Union.” He then recalled this exchange:

40 I said . . . , I thought that you had lots of work. He said, we do; we have tons of it.

Lungrin testified that he knew that Grimes was a “Union hand.” He acknowledged commenting to Donaldson that the Company had a lot of work, although he asserted that this comment was solely a joke. He denied stating that Grimes’ layoff was connected to his Union

¹⁷ He did not testify at the hearing.

¹⁸ He is licensed by the State Plumbing Board of Louisiana. (GC Exh. 32).

activities. He stated, however, that immediately following Grimes’ layoff, Mr. Hall told him that Grimes was only temporarily laid off, and would be recalled within weeks.

5 Mr. Hall explained that, when Shannon Batiste, a plumber who had been with the
 Company for several years, received his plumbing permit, it made Grimes, a licensed plumber,
 expendable. He stated that, as a result, he was laid off. He acknowledged, however, that Batiste
 never actually took the April plumbing examination, and ultimately resigned due to poor health a
 couple of months later. He admitted that Grimes was a good worker, whom he would consider
 10 rehiring. He conspicuously failed to explain, however, why he discharged Grimes a licensed
 plumber and productive employee, on the basis of the mere possibility that Batiste would pass
 the licensing examination. He agreed that he knew that Grimes was a Union member.

15 Inasmuch as Donaldson testified that Lungrin stated that Grimes was laid off because “he
 was Union,” and Lungrin denied such commentary, I must make a credibility determination, in
 order to resolve this key factual dispute. For multiple reasons, I credit Donaldson over Lungrin.
 First, as noted, regarding demeanor, I found Donaldson to be very reliable. Lungrin, on the other
 hand, was a difficult, argumentative and cagey witness, who changed several key portions of his
 testimony, after being reminded about prior inconsistent statements in his sworn affidavit.
 20 Second, Lungrin’s statement that Grimes was laid off because of his Union affiliation is
 consistent with the many union animus laden statements made by him at the hearing and during
 the campaign.

4. *North Oaks*

25 Barbour credibly testified that a new construction plumbing project involves three
 distinct phases. He called the first phase, “rough in,” and explained that this phase involves the
 installation of underground sewer and water lines. He labeled the second phase, “top out,” and
 added that this phase involves placing water lines in the structure’s ceilings and walls. He
 reported that this phase represents the lion’s share of a new construction plumbing project. He
 30 identified the third phase as “trim out,” and noted that this phase involves the installation of
 sinks, urinals, toilets, and other fixtures. He explained that, when he was laid off, North Oaks
 job was in the preliminary portion of the “top out,” phase. He recollected that, at that time, the
 majority of the “top out” work on the first and second floors remained unfinished. He indicated
 that his layoff was, in his experience, unusual because it occurred, while most of the North Oaks
 35 job remained uncompleted.

Donaldson credibly testified that the North Oaks job ended in June, roughly 5 months
 after the layoffs at issue herein. He indicated that the Company’s plumbing workforce at North
 Oaks consistently remained at 6 to 7 employees, both before and after the layoffs.

40 Lungrin testified that, due to poor weather, the Company was able to get ahead on its
 work at North Oaks, inasmuch as rainy conditions at other outdoor jobsites caused it to transfer
 those workers to North Oaks. He reported that, when he resigned from the Company in June, it
 had just completed the top out phase at North Oaks, and was set to begin the trim out phase.

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5. *Layoff Practices*

Mr. Hall stated that, generally, the Company lays off its workers, in accordance with a “last hired, first released” system. He added that this system does not always work, and that he also considers the ratio of helpers, laborers, apprentices, and plumbers needed for upcoming projects. He indicated that, in January, he determined that he was employing too many workers, which prompted the instant layoffs. He stated that the Company was not being awarded bids at that time.

6. *Plumbing Personnel*

The following chart describes, in order of seniority, the Company’s plumbing workforce from January 11, the petition filing date, through July 31:

Employee	Title	Hire Date	Tenure Ending Date
Shannon Batiste	Apprentice	Pre-2007	April 25
Howard Hall	Laborer	March 5, 2007	N/A ¹⁹
Al Harris	Laborer	March 26, 2007	N/A
Joe Lungrin	Plumber	January 14, 2008	N/A
Jervier Maxwell	Plumber	January 21, 2008	N/A
Lance McDaniel	Helper	May 4, 2009	N/A
Robbie Neal	Plumber	June 22, 2009	N/A
Gustavo Garcia	Laborer	June 29, 2009	March 14
Ricardo Martinez	Laborer	June 29, 2009	March 7
<i>Doug Diamond</i>	<i>Plumber</i>	<i>July 13, 2009</i>	<i>January 22</i>
Justin Magee	Laborer	July 27, 2009	January 24
Joshua Jackson	Laborer	August 3, 2009	August 29
<i>Brady Barbour</i>	<i>Plumber</i>	<i>November 12, 2009</i>	<i>January 22</i>
Ricky Pourceau	Plumber	November 16, 2009	October 7
Brian Hernandez	Plumber	December 2, 2009	June 6
Lawrence Vince	Plumber	November 16, 2009	May 23
<i>Michael Grimes</i>	<i>Plumber</i>	<i>December 7, 2009</i>	<i>February 4</i>
Miguel Sanford	Laborer	March 15	N/A
Jimmie Washington	Laborer	April 21	June 24
Steven Graves	Apprentice	April 26	July 8
Detric Jackson	Plumber	June 28	N/A
Roy Tillman	Plumber	July 19	July 29
Kermit Hickman	Laborer	July 22	N/A
Jevaughn Oubre	Laborer	July 19	N/A

(GC Exhs. 6, 85–88; R. Exh. 8).

In spite of Mr. Hall’s contention that the Company had more employees than work at the time of the layoffs, the latter chart demonstrates that it nevertheless added several employees

¹⁹ “N/A” indicates that the employee remained on the payroll after July 31.

shortly after conducting the instant layoffs.²⁰

*E. Lungrin’s Supervisory and Agency Status*²¹

5 Lungrin’s supervisory status is a central issue, inasmuch as many of his statements have been alleged to violate 8(a)(1) and demonstrate union animus. Lungrin, a licensed plumber with 21 years of experience, was employed by the Company from January 2008 through June 2010. (GC Exhs. 54, 58, 59). During the campaign, he was assigned to North Oaks.

10 Ms. Hall called him the “eyes and ears of the employer at the job site.” She stated that he monitored whether work was completed, in accordance with Mr. Hall’s directives. She provided that, when Mr. Hall gave him a task, he exercised his discretion to assign workers discrete components of this task. She related that he updated the Company on the job’s status, and reported directly to Mr. Hall. She indicated that he was required to obtain Mr. Hall’s consent,
15 before sending a worker home for disciplinary or performance issues.

 Mr. Hall opined that, beyond he and Ms. Hall, the Company employed no other supervisors.²² He stated that only he and Ms. Hall were empowered to hire, discipline, discharge, reward, lay off, or promote. He indicated that Lungrin relayed material orders,
20 updated him on the job’s status, and completed daily log sheets. He reported that he periodically visited jobsites to supervise employees, and estimated that he visited North Oaks twice per week. He stated that Lungrin played no role in disciplinary actions, beyond reporting misconduct or poor performance, which was everyone’s shared obligation. He insisted that he assigned work at daily morning meetings. Although he conceded that he does not possess blueprints at the
25 facility, and generally does not observe where the prior day’s work ended, he denied that Lungrin assigned work at North Oaks. On cross-examination, however, he acknowledged that his affidavit contradictorily stated that Lungrin assigned work.²³

 Lungrin testified that Mr. Hall determined how many workers were assigned to North
30 Oaks. He stated that, while some plumbers worked independently, others were unable to read blueprints and required his guidance. He admitted that he distributed assignments to employees, who were unfamiliar with the jobsite. He stated that, if he had a problem with an employee, he would advise the Halls.²⁴ He added that, when other jobs were cancelled due to poor weather conditions, Mr. Hall would contact him and ask whether North Oaks needed additional workers.
35 He reported that he would complete a daily log sheet. He claimed that he engaged in a “give and take” with his colleagues, whereby they reviewed his work, and vice versa. He averred that Mr. Hall visited North Oaks once or twice per week, and directed their work.

20 There is no evidence that the Company made recall offers to Barbour, Diamond, or Grimes, prior to hiring additional workers.

21 In its answer, the Company denied Lungrin’s supervisory and agency status.

22 It is noteworthy, however, that, the Company contrarily asserted at the election that it employed several other supervisors, when it contended that Neal, Hernandez, and Vince were all supervisors, and challenged their ballots on this basis. (GC Exhs. 1(rr)-(ss)).

23 See (Tr. 709 (“I have told employees in the morning meetings that if they had problems at the project to get with Lungrin.”)).

24 But, c.f., (GC Exhs. 49–50) (describing Lungrin disciplining Bethea for insubordination).

Barbour credibly testified that, when he was hired, Mr. Hall told him to report to North Oaks, and Lungrin would tell him what to do. He added that Lungrin paired employees, and issued their daily assignments. He stated that Lungrin prompted employees to take breaks, monitored the length of their breaks, and reminded them when their workday ended. He stated that, when he encountered a problem with another contractor, he consulted Lungrin, who addressed the matter. He succinctly characterized Lungrin as his “boss.”

Grimes credibly testified that he was supervised by Lungrin at North Oaks. He added that Mr. Hall identified Lungrin as his supervisor, when he started. He stated that North Oaks employees received their daily assignments from Lungrin. He indicated that Mr. Hall seldom visited the jobsite.

Donaldson credibly testified that Lungrin appeared to supervise the Company’s North Oaks employees. He related that, if he had issues with plumbing work interfering with his HVAC work, he consulted Lungrin. He added that Lungrin referred to North Oaks as, “his job,” and was the sole Company employee, who interacted with other contractors.

Hernandez credibly testified that Mr. Hall described Lungrin as his “superintendent.” He stated that, at North Oaks, Lungrin assigned the plumbers their work.

For several reasons, I do not credit Mr. Hall’s claim that Lungrin did not assign work at North Oaks, and that solely he and Ms. Hall are supervisory. First, as noted, I found his demeanor to be less than credible. Second, it is implausible that Mr. Hall was able to supervise the jobsite from afar, given that he only visited North Oaks biweekly, did not store blueprints at the facility, and did not routinely physically review where the prior day’s work ended. It is vastly more plausible that Lungrin, an on-site presence, primarily assigned work at North Oaks. Lastly, Mr. Hall’s testimony on these issues was inconsistent with his sworn affidavit, and election challenges of plumbers Neal, Hernandez, and Vince as supervisors.²⁵

III. Analysis

A. Lungrin’s Supervisory and Agency Status

1. Supervisory status

I find that Lungrin is a statutory supervisor. Section 2(11) defines a supervisor as:

Any individual having the 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.

²⁵ The Company cannot reasonably contend that several plumbers were supervisory in an election, while contrarily averring that the very same plumbers were not supervisory in the instant litigation.

The party alleging supervisory status must establish that: the disputed individual possesses at least one of the supervisory authorities delineated above; and that independent judgment is used in exercising such authority.²⁶ *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). “Independent judgment” is defined as judgment that is, “free of the control of others . . . [and] not . . . dictated or controlled by detailed instructions . . . [including] the verbal instructions of a higher authority.” *Id.* at 693.

i. Assignments

Lungrin exercised independent judgment, when he assigned duties to North Oaks employees. The Board defines “assign” as:

[T]he 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.

Oakwood Healthcare, supra at 689.

As a threshold matter, Lungrin assigned work at North Oaks. Ms. Hall stated that, when Mr. Hall gave him a task, he exercised his discretion to assign workers discrete components of the task. Lungrin admitted that he distributed assignments to North Oaks workers, who were unfamiliar with the job, or unable to read blueprints. Barbour, Grimes, Hernandez, and Donaldson testified that he paired up employees, assigned their work, and directed them throughout the workday. They referred to him as the “boss” and “superintendent,” and indicated that he called North Oaks, “his job.” Given that it is undisputed that Mr. Hall visited the jobsite on a biweekly basis, did not possess blueprints at the office, and generally did not observe where the prior day’s work ended, I find that North Oaks could not have effectively functioned, without Lungrin, an on-site presence, distributing assignments.²⁷

Lungrin also exercised independent judgment, when assigning work. He exercised such judgment by, inter alia: (1) reading blueprints, gauging the job’s status, and determining the next phases of the North Oaks job to be completed (i.e. identifying the day’s agenda); (2) identifying which tasks were suitable for the 4 different classifications assigned to North Oaks (i.e. dividing work amongst plumbers, apprentices, laborers and helpers); (3) allocating tasks within constant classifications (i.e. dividing plumbing work amongst multiple plumbers, dividing laborer work amongst multiple laborers, etc.); and (4) when additional personnel became available, assessing the job’s status, and apprising Mr. Hall whether such personnel could be temporarily utilized at North Oaks.

²⁶ Section 2(11) solely requires possession of a listed supervisory function, not its actual exercise. See *Barstow Community Hospital*, 352 NLRB 1052, 1052–1053 (2008). The fact that most of an alleged supervisor’s duties involve routine tasks “does not preclude the possibility that such regular assignments require the exercise of independent judgment.” *Loyalhanna Care Center*, 352 NLRB 863, 864 fn. 4 (2008).

²⁷ As noted, I did not credit Mr. Hall’s somewhat self serving testimony that Lungrin did not assign work, and that all assignments were made remotely.

ii. Responsible Direction

Lungrin did not responsibly direct employees. This authority exists when:

5 [An employee decides] what job shall be undertaken next or who shall do it, . . .
 provided the direction is both “responsible” . . . and carried out with independent
 judgment.

10 *Oakwood Healthcare, Inc.*, supra at 691. “[F]or direction to be ‘responsible,’ the person
 performing the oversight must be accountable for the performance of the task . . . such that some
 adverse consequence may befall the one providing the oversight if the tasks performed are not
 performed properly.” Id. at 692.

15 Although Lungrin exercised independent judgment in assigning work, the record failed to
 reveal evidence of “actual accountability.” Specifically, the record failed to show that he was
 potentially subject to adverse consequences, if the job was delayed, or otherwise unsatisfactory.
 I find, as a result, that it has not been shown that he responsibly directed employees. See *Golden
 Crest Healthcare Center*, 348 NLRB 727, 731 (2006).

20 **iii. Authority to Discipline**

Lungrin did not exercise disciplinary authority; he was only involved in a single
 disciplinary incident, i.e. when Bethea was sent home for insubordination. (GC Exhs. 49–50).
 In that case, however, he reported the incident to Mr. Hall, who independently determined the
 25 appropriate punishment. I find, as a result, that Lungrin did not effectively recommend
 discipline. See, e.g., *Los Angeles Water & Power Employees’ Assn.*, 340 NLRB 1232, 1234
 (2003) (individual’s report of misconduct does not constitute effective recommendation of
 discipline, where management undertakes its own investigation and decides what, if any,
 discipline to impose).

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iv. Conclusion

35 I find that Lungrin was a 2(11) supervisor, solely on the basis of his ability to assign work
 to employees, while exercising independent judgment. I do not find that he exercised any other
 supervisory responsibilities.

2. Agency Status

40 I also find that Lungrin was an agent. Section 2(13) provides as follows:

In determining whether any person is acting as an “agent” of another person so as
 to make such other person responsible for his acts, the question of whether the
 specific acts performed were actually authorized or subsequently ratified shall not
 be controlling.

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The Acting General Counsel bears the burden of proving agency herein. The Board has held
 that:

The . . . test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management.

Albertson’s Inc., 344 NLRB 1172 (2005), citing *Pan-Osten Co.*, 336 NLRB 305, 305–306 (2001). Employees, for example, who regularly communicate management’s directives to coworkers, are considered agents regarding the distribution of such information. *Id.*

Lungrin was clearly an agent. He, amongst other things, supervised employees and communicated directives regarding work assignments.

B. Independent 8(a)(1) Allegations

1. Plant Closure Threat²⁸

On December 14, 2009, Lungrin unlawfully threatened Grimes that the Company would close, if it unionized.²⁹ An employer violates Section 8(a)(1), when it engages in conduct that might reasonably tend to interfere with employees’ Section 7 rights. *American Freightways Co.*, 124 NLRB 146 (1959). Such unlawful conduct includes plant closure threats, in retaliation for engaging in union activity. *Mid-South Drywall Co., Inc.*, 339 NLRB 480 (2003). I find, therefore, that Lungrin’s threat was unlawful.

2. Interrogations³⁰

On February 11, Lungrin unlawfully interrogated employees at Hooters concerning their Union activities. In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board held that the following factors determine whether an interrogation is unlawful:

- (1) The background, i.e. is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
- (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
- (4) Place and method of interrogation, e.g. was employee called from work to the boss’s office? Was there an atmosphere of unnatural formality?
- (5) Truthfulness of the reply.

Id. at 939. In applying these factors, however, the Board concluded that:

²⁸ This allegation is listed under paras. 7(a) and 12 of the complaint.

²⁹ Although Lungrin contended that this statement was solely opinion, there is no evidence that he voiced this distinction, or that his opinion was rationally based upon concrete financial data.

³⁰ This allegation is listed under paras. 7(b) and 12 of the complaint.

In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.

Id. at page 940.

Lungrin, a supervisor, questioned Grimes and Hernandez about their Union activities at Hooters. He asked Grimes whether he was going to the Union meeting, and Hernandez whether he was affiliated with the Union. As will be discussed, these interrogations followed his unlawful surveillance of the Union meeting, and occurred within weeks of Barbour’s, Diamond’s, and Grimes’ unlawful layoffs. I also note that the questioning occurred at a Union meeting, and conveyed to employees that the Company was closely monitoring their Union activities. I find that, under these circumstances, such questioning was unlawful, and tended to coerce the targeted employees in the exercise of their Section 7 rights.

3. Surveillance³¹

On February 11, Lungrin engaged in unlawful surveillance at Hooters. An employer violates Section 8(a)(1), when it “surveils employees engaged in Section 7 activity by observing them in a way that is ‘out of the ordinary’ and thereby coercive.” *Aladdin Gaming LLC*, 345 NLRB 585, 586 (2005). Indicia of coerciveness, include the “duration of the observation, the employer’s distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation.” Id. The instant surveillance occurred at a Union meeting, lasted for 30 minutes, took place within the close confines of a restaurant, and was coupled with unlawful interrogations. Lungrin’s visit was out of the ordinary, inasmuch as it appeared to have no purpose beyond observation of the Union meeting. I also note that the Company failed to present any evidence that he regularly frequents Hooters, after his workday ends.

4. Moore’s Election Presence³²

The Company’s retention of Moore during the election was lawful. The Board has held that an employer violates the Act, when, during an election and without justification, it posts armed guards at the plant gate, who restrict voter access and prevent unlawfully discharged voters from voting subject to challenge. See *General Trailer*, 330 NLRB 1088 (2000).³³

The Company’s decision to post Moore at the facility during the election was legitimate. First, it possessed reasonable safety and property concerns. Immediately prior to the election, Lungrin and LeBlanc engaged in a heated verbal exchange at the facility, which could have

³¹ This allegation is listed under paras. 7(c) and 12 of the complaint.

³² These allegations are listed under paras. 8 and 12 of the complaint.

³³ See also *Scotch & Sirloin Restaurant*, 269 NLRB 436, 448 (1984) (unlawful to prevent discriminatees, who intended to vote under challenge, from voting by telling them that, if they did not leave, employer would call the police on them); *Beverly California Corp.*, 326 NLRB 232, 261 (1998) (posting of guards outside of union meeting, without legitimate justification, the day before the election was unlawful).

escalated into a physical confrontation. Given that this confrontation might have resumed at the election, the Company proactively hired Moore, in order to promote its legitimate interests in preventing workplace violence and protecting its property. Second, the Company previously hired Moore, in order to deal with other potentially violent workplace situations, including its discharges of disgruntled workers. Its hiring of Moore to police the election was solely a continuation of this established practice. Lastly, there is no evidence that Moore actually prevented anyone from voting subject to challenge. Although he delayed Barbour and Diamond from voting, they were eventually granted entry and voted. Accordingly, I find that his presence was lawful.

C. 8(a)(3) Allegations

The Company violated Section 8(a)(3), by laying off Barbour, Diamond and Grimes. The framework for analyzing alleged 8(a)(3) violations is *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing that the employee’s protected conduct motivated the adverse action. The General Counsel must show, either by direct or circumstantial evidence, that: the employee engaged in protected conduct; the employer knew or suspected that he engaged in such conduct; the employer harbored animus against such conduct; and the employer took the personnel action at issue because of such animus.

Under the *Wright Line* framework, if the General Counsel makes a prima facie showing, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer’s action. Once this is established, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action, even absent the protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399, 403 (1983); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enf. 127 F.3d 34 (5th Cir. 1997) (per curiam). To meet this burden, “an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.” *Serrano Painting*, 332 NLRB 1363, 1366 (2000). If the employer’s proffered defenses are found to be a pretext, i.e., the reasons given for its actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of “dual motivation,” that is, the employer defends that, even if an invalid reason might have played some part in the employer’s motivation, it would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

1. Grimes’ Layoff³⁴

i. Union Activity

Grimes engaged in Union activity. He was affiliated with the Union, participated in its apprenticeship program, attended the February 11 Union meeting at Hooters, and signed a Union

³⁴ This allegation is listed under paras. 9, 10, and 13 of the complaint.

authorization card in Lungrin’s presence.

ii. Knowledge

5 The Company knew of Grimes’ activity. Lungrin observed him sign an authorization
 card and attend the Hooters meeting. Lungrin interrogated him about his Union activity, and
 testified that he knew that he was a “Union hand.” *See State Plaza, Inc.*, 347 NLRB 755, 756–
 757 (2006) (supervisor’s knowledge of union activities is imputed to the employer unless
 10 credited testimony establishes the contrary); *Dobbs International Services*, 335 NLRB 972, 973
 (2001); *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82, 82 (1983). Moreover, Mr. Hall
 conceded that he knew that Grimes was a Union member.

iii. Animus and Causation

15 The Company harbored significant union animus, which prompted Grimes’ layoff. This
 matter was proven via direct evidence, by Donaldson’s credible testimony that Lungrin said that
 Grimes was laid off “because he was Union.” This direct evidence was corroborated by
 substantial additional evidence of union animus, which included Lungrin’s: plant closure threat;
 20 interrogations; surveillance; statements that he would quit, if the Company unionized; repeated
 comments that the Company would always be nonunion; comparison of the Union to “garbage;”
 verbal assault of LeBlanc, while leafleting outside the facility; celebration following the Union’s
 election loss; and remarkably open hostility concerning the Union at the hearing. Animus and
 causation are further demonstrated by the close timing between Grimes’ layoff and his Union
 25 activities; he was laid off within days of Lungrin interrogating him and observing him attend the
 Hooters meeting. *See State Plaza, Inc.*, supra at 756 (adverse action occurring shortly after an
 employee has engaged in protected activity raises an inference of unlawful motive); *La Gloria
 Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003). Animus was
 also demonstrated by Mr. Hall’s comment after the election that he would castrate, whoever
 30 aided the Union. I also find that it is likely that the Company’s antinonion animus was motivated
 by its damaged past 8(f) relationship with the Union, which was highlighted by the Union filing
 a lawsuit against the Company due to its ongoing failure to remit dues and benefits payments.

iv. Prima facie case under Wright Line

35 I find, therefore, that counsel for the Acting General Counsel has proven that: Grimes
 engaged in Union activity; the Company was aware of such activity; and union animus triggered
 his layoff. Accordingly, I find that he has met his initial burden of persuasion under *Wright Line*.
 I will now consider the Company’s s asserted layoff reasons.

v. Pretextual discharge reasons

40 The Company’s explanation concerning Grimes’ layoff was pretextual. Mr. Hall
 explained that two circumstances prompted Grimes’s layoff: (1) an overall slowing of the
 Company’s workload; and (2) Batiste’s attainment of a journeyman plumbing permit rendering
 45 Grimes, a licensed plumber, redundant.

Regarding the Company’s workload, I find that the slowing of its workload had no connection to Grimes’ layoff. First, immediately following his layoff, Lungrin stated to Donaldson that Grimes’ layoff was connected to his Union activity, and the Company still had a substantial workload. Second, Grimes was laid off in February, even though North Oaks, his assigned jobsite, was not completed until July. This scenario is inconsistent with a lack of work at North Oaks. Third, I find it implausible that Mr. Hall, who appears to be extremely thorough in his business planning, would have granted Grimes a substantial pay raise and then laid him off within a month, unless the layoff was taken to eliminate a Union supporter. Fourth, given that reliable and competent licensed plumbers such as Grimes are likely difficult to retain, I find it probable that the Company would have retained Grimes, absent some invidious motivation. Lastly, I find that Mr. Hall’s claim that Grimes’ layoff was motivated by lack of work was inconsistent with the Company’s hiring of 3 additional workers, within 2 months of his layoff. Specifically, following his layoff, the Company hired Sanford in March, and Washington and Graves in April. (GC Exhs. 6, 85–88; R. Exh. 8). I find, therefore, that Mr. Hall’s claim that Grimes’ layoff was necessitated by a slowdown in the Company’s workload was pretextual.³⁵

Regarding Batiste’s pursuit of his plumbing license, Mr. Hall’s claim that this pursuit resulted in Grimes’ layoff was also pretextual. It is implausible that Mr. Hall, a rational businessman who likely strives to maximize certainty in his business affairs, would, absent an invidious motivation, prematurely release Grimes, a licensed plumber and strong performer, on the basis of Batiste solely signing up to take a test he might never pass.³⁶

Based on my above analysis of the Company’s layoff rationale, as well as my consideration of the many factors that led me to find express and inferred animus, and knowledge, I conclude that its proffered reasons were mere pretexts and that antiunion animus motivated its actions. Accordingly, no further analysis of its defenses is necessary for, as the Board stated in *Rood Trucking Co.*, 342 NLRB 895, 898 (2004):

A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminatees absent their union activities. This is because where “the evidence establishes that the reasons given for the Respondent’s actions are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.” *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). . . .

2. Barbour’s Layoff³⁷

i. Union activity

Barbour engaged in Union activity. He was affiliated with the Union, participated in its

³⁵ Or put another way, even assuming arguendo that the Company faced a short-term decrease in its workload that warranted a layoff, I find that absent antiunion animus, it would have laid off a different worker.

³⁶ Batiste’s passage was far from a certainty, given that both Lungrin and Diamond failed the same exam on their first attempts. Ironically, following Grimes’ layoff, Batiste missed the exam and later resigned.

³⁷ This allegation is listed under paragraphs 9, 10, and 13 of the complaint.

apprenticeship program, attended the Hooters meeting, signed an authorization card, wore his Union T-shirt to work during the campaign, and his parked vehicle, which displayed Union stickers, in the Company’s lot.

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ii. Knowledge

The Company was aware of his activity. Lungrin observed him attend the Hooters meeting, and admitted that he knew that Barbour was a “Union hand.” See *State Plaza, Inc.*, supra at 756–757 (supervisor’s knowledge of union activities is imputed to the employer unless credited testimony establishes the contrary). Moreover, Mr. Hall admitted knowing that Barbour was affiliated with the Union.

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iii. Animus and Causation

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The Company harbored Union animus, and laid off Barbour due to such animus. This matter was proven directly, by Donaldson’s testimony that Lungrin said that Barbour was laid off “because he was Union.” Animus and causation are also demonstrated by the close timing between the January 11 filing of the petition and Barbour’s January 22 layoff. See *State Plaza, Inc.*, supra at 756. Animus is further demonstrated by the shifting reasons offered for Barbour’s layoff. Specifically, even though his separation notice solely cited lack of work (GC Exh. 11(c)), Mr. Hall stated at the hearing that he was also released for attendance issues,³⁸ poor workmanship,³⁹ and drivers’ license issues. See *Approved Electric Corp.*, 356 NLRB No. 45 (2010) (nondiscriminatory reasons for discharge offered at the hearing were found to be pretextual, where different from those set forth in the discharge letters). Additional evidence of animus was also discussed under my earlier analysis of Grimes’ layoff.

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iv. Prima facie case under Wright Line

I find that counsel for the Acting General Counsel has proven that: Barbour engaged in Union activity; the Company was aware of such activity; and union animus triggered his layoff. Accordingly, I find that he has met his initial burden of persuasion under *Wright Line*. I will now consider the Company’s asserted layoff reasons.

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v. Pretextual layoff rationale

The Company’s rationale regarding Barbour’s layoff was pretextual. Mr. Hall stated that he was laid off due to: insufficient work; poor workmanship; poor attendance; and his suspended drivers’ license. Concerning lack of work, the majority of the same reasons that rendered Grimes’ layoff for lack of work pretextual also apply herein. Barbour’s lay off for lack of work was also inconsistent with Mr. Hall’s claim that he normally follows a last hired, first released

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³⁸ Although, prior to his layoff, Barbour had some attendance issues, these issues solely resulted in the issuance of a written counseling on January 18. (GC Exh. 17). I find that, if his attendance issues were as serious as asserted, the Company would have issued him something more onerous than a written counseling, and would have also cited this issue in the separation notice.

³⁹ Although Mr. Hall generally complained that Barbour’s workmanship was inferior, he failed to cited any concrete examples, or otherwise explain this contention. The Company similarly failed to offer documentation of past performance issues, or corroborative testimony.

policy for layoffs. If that policy had been applied herein, the Company would have first laid off plumbers Pourceau, Hernandez, and Vince, each of whom were less senior than Barbour. Concerning poor performance, this allegation was pretextual, given that it was not cited on his separation notice or otherwise documented, and was conspicuously raised for the first time at the hearing. Concerning absenteeism, this allegation was similarly pretextual, inasmuch as: this reason was not cited on his separation notice; and he solely received a written warning for absenteeism, and was not subsequently absent. Lastly, concerning his suspended drivers' license, this explanation is pretextual, given that the Company has retained other employees, who were encumbered by suspended licenses. See, e.g., (GC Exhs. 10 (Debruyne, Machuca), 26 (Magee), 28 (Jackson)). I find, as a result, that its proffered reasons concerning Barbour's layoff were mere pretexts and that antiunion animus motivated its actions. Accordingly, no further analysis of its defenses is necessary. *Rood Trucking Co.*, supra at 898.

3. ***Diamond's Layoff***⁴⁰

i. ***Union activity and Knowledge***

Diamond was affiliated with the Union. He participated in its apprenticeship program, and Mr. Hall acknowledged that he was aware of his affiliation.

ii. ***Animus and Causation***

The Company harbored significant union animus, which prompted Diamond's layoff. This matter was proven via direct evidence, by Donaldson's testimony that Lungrin said that Diamond was laid off "because he was Union." Animus and causation are also demonstrated by the close timing between the filing of the January 11 petition and Diamond's January 22 layoff. Animus is further demonstrated by the shifting reasons provided for Diamond's layoff. Moreover, even though his separation notice solely cited lack of work (GC Exh. 11(d)), Mr. Hall stated at the hearing that he was also released because he failed to pass the licensing exam and schedule a follow-up exam, and for poor workmanship.⁴¹ See *Approved Electric Corp.*, supra. Additional evidence of animus was also discussed under my earlier analyses of Grimes' and Barbour's layoffs.

iii. ***Prima facie case under Wright Line***

I find that the Acting General Counsel has proven that: Diamond engaged in Union activity; the Company was aware of such activity; and union animus triggered his layoff. Accordingly, I find that he has met his initial burden of persuasion under *Wright Line*. I will now consider the Company's asserted layoff reasons.

iv. ***Pretextual layoff rationale***

The Company's explanation concerning Diamond's layoff was pretextual. Mr. Hall

⁴⁰ This allegation is listed under paras. 9, 10, and 13 of the complaint.

⁴¹ Although Mr. Hall generally complained that Diamond's workmanship was inferior, he failed to cite any concrete examples of performance issues, or otherwise explain his position. The Company similarly failed to offer documentation of past performance issues, or corroborative testimony.

stated that Diamond was laid off due to: insufficient work; poor workmanship; and his failure to pass the plumbing licensure exam. Concerning lack of work, the majority of the same reasons that rendered Grimes’ layoff for lack of work pretextual also apply herein. Diamond’s lay off for lack of work was also inconsistent with Mr. Hall’s contention that he normally follows a last hired, first released policy for layoffs. If that policy had been applied, the Company would have first laid off plumbers Pourceau, Hernandez, and Vince.⁴² Concerning poor workmanship, Diamond’s layoff on this basis was pretextual, inasmuch as poor workmanship was never cited on his separation notice, never previously documented, and solely raised for the first time at the hearing. Concerning the plumbing licensure exam, Diamond’s layoff on this basis was pretextual, given that the Company has retained others, who have failed this exam.⁴³ I, therefore, conclude that its proffered reasons were mere pretexts and that antiunion animus motivated the Company’s actions. See *Rood Trucking Co.*, supra at 898.

D. 8(a)(4) Allegations⁴⁴

An employer violates Section 8(a)(4), when it fires an employee for filing charges, or for testifying, or for being subpoenaed to testify, at a Board proceeding. See 29 U.S.C. 158; *Grand Rapids Die Casting Corp.*, 279 NLRB 662, 664 (1986); *First National Bank & Trust Co.*, 209 NLRB 95, 95 (1974); *Southern Foods*, 289 NLRB 152 (1998); *Walt Disney World Co.*, 216 NLRB 836, 837–838 (1975). Such violations are analyzed under the *Wright Line* framework, which requires the General Counsel to first make a prima facie showing that the employee engaged in protected activity, the employer was aware of such activity, and the activity was a motivating factor in the employer’s decision. See *Syracuse Scenery & Stage Lighting Co.*, 342 NLRB 672, 673 (2004). Upon making such a showing, the burden then shifts to the employer to demonstrate that it would have taken the same action, even in the absence of the protected conduct. *Wright Line*, supra at 1089. If the evidence establishes that the reasons given by the employer are pretextual, in that they are either false or were not relied upon by the employer in making the termination decision, then it has failed to show that it would have taken the same action, absent the protected conduct. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

1. Barbour’s layoff

Barbour’s layoff violated Section 8(a)(4). The Acting General Counsel established a prima facie case. On January 20, at North Oaks, LeBlanc subpoenaed Barbour to testify at the r-case hearing. The subpoena was tendered in the presence of several employees, and Barbour informed both Lungrin and Mr. Hall about it on the same date that it was received. I glean animus and causation from the very close timing between Barbour’s subpoena and his release, i.e., he was released within 2 days of being served. I also find it likely that the Company construed Barbour’s receipt of a Union subpoena to mean that he was a Union supporter, whom it needed to remove in order to suppress the campaign. Lastly, as noted, the Company’s rationale for laying off Barbour was pretextual.

⁴² The Company could have also arguably laid off laborers Magee and Jackson, who were also less senior, before it laid off Diamond.

⁴³ Lungrin failed the licensing exam, and Batiste failed to take a scheduled plumbing examination, each without suffering adverse consequences. It is also undisputed that the Company routinely hires unlicensed plumbers.

⁴⁴ These allegations are listed under paras. 9, 11, and 14 of the complaint.

2. Grimes’ layoff

5 Grimes’ layoff did not violate Section 8(a)(4). In furtherance of their position on this issue, the Acting General Counsel and Union contended that the Company only initially intended to lay off Grimes for a 2-week period, and then converted his temporary layoff into a permanent layoff, once he was listed within an unfair labor practice charge. (GC Exhs. 1(g)-(h), 11(f)). In support of their argument, they cite: Lungrin’s testimony that Mr. Hall initially stated that Grimes’ layoff was temporary; and Grimes’ testimony that, on February 7, Mr. Hall solely told him that he was not “penciled in” for the next workweek.

15 For several reasons, I find that the Company’s actions regarding Grimes did not violate Section 8(a)(4). Grimes’ layoff, in spite of Lungrin’s comment that it was initially temporary was, at all times, a permanent action designed to eliminate a Union adherent. The Company permanently laid off Grimes on February 7, when he was told that “he was not penciled in to work that following week.” Although Mr. Hall inelegantly communicated the permanent nature of his layoff on February 7 when he told him he was not “penciled in,” the February 12 separation notice solely memorialized his earlier, permanent, layoff. The Company had, as a result, permanently laid off Grimes, when the February 10 charge was filed, and this filing, thus, did not cause the layoff.⁴⁵

IV. The Representation Case

A. Objections

25 On February 25, the Union filed 17 objections to the Company’s conduct during the critical period preceding the election, i.e., from January 11 to February 19.⁴⁶ (GC Exh. 1(bb)). Many of these objections duplicate the complaint allegations, which I have already analyzed and found unlawful. At the hearing, the Union also withdrew several objections.⁴⁷ The parties presented argument concerning the objections in their posthearing briefs.

1. Objection 2

35 Objection 2 alleged that, during the critical period, the Company, through Lungrin, threatened employees that it would close, if they unionized. Given that I previously found this threat to be unlawful, this objection is valid.

2. Objections 3, 4, and 7

40 Objections 3, 4, and 7 alleged that, during the critical period, the Company unlawfully laid off Barbour, Diamond and Grimes. Given that I found that these layoffs were unlawful,

⁴⁵ I also note that one would be hard pressed to explain why the Company would have operated in a tentative, 2-step manner regarding Grimes (i.e. by first temporarily laying him off, and then permanently laying him off days later, once he was cited by the charge), when it acted so decisively regarding the removal of the other Union adherents, as well as its handling of the campaign.

⁴⁶ See *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961).

⁴⁷ Specifically, the Union withdrew objections 5, 8, 9, and 17.

these objections are sustained.

3. Objection 6

5 Objection 6 alleged that, during the critical period, the Company, by Lungrin, engaged in surveillance of a Union meeting, and interrogated employees concerning their Union activities. The Union asserted that this objection was based upon Lungrin’s conduct at Hooters on February 11, which I have found to be unlawful. Accordingly, this objection is legitimate.

4. Objection 10

10 Objection 10 alleged that, at the pre-election conference, the Company, through counsel, “destroyed the laboratory conditions of the election,” when he, “wrote on the . . . official Excelsior List which was left in the presence and view of voters during the election . . . over the objection of both the Union and the Board Agent.” LeBlanc testified that counsel wrote on the Excelsior List at the preelection conference. LeBlanc, who did not observe the writing, added that counsel stated that he was memorializing his challenges on the list. The list itself was not submitted into evidence, there was no additional testimony regarding what was written, and there is no evidence that any voters observed the writing. Under these circumstances, I find that this was a de minimis action, which did not affect the election’s outcome. See *Bon Appétit Management Co.*, 334 NLRB 1042 (2001). I find, therefore, that this objection lacks merit.

5. Objections 11, 12, and 13

25 Objection 11 alleged that the Company, through Moore, “destroyed the laboratory conditions of the election,” when he temporarily prevented Barbour and Diamond from voting. Objections 12 and 13 provided that the Company, “destroyed the laboratory conditions of the election,” when Moore restricted access to the facility. The Company had a lawful, nondiscriminatory rationale for hiring Moore, and Barbour and Diamond ultimately voted subject to challenge. There is no evidence that Moore impeded any other voters, or that Moore maintained a list of who voted, or that voters perceived such action. See *Days Inn Management Co.*, 299 NLRB 735 (1992). I find, as a result, that these objections are invalid.

6. Objection 14

35 Objection 14 alleged that the Company, “destroyed the laboratory conditions of the election,” by:

40 [L]eaving the front door of the building unlocked during the election . . . and facilitated, Howard Hall, Luke Hall’s brother, . . . [entering] the front door repeatedly during the election.

45 Although there was limited testimony that the front door was unlocked, it was unclear whether any voters observed anyone enter the facility through this door. I find, as a result, that this matter was de minimis, and did not affect the election’s outcome. See *Bon Appétit Management Co.*, supra. Accordingly, this objection lacks merit.

7. *Objection 15*

Objection 15 alleged that the Company, “destroyed the laboratory conditions of the election,” by, “challenging all individuals who the Company believed were supporters of the Union.” The Union failed to present any evidence, beyond its own conjecture, that the Company’s challenges were exclusively aimed at Union supporters. I find, as a result, that this objection is unfounded.

8. *Objection 16*

Objection 16 alleged that the Company “destroyed the laboratory conditions of the election,” by, posting a sign that read, “never abandon the owner or Company,” in the election area. I find that Mr. Hall satisfactorily explained the context behind this posting, and that this matter was insufficient to affect the election’s outcome. Thus, I find that this objection is invalid.

9. *Objection 1*

Objection 1, a catchall objection, alleges that the Company “interfered with, restrained, and coerced its employees” in their ability to exercise free choice in the election. Given that I have already sustained several objections, this objection, although duplicative, is legitimate.

B. Challenged Ballots

The Tally of Ballots revealed: 1 vote for the Union; 6 votes against; and 7 determinative challenges. (GC Exh. 1(rr)). The determinative challenges are described below:

Employee	Challenging Party	Reason
Barbour	Board	Not on Excelsior List
Diamond	Board	Not on Excelsior List
Grimes	Company	No longer employed
Lungrin	Union	Alleged supervisor
Neal	Company	Alleged supervisor
Hernandez	Company	Alleged supervisor
Vince	Company	Alleged supervisor

(GC Exh. 1(ss)).

Barbour’s, Diamond’s, and Grimes’ challenges were invalid, inasmuch as their layoffs were unlawful. Thus, their ballots must be counted. Lungrin’s challenge was, however, valid, given his supervisory status. The Company’s challenges of Neal, Hernandez, and Vince as supervisors were invalid, inasmuch as it wholly failed to present any evidence of their supervisory status. Mr. Hall even contradictorily stated that only he and Ms. Hall are the Company’s sole supervisors. Their ballots, therefore, must be counted.

C. Conclusion

Concerning the challenges, the ballots cast by Barbour, Diamond, Grimes, Neal, Hernandez and Vince should be counted, while the ballot cast by Lungrin should not be counted. The 6 uncounted ballots are sufficient in number to affect the outcome of the election, which was decided by a 5-vote margin.

Concerning the objections, I find that objections 1, 2, 3, 4, 6, and 7 are valid, and that the conduct underlying these objections, which also violated Sections 8(a)(1), (3), and (4), prevented employees from exercising free choice during the February 19 election. Accordingly, in the event that the Union does not win the election after the 6 challenged ballots are counted, I recommend that the election be invalidated, and that employees be permitted to vote in a second untainted election. See *General Shoe Corp.*, 77 NLRB 124 (1948); *IRIS U.S.A., Inc.*, 336 NLRB 1013 (2001); *Diamond Walnut Growers, Inc.*, 326 NLRB 28 (1988).

Conclusions of Law

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Company violated Section 8(a)(1) of the Act by

a. Threatening employees that the Company would close, if they engaged in Union or other protected concerted activities;

b. Interrogating employees concerning their Union or other protected concerted activities; and

c. Engaging in surveillance of employees' Union or other protected concerted activities.

4. The Company violated Section 8(a)(1) and (3) of the Act by laying off and/or discharging Barbour, Diamond, and Grimes because they engaged in Union or other protected concerted activities.

5. The Company violated Section 8(a)(1) and (4) of the Act by laying off and/or discharging Barbour because he was subpoenaed to testify in a representation case hearing conducted by the Board.

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

7. The Company has not otherwise violated the Act.

8. By the foregoing violations of the Act, which occurred during the critical period

before the election, and by the conduct cited by the Union in objections 1, 2, 3, 4, 6, and 7, the Company has prevented the holding of a fair election, and such conduct warrants setting aside the election conducted on February 19, 2010, in Case 15–RC–8819.⁴⁸

5

Remedy

Having found that the Company 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.

10

The Company, having unlawfully laid off and/or discharged its employees, Barbour, Diamond, and Grimes, must offer them reinstatement and make them whole for any loss of earnings and other benefits. Backpay shall be computed on a quarterly basis from the date of their layoffs and/or discharges to the date of their proper offers 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), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Company shall expunge from its records any references to their unlawful layoffs and/or discharges, give them written notice of such expunction, and inform them that its unlawful conduct will not be used against them as a basis for any future personnel related actions.

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The Company shall distribute appropriate remedial notices electronically via email, intranet, internet, or other appropriate electronic means to unit employees at the facility, in addition to the traditional physical posting of paper notices. See *J Picini Flooring*, 356 NLRB No. 9 (2010).

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In addition to the traditional remedies for the 8(a)(1), (3), and (4) violations found herein, the Company shall permit a Board agent to read the notice marked “Appendix” to unit employees at its facility, during work time, in the presence of Mr. and Ms. Hall, its president and vice president. A notice reading will foster the environment required for a fair and final second election result, assuming such an election is warranted. A notice reading will also counteract the coercive impact of the instant unfair labor practices, which were substantial and pervasive. See *McAllister Towing & Transportation Co.*, 341 NLRB 394, 400 (2004) (“[T]he public reading of the notice is an ‘effective but moderate way to let in a warming wind of information and . . . reassurance. [citations omitted].’”).

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35

The Union’s request for a *Gissel* bargaining order is, however, denied. First and foremost, this special remedy was not pled in the complaint, litigated at the hearing, or requested by the Acting General Counsel. Under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Board will issue a remedial bargaining order, absent an election, under two circumstances. Category I cases are “exceptional” cases, marked by “outrageous and “pervasive” unfair labor practices, which cannot be corrected by traditional remedies and prevent the holding of a fair election. *Id.* at 613–614. In such cases, a bargaining order is appropriate, “without need of inquiry into [the union’s] majority status on the basis of cards or otherwise.” *Id.* Category II

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⁴⁸ As noted, a rerun election is only warranted, if the counting of the challenges does not alter the election results.

cases are less severe cases, which still have the tendency to undermine majority support, and impede the election process. *Id.* at 614. In these cases, a bargaining order is appropriate, once there is a showing that: the union previously had majority support; and in light of the unfair labor practices, the possibility of erasing the effects of the unfair labor practices and ensuring a fair election through traditional remedies, though present, is slight. *Id.* at 614–615. In such cases, employee sentiment, once expressed through cards, is, on balance, better protected by a bargaining order. *Id.*

The instant case is not a category I case. First, in spite of the Company’s commission of several unfair labor practices, the Union might nevertheless win the election, once challenged ballots are counted. Second, the Board’s traditional remedies, which include a notice reading, should suffice to assure a fair second election, if needed. This case is also not a category II case. The record failed to reveal any evidence (e.g. authorization cards or other documentary evidence), which demonstrated that the Union enjoyed majority support, before the commission of the instant unfair labor practices.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁴⁹

ORDER

The Respondent, Allservice Plumbing and Maintenance, Inc., Baton Rouge, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Threatening employees that the Company will close, if they engage in Union or other protected concerted activities;

b. Interrogating employees concerning their Union activities or other protected activities;

c. Engaging in surveillance of employees’ Union or other protected activities;

d. Laying off and/or discharging employees because they engaged in Union or other protected concerted activities;

e. Laying off and/or discharging employees because they have been subpoenaed to testify in representation case hearings conducted by the Board.

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

⁴⁹ 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.

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

5 a. Within 14 days from the date of the Board’s Order, offer Barbour, Diamond and Grimes their former jobs or, if such jobs no longer exist, offer them substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

10 b. Make Barbour, Diamond and Grimes whole for any loss of earnings and benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this Decision.

15 c. Within 14 days from the date of the Board’s Order, remove from its files any reference to their unlawful layoffs and/or discharges, and within 3 days thereafter notify them in writing that this has been done and that their layoffs and/or discharges will not be used against them in any way.

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

25 e. Within 14 days after service by the Region, physically post at its Baton Rouge, Louisiana facility, and electronically send and post via email, intranet, internet, or other electronic means its unit employees who were employed by the Company at its Baton Rouge, Louisiana facility at any time since December 14, 2009, copies of the attached Notice marked “Appendix.”⁵⁰ Copies of the Notice, on forms provided by the Regional Director for Region 15, after being signed by the Company’s authorized representative, shall be physically posted by the Company 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 Company to ensure that the Notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the Notice to all current employees and former employees employed by the Company at any time since December 14, 2009.

30 40 f. Within 14 days after service by the Region, hold a meeting or meetings at the facility, during working hours, which will be scheduled to ensure the widest possible attendance of unit employees, at which time the attached notice marked “Appendix” is to be read to its unit employees by a Board agent, in the presence of its current president and vice president.

50 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.”

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 the Respondent has taken to comply.

5 **IT IS FURTHER ORDERED** that the Regional Director for Region 15 shall, in the event that the inclusion and counting of the 6 challenged ballots does not result in the Union winning the representation election conducted in Case 15–RC–8819, set aside that election result, and hold a new election at a date and time to be determined by the Regional Director.

10 Dated Washington, D.C., December 1, 2011.

15

Robert A. Ringler
Administrative Law Judge

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 do anything that interferes with these rights.

WE WILL NOT threaten you that the Company will close because you support the United Association of Journeymen and Apprentices of the Plumbing Industry of the United States and Canada, Local 198 (the Union) or any other union.

WE WILL NOT interrogate you about your Union activities.

WE WILL NOT engage in surveillance of your Union activities.

WE WILL NOT layoff, discharge, or otherwise discriminate against you for supporting the Union or any other union.

WE WILL NOT layoff, discharge, or otherwise discriminate against you because you have been subpoenaed to testify in a National Labor Relations Board proceeding.

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

WE WILL, within 14 days from the date of this Order, offer Brady Barbour, Doug Diamond, and Michael Grimes full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Brady Barbour, Doug Diamond, and Michael Grimes whole for any loss of earnings and other benefits resulting from their layoffs and/or discharges, less any net interim earnings, plus interest.

