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

INDIANA FIRE SPRINKLER AND BACKFLOW, INC.

and Case 25-CA-088505

ROAD SPRINKLER FITTERS LOCAL UNION
NO. 669, UA, AFL-CIO

and

INDIANA FIRE SPRINKLER AND BACKFLOW, INC.
Employer

and Case 25-RC-085030

ROAD SPRINKLER FITTERS LOCAL UNION
No. 669, UA, AFL-C I O
Petitioner

Michael Beck, Esq.,
for the Acting General Counsel.
Brian Carroll, Esq.,
for the Respondent.
Natalie Moffett, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. This consolidated unfair labor practice and representation case was tried in Fort Wayne Indiana on January 16 and 17, 2013. The Road Sprinkler Fitters Local Union No. 669, UA, AFL-CIO (the Union) filed the charge in Case 25-CA-088505 on September 4, 2012.[1] On September 4, 2012, the Union also filed objections to

[1] All dates are in 2012 unless otherwise indicated.

an election held on August 27, 2012, pursuant to a petition filed on July 16, 2012, in Case 25-CA-085303. The tally of ballots issued at the election reflected that 2 votes were cast for the Union and 4 votes were cast against the Union. There was one challenged ballot which was insufficient to affect the results of the election.[2] On October 12, 2012, the Regional Director issued a report on objections, order directing hearing and notice of hearing in case 25-RC-085303. On November 15, 2012, the Acting General Counsel issued an order consolidating cases, complaint and notice of hearing in Cases 25-CA-088505 and 25-RC-085303 for purposes of hearing, ruling and decision by an administrative law judge.

The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the Act on July 13, 2012, by refusing to consider for hire or hiring Marvin Harmon. The complaint also alleges that on August 28 and 29, 2012, the Respondent, through David Ringer and Brandon Bayne, violated Section 8(a)(1) of the Act by interrogating employees about the Union. In its objections to the election the Union alleges that, during the critical period,[3] the promised raises to employees to offset the cost of the health insurance policy. The Union also alleges that the, through its president and owner, David Ringer, threatened to close the facility if the employees voted in favor of the Union.

On the entire record[4], including my observation of the demeanor of the witnesses[5], and after considering the briefs filed by the Acting General Counsel, the Union and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business in Fort Wayne,

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[2] The appropriate unit as set forth in item 5 of the stipulated election agreement is as follows:

> All full-time and regular part-time employees engaged in the installation, maintenance, and repair of automatic fire protection systems employed by the Employer at its Fort Wayne, Indiana facility; but excluding all designers, salespersons, office clerical employees and guards and supervisors as defined in the Act, and all other employees.

[3] In determining whether to set aside an election the Board considers only conduct that occurred from the date of the filing of the petition through the election. *Ideal Electric & Mfg. Co*., 134 NLRB 1275 (1961).

[4] During the preparation of her brief, counsel for the Union noticed what she believed to be missing testimony from the transcript of the second day of the hearing, January 17, 2013. The reporting service's review confirmed that there was, in fact, testimony missing from the transcript of the hearing for January 17, 2013. Accordingly, the reporting service prepared a corrected and revised transcript for that date

[5] In making my findings regarding the credibility of witnesses I have considered their demeanor, the content of the testimony and the inherent probabilities based on the record as a whole. In some circumstances I have credited some, but not all, of what the witness said. I note, in this regard, that "nothing is more common in all kinds of judicial decisions then to believe some and not all" of the witness' testimony. *Jerry Ryce Builders*, 352 NLRB 1262, fn.2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F. 2d 749, 754 (2d Cir. 1950), revd. on other grounds, 340 U.S. 474 (1951). See also *J. Shaw Associates, LLC,* 349 NLRB 939, 939-940 (2007).

Indiana, has been engaged in the business of the installation of fire sprinkler systems. During the past 12 months, the Respondent, in conducting its business operations, performed services valued in excess of $50,000 in states other than the State of Indiana. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Facts

Background

The Respondent began the installation of fire sprinkler systems in commercial buildings in October 2009. The Respondent is co-owned by David Ringer and Brandon Bayne. Prior to starting their own company, Ringer and Bayne knew each other from working together in the past. Ringer's experience had been primarily in the management side of the fire sprinkler installation business while Bayne's background had been in installation. When the Respondent first began operations, Ringer and Bayne performed all of the work. After the Respondent began to hire additional employees, Bayne and Ringer applied their particular skills, with Ringer concentrating on the management end of the business and Bayne focusing on supervising the field work.

As the Respondent's business grew in the fall of 2010, Bayne and Ringer hired their first employee, Jason Bartlett, an experienced sprinkler fitter. At that time the Respondent also moved its office from Ringer's home to its present location in Fort Wayne, Indiana. The Respondent also has a warehouse and shop in Leo, Indiana, which is located near Fort Wayne. In early March 2011, the Respondent hired another experienced sprinkler fitter, Jeff Ferguson.[6] In April 2011, the Respondent hired another employee Philip Bremer. (R. Exh. 1, p. 17; Tr. 183-184)) According to Ringer's credited testimony, Ferguson was discharged in the summer of 2011 for sleeping on a job site in Norwalk Ohio. Ringer testified that the Respondent had to pay a fine of $500 to the general contractor for this occurrence.[7]

The Respondent continued to hire some new employees through 2011 as its work increased. In the summer of 2011, in addition to Bayne and Ringer the Respondent generally

[6] Ferguson testified that he first began employment in the sprinkler fitter industry in 2003 and was laid off in 2008 while in a union apprenticeship program. After his layoff, he had worked outside the sprinkler fitter industry prior to being hired by the Respondent.

[7] I do not credit the conflicting testimony of Ferguson regarding the manner in which he left the Respondent in the summer of 2011. According to Ferguson, he was laid off and was told to call in after a week. Ferguson testified he kept calling, but the Respondent indicated it not have any work. On cross-examination, however, Ferguson admitted that, while employed by the Respondent, he had fallen asleep in a parking lot after driving all night. Ringer's testimony was more detailed regarding the circumstances of Ferguson's departure from the Respondent in 2011 and his demeanor reflected certainty while testifying regarding this event. Ferguson's testimony on this point was brief and generalized. In addition, there is no other evidence in the record that indicates that the Respondent had any lack of work in the summer of 2011. Rather, the record indicates that the Respondent was steadily increasing its business.

employed three other employees. (R. Exh.1, p. 31-38.) From late May 2011 through August 2011 the Respondent employed James Ringer, a college student and David Ringer's brother, who wanted to work during the summer. (R. Exh1, pps. 21-34.) James Ringer was not a trained sprinkler fitter and performed unskilled labor on jobs. In October, 2011, the Respondent increased its complement to 6 employees. (R. Exh. 1, pps. 43-44.)

In May 2012, Ferguson was rehired by the Respondent.[8] On May 29, 2012 the Respondent hired another experienced sprinkler fitter, Alan Liby. After Ferguson began working for the Respondent in May 2012 he contacted Andrew Meyers, an organizer with the Union, to inform him that he was working at the Respondent. [9] After their hire, Ferguson and Liby began discussing organizing a union at the Respondent with other employees. Both Ferguson and Liby signed authorization cards on behalf of the Union. On July 12, 2012, Meyers sent a letter by facsimile to the Respondent indicating that Ferguson was a "volunteer union organizer" on behalf of the Union. (R. Exh. 5.) In order to ensure that the Respondent received this letter reflecting Ferguson's support for the Union, Meyers and Leigh planned to deliver the letter personally to the Respondent on July 13.

Prior to addressing the events of July 13, 2012, it is appropriate to set forth the background facts regarding the attempts of Marvin Harmon to be hired by the Respondent as those attempts resulted in a scheduled meeting between Bayne, Ringer and Harmon on July 13.

Marvin Harmon

Marvin Harmon is an experienced sprinkler fitter with 25 years of experience, 19 as a journeyman. He worked for a union sprinkler fitter contractor, Shambaugh and Sons, from 1991 to 2010. During his employment there, he worked with Bayne. At the time they worked together prior to Bayne leaving in 2003, Harmon was a journeyman and Bayne was an apprentice. In February 2010, Harmon was arrested for selling illegal drugs to a coworker and pled guilty to a felony charge. Harmon served 6 months in jail and was released in November 2010. After his release, Harmon had difficulty in finding employment. Harmon had heard from a former coworker that Bayne had started his own company and obtained the Respondent's phone number through Google. Harmon testified that in May 2011, he contacted Bayne and asked him about working for the Respondent. Harmon also told Bayne about his felony charge for drug sales and the fact that he served 6 months in jail. Harmon also told Bayne that the Union was not helping him find a job. According to Harmon, Bayne testified that his "felony would not be a problem." Bayne said that "everyone screws up and deserves a second chance." Bayne also said, however,

[8] There is a conflict in the testimony regarding the manner in which Ferguson was rehired. Ferguson testified that Ringer called him and offered him a job. Ringer testified that Ferguson called him and asked to be rehired. According to Ringer, Ferguson said that positive changes had occurred in his life and asked for another chance. After Ringer discussed Ferguson with Bayne, the Respondent rehired Ferguson. I credit Ringer's version of how Ferguson came to be rehired. It does not strike me as plausible that after firing Ferguson, Ringer would be the one to initiate the process of Ferguson again being employed by the Respondent.

[9] Ferguson testified he contacted the Union in July 2011 after he was "let go" by the Respondent in May 2011. Ferguson denied, however, that the Union directed him to try to obtain employment at the Respondent in 2012 or that the Union paid him to work there. I credit Ferguson's uncontroverted testimony on this issue

that the Respondent was not hiring at that time. After their first conversation in May 2011, Harmon called Bayne weekly or biweekly for several months. When Bayne spoke to Harmon during this period, Bayne always indicated that the Respondent was not hiring. At a point not clearly defined in the record, Harmon stopped calling Bayne about a job.

In May 2012, Harmon contacted Matt Leigh, a business agent for the Union and asked him about employment. Leigh told Harmon to call Meyers. When Harmon spoke to Meyers, Meyers told Harmon that he had heard that the Respondent was hiring. Harmon then contacted Bayne by phone in May 2012. According to Harmon, Bayne told him that the Respondent had jobs that were coming up but that they were not hiring at that time. Harmon called Bayne weekly after that. When Harmon finally reached Bayne, he indicated that the Respondent had work coming up and mentioned a job in Muncie, Indiana.[10]

Harmon testified that during a telephone conversation he had with Bayne in June 2012, Bayne said that he had to talk to Ringer about hiring Harmon. According to Harmon, Bayne said he would get back to him but never did. In late June, Harmon called Bayne and asked him if he had spoken to Ringer. Harmon testified that Bayne stated "yeah, we're going to bring you on, hire you." (Tr. 88.) Bayne asked when Harmon could come to Fort Wayne. Harmon indicated that he could come at any time. Harmon and Bayne agreed that Harmon would meet with Bayne and Ringer on July 13, 2013 at 7 a.m. Harmon testified that Bayne told him that they were going to fill out paperwork and tell him where he would be working on the following Monday. (Tr. 91.) Harmon said that he had had no discussion with Bayne regarding vacation time, sick leave or start and finish times. Harmon testified that Bayne told him that the wage would be in the $20 range and that the Respondent had no insurance at the time. Harmon testified that he had not told Meyers or anyone from the Union that he was going to meet with Ringer and Bayne on that date.

There are some material variances between the testimony of Bayne and Harmon regarding their telephone conversations prior to July 13, 2012. Bayne testified that Harmon began calling him for a job in 2011. Bayne indicated that he told Harmon that the Respondent did not really need anybody at that time. Bayne further testified that he did not return all of Harmon's phone calls.

Bayne testified that he spoke to Harmon in July 2012, and told him that he could come up and have a meeting with him and Ringer that was "basically a meet and greet and go from there." (Tr. 147). Bayne said that he wanted Harmon to meet Ringer "because me and Dave, when we hire somebody, we both are there for an interview." (Tr. 148.) Bayne denied telling Harmon that he had a job with the Respondent. (Tr. 148.)

Ringer testified that Bayne had first mentioned Harmon to him when Harmon first began to contact Bayne about a job in 2011. Bayne had mentioned to Ringer that he had worked with Harmon at Shambaugh and Sons and that Harmon kept calling Bayne about getting a job with the Respondent. Ringer testified that in 2012 Harmon again began to call Bayne consistently and that Bayne asked him if he would meet with Harmon. Ringer told Bayne that Harmon could come to the office and that he would at least meet with him.

[10] Harmon admitted that on several occasions during the entire period of time that he was calling Bayne about a job, when Harmon could not reach Bayne and left a message, Bayne did not return the call.

I credit Bayne's testimony over Harmon regarding what Bayne said to Harmon in late June or early July 2012, regarding the nature of the meeting that was to be held on July 13. Thus, I find that Harmon was told he could come and meet with Bayne and Ringer for a "meet and greet and go from there." I do not credit Harmon's testimony that Bayne told him that he was hired. I find that Bayne's testimony is more plausible based on the entire record. In this connection, the record establishes that all full-time employees employed by the Respondent prior to Harmon's meeting had a personal interview with both Bayne and Ringer before being hired. I find that Harmon, anxious for a job after a substantial period of unemployment, misunderstood Bayne's statements to him about the nature of the scheduled meeting.

According to Ringer's uncontroverted testimony, both he and Bayne met with the following employees before they were hired: Jason Bartlett; Philip Bremer; Derek Deardorff; Kirk Ritter; Kevin Kane; Ryan Carlen; Michael Robinson; Justin Bartlett; and John Lahr.

Ferguson testified that he met with Ringer in person and spoke to Bayne on the phone prior to being hired the first time in 2011. Liby testified he met with Ringer before being hired. Ringer testified that the in-person interview with Liby was conducted by both himself and Bayne (Tr. 192). As noted above, Bayne testified that both he and Ringer spoke to all employees before they were hired. I credit Ringer's testimony that both he and Bayne were present for Liby's interview given the clear evidence of the Respondent's established policy that both Bayne and Ringer were personally involved in the hire of all full-time employees.

In the context of the record as a whole it appears implausible that Bayne would have told Harmon that he was hired before Ringer had ever spoken to him.

The Events of July 13, 2012

On July 13, 2012, Meyers and Matthew Leigh, another union agent, arrived at the Respondent's office in Leigh's vehicle at approximately 6:30 a.m. to deliver the letter naming Ferguson as the Union's volunteer organizer. They parked about 70 yards from the Respondent's office. Meyers credibly testified that he wanted to wait until both Ringer and Bayne arrived at the office before delivering the letter. He observed Bayne arrive first and then Ringer. Meyers testified that he wanted to wait a few minutes before going in to let them "settle in." After approximately 3 minutes, Ringer came out of the office and got into his vehicle and drove toward the area where the union representatives were parked. Meyers told Leigh to leave and that they would come back when both Ringer and Bayne were there. As the union representatives left the parking lot, Ringer followed them and called the police. When Meyers saw Ringer stop and speak to a police officer, he instructed Leigh to pull into a parking lot as he surmised the police wanted to speak to them.

While Meyers and Leigh were parked outside of the Respondent's office, Harmon was approaching the office for his scheduled 7 a.m. meeting. According to the credited testimony of Harmon, he was about 10 minutes away from the Respondent's office, when Bayne called him on his cell phone. Bayne asked Harmon where he was; Harmon replied he was pretty close to the office and would be there in a couple of minutes. Bayne told Harmon to turn around and go home as the Respondent was not hiring. Harmon asked Bayne what he meant and told Bayne that

Bayne had just hired him over the phone last week. Bayne responded that Harmon would have to call "Andy." When Harmon asked "Andy who," Bayne replied "Call Andy Meyers." (Tr. 90.)

Bayne's testimony conflicts with that of Harmon regarding the phone call. Bayne testified that when he arrived at the office on July 13, he saw individuals videotaping the outside of the building. According to Bayne, at approximately 6:50 a.m. he called Harmon and told him that it was "chaotic" and that the meeting was off. On direct examination, Bayne testified that when he first arrived at work and made the phone call to Harmon, he was not aware of who was in the vehicle outside of the office. Bayne claimed that was not known until later when the police became involved. (Tr. 150.) When called as a rebuttal witness by the Acting General Counsel, Bayne again testified that he did not know representatives of the Union were outside the facility when he called Harmon. However, his affidavit furnished during the investigation contained the following regarding the phone call to Harmon:

> Another guy has called looking for work, called Marv, whose last name I do not remember. He was supposed to come in the day that the union guys were out at the truck videotaping us. We decided to call him and tell him not to come in for an interview because we figured that the union was videotaping us to show that we laid off another employee but we're still hiring. (Tr. 255)

I do not credit Bayne's testimony regarding what he said to Harmon when he called to cancel their meeting. While, at the trial, Bayne denied knowing that the union representatives were parked outside the office when he called Harmon, his affidavit indicates that he knew that union representatives were there when he made the phone call to Harmon. Beyond the inconsistency between his trial testimony and his pretrial affidavit, Bayne appeared evasive with respect to whether he knew that the union representatives were present at the office when he made the call to cancel the meeting with Harmon. On the other hand, Harmon's testimony on this point was clear and concise and his demeanor reflected certainty regarding this event.

While Meyers was speaking to Ringer and the police, Bayne called Meyers on his cell phone.[11] According to Meyers, Bayne wanted Meyers to drive back to the shop so he could "whoop my ass." Bayne also said that he did not know what Meyers was trying to do. When Meyers said he was trying to deliver a letter, Bayne told him to come and deliver it. Meyers said he would like to but the police had stopped him and he asked Bayne to come over to where the police had stopped him.

Bayne arrived at the scene where Meyers, Ringer and the police were located. Meyers gave Ringer the letter regarding Ferguson that he had come to the office to deliver. While Meyers was speaking to Ringer, Bayne and the police, he received a phone call from Harmon. Harmon asked what was going on. Meyers replied that he was trying to hand deliver a letter to the Respondent. Harmon replied that he had an interview with the Respondent that morning. Meyers said that he did not know that and he was busy at that time but would get back to him.

According to Bayne's uncontroverted testimony, at approximately 7:30 a.m. Harmon left him a voicemail saying, "I don't know what's going on. I talked to Matt (Leigh) and as far as I

[11] Bayne knew Meyers from previous dealings with him and had his cell phone number.

5 know I can go wherever I want." (Tr. 150.) Bayne did not call Harmon back and did not speak to him again about being employed by the Respondent.

Meyers testified that he called Harmon back later on July 13 and Harmon again asked him what was going on since he had just been hired by the Respondent and was going to be
10 assigned to a job on Monday. Meyers replied that he was not aware that Harmon was going to meet with the Respondent and Harmon told Meyers that "things got screwed up."

On July 13 at 12:28 p.m, Meyers received a text message from Bayne indicating "I bet your plan got all fucked up today, better luck next time." Meyers responded by a text message at
15 1:11 p.m.indicating "Actually worked out well, thanks again!!" (GC Exh. 3.)

The Respondent's Meetings Regarding the Union

On July 16, 2012, the Union filed a petition in Case 25-RC-085303 seeking to represent
20 the Respondent's installation employees. Thereafter, the Respondent scheduled weekly Monday morning meetings at its shop in Leo, Indiana to discuss to the upcoming election. The five meetings began on Monday, July 23, 2012 and ended on Monday, August 20, 2012. Ringer was the principal spokesman for the Respondent at these meetings. However, Bayne was present along with the Respondent's attorney, Brian Carroll, and at times both of them also spoke.
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At the time the petition was filed, Ringer and Bayne were investigating the possibility of providing health insurance to their employees. This effort had gone so far as to have the employees fill out questionnaires regarding relevant personal information in order to receive quotes on the cost of the policy. Bayne testified that he had a conversation with Ringer about
30 raising wages in June or July, 2012, prior to the petition being filed, Bayne testified that they discussed that when the health insurance was in place, they would offset the cost of the health insurance premiums with raises. (Tr. 157, 166.) Ringer credibly testified that prior to the petition being filed on July 13, he had expressed to employees that the insurance was going to be an additional cost to them and that he would like to give them raises to offset that cost. (Tr. 247)
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Initially, the Respondent advised employees at its weekly meetings regarding the upcoming election that it could not proceed with the plans for insurance because of the filing of the petition. After contacting the Union and discussing the matter, the Respondent, with the Union's acquiescence, went forward with its plans to offer health insurance to its employees. At
40 the weekly meetings held with employees regarding the union campaign, the Respondent advised employees of this development.

A number of witnesses testified with respect to these meetings in so far as they were relevant to the Union's objections to the election. Ferguson and Liby testified in support of the
45 Union's objections, while the Respondent called Bayne, Ringer, John Lahr, Justin Bartlett, Jason Bartlett, and Kirk Ritter.

Ferguson testified that the general theme set forth by Ringer was the Union would not benefit the Respondent because it could not afford the additional costs associated with being a
50 union contractor. Ferguson testified that at the meeting held on August 13 Ringer told employees that they will somehow help employees pay for their portion of the health insurance premium.

(Tr. 39.) Ferguson also testified that at the same meeting Ringer said that if the company went union it would probably have to close its doors like another company in Ohio did because the Respondent could not afford to pay the employees the union scale. (Tr. 40-41.) On cross-examination, Ferguson initially reiterated that Ringer has stated that if the union was voted in that Respondent would have to close its doors like a company in Ohio did because they could not afford to pay the benefits as they were too small a company (Tr. 46.) The following exchange then took place (Tr. 46-47):

> (Mr. Carroll) Q: Isn't it true, Mr. Ferguson, that in reality what Mr.Ringer indicated was that the union was not a good fit and that there did some companies, according to the union, that had closed their doors after they went union?
>
> A: I don't think he meant that. I think he meant that they would probably close their doors.
>
> Judge Carissimi: Sir, the question was what he said, not what you think he meant.
>
> A: Okay, well
>
> Judge Carissimi: The important thing for me is what language did he use.
>
> (Mr. Carroll) Q: Those were his words, we're going to close our doors if you guys vote the union in?
>
> A: Not if the union voted in, they-I feel like you're getting me in a bind here.
>
> Judge Carissimi: Just tell us as best you can recall.
>
> A: Yes, he said he'd have to close the doors of the union was voted in, yes.
>
> Q: Do you recall him talking about union newsletters?
>
> A: Yes
>
> Q: In the union newsletter it was mentioned that company had been organized and they had to close their doors, do you recall that?
>
> A: I don't remember that being in a newsletter, but I'm sure that we talked about it, yes.

Liby testified that at the fourth or fifth meeting Ringer discussed the Respondent's efforts to obtain health insurance for employees. Ringer indicated there would be different levels of the cost of the premium depending upon whether it was an individual or family plan. According to Liby, Ringer said that each employee would be compensated for the employee's share of the health insurance premium. (Tr. 68.) On cross-examination, Liby testified that he believed it was mentioned at the meetings that employees would be compensated for the cost of the health insurance premiums, but added that he called Ringer after the meeting and asked how soon the insurance was going to be in effect. Ringer stated at that time that the employees were going to

be compensated for the insurance premiums (Tr. 77-78.) Liby testified that at the third or fourth meeting Ringer presented statistics regarding "different companies that had been pursued prior to this and the idea that if they went union, they wouldn't be able to financially keep the doors open, that they would have to close the doors." (Tr. 71.) On cross-examination, when Liby was asked what was said regarding the closure of the Respondent, Liby responded, "I can't remember exactly, just to the effect that it's a possibility that if they went union that they would have to close the doors. They wouldn't financially be able to support that." (Tr. 79.)

Bayne testified that he attended all of the meetings that were held to discuss the Union. Bayne briefly testified about the meetings saying that he did not recall either himself or Ringer promising a wage increase if the union was "voted in or out." (Tr. 158.) He also testified during 2012 there were no discussions with employees about "shutting the doors of Indiana Fire." (Tr. 158.)

Ringer testified that the meetings that were held with employees after the petition was filed did not involve discussions about wages. He indicated that while he discussed insurance, he did not talk to employees about wages or raises accompanying the implementation of health insurance. On cross-examination, Ringer specifically denied that at the August 20 meeting he told employees that Respondent was going to give raises to offset the cost of the insurance premiums. He also denied that employees had asked about raises at this meeting. In his affidavit furnished to the Regional Office during the investigation, however, Ringer stated that during the meetings "Some of the employees asked us about them raises that we had talked about when we had them signed the applications. We told them at that time we would get back to them about it."

Ringer also testified that he did not discuss shutting down the Respondent. He admitted, however, discussing the Union's website and its monthly newsletter. Ringer indicated that that in those materials, the Union had indicated that other employers had closed. Ringer also told employees that according to the Union's website "small companies have struggled when the union comes in." Ringer also admitted discussing at the meetings research he had performed on line and NLRB cases he was familiar with regarding "companies that have and have not made it." Ringer told employees that while the Union was a "fit" for some companies, it was not a "fit" for the Respondent. Ringer also relayed that he had spoken to other small business owners who had told him about the struggles their businesses had experienced with a union. Ringer told employees that he was concerned about the financial impact the Union might have on the Respondent as other businesses had closed after being organized.

Current employee John Lahr testified that he attended all the meetings held by the Respondent since the petition was filed. Lahr testified that there was a discussion about insurance at the meetings but, when employees asked what the cost would be, Ringer replied that he did not know yet. Lahr testified that wages were not discussed at the meeting. He did not recall Ringer ever saying anything about the Respondent shutting down and going out of business.

Current employee Kirk Ritter testified that he attended only one meeting in late July before he was called up for Army National Guard training. Because of that training he did not attend any of the other meetings. During the one meeting that he attended, Ritter testified Ringer did not say anything about wages or the Respondent shutting down.

Current employee Justin Bartlett testified he attended all of the meetings. He recalls Ringer discussing health insurance, but did not recall Ringer saying anything about receiving raises after the election to offset the health insurance premiums. He also did not recall Ringer saying anything about the Respondent closing. Similarly, current employee Jason Bartlett recalled Ringer discussing health insurance but did not recall Ringer making any statements about offsetting insurance premiums with raises. He also did not recall Ringer making any statements about the Respondent closing.

In determining what Ringer said during the employee meetings about wage increases being given to employees to offset the cost of insurance premiums, I first note that Bayne admitted that he and Ringer had discussed giving raises to employees to offset the cost of health insurance premiums before the petition was filed. Also prior to the petition being filed, Ringer told employees that the Respondent would like to give them raises in order to offset the cost of the insurance premiums. According to Ringer and Bayne, however, once the Respondent began to hold its weekly meetings after the petition was filed, Ringer said nothing about the raises that he had previously indicated he would like to give to employees to help offset the cost of the insurance premiums. Ringer and Bayne maintain that, even though there were discussions about the health insurance at the meetings, the issue of raises never came up. Ringer even denied that employees asked any questions at the meetings about the issue of raises. I note that his testimony in this regard conflicts with his pretrial affidavit which reflects that employees did question him about the raises and he replied that he would have to get back to them. Under the circumstances, I find the testimony of Ringer and Bayne, that there was no discussion about the raises at the postpetition employee meetings, to be implausible and I do not credit it. Similarly, I do not credit the testimony of Lahr, and Justin and Jason Bartlett that they did not recall Ringer saying anything about offsetting the cost of insurance premiums with wages at the postpetition employee meetings. Their testimony on this point appeared to be perfunctory and given in a manner that they felt would benefit the Respondent's position. Ritter was only present at the first meeting, and there is no claim that anything was said about the issues of raises at the first postpetition employee meeting.

The testimony of Ferguson and Liby that Ringer did make statements at the postpetition employee meetings regarding compensating employees for the cost of health insurance premiums was consistent on both direct and cross-examination. Their testimony is also inherently plausible under the circumstances I have described above. Accordingly, I find that at the August 13 employee meeting Ringer told employees that the Respondent would help them pay their portion of the health insurance premiums. I also find that at the fourth or fifth meeting Ringer told employees that they would be compensated for the cost of the health insurance premiums. Finally I find that Ringer told Liby individually that the employees were going to be compensated for their cost of the health insurance premiums.

I turn next to the alleged statements that Ringer made at the postpetition employee meetings regarding the possible closure of the Respondent's facility. Based primarily on Ringer's admissions, I find that at these meetings, Ringer told employees that the Union's website and monthly newsletter indicated that some employers have struggled and closed after their employees had selected a union. He also told the Respondent's employees that he done research on line and that he was familiar with "companies that have made it and those that have not made it." Ringer emphasized that the Union was a "fit" for some companies but not for the

Respondent. Ringer also relayed the struggles that other small business owners had told him they had experienced with a union. Finally, Ringer told employees that he was concerned about the financial impact the Union may have on the Respondent as other businesses had to close after being organized.

While Liby's testimony confirms that Ringer had presented statistics regarding other companies that had been organized by the Union he knew he could not remember exactly what Ringer had said about the Respondent closing its stores. Ferguson's testimony is not entirely consistent with Liby's. More importantly, however, his testimony on cross-examination demonstrated to me that it was likely that Ferguson's testimony regarding what Ringer said was based upon his interpretation of what Ringer stated rather than the actual language he used. For these reasons I do not credit the testimony of Ferguson and Liby on this issue to the extent it conflicts with the admissions made by Ringer.

I find the testimony of Jason and Justin Bartlett and Lahr regarding what Ringer said at the meetings regarding a possible closure of the Respondent's facility to be of little probative value.[12] In a brief and perfunctory manner they all testified that Ringer did not say that the Respondent would close. As I have indicated above, my findings regarding Ringer's statements at the meetings are based on Ringer's detailed testimony regarding this issue.

The Events of August 27, 28, and 29, 2012

On August 27, 2012, the election was held. Ferguson was the Union's observer at the election. As noted above, the tally of ballots issued at the election reflected that 2 votes were cast for the Petitioner, 4 votes were cast against it and there was one challenged ballot, an insufficient number to affect the results of the election.

Ferguson testified that after the election, when he asked Ringer about his assignment for the next day, Ringer instructed him to come to the office the next morning. When Ferguson reported to the office on August 28, he was wearing a union T-shirt. The T-shirt had "Local 669" on the pocket and the Union's logo on the back Bayne remarked that the Union had gotten him a new T-shirt but Ferguson did not respond to Bayne's comment. Ferguson brought doughnuts with him that morning. The icing on top of the doughnuts indicated "union yes" and "669." Ferguson offered them to Ringer and Bayne, saying that he was not a sore loser.

Liby arrived shortly after Ferguson. After Liby arrived Bayne asked Ringer if he wanted to talk to the two employees separately or together. Ringer and Bayne decided to speak to them separately so Ferguson went outside while they spoke to Liby. After Liby left the office, Ferguson went inside. Bayne asked him if he had anything to say to them. Ferguson replied no. Bayne asked "Are you ready to work?" Ferguson replied "yeah" and left to go to work. (Tr. 35) Later that day, Ringer and Bayne came out to the job site he was working on. Ringer asked him what the numbers on his shirt worked for, commenting whether they stood for "how many guys laid off?"

[12] Ritter attended only the first meeting in July. His testimony has no probative value on this issue as there is no contention that Ringer made any statements regarding the possible closure of the Respondent's facility until August 13.

Liby testified that on August 28, he was on his way to a job site when he received a phone call instructing him to report to the Respondent's office immediately. When he arrived at the office, Ferguson, Bayne and Ringer were present. Ringer and Bayne asked to speak to him first. Ferguson waited outside. According to Liby, Liby was asked about an inconsistency between his time records and the Respondent's GPS record regarding his use of a company vehicle. Specifically, Liby was questioned concerning a route he had taken home one day after work approximately one week earlier. Liby testified that on the day in question he left work early and took vacation time. On his way home from the job site, he took a different route and met union organizer Meyers. Liby testified that he had not claimed any time in excess of the actual time he spent on the job that day. After the conclusion of the meeting on August 28, Liby reported to the job site he was working on.

On August 29 Ringer and Bayne came to the job site that Liby was working on. While he was at the job-site, Ringer offered the doughnuts that Ferguson had brought into the office that morning to Liby and the other employees on the job site. Liby testified he overheard Ringer say "Look, we won the election and the Union is still purchasing stuff for us." Liby then asked Ringer about documents that Liby's loan officer had requested from the Respondent regarding Liby's application to refinance his home loan. Liby indicated that he had asked Ringer about completing this document before, but Ringer had never done so. On this occasion, Ringer told Liby he had spoken to his attorney and they had determined that they were not going to submit the loan documents until some things got straightened out with the GPS and Liby's time records. On cross-examination, Liby admitted that Ringer asked him why Meyer's phone number was on his loan application. (Tr. 75.) Liby testified that he told Ringer that he (Liby) must have given Meyers number to the bank but that the loan officer mistakenly put it on his loan document, as there was no reason for it to be there. (Tr. 75-76.) Liby further testified that he told Ringer that he was very unhappy and frustrated with the Respondent regarding Ringer's failure to complete the loan document.

Shortly afterward, after speaking with Bayne, Ringer again spoke to Liby and told him that he was going to go ahead and complete the loan document. At that time, Ringer asked Liby what his intentions were with regard to his job at the Respondent. Liby responded that his intention was that he was going to financially take care of his family. Later that day Liby received notification from the loan officer that he had received the document from Ringer.

Ringer testified that he had not requested Ferguson to report to the office on August 28. According to Ringer, Ferguson arrived at the office with the doughnuts and said "This is from the Union, we're providing breakfast this morning." After delivering the donuts, Ferguson left and went to his assigned job-site. Ringer specifically denied asking Ferguson "Are you ready to work."

Ringer testified that he did meet with Liby on August 28 to discuss inconsistencies in his time record. Ringer indicated the basis for this meeting was that approximately a week before the meeting he passed Libby on the highway early in the afternoon. When he received Liby's hours for that day there was an inconsistency that caused him to review the Respondent's GPS records to see if there were other inconsistencies. Ringer's review determined that there were. Ringer indicated he told Liby on August 28 what his review of the time and GPS records had revealed. Libby responded that maybe he was unclear on the Respondent's "drive policy." Ringer

indicated he was still investigating the issue at that time. Ringer denied that he met with Liby because of the results of the election the previous day.

Ringer testified that then August 29 did see Liby on a job-site when he and Bayne delivered a truckload of pipe. Ringer confirmed that he brought Ferguson's "union" doughnuts and offered them to all the employees on the job site. Ringer testified that Liby did ask him about the loan application and he responded that he had been busy but that he would fill it out. Ringer also testified that he told Liby that Meyer's cell phone was listed as Liby's business phone on the document. According to Ringer, Liby told him that there was a lot of chaos in his life and that "with everything going on with the union, I hope the union gets me a spot so I can get out of here." (Tr. 219.) Ringer testified he then asked Liby if it was his intention to leave the Respondent. Liby responded, "As soon as the union gets me a spot, I'm out of here. I have to do what's right for my family." (Tr. 219.) Ringer also confirmed that he completed the loan application form and sent it to Liby's bank.

Bayne testified, however, that the purpose of the August 29 visit to the job site that Liby was working on was to find out if Libby's intention was to continue to work for the Respondent. (Tr. 20-21; 167.) Bayne admitted that all the employees were not asked this question after the election. Bayne did not testify regarding the meeting held with Ferguson on August 28.

I credit Ferguson's testimony regarding the brief meeting he had with Bayne and Ringer on the morning of August 28. In the first instance, Bayne did not testify regarding this issue and thus Ferguson's testimony that Bayne asked him if he was "ready to work" was not contradicted by Bayne. In addition, Ferguson's testimony regarding the circumstances of the meeting is more convincing than Ringer's. I find it more plausible that Ferguson was asked to come to the office, rather than merely stopping by on his own initiative to offer Bayne and Ringer "union" doughnuts.

I further credit Liby's version of the conversation he had with Ringer on August 29 to the extent their testimony conflicts. While there is no dispute that Ringer, Bayne, and Liby met at the shop on August 28, to discuss Liby's time records, there is a dispute regarding occurred what occurred on the job-site on August 29. According to Liby, after discussing the loan documents that Liby had asked Ringer to complete, Ringer also asked Liby what his intentions were regarding his job at the Respondent. Libby's response was that he was going to take care of his family.

In Ringer's version, Liby initiated the discussion regarding his job with the Respondent, by saying that he was going to leave the Respondent as soon as the Union found in the job. It was only after that that Ringer asked Liby if he intended to stay with the Respondent. In the first instance, Bayne admitted that he and Ringer went to the job-site to asked Liby about whether he intended to stay with the Respondent. In addition, Ringer's version is somewhat implausible in that if Liby had already told Ringer that he hoped that the Union could get him a position so he could leave the Respondent, it seems somewhat redundant for Ringer to have asked Liby at that point what his intentions were with regard to working for the Respondent. Under Ringer's version, Liby had already told him his intentions.

Ringer struck me as a witness who at times would testify in a manner that he felt would better support his case and I find that this was one of those occasions. While I have some concerns about Liby's somewhat convoluted explanation as to how and why Meyers' cell phone number ended up on his loan application, that portion of his testimony involves a collateral matter. My concerns regarding Liby's testimony are outweighed by Bayne's admission and the unreliable and implausible testimony of Ringer regarding the issue of questioning Liby about his future intentions in working for the Respondent

The Strike of Ferguson and Liby and the Implementation of the Health Insurance Plan

On September 4, 2012, Ferguson went on strike against the Respondent. Liby also went on strike against the Respondent but it was later in September, as his last paycheck was dated September 28, 2012. Ferguson and Liby remained on strike at the time of the hearing and both employees had found work at other fire sprinkler system installation companies.

The Respondent also implemented the health insurance plan and began to deduct the employee portion of the premium from paychecks in September 2012. (Tr. 136, 142.) On or about September 14, 2012, employees, Jason and Justin Bartlett, Lahr, and Ritter received raises. (Tr. 23-24.)

Analysis

Whether the Respondent Refused to Hire, or Consider for Hire, Harmon in violation of Section 8(a)(3) and (1)

In *FES*, 331 NLRB 9, 12 (2000), the Board set forth the following framework for determining cases in which the complaint alleges a discriminatory refusal to hire:

> In order to establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982),first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. (footnotes omitted)

In order to establish a refusal-to hire-violation with regard to Harmon, the Acting General Counsel must establish that Respondent was hiring, or had concrete plans to hire, on July 13. It is undisputed that at that time that Respondent was not advertising for sprinkler fitters. In support of his position that the Respondent had concrete plans to hire, the Acting General Counsel relies on the testimony of Harmon that Bayne had actually offered him a job prior to their scheduled

July 13 meeting. However, as noted above, I have not credited Harmon's testimony that Bayne had actually offered him a job. Rather, I find that Bayne had asked Harmon to come to the Respondent's office to meet with him and Ringer and "go from there."

The Acting General Counsel also contends that the Respondent had concrete plans to hire because it had hired James Ringer and Brad Sutton after July 13. However, according to the Respondent's payroll records, Sutton received his first check on July 20 for 16 hours of work covering the period from Monday, July 9 through Sunday, July 15. (R Exh. 2, p. 39; Tr. 198.) According to the uncontroverted testimony of Ringer, Sutton's first day of work was July 9. Sutton was Bayne's brother-in-law and was hired by the Respondent in early July 2012. Prior to being hired Sutton had spoken to Ringer and Bayne about working on a part-time, as needed basis. Sutton had no sprinkler fitting experience but the Respondent had a job coming up (the Lippert job) that required a lot of demolition and had a tight completion schedule. Ringer and Bayne thought that Sutton could be helpful regarding the unskilled work on this project. The Respondent's payroll reflects that Sutton worked on an as needed basis through the end of 2012. During this period, while he worked 54.5 hours one week and 40 hours and another, in the remaining weeks his hours ranged from 4 to 34. In several of the weeks he worked less than 10 hours. (R Exh. 2, p.39.)

As noted above, James Ringer is a college student who performed unskilled work for the Respondent in the summer of 2011. In 2012 he again performed such work for approximately 6 weeks. The Respondent's payroll records reflect that he became employed by the Respondent in 2012 during the week of July 16 to July 22. His last check was dated September 7, 2012. (R. Exh. 2, p. 36; Tr. 198.)

Under the circumstances, the hiring of Sutton to perform unskilled work on an as needed basis and hiring James Ringer to perform such work for approximately 6 weeks in the summer, does not establish that the Respondent was hiring, or had concrete plans to hire a journeyman sprinkler fitter such as Harmon.

The fact that Harmon had an interview on July 13 also does not establish that the Respondent was hiring, or had concrete plans to hire. The record establishes that it is the Respondent's consistent practice for both Bayne and Ringer to interview prospective employees before they are hired. The record also demonstrates that the Respondent has interviewed two experienced sprinkler fitters and not hired them. The first such individual was a friend of Liby's, who was only referred to in the record as "Oscar." After Liby began working for the Respondent in June 2012, he spoke to Ringer and Bayne and told them that Oscar was an experienced sprinkler fitter who was looking for work. Both Ringer and Bayne knew Oscar from working on previous jobs with him. According to Ringer's uncontroverted testimony, although the Respondent was not actively seeking to hire employees, Ringer and Bayne interviewed Oscar in order to consider him if it needed experienced sprinkler fitters in the future. The Respondent did

not hire Oscar after interviewing him.[13]

In November or December, 2012, Ringer and Bayne interviewed another experienced sprinkler fitter from Florida who came across the Respondent's name through Google. This individual was also not hired after an interview. The Respondent's payroll records (R. Exh. 2) establish that it did not hire any experienced sprinkler fitters from July 13 through the end of 2012, even though Ferguson and Liby went on strike in September.

After considering all of the circumstances, I find that the Acting General Counsel has not established the first part of the test involving an alleged discriminatory refusal to hire under *FES* as the Respondent was not hiring full-time sprinkler fitters nor had concrete plans to do so at that time. Accordingly, I find that the Respondent did not refuse to hire Harmon on July 13 in violation of Section 8(a)(3) and (1) and I shall dismiss that allegation of the complaint.

I next consider the complaint allegation regarding whether the Respondent refused to consider Harmon for hire in violation of Section 8(a)(3) and (1) of the Act. In *FES,* supra, the Board found that in order to establish a discriminatory refusal to consider for hire, the General Counsel must show that:

> (1) that the respondent excluded applicants from a hiring process; and (2) antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. (Id. at 15.)

Applying that test to the instant case, it is clear that Bayne's call to Harmon on July 13 canceling his scheduled interview excluded Harmon from the hiring process. As I have indicated above, the Respondent's practice is for Ringer and Bayne to interview an applicant before he is hired. By canceling Harmon's interview on July 13 and not rescheduling it, Harmon was clearly excluded from the hiring process. Thus, the first part of the *FES* test has been established.

The next issue is whether antiunion animus contributed to the decision not to consider the applicant for employment. Based on the credited testimony of Harmon on this point, I find that Bayne called him on the morning of July 13 and canceled his interview, telling him that the Respondent was not hiring. When Harmon asked Bayne what he meant, protesting that Bayne had already hired him, Bayne told Harmon to call "Andy" when Harmon asked "Andy who", Bayne replied "Andy Meyers." As I have indicated above, the Respondent's practice is for Ringer and Bayne to interview an applicant before he is hired. By canceling the interview and not rescheduling it, Harmon was clearly excluded from the hiring process. Thus, the first part of the *FES* test is established.

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[13] I do not credit Liby's testimony that after the Respondent had interviewed Oscar, Bayne told him that, rather than hiring Oscar, the Respondent had hired an ex-union member who had been some trouble and deserved a second chance. Rather, I credit Bayne's denial that he had such a conversation with Liby (Tr. 160.) Since I have found that Bayne did not tell Harmon that he was hired, I find it implausible that he would have made such a statement to Liby.

The next issue is whether antiunion animus contributed to the decision not to consider Harmon for hire. By canceling Harmon's interview and telling him to call Meyers to find out the reason for the cancellation, Bayne clearly cancelled the interview because he believed that Hanson was aligned with the Union in his efforts to obtain a job at the Respondent. I find that Bayne's text message to Meyers later in the day on July 13 stating "I bet your plan got all fucked up today, better luck next time." is further evidence that Bayne believed that Harmon was acting in concert with the Union in his attempt to get a job with the Respondent. Finally, Bayne's pretrial affidavit indicating he canceled Harmon's interview because he believed the Union would videotape the Respondent's interview of a potential employee and use it against the Respondent supports the finding that antiunion animus was behind the cancellation of the interview.

The record establishes that Meyers' visit to the Respondent's premises on July 13 and Harmon's scheduled interview on the same date were coincidental. While Meyers had mentioned to Harmon in May 2012 that he had heard that the Respondent was hiring, there was no coordination between the Union and Harmon regarding the date his interview at the Respondent was scheduled. Board law is clear, however, that a prima facie case of discrimination against an employee does not fail because of the employer's mistaken belief that an employee has engaged in union activity. *Trader Horn of New Jersey, Inc*. 316 NLRB 194, 198 (1995); *Respond First Aid*, 299 NLRB 167, 169 fn. 13 (1990). The employer's suspicion that an employee has engaged in union activity is sufficient to satisfy the requirement of employer knowledge of an employee's union activity in a case alleging discrimination under Section 8(a)(3) and (1).

In the instant case, it is clear that the Respondent possesses antiunion animus when the only reason for canceling Harmon's interview was its belief that Harmon was acting in concert with union organizer Meyers in attempting to gain employment at the Respondent. In addition, the record clearly establishes that the Respondent was opposed to the attempt to organize its employees as engaged in an active campaign utilizing captive audience meetings an attempt to dissuade employees from supporting the Union. Thus, it is clear that the Acting General Counsel has established a prima facie case regarding the Respondent's discriminatory refusal to consider Harmon for hire.

The Respondent has not satisfied its burden to show that it would not have considered Harmon for hire, absent its belief that he was involved with the Union in his attempt to gain employment. There is no dispute regarding the fact that Harmon was a qualified, experienced sprinkler fitter. His qualifications were equal to or greater than that of the other experienced sprinkler fitters employed by the Respondent and Bayne was familiar with his qualifications from working with him in the past. On this record, there is no other explanation for the Respondent's cancellation of Harmon's interview on July 13 other than its belief he was acting in concert with the Union in attempting to gain employment. Accordingly, I find that the Respondent violated Section 8(a)(3) and (1) of the Act on July 13, 2012 by refusing to consider Harmon for hire.

Whether the Respondent violated Section 8(a)(1) of the Act by Interrogating Employees

The complaint alleges that on August 28 and 29, 2012, the Respondent violated Section 8 (a)(1) of the Act by interrogating employees. In his brief, the Acting General Counsel contends that the questions asked of Ferguson by Bayne on August 28 and Ringer's August 29 inquiry of Liby as to what his intentions were with respect to the Respondent, constitute unlawful interrogation. The Respondent contends that the questions asked of Ferguson and Liby did not elicit information regarding their union support, were not accompanied by any threats, and therefore were not coercive.

Based on the credited testimony, I find that on August 27, after the election was conducted in which Ferguson served as the Union's observer, Ringer asked Ferguson to come to the Respondent's office the next morning. This was not the norm as employees usually reported directly to the job-site they were assigned to. When Ferguson arrived at the office on the morning of August 28 he was wearing a T-shirt that had the Union's name and logo on it. Ferguson had brought doughnuts that indicating in the icing on the top "union yes" and "669." He offered the doughnuts to Ringer and Bayne, saying that he was not a sore loser. Shortly thereafter, Liby arrived and was told by Bayne and Ringer that they wished to speak to him privately. Ferguson waited outside of the office while Ringer and Bayne spoke to Liby.

After the meeting with Libby ended, Ferguson was asked to come into the office. When Ferguson came into the office Bayne asked him if he had anything to say to them. When Ferguson replied, "no." Bayne then asked him "Are you ready to work?" Ferguson replied, "yes" and then left the office to go to work.

On August 29, Ringer and Bayne visited the job site that Liby was working on. Bayne admitted that one of the reasons for their visit was to find out if Liby intended to continue to work for the Respondent. When Ringer first spoke to Libby, Liby asked Ringer about documents that Liby's loan officer had requested from the respondent regarding Libby's application to refinance his home loan. Ringer told Liby that he had spoken to his attorney and they determined they were not going to submit the loan documents until some things got straightened out with the GPS and Liby's time records. Ringer also asked Liby why Meyers' phone number was on his loan application. Liby told Ringer that he must have given Meyers's phone number to the bank but that the loan officer mistakenly put it on the loan document as there would be no reason for it to be there. Liby added that he was unhappy and frustrated with Ringer's failure to the requested documents to the bank.

Shortly afterward, after speaking with Bayne, Ringer again spoke to Liby and told him that he was going to go ahead and complete the loan documents and submit them to Liby's bank. Ringer then asked Liby what his intentions were with regard to his job at the Respondent. Libby responded that his intention was that he was going to financially take care of his family.

In asserting that the Respondent violated Section 8(a)(1) by questioning Ferguson and Liby of the Acting General Counsel relies on the Board's decision in *Scheid Electric*, 355 NLRB No. 27 (2010). In that case, the Board noted that in determining whether questions asked of an employee violate Section 8(a)(1) it considers:

> [W]hether under all the circumstances the interrogation [of an employee] reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act.

> *Bloomfield Health Care Center*, 352 NLRB 252 (2008), quoting *Rossmore House,* 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). Among the factors that may be considered in making such an analysis is the identity of the questioner, the place, and method of the interrogation, the background of the questioning and the nature of the information sought, and whether the employee is an open union supporter. (*Scheid Electric*,supra. at sl. op p. 1).

Applying those factors, I find that Bayne's questioning of Ferguson violated Section 8(a)(1) of the Act. The questioning was carried out by one of the Respondent's owners in his office. The background of the questioning supports a finding that the questioning was coercive. Immediately after the election, Ferguson directed to report to the office the next day. After giving "union doughnuts" to the Respondent's owners, Ferguson was asked if he had anything to say to them say to them. When he replied, "no" he was asked if he was ready to work and he replied "yes". Within this context, Bayne's questions were an attempt to obtain information from Ferguson as to whether he would continue in his support for the Union or, since the Union had lost the election, whether he was willing to set aside his support for the Union and commit himself to the Respondent.

I also find that Ringer's questioning of Liby on August 29 as to what his intentions regarding the Respondent were violated Section 8 (a)(1) of the Act. While this conversation occurred on the job-site and not in the Respondent's office, it was conducted by one of the Respondent's owners. The conversation between Liby and Ringer first involved the documents that Liby had requested the Respondent to submit to his bank regarding a loan application to refinance Liby's house. During this conversation Ringer asked Liby why Meyers' phone number was listed on Liby's loan documents.[14] Libby admitted that he must have given Meyers' phone number to the loan officer but did not understand why it appeared on the loan documents. This question and answer establishes that Ringer knew, or at least strongly suspected, that Liby was a supporter of the Union. Ringer later told Liby that he would complete the loan documents and submit them to Liby's bank but also asked him what his intentions were with regard to his job at the Respondent. I find that, in this context, Ringer's question was an attempt to elicit from Liby whether he would continue in his support for the Union or give his wholehearted support to the Respondent, who was willing to assist him in obtaining refinancing for his home.

The record establishes that the only two employees who were asked what their intentions were with respect to their work for the Respondent were the two known union supporters, Liby and Ferguson. Under the circumstances, I do not find that the Board's decision in *Rossmore House,* supra, privileges the Respondent's questioning of Ferguson and Liby. The Respondent's conduct reflects an intent to find out what the two known union adherents plans were for future union activities at the Respondent. In *Rossmore House* the Board specifically indicated that it would continue to weigh the setting and nature of interrogations involving open and active union supporters.Id. at 1178 fn. 20. The setting and nature of the interrogations in this case establish that the Respondent's questioning of Ferguson and Liby violated Section 8(a)(1) of the Act.

[14] The Acting General Counsel does not allege, and I do not find, this question to be unlawful.

5

The Objections to the Election

In Objection 1 the Union alleges that, during the critical period, the Respondent promised raises to employees to offset the cost of the health insurance policy.

Based on the credited testimony, I find that prior to the petition being filed on July 16, the Respondent had investigated the possibility of providing health insurance to its employees. Ringer and Bayne had expressed to employees their desire to provide health insurance and had given the employees questionnaires to fill out regarding relevant personal information in order to receive quotes on the cost of a policy. In June or early July, Ringer and Bayne discussed giving a raise to employees to help offset the cost of the employee portion of the health insurance premium. Prior to the petition being filed, Ringer expressed to employees that the health insurance was going to be an additional cost to the employees and he would like to give them raises to offset that cost.

After the petition was filed, the Respondent initially advised the employees at its weekly meetings regarding the upcoming election that it could not proceed with its plans to provide health insurance because of the filing of the petition. However, after contacting the Union and discussing the matter, the Respondent, with the Union's acquiescence, advised employees that it would go forward with its plans to offer health insurance coverage and that the Union had no objection to it.

Based on the credited testimony, I find that at the August 13 meeting with employees, Ringer repeated what he had said prior to the petition being filed, that the Respondent would help them pay their portion of the health insurance premiums. I find that at the fourth or fifth meeting, Ringer again told employees that they would be compensated for the cost of the health insurance premiums. Finally, Ringer also told Liby individually that employees would be compensated for their cost of the health insurance premiums.

In its brief, the Union indicates that while it concedes that the health insurance plan had been discussed with employees prior to the petition being filed, it does not concede that raises to offset the cost of that plan were part of the prepetition discussions with employees. The Union contends that the promise of a raise to offset the cost of the health insurance is objectionable conduct that warrants setting aside the election.

In its brief, the Respondent's primary argument regarding this objection is that it is not supported by credible evidence. Alternatively, however, the Respondent argues that if I should find that the Respondent did promise to give raises during the critical period, this conduct was not objectionable as the decision to implement the raises was also made prior to the petition being filed.

The Board's long-standing policy is that an employer's duty in deciding whether to grant improvements in working conditions while a representation proceeding is pending is to decide the question as it would if the Union were not on the scene. *Niblock Excavating, Inc*., 337 NLRB

53 (2001); *Kauai Coconut Beach Resort*, 317 NLRB 996, 997 (1995); *Great Atlantic & Pacific Tea Corp.*, 166 NLRB 27, 29 fn. 1 (1967).

In the instant case, prior to the petition being filed, Ringer and Bayne had decided to offer health insurance benefits to their employees and had begun the process of gathering information from the employees in order to receive quotes on the cost of a policy from insurance companies. Ringer also advised employees that the Respondent would like to give them a raise to help offset the cost of the employee's share of the health insurance premium.

After the filing of the petition, the Respondent initially advised employees that the plans for providing health insurance were on hold. However, the Respondent then discussed the issue of health insurance with the Union and informed it that the process of offering insurance to employees had begun prior to the petition being filed. The Union indicated to the Respondent that, under those circumstances, it had no objection to the process of obtaining insurance continuing during the critical period. After receiving the Union's acquiescence in this matter, the Respondent informed the employees that the Union did not object to the process of continuing to obtain health insurance and that the process would continue.

While the Union does not object to the Respondent's statements during the critical period regarding the ongoing process of obtaining health insurance, it objects to any statements that the Respondent made regarding giving raises to help offset the cost of health insurance premiums. However, prior to the petition being filed, in addition to the Respondent informing employees that it was going to provide health insurance, it also informed them that it would like to give them raises to help offset the cost of their portion of the premiums. Under the circumstances, I find that the Respondent's repetition of statements regarding raises being given to help offset the cost of health insurance premiums were not objectionable. The Respondent's conduct was consistent with what it told employees prior to the petition being filed and conforms to the policy of acting as if the Union was not on the scene.

Under the circumstances of this case, I find the Union's reliance on *Beverly Enterprises*, 322 NLRB 334 343-344 (1996) to be misplaced. In that case the employer promised employees, shortly before the election, that it was working on a 4 percent across-the-board wage increase. The Board found that the employer's statement violated Section 8(a)(1) and also constituted objectionable conduct. However, in *Beverly Enterprises* there was no evidence that the employer had actually begun consideration of granting an across-the-board prior to the filing of the petition. Accordingly, for the reasons expressed above, I find no merit to Objection 1and will overrule it.

In Objection 2 the Union alleges that the Respondent, through David Ringer, threatened to close the doors to the Respondent's facility if the employees voted in favor of the Union.

Based on the credited testimony, I have found that at the employee meetings held during the critical period, Ringer told employees that the Union's website and monthly newsletter had reflected that some employers have struggled and closed after employees had selected the Union as a representative. He also told employees that he had done research on line and had looked at NLRB cases and that he was familiar with "companies that have made it and those that have not made it" after being organized. Ringer told the employees of struggles that other small business

owners had told him they had experienced with unions. Finally, Ringer told employees that he was concerned about the financial impact the Union may have on the Respondent as other businesses had to close after being organized.

The Union relies principally on the Board's decisions in *Eldorado Tool, Division of Quamco,* 325 NLRB 222 (1997); and *Homer D. Bronson Co*, 349 NLRB 1, (2007) in support of this objection. The Respondent relies on the Board's decision in *Smithfield Foods*, 349 NLRB 1225 (2006), in support of its position that Ringer did not make any statements regarding the possible closure of the Respondent during the critical period that warrant setting aside the election.

In *NLRB v. Gissell Packing* Co., 395 U.S. 575, 618 (1969) the Supreme Court indicated that an employer "is free to communicate to his employees any of his general views about unionism or any of his specific views about the particular union so long as the communications do not contain a threat of reprisal or force or promise of benefit." An employer may even make a prediction as to the precise effects it believes unionization will have on its employees as long as such a prediction is:

> [C]arefully phrased on the basis of objective fact to convey [its] belief as to demonstrably probable consequences beyond [its] control… If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation… without the protection of the first amendment. Id at 618.

As the objecting party, the Union bears the burden of proving "misconduct that warrants setting aside the election." *Consumers Energy Co.,* 337 NLRB 752 (2002). In the instant case I do not find that the credited statements made by Ringer constitute objectionable conduct sufficient to set aside the election. Ringer made general statements regarding information he had obtained from the Union's website and monthly newsletter indicating that some employers whose employees it represented have struggled and closed. He also made similar statements that his online research and review of some NLRB cases revealed to him some companies that had made it and some that had not made it after being unionized. The only specific statement Ringer made about the Respondent was that he was concerned about the financial impact the Union may have on the Respondent as other businesses had to close after being organized. He also indicated, howeve,r that while he did not think the Union was "fit for the Respondent it was a fit for some companies. Ringer never made any specific statements that the Respondent would close if the Union won the election, or even that it could close under those circumstances.

I find the instant case to be distinguishable from the cases relied on by the Union. In *Eldorado Tool, Division of Quamco*, supra, the employer displayed a poster with a banner bearing the title "PLANT CLOSURES: UAW WALL OF SHAME." Beneath the banner were the names on tombstones of plants that had closed following their organization by the UAW. The day before the election the employer posted a tombstone with the name "Eldorado" on it with a question mark in the middle. The Board found that the title of the display clearly implied that the UAW was the cause of the prior plant closings. The Board also found that the depiction of the employer's plant on the tombstone constituted an implicit threat about the closure of the plant. Accordingly, the Board found the employer's statements violative of Section 8(a)(1).

In *Homer D. Bronson*, the employer conducted approximately 10 meetings with employees during an organizing campaign by the UAW. At one meeting, Spencer, a high-level manager, told employees, inter alia that at one time the company had manufacturing plants in Chicago and Beacon Falls, Connecticut but after repeated strikes by the Steelworkers Union, which had represented those employees, both plans had closed and the Beacon Falls operation was relocated to its present site, which was the facility that the UAW was attempting to organize. Spencer reminded employees that the facility had always been a nonunion facility. At another meeting conducted by Spencer and another high-level manager, Blancato, the employer presented a slide show that included a chart purporting to show that that over 15 years, 13 companies have closed putting 4141 employees, who used be represented by the UAW, out of work. Spencer told the employees that the closing showed that not only could the union not guarantee job security but in fact the opposite may be true. When an employee asked Blancato whether he was saying that the employer would move or close if the union came in, Blancato replied "no, I'm saying we could move or we could close if the union comes in."

In addition to the statements noted above, the employer displayed posters throughout the plant highlighting 5 of the 13 closed companies discussed in the slide show. The posters contain the statement, "These are just a few examples of plants where the UAW used to represent employees" the poster then asked the question "Is this what the UAW calls job security". The Board found the employer's statements constituted threats of plant closure in violation of Section 8(a)(1).

I find these cases to be distinguishable from the instant case. Ringer's statements regarding the experience of other employers were far more generalized than the statements made by the employers in both cases noted above. Ringer never even mentioned the possible closure of the Respondent's facility, let alone predicting that it would close if the employee selected the Union. This is an important factor in determining whether the Respondent made objectionable threats of plant closure. See *Smithfield Foods*, supra at 1227. Under the circumstances present in this case, I do not find that Ringer's statements constituted threats of plant closure in reprisal for attempting to organize within the meaning of *Gissell Packing* and the Board cases discussed above. Accordingly, I overrule Objection 2.

Since I have overruled the objections, I will issue a certification of results of election.

CONCLUSIONS OF LAW

1. The Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act by interrogating employees about their union membership, activities and sympathies.

2. The Respondent has engaged in an unfair labor practice in violation of Section 8 (a) (3) and (1) of the Act by refusing to consider for hire Marvin Harmon because it believed that Harmon had engaged in union activities.

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

4. The Respondent has not otherwise violated the Act.

REMEDY

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

The Respondent, having discriminatorily refused to consider for hire an employee because it believed he had engaged in union activity, must consider, in accord with nondiscriminatory criteria, Marvin Harmon, for future openings that arise, and notify Harmon, the Union, and the Regional Director of such openings in positions for which Harmon applied, or substantially equivalent positions.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Indiana Fire Sprinkler and Backflow, Inc., Fort Wayne Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union membership, activities, and sympathies.

(b) Refusing to consider for hire employee applicants because of their union affiliation or to discourage union activities.

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

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

(a) Consider, in accord with nondiscriminatory criteria, Marvin Harmon for future job openings that arise, and notify Harmon, the Union, and the Regional Director of such openings in positions for which Harmon applied, or substantially equivalent positions.

[15] 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.

5 (b) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful refusal to consider for hire Marvin Harmon, and within 3 days thereafter notify him in writing that this has been done and that the refusal to consider him for hire will not be used against him in any way.

(c) Within 14 days after service by the Region, post at its facilities in Fort Wayne and Leo, Indiana copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 13, 2012.

(d) 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.

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

IT IS FURTHER ORDERED that the following certification of results of election issue:

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for Road Sprinkler Fitters Local Union No. 669, UA, AFL-CIO and that it is not the exclusive representative of the bargaining unit employees.

Dated, Washington, D.C., March 28, 2013.

_____
Mark Carissimi
Administrative Law Judge

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

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT question employees about their union membership, activities or sympathies.

WE WILL NOT fail and refuse to consider applicants for hire on the basis of their union affiliation or to discourage 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 consider, in accord with nondiscriminatory criteria, Marvin Harmon for future job openings that arise, and notify Harmon, Road Sprinkler Fitters Local Union No. 669, UA, AFL-CIO, and the Board's Regional Director of such openings in positions for which Harmon applied, or substantially equivalent positions.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful refusal to consider for hire Marvin Harmon, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the refusal to consider him for hire will not be used against him in any way.

INDIANA FIRE SPRINKLER AND
BACKFLOW, INC.
_____
(Employer)

Dated _____ By _____
(Representative) (Title)

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

575 North Pennsylvania Street, Room 238, Indianapolis, IN 46204-1577

(317) 226-7381, Hours: 8:30 a.m. to 5 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (317) 226-7413.