NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Neises Construction Corp. *and* Indiana/Kentucky/Ohio Regional Council of Carpenters. Cases 13–CA–135991, 13–CA–139977, and 13–RC–135485

September 11, 2017

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On April 10, 2015, Administrative Law Judge Arthur J. Amchan issued the attached decision in this consolidated unfair labor practice and representation case. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed an answering brief, and the Respondent filed reply briefs responding to each answering brief. In addition, the General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision, Order, and Direction, and to adopt the recommended Order as modified and set forth in full below.[2]

The Respondent does residential concrete work in the Crown Point, Indiana area. In late June or early July 2014,[3] the Union began organizing the Respondent's wall and footer carpenters. On August 25 or 26, the Union informed Brian Neises, the Respondent's coowner, that it had obtained signed union authorization cards from a majority of the wall and footer carpenters, and it requested voluntary recognition. Neises declined, and the Union filed a representation petition on August 26. An election was held on October 3, and the tally of ballots showed 5 votes for and 3 against the Union, with 11 challenged ballots. The Union filed objections to the election, which were consolidated for consideration with the unfair labor practice allegations in this proceeding.

The judge found, and we agree, that the Respondent violated Section 8(a)(1) of the Act by posting a notice at its facility requiring employees to obtain a commercial driver's license (CDL), thereby implicitly threatening to enforce a policy which had never been previously enforced,[4] and by issuing reprimands to wall and footer employees Robert Carpenter and Mike Keilman.[5] We also agree with the judge's finding that the Respondent violated Section 8(a)(3) and (1) by terminating lead organizer Dominic Valenta.[6] Contrary to the judge, how-

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

The record shows that Union Representative James Slagle visited the Respondent's jobsite in July 2014, not July 2013 as the judge stated in his decision. This error does not affect our disposition of the case.

[2] We have amended the judge's conclusions of law and remedy consistent with our findings herein. We shall modify the judge's recommended Order to conform to our findings and to the Board's standard remedial language. We shall also substitute a new notice to conform to the Order as modified.

The General Counsel filed a motion to strike the Respondent's exceptions or, alternatively, for an extension of time to file a response to the Respondent's exceptions and cross-exceptions and a supporting brief. The Board's Associate Executive Secretary granted the requested extension of time, and the General Counsel subsequently filed an answering brief, cross-exceptions and a supporting brief, and a reply brief. Accordingly, we find that the motion to strike is moot.

[3] All dates are in 2014 unless otherwise stated.

[4] We agree with the judge that the Respondent violated Sec. 8(a)(1) by posting a notice of a CDL requirement that had never previously been enforced. The timing of the posting, shortly after the representation petition was filed, conveyed to employees a message that the Respondent intended to enforce the CDL requirement because of their union activities. See, e.g., *Robert Orr/Sysco Food Services, LLC*, 343 NLRB 1183, 1193 (2004); *Hall of Mississippi, Inc.*, 249 NLRB 775, 776–777 (1980). Thus, contrary to the Respondent's contention, it is irrelevant whether any employees were actually disciplined pursuant to the CDL policy after the new notice was posted.

[5] The complaint alleged that the reprimands violated Sec. 8(a)(3) and (1) of the Act. In his Conclusion of Law 2, the judge stated that the reprimands violated Sec. 8(a)(3) and (1), but in his decision, the judge found an 8(a)(1) violation only and did not address the 8(a)(3) allegation. In light of our finding below that the Respondent's stricter enforcement of its attendance policy violated Sec. 8(a)(3), we find that the reprimands, which were issued pursuant to this stricter enforcement, violated Sec. 8(a)(3) as well. See, e.g., *Dynamics Corp. of America*, 286 NLRB 920, 921 (1987), enfd. 928 F.2d 609 (2d Cir. 1991).

In any event, the Respondent filed a bare exception to the judge's conclusion that the reprimands violated Sec. 8(a)(3) and (1) and were objectionable. The Respondent presented no argument in support of this exception. Accordingly, pursuant to Sec. 102.46(b)(2) of the Board's Rules and Regulations, this exception may be disregarded, and we find it appropriate to do so here. See, e.g., *Encino Hospital Medical Center*, 364 NLRB No. 128, slip op. at 1 fn. 1 (2016); *New Concept Solutions, LLC*, 349 NLRB 1136, 1136 fn. 2 (2007).

[6] In affirming the judge's conclusion that Valenta's termination violated Sec. 8(a)(3) and (1) under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), we do not rely on his citation to *American Gardens Management Co.*, 338 NLRB 644 (2002), which characterizes *Wright Line* as requiring the General Counsel to establish a nexus between the employee's protected activity and the adverse employment action. See, e.g., *Mesker Door, Inc.*, 357 NLRB 591, 592 & fn. 5 (2011) (General Counsel estab-

ever, and as explained below, we find that the Respondent also violated the Act by more strictly enforcing its attendance policy and by threatening an employee with job loss and closure of the Company if employees chose to be represented by the Union. Finally, as discussed below, we shall direct the Regional Director for Region 13 to open and count four challenged ballots, to certify the Union as the employees' representative if the revised tally of ballots shows that the Union received a majority of the votes, and, if not, to conduct a rerun election.

1. As stated above, the judge found, and we agree, that the Respondent violated the Act by terminating Valenta and reprimanding Carpenter and Keilman. However, the judge dismissed the related allegation that, as evidenced by Valenta's termination and Carpenter's and Keilman's reprimands, the Respondent enforced its attendance policy more strictly in response to employees' union activities and thereby violated Section 8(a)(3) of the Act. We reverse.

Although the Respondent does not have a written attendance policy, it maintains annual attendance calendars for its employees, where it records their absences and tardies. The Respondent differentiates between excused and unexcused absences. Brian Neises determines whether an absence is excused or unexcused. Neises testified that there were two ways an absence would be considered unexcused: if the employee was a no show/no call, or if the employee called off the morning of the day he was supposed to work.

Before the representation petition was filed on August 26, the Respondent's enforcement of its attendance standards was lax. Employees Valenta, Mitchell Weidinger, and Benny Leviner all testified consistently that the only requirement regarding attendance was to notify the Respondent if they were going to be absent from work. However, they could call off as late as the morning of the day they were supposed to work without consequence, and they were not required to provide a doctor's note to take a sick day. While the Respondent's attendance calendars show that employees frequently incurred unexcused absences, the Respondent only issued three written attendance-related reprimands before the representation petition was filed. All three reprimands were issued to employees who were no show/no call. None refers to the employee calling off work, mentions a doctor's note requirement, or warns that the employee could be fired for poor attendance. Until Valenta's termination on August 29, the Respondent had never fired an employee for missing too many days, nor were employees told they could be fired for poor attendance.[7]

On August 26, the Union filed a petition for an election in a bargaining unit consisting of the Respondent's wall and footer carpenters. Three days later, on August 29, Valenta was terminated, assertedly for poor attendance. Valenta's written reprimand stated that he had been late eight times and had called off six times since June 9.[8] On September 9, the Respondent disciplined wall and footer crew employee Robert Carpenter for calling off work on September 3. Carpenter's written reprimand noted that he had called off 7 days since March 1 and stated: "We require people to give notice for time off

lishes antiunion motivation of employer's conduct by showing "union activity by the employee, employer knowledge of that activity, and antiunion animus by the employer"; the General Counsel's initial burden does not include a fourth "nexus" element).

Nonetheless, the judge correctly found that Valenta's union activity, which included talking to union representatives, distributing authorization cards, and encouraging coworkers to support the Union, was a motivating factor in the Respondent's decision to discharge him. The timing of Valenta's August 29 discharge—just 3 days after the Union filed the representation petition—and the Respondent's contemporaneous unfair labor practices show discriminatory antiunion animus. See *Lucky Cab Co.*, 360 NLRB 271, 274 (2014). Knowledge can be inferred from the Respondent's general knowledge of employees' union activities (which is established by the Union's disclosure to the Respondent on August 25 or 26 that a majority of the Respondent's employees had signed union authorization cards and by the filing of the representation petition on August 26), the timing of Valenta's discharge, and the Respondent's antiunion animus. See *Coastal Sunbelt Produce*, 362 NLRB No. 126, slip op. at 2 (2015). We also adopt the judge's finding that the reasons given for Valenta's discharge were pretextual, which further supports our finding that Valenta's discharge was unlawfully motivated and defeats any attempt by the Respondent to show that it would have discharged Valenta even in the absence of his union activities. See id. Finally, we find that Valenta's discharge violated Sec. 8(a)(3) on the additional basis that it resulted from the Respondent's stricter enforcement of its attendance policy, which was unlawful for the reasons explained below. See *Hyatt Regency Memphis*, 296 NLRB 259, 263 (1989), enfd. 944 F.2d 904 (6th Cir. 1991).

Chairman Miscimarra disagrees with his colleagues' understanding of the General Counsel's burden under *Wright Line*. In Chairman Miscimarra's view, the General Counsel must make a particularized showing that links an employee's protected activity to the adverse employment action. See *Wright Line*, above at 1089 (the General Counsel must make "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision"). In other words, the General Counsel must establish a link or nexus between the employee's protected activity and the particular decision alleged to be unlawful. See *Libertyville Toyota*, 360 NLRB 1298, 1306 fn. 5 (2014) (Member Miscimarra, concurring in part and dissenting in part), enfd. 801 F.3d 767 (7th Cir. 2015); *Starbucks Coffee Co.*, 360 NLRB 1168, 1172 fn. 1 (2014) (Member Miscimarra, concurring). Applying this standard, Chairman Miscimarra agrees that the General Counsel made the required showing in this case.

[7] Valenta received a written reprimand on June 10 because he was no show/no call on June 9. He testified that he was verbally warned that he could be suspended for further attendance problems, but he was not told that he could be fired. After the June 10 reprimand, Valenta did not receive any warnings or other discipline until he was fired on August 29.

[8] GC Exh. 11.

work—or bring in a doctor's note if you are sick."[9] The reprimand further warned: "If Robert continues his poor attendance his employment here will be terminated." Also on September 9, the Respondent issued a written reprimand to wall and footer crew employee Mike Keilman for not coming in to work that day (Keilman was in jail). Keilman's reprimand noted that he was late four times and had called off two times in August, and warned: "We need Mike's attendance to improve or his employment here will be terminated."[10]

An employer violates Section 8(a)(3) of the Act when it more strictly enforces its work rules in response to employees' union activities. *Print Fulfillment Services LLC*, 361 NLRB No. 144, slip op. at 3–4 (2014).[11] The judge dismissed the stricter enforcement allegation in this case on the ground that the "there is no evidence that Respondent had an attendance policy as of August 29." We find that the judge erred in this respect.

As an initial matter, the Respondent acknowledges that it maintained an unwritten attendance policy both before and after August 29.[12] In any event, the record reveals a clear difference between the Respondent's enforcement of attendance before the representation petition was filed and after it was filed. Beginning with Valenta and followed shortly thereafter by Carpenter and Keilman, the Respondent issued reprimands for conduct that had previously gone unpunished and imposed harsher disciplinary consequences. Three days after the representation petition was filed, the Respondent terminated Valenta for poor attendance and prepared a written reprimand that referred to days when Valenta called off work. Shortly after that, the Respondent issued written reprimands to Carpenter and Keilman that also referred to past instances of the employees calling off work and warned that continued poor attendance would result in termination. Carpenter's reprimand also stated that employees were required to provide a doctor's note if they were sick and referred to 3 days where Carpenter was absent due to illness as "non excused." Prior to Valenta, the Respondent had never disciplined, much less discharged, an employee for calling off work. And prior to Carpenter and Keilman, the Respondent had never required a doctor's note for sick days or threatened an employee with termination for poor attendance.

The Respondent offers no explanation for the change in its enforcement of its attendance policy. Instead, the Respondent contends that there was no change and that it enforced attendance inconsistently both before and after the petition was filed. That contention, however, is contradicted by the credited evidence, which shows that before the petition was filed, no employee had ever been fired for missing too many days, been issued a written reprimand for calling off work, been required to provide a doctor's note to take a sick day, or been warned that poor attendance could result in termination.[13] Although the Respondent did not more strictly enforce its attendance policy against flatwork crew employee David Chavez, whose attendance record was similar to Valenta's and considerably worse than Carpenter's or Keilman's,[14] this does not overcome the evidence showing the policy was more strictly enforced against Valenta, Carpenter, and Keilman. Moreover, Chavez was a member of the flatwork crew—and thus not a member of the unit that supported the Union—and his more lenient treatment further supports a finding that the change in enforcement of the Respondent's attendance policy against employees in the petitioned-for unit was discriminatorily motivated. See *Dynamics Corp. of America*, 286 NLRB at 921, 934 (finding employer's stricter enforcement of attendance policy unlawful where, among other things, union activists received disciplinary warnings while employees with similar attendance records who did not support the union did not).

Based on the evidence described above, we find that the Respondent more strictly enforced its attendance policy in retaliation for its employees' union activities and support. By doing so, the Respondent violated Section 8(a)(3) of the Act.

2. The judge found that, a few days before the October 3 election, Brian Neises told employee Benny Leviner that if employees selected the Union it would "crush" the

[9] GC Exh. 8. Carpenter's attendance sheet shows 4 "U's" (unexcused absence) and 3 "I's" (illness) during that time period. GC Exh. 3 at 8.

[10] GC Exh. 9.

[11] In *Print Fulfillment Services*, Chairman Miscimarra dissented from the majority's factual finding that the employer implemented a policy of stricter enforcement of its work rules. 361 NLRB No. 144, slip op. at 9 (Member Miscimarra, dissenting in part). He agrees, however, with the legal standard stated above, i.e., an employer that implements a policy of stricter enforcement of its work rules because employees engage in union activity violates Sec. 8(a)(3) of the Act.

[12] R. Answer Br. at 5.

[13] While the Respondent claims that employee Lino Rios was terminated for poor attendance in May 2014, the judge credited the testimony of Superintendent Ron Schaafsma that Rios simply "quit showing up." As stated above, we see no basis for overruling the judge's credibility determination.

[14] Chavez had 12 unexcused absences and 8 tardies from March 3, 2014 (the date he was rehired) through September 9. GC Exh. 3 at 10. Valenta had 11 unexcused absences and 10 tardies for the same time period. GC Exh. 3 at 49. Carpenter had 4 unexcused absences, 3 illnesses (which the Respondent apparently considered "non excused") and 1 tardy for the same time period. GC Exh. 3 at 8. Keilman had 3 unexcused absences, 1 illness, 2 days when he missed work because he was in jail, and 5 tardies. GC Exh. 3 at 25.

Respondent and that Neises could not afford to pay union wages. However, the judge found it unnecessary to determine whether these statements violated Section 8(a)(1). The General Counsel excepts to the judge's failure to rule on this allegation. In agreement with the General Counsel, we find that Neises' statements constituted unlawful threats of job loss and closure of the Company.[15]

Employees would reasonably understand that being "crushed" leads to closure and that being unable to pay employees' wages leads to layoffs or, ultimately, closure. Thus, Neises' statements implied that unionization would inevitably result in the Respondent laying off employees or closing the Company. Under *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), an employer is free to predict the effects it believes unionization will have on the company, so long as the prediction is "carefully phrased on the basis of objective fact to convey [the Employer's] belief as to demonstrably probable consequences beyond [its] control."

Neises did not provide any substantive support for his predictions. Rather, they were premised on an assumption that employees' selection of the Union as their collective-bargaining representative would automatically lead to higher wages that the Respondent would be unable to afford. Thus, Neises' statements lacked the requisite objective factual basis. See, e.g., *Iplli, Inc.*, 321 NLRB 463, 468 (1996) (employer's statement that unionization would lead to higher costs not based on objective fact because even if union were elected, it would not necessarily demand or be able to obtain through bargaining a contract that would substantially increase labor costs).[16] We therefore find that Neises' statements violated Section 8(a)(1).

3. Turning to the representation case, we adopt the judge's resolutions of the 10 remaining ballot challenges.[17] We also agree with the judge's recommendation to set aside the October 3 election if the revised tally of ballots shows that the Union did not prevail. In doing so, we adopt the judge's finding that the Respondent engaged in objectionable conduct by distributing a flyer stating that "bargaining starts from scratch" and "the union . . . start[s] with nothing and negotiate[s] from there."[18] In addition, the Respondent's unfair labor practices, all of which occurred during the critical period, constitute objectionable conduct as well. Specifically, the Respondent implicitly threatened to enforce a never-before-enforced policy by posting a notice about a CDL requirement, more strictly enforced its attendance policy, fired lead organizer Valenta, issued reprimands to wall and footer employees Carpenter and Keilman, and threatened wall and footer employee Leviner that the Respondent would close or lay off employees if the Union were elected. This unlawful conduct interfered with employees' exercise of free choice in the election. See, e.g., *Clark Equipment Co.*, 278 NLRB 498, 505 (1986); *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786 (1962).[19]

---

[15] We find it unnecessary to pass on the General Counsel's exceptions to the judge's failure to find that additional comments made by Neises were also unlawful, as the finding of any additional violations would not affect the remedy and therefore would be cumulative.

[16] In its answering brief to the General Counsel's cross-exceptions, the Respondent suggests, for the first time, that Neises' statements were supported by his experience with the unions representing the Respondent's drivers and excavators. As the Respondent did not raise this argument to the judge, we deem it untimely raised and thus waived. See *Smoke House Restaurant*, 347 NLRB 192, 195 (2006), enfd. 325 Fed.Appx. 577 (9th Cir. 2009).

Even if the Respondent had not waived this argument, it lacks merit. Neises did not inform Leviner that his statements were based on his experience with other unions. See, e.g., *DTR Industries*, 350 NLRB 1132, 1133 (2007) (prediction that unionizing would result in loss of customers and decrease in business unlawful where, among other things, employer did not provide employees with "context and basis" for its prediction), enfd. 297 Fed.Appx. 487 (6th Cir. 2008). Moreover, the wages the Respondent paid to other employees represented by other unions do not constitute objective evidence that the wall and footer employees' wages would automatically increase if they were unionized, much less that they would increase to the point that the Respondent could not afford them. See, e.g., *Iplli*, above at 468.

[17] Eleven ballots were challenged. Prior to the hearing, the Union withdrew its challenge to the ballot of Derrick Mann. In the absence of exceptions, we adopt pro forma the judge's recommendations to overrule two challenges (Benny Leviner and Brian Wegman) and sustain two challenges (Matthew Wegman and Ron Schaafsma). We agree with the judge's recommendation to overrule the Respondent's challenge to the ballot of Dominic Valenta for the reasons stated by the judge.

In affirming the judge's recommendation to sustain the Union's challenges to the ballots cast by flatwork employees Benjamin Lewis, David Chavez, Franky Pineda, Junior Perez, and Robert Rapka, we find that the stipulated election agreement unambiguously excludes these five employees, rendering these individuals ineligible at the first step of the three-step test set forth in *Caesar's Tahoe*, 337 NLRB 1096, 1097 (2002). We therefore find it unnecessary to pass on the judge's analysis under the community-of-interest test utilized at the third step of that test. For similar reasons, we also find it unnecessary to reach the Respondent's contention that the five challenged voters are dual-function employees. See *Halsted Communications*, 347 NLRB 225, 226 (2006) ("A dual-function analysis is a variant of the community-of-interest test, and it is not applied where the parties' intent to exclude the classification is clear" (fn. omitted).).

[18] In his decision, the judge found only that the flyer was objectionable, but in his Conclusion of Law 3, the judge stated the flyer was both objectionable and violated Sec. 8(a)(1). We do not adopt the judge's conclusion that the flyer violated Sec. 8(a)(1), as the flyer was not alleged to be unlawful, only objectionable.

[19] Chairman Miscimarra joins his colleagues in finding the election must be set aside if the revised tally of ballots shows that the Union did not win. He expresses no view on the soundness of the "virtually impossible" standard articulated in *Dal-Tex* and its progeny, which he acknowledges is extant law.

Accordingly, we will direct the Regional Director to open and count the ballots of Dominic Valenta, Benny Leviner, Derrick Mann, and Brian Wegman and, as appropriate, either issue a certification of representative or conduct a second election.

AMENDED CONCLUSIONS OF LAW

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

2. Indiana/Kentucky/Ohio Regional Council of Carpenters (Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Threatening employees by posting a never-previously-enforced requirement that employees must obtain a commercial driver's license (CDL) in response to employees' union activities or support.

(b) Threatening employees with job loss or closure of the Company if they select the Union as their bargaining representative.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by engaging in the following conduct:

(a) More strictly enforcing its attendance policy in retaliation for employees' union activities or support.

(b) Issuing reprimands to Robert Carpenter and Mike Keilman in retaliation for employees' union activities or support.

(c) Discharging Dominic Valenta in retaliation for his union activities or support.

5. The aforesaid violations affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. By the foregoing violations of the Act, which occurred during the critical period before the election, and by distributing a flyer during the critical period stating "bargaining starts from scratch" and "the union . . . start[s] with nothing and negotiate[s] from there," the Respondent has prevented the holding of a fair election, and such conduct warrants setting aside the election held in Case 13–-RC–135485.

AMENDED REMEDY

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

Specifically, we shall order the Respondent to remove from its files any reference to the written reprimands issued to Robert Carpenter and Mike Keilman and to notify them in writing that this has been done and that the reprimands will not be used against them in any way.

In addition to the reinstatement and backpay remedies ordered by the judge, and in accordance with our decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), we shall order the Respondent to compensate Dominic Valenta for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).[20] Additionally, the Respondent shall be required to compensate Valenta for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Finally, we shall order the Respondent to remove from its files any reference to Valenta's unlawful discharge and to notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Neises Construction Corp., Crown Point, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees by posting a never-previously-enforced requirement that employees must obtain a commercial driver's license (CDL) in response to employees' union activities or support.

(b) Threatening employees with job loss or closure of the Company if they select the Union as their bargaining representative.

(c) More strictly enforcing its attendance policy in retaliation for employees' union activities or support.

(d) Issuing reprimands to employees in retaliation for their union activities or support.

(e) Discharging or otherwise discriminating against employees in retaliation for supporting the Union or any other labor organization.

(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.

---

[20] For the reasons stated in his separate opinion in *King Soopers*, supra, slip op. at 12–16, Chairman Miscimarra would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

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

(a) Within 14 days from the date of this Order, remove from its files any reference to the written reprimands issued to Robert Carpenter and Mike Keilman on September 9, 2014, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful reprimands will not be used against them in any way.

(b) Within 14 days from the date of this Order, offer Dominic Valenta full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Dominic Valenta whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(d) Compensate Dominic Valenta for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Dominic Valenta, and within 3 days thereafter, notify Valenta in writing that this has been done and that the discharge will not be used against him in any way.

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

(g) Within 14 days after service by the Region, post at its facility in Crown Point, Indiana, copies of the attached notice marked "Appendix."[21] Copies of the notice, on forms provided by the Regional Director for Region 13, 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, 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. If 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 August 29, 2014.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 13 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.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 13 shall, within 14 days from the date of this Decision, Order, and Direction, open and count the ballots of Dominic Valenta, Benny Leviner, Derrick Mann, and Brian Wegman and issue a revised tally. If the revised tally of ballots shows that the Union received a majority of the eligible votes, the Regional Director shall issue a certification of representative. Alternatively, if the revised tally shows that the Union has not prevailed in the election, the election shall be set aside and a second election shall be conducted at such time as the Regional Director deems appropriate.

Dated, Washington, D.C. September 11, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

[21] 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."

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 threaten you by posting a never-previously-enforced requirement that you must obtain a commercial driver's license (CDL) in response to your union activities or support.

WE WILL NOT threaten you with job loss or closure of the Company if you select the Union as your bargaining representative.

WE WILL NOT more strictly enforce our attendance policy in retaliation for your union activities or support.

WE WILL NOT issue reprimands to any of you in retaliation for your support for or activities on behalf of the Union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful reprimands issued to Robert Carpenter and Mike Keilman, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the reprimands will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Dominic Valenta full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Dominic Valenta whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make Valenta whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Dominic Valenta for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 13, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Dominic Valenta, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

NEISES CONSTRUCTION CORP.

The Board's decision can be found at https://www.nlrb.gov/case/13–CA–135991 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Renee D. McKinney, Esq., for the General Counsel.

Arthur C. Johnson, II, Esq. (Johnson, Stracci & Ivancevich, LLP), of Merrillville, Indiana, for the Respondent.

Paul T. Berkowitz and Suzanne C. Dyer, Esqs. (Paul Berkowitz & Associates, Ltd.,), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Chicago, Illinois on February 9–11, 2015. The Indiana/Kentucky/Ohio Regional Council of Carpenters filed the charges giving rise to this case on September 3, and October 31, 2014. The General Counsel issued the consolidated complaint in this matter on December 30, 2014.

The two unfair labor practices charges were consolidated with the representation case arising from an NLRB election at Respondent's facility on October 3, 2014. In that election 5 votes were cast in favor of the Union (aka Charging Party/Petitioner), 3 were cast against it, and 11 ballots were challenged (9 by the Union; 1 by the Respondent Employer and 1 by the Board Agent). Thus, the case before me involves the 11 ballot challenges and the Charging Party Union's (aka the Petitioner's) objections to conduct affecting the results of the election.

On the entire record, including my observation of the de-

meanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent Employer and Charging Party (Petitioner) Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, Neises Construction Corp. does concrete work in the construction of residential houses. It operates from Crown Point, Indiana, where it annually purchases and receives goods, supplies, and materials valued in excess of $50,000 from companies which received those goods, materials, and supplies directly from locations outside of the State of Indiana. 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

The Indiana/Kentucky/Ohio Regional Council of Carpenters made an effort to organize Respondent's employees in 2013. It renewed those efforts in 2014 and obtained authorization cards from a number of Respondent's employees.

In July 2013, Union Representative James Slagle visited one of Respondent's jobsites. He talked to the crew leader/foreman James Andrisko and employees Dominic Valenta and Robert "Doug" Carpenter. On Monday, August 25 or Tuesday, August 26, two union representatives, Slagle and Scott Cooley, visited Respondent's offices and asked coowner Brian Neises to voluntarily recognize the Union. Neises declined and the Union filed a petition to represent a unit of Respondent's employees on August 26. The Union's attorney emailed Respondent a copy of its representation petition on August 26.

The termination of Dominic Valenta

Dominic Valenta worked for Respondent from 2011 until August 29, 2014, with the exception of a 3-month period in 2013 when he left Respondent for another job. During that time he worked almost exclusively on Respondent's wall and footing crews. He rarely worked on the concrete finishing (flatwork) crew. The footing crew constructs the concrete foundation for residential houses. The wall crew erects the basement wall of the house on the footing. Respondent's flatwork or finishing crew pours and finishes the concrete slab for the house's basement. The flatwork crew also does the concrete work for driveways, garages and porch steps, among other things.[1]

During July and August, Valenta spoke with union representatives in the presence of the wall crew leader James Andrisko.[2] He encouraged other employees to support the Union, including Larry Mills, the footing crew leader. Valenta gave union authorization cards to a number of employees, including Mills. While other employees returned signed authorization cards to Valenta, Mills did not do so.

In 2014, Valenta missed work on a number of days and arrived after the 6:50 clock-in time on many others. General Superintendent Ron Schaafsma issued Valenta a written warning for neither showing up to work nor calling-in on June 9, 2014. Schaafsma warned Valenta that he could be suspended for any more no-call, no-shows. Respondent has never had any formal, informal, written or verbal policy regarding attendance or tardiness. Moreover, it had never terminated any employee for poor attendance. I do not credit any of the testimony that Respondent terminated Lino Rios for poor attendance in May 2014. Instead, I credit the testimony of Superintendent Ron Schaafsma that Rios, "quit showing up," (Tr. 423).

On Friday, August 22, 2014, Schaafsma told Valenta, Everett Ballou and Mitchell Weidinger that he did not have any work for them for Monday, August 25 and Tuesday, August 26. On Sunday, August 24, Brian Neises called Weidinger and told him to come to work on Monday and Tuesday. On those days Weidinger did concrete finishing work. This was different than his normal tasks which were working on the construction of foundation footings and erection of basement walls.[3]

Valenta worked full days Wednesday, Thursday and Friday, August 27, 28 and 29. On Friday, August 29, 3 days after Respondent became aware that the Union had filed a representation petition, Larry Mills sent Valenta to Brian Neises' office. Neises informed Valenta that he was terminating his employment. Valenta asked Neises for a reason. Neises told Valenta that the reason for his termination was his attendance. He also told Valenta that work was slow and that he had to fire somebody. In late July 2014, Neises had hired two new employees for the flatwork crew, Jose Reyes and Jose Rodriguez. These two employees continue to work for Neises except for a short period of layoff in December 2014 (GC Exh. 3).

On August 29, Brian Neises prepared a notice of reprimand for Valenta (GC Exh. 11), which he never showed to Valenta. In that notice, Neises stated that Ron Schaafsma gave Valenta two days off on August 25 and 26 for poor attendance and that Schaafsma told Valenta that Respondent would not tolerate this. I find that the statements in this reprimand are false. Not only did Schaafsma fail to corroborate these statements, but I credit Valenta's testimony that he was told not to come to work on August 25 and 26 on the preceding Friday.[4]

In addition to uncontradicted testimony of Valenta and Mitchell Weidinger on this issue, Respondent's timecards show that three members of the footing and wall crews, Valenta, Everett Ballou and Benny Leviner, did not work on these days due to lack of work (GC Exh. 3), Bates stamp pages 4, 27 and 49. In addition, Ballou's timecard (GC Exh. 16(d)) shows that he was told to stay home on August 25 and 26. Finally, Valen-

[1] The concrete footing distributes the load of the basement wall so that the wall does not cut into the soil the way a knife cuts through a stick of butter.

[2] Superintendent Ron Schaafsma, who I find to be a statutory supervisor, also observed employees talking to union representatives in August 2014, Tr. 408-09. It is unclear whether Valenta was one of those employees.

[3] Weidinger's testimony on this issue was not contradicted by either Schaafsma or Brian Neises.

[4] Wall foreman James Andrisko could not remember if Valenta was at work on August 25 and 26 or whether he tried to get in contact with him on those dates (Tr. 374–375). I find that he did not do so. Footing crew foreman, Larry Mills, who is still employed by Respondent, did not testify in this proceeding.

ta's timecard (GC Exh. 16(f)) is inconsistent with Respondent's assertion that his absence from work on these days was unexcused. The "U" entered on Valenta's timesheet for August 25 and 26 (GC Exh. 3, p. 49), indicating an unexcused absence is a post-hoc and false justification for Valenta's termination, Tr. 578–579, G.C. Exhs. 16(f), 3 p. 49. There is no credible explanation for Valenta's termination, given its proximity to Respondent's knowledge of the representation petition, other than anti-union animus.

If I were to assume that Respondent had a nondiscriminatory reason for laying off an employee on August 29, it has made no showing that it made a nondiscriminatory choice of Valenta for layoff. On the other hand, if Valenta was discharged for poor attendance, the record establishes that he was treated disparately compared to David Chavez, whose poor attendance record was very similar to Valenta's.

Analysis

In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983) ; *American Gardens Management Co.*, 338 NLRB 644 (2002). Unlawful motivation and antiunion animus are often established by indirect or circumstantial evidence.

In order to make a sufficient initial showing of discrimination, the General Counsel must generally make an initial showing that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action.

Dominic Valenta engaged in protected union activity by supporting the Union, talking to union representatives, distributing union authorization cards and encouraging other employees to support the Union. As to employer knowledge, the Board has consistently held that direct evidence is not required. The Board may infer knowledge from such circumstantial evidence as the employer's knowledge of general union activity, its demonstrated union animus, the timing of the discharge and the pretextual reasons for the discharge asserted by the employer, *Lucky Cab Co.,* 360 NLRB 271, 275 (2014).

In the instant case, it is clear that Brian Neises was aware of union organizing as of August 26. The timing of Valenta's discharge 3 days later, in the absence of any other credible reason for the timing of his termination, leads me to conclude that Neises knew or suspected Valenta of union activity, bore animus towards him as a result and discharged him for this reason. This conclusion is also based on the pretextual nature of the reasons given for Valenta's discharge and the falsification of his timesheet indicating that his absence from work on August 25 and 26 was unexcused. Moreover, my conclusion that the nondiscriminatory reason asserted for Valenta' discharge was pretextual defeats Respondent's attempt to meet its rebuttal burden, id. at 276.

Additionally, should the counting of challenged ballots result in the Union losing the representation election, the 8(a)(3) discharge of Valenta warrants setting aside the results of the October 3, 2014 election, *Dal-Tex Optical Co.,* 137 NLRB 1782 (1962).

Other alleged unfair labor practices

Complaint paragraph V (a) & (b): Union Objection # 2

The General Counsel alleges that Respondent, by Brian Neises, threatened employees in about September 2014 that his company would be unable to compete and would close if it became a union shop. The General Counsel also alleges that Neises threatened employees that Respondent would lose its customers and would have to lay off employees if Respondent became a union shop.

The evidence relevant to these allegations is Benny Leviner's uncontradicted, and therefore credited, testimony at Tr. 133–137. A few days prior to the Friday, October 3, 2014 election, Brian Neises asked Leviner, an open union supporter, why he wanted the Union. Neises said Leviner was paid well, hadn't worked at Respondent very long and had a lot to lose. Neises told Leviner it would crush his company if the employees selected the Union. Further, he told Leviner that he did not want to do commercial work and that he could not afford to pay union wages.

There is no evidence that Brian Neises or any other supervisor or agent of Respondent specifically told employees that he would close his company or lay off employees if the Union won the election.

Analysis

I find it unnecessary to determine whether Neises' comments violated Section 8(a)(1) or provided a basis to set aside the election if the Union does not prevail upon a final counting of the ballots. Respondent has committed other significant violations of Act, which warrant setting aside the election if the Union loses. There is no need to address this complaint item as finding a violation and objectionable conduct would not result in any additional remedy.

Complaint paragraph V(c)

The General Counsel alleges that in about September 2014, Respondent posted a notice at its facility more strictly enforcing a requirement for employees to obtain commercial driver's licenses (CDL). In September 2014, Respondent posted a sign in the area in which employees put on their boots and work gear in the morning. That sign read as follows:

> *THIS JOB REQUIRES A CDL LICENSE*
>
> *EVERYONE* WAS INSTRUCTED WHEN YOUWERE HIRED—
>
> AND MANY TIMES SINCE THAT
> YOU WOULD HAVE TO GET A CDL LICENSE
>
> WE HAVE SEVERAL TRUCKS THAT CAN
>
> BE DRIVEN WITH A CHAUFFEURS LICENSE WHILE

> YOU ARE GETTING YOUR CDL. IT ISYOUR JOB TO GET THE
>
> PROPER LICENSE TO WORK HERE.
>
> IF TRUCK IS LESS THAN 26001 lbs YOU DO NOT NEED A CDL.

For at least several years prior to 2014, Respondent had posted notices in the same area that stated:

> ALL EMPLOYEES MUST BE ABLE TO DRIVE OUR TRUCKS
>
> Valid License—Chauffeurs-CDL-must be working on getting class "A" CDL

It also had posted a sign stating the Respondent would pay 99 percent of an employee's insurance if the employee had a class A CDL.

Respondent never enforced the requirement that employees either obtain a class A CDL or be working towards getting one. It routinely hired employees who had neither a CDL nor chauffeur's license. At least on some occasions, employees drove Respondent's trucks without the proper license. Respondent offered no explanation for posting its notice regarding CDLs shortly after the filing of the representation petition. Thus, I infer the posting was result of employees' union activities and therefore a violation of Section 8(a)(1), *La Reina, Inc.,* 279 NLRB 791 fn. 2 (1986); *Schrock Cabinet Co.,* 339 NLRB 182, 183–184 (2003).

The posting of the notice during the critical period between the filing of the representation petition and the October 3, 2014 election is also a sufficient basis for setting aside the results of the election and directing that a second election be conducted—if the Union does not prevail in the final ballot count from the first election, *Miller Industries Towing Equipment, Inc.,* 342 NLRB 1074, 1084 (2004).

Complaint paragraphs VI (a), (c) and (d) as amended at trial

The General Counsel alleges in complaint paragraph VI (a) that beginning on August 29, 2014, Respondent more strictly enforced its attendance policy. In VI (b) he alleges that Respondent violated the Act in terminating Dominic Valenta, in VI (c) he alleges that Respondent violated the Act in issuing a reprimand to Robert Carpenter on September 9, 2014, and in paragraph (d) in issuing a reprimand to Michael Keilman on the same day (GC Exhs. 8 & 9).

I dismiss paragraph VI(a) because there is no evidence that Respondent had an attendance policy as of August 29. However, it occasionally disciplined employees for attendance issues on an ad hoc basis. As to VI (b) I have already determined that Respondent violated Section 8(a)(3) and (1) of the Act in terminating Dominic Valenta. However, as discussed in this decision, Respondent's reliance on Valenta's attendance record was a pretext.

Respondent issued notices of employee reprimand to Robert Carpenter and Mike Keilman on September 9, 2014 (GC Exhs. 8 & 9). In both notices, it warned the employees that continued poor attendance would result in their termination. There is no evidence that Respondent had ever threatened an employee with termination for poor attendance prior to September 9. As stated above, I find that this threat shortly after the filing of the representation petition, without an alternative explanation, is related to employees' union activities. It is thus a violation of Section 8(a)(1) and objectionable conduct warranting setting aside the results of the October 3, 2014 election—if the Union loses.

Union Objection #1

The Union alleges that the first paragraph of Union Exhibit 1, which was distributed to employees with their timecards about a week before the election is objectionable. The flyer reads as follows:

> WHERE DOES COLLECTIVE BARGAINING BEGIN?
>
> Bargaining logically begins at the beginning, or as another hand-out stated, bargaining starts from scratch. That means that both the union and the company start with nothing and negotiate from there. When a union wins an election, it only gains the right to negotiate with the company for pay, working conditions, and benefits - NOTHING ELSE.
>
> The National Labor Relations Act specifically states that the company and the union need not give into the demands of' the other, rather, they only must bargain in good faith. Some things may stay the same, some things may improve, and some things may regress or be completely eliminated.
>
> Have you asked the Carpenters what employee benefits they may be willing to trade in order to obtain a union check-off clause, or their union dues clause?
>
> > The Union may have stated that it will get you Journeyman's' wages, but as you can see, the bargaining process starts from scratch. The Union cannot guarantee you anything, including Journeyman's wages.
> >
> > Remember, collective bargaining is really negotiations about the interests of three parties: the company, the union, and the employees. But only the company and the union are at the bargaining table. Under the law, the company bargains what's in its best interests; the union bargains what's in its best interests; where does that leave you?

The Board has long held that, depending on the context, an employer engages in objectionable conduct warranting the setting aside of an election when the employer tells employees that it could discontinue existing benefits and that it intended to start negotiating "from scratch" if employees chose union representation, *Rein Co.,* 111 NLRB 537, 538 (1955); *Federated Logistics & Operations,* 340 NLRB 255, 255–256 (2003).

I find that Respondent's handout is objectionable. First of all, the handout suggests that unit employees' current wages and benefits will be completely irrelevant in bargaining with the Union. To the contrary, the employer may make changes to existing benefits only as the result of a collective-bargaining agreement or reaching an impasse in good-faith bargaining. In suggesting that the Union must trade in existing benefits in order to obtain additional benefits, Respondent was strongly suggesting to employees that choosing union representation

would be futile and was a threat that employees would likely lose their existing benefits if the Union won the election, *Plastronics, Inc.* 233 NLRB 155, 155–156 (1977).

The Ballot Challenges

On September 5, 2014, Neises Construction and the Union entered into a stipulated election agreement. The bargaining unit was described in the agreement as follows:

> All full-time and part-time wall and footer carpenters employed by the Employer working out of its facility located at 1640 East North Street, Crown Point Indiana.
>
> Excluded: All other employees, all employees who are currently represented by other labor organizations,[5] managerial employees, professional employees, confidential employees, clerical employees, supervisors, and guards as defined by the Act.

The agreement further provides that eligible voters were those employed during the payroll period ending Saturday, August 30, 2014, including employees who did not work during that period because they were ill, on vacation, or were temporarily laid off.[6]

Amongst the categories of employees ineligible to vote were employees discharged for cause after the designated payroll period for eligibility.

Generally applicable principles

With respect to a ballot challenge, the burden of proof rests on the party seeking to exclude a challenged individual from voting, *Sweetener Supply Corp.,* 349 NLRB 1122 (2007).

To determine whether a challenged voter is included in a stipulated bargaining unit, the Board must first determine whether the stipulation is ambiguous. If not, the Board simply enforces the agreement. If the agreement is ambiguous the Board seeks to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent cannot be determined, the Board determines the bargaining unit by employing its normal community-of-interest test, *Caesar's Tahoe,* 337 NLRB 1096 (2002).

In order to determine whether a stipulation's intent is ambiguous or clear, the Board will compare the express descriptive language of the stipulation with the bona fide titles or job descriptions of the affected employee. If the employee's title fits the descriptive language, the Board will find a clear expression of intent and include the employee in the unit. If the employee's title does not fit the descriptive language, it will also find a clear expression of intent and exclude the employees from the unit. The Board bases this approach on the expectation that the parties are knowledgeable as to the employees' job titles and intend their descriptions in the stipulation to apply to those job titles, *Viacom Cablevision,* 268 NLRB 633 (1984).

The 11 Challenged Ballots

Dominic Valenta

Dominic Valenta worked for Respondent during the pay period ending August 30, 2014. Moreover, he would, so far as this record shows, have continued working for Respondent but for Respondent's discrimination against him. Thus, I overrule Respondent's challenge to his ballot. It must be opened and counted, *Ra-Rich Mfg. Corp.,* 120 NLRB 1444, 1446–1447 (1958).

Matthew Wegman

Matthew Wegman, the son of Brian Wegman, one of Respondent's crew leaders, worked for Respondent on the footing and walls crew from June 19, 2004 until August 16, 2014 (R. Exh. 2), Tr. 549.[7] He left Respondent's employment to attend college at Valparaiso University. Thus, Matthew Wegman was not employed by Respondent during the payroll period ending on August 30.

It is well settled that, in order to be eligible to vote, an individual must be employed and working on the established eligibility date, unless absent for one of the reason set out in the Direction of Election, *Ra-Rich Mfg. Corp*, supra*, Roy Lotspeich Publishing Co,* 204 NLRB 517 (1973). The same principle applies when a stipulated election agreement sets forth the reasons that an individual did not work on the eligibility date. Since Matthew Wegman did not work, was not ill, on vacation, or on a temporary layoff, I sustain the Union's challenge to Matthew Wegman's ballot. While Respondent argues that Matthew Wegman plans to return to work for it in the summer of 2015, there is no credible evidence to support this assertion.

Ron Schaafsma

The Union challenged Ron Schaafsma's ballot on the grounds that he is and was at all relevant time a statutory supervisor. Section 2(11) of the Act, defines "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." An individual who is a "supervisor" pursuant to Section 2(11) is excluded from the definition of "employee" in Section 2(3) of the Act and therefore does not have the rights accorded to employees by Section 7 of the Act.

A party seeking to exclude an individual from the category of an "employee" has the burden of establishing supervisory authority. The exercise of independent judgment with respect to any one of the factors set forth in Section 2(11) establishes that an individual is a supervisor. However, not all decision-making constitutes the independent judgment necessary to establish that an individual is a statutory supervisor, *Oakwood Healthcare, Inc.,* 348 NLRB 686 (2006).

This record establishes that Ron Schaafsma is a statutory su-

[5] Respondent's drivers are represented by a Teamster local, its equipment operators are represented by the Operating Engineers Union.

[6] Respondent's payroll periods were for one week, ending on a Sunday (GC Exh. 3, R. Exh. 2). Thus the payroll period covered by the stipulated election agreement ran from Monday, August 24, to Sunday, August 30, 2014.

[7] He also worked slightly less than 50 hours for Respondent in the summer of 2013.

pervisor. I find that he has the authority to hire new employees and/or to effectively recommend such action. I find further that Schaafsma exercises independent judgment in doing so. I do not credit Schaafsma's testimony regarding the limits of his authority. It is clear that several employees were hired after being interviewed by Schaafsma and no other management official. These include Benny Leviner and Dominic Valenta. Therefore, Schaafsma has, at least, the authority to effectively recommend the hiring of employees. This authority makes Schaafsma a statutory supervisor in the absence of any other considerations, *Donaldson Bros., Ready Mix, Inc.,* 341 NLRB 958, 962–963(2004).

I also do not credit Schaafsma's testimony of the limitations on his authority to assign and direct employees. Schaafsma has sufficient non-routine authority to assign and direct employees that I conclude that he is a statutory supervisory on this basis as well as his authority to hire. Unlike the crew leaders, Schaafsma moves from job to job during each workday and shifts employees from one job to another.[8] He also decides, or effectively recommends the composition of each crew, and exercises independent judgment in doing so. I sustain the challenge to Schaafsma's ballot; it should not be opened nor counted.

Benny Leviner

According to the Regional Director's report, Respondent challenged the ballot Benny Leviner on the grounds that he had worked an insufficient number of days or hours to be eligible to vote. In this regard, Respondent relies on the formula in *Daniel Construction Co.,* 133 NLRB 264 (1961). However, that formula is not applicable to employees, including newly hired employees, who are actually working in the bargaining unit during the payroll period of eligibility, *CWM, Inc.* 306 NLRB 495 (1992). Such employees are eligible to vote. The record shows that Leviner worked for Respondent on the footing and wall crews from late July to October 16, 2014. The challenge is overruled and Leviner's ballot should be opened and counted.

Benjamin Lewis, Brian Wegman, David Chavez, Franky Pineda, *Junior Perez and Robert Rapka*[9]

One of the principal issues in this case is whether the votes of Respondent's employees who were usually assigned to be the flatwork (concrete finishing) crew should be counted. If the designation of the employees' timesheets are "job titles" within the meaning of *Viacom Cablevision, supra,* then Benjamin Lewis, David Chavez, Franky Pineda, Junior Perez and Robert Rapka are not "wall and footer" carpenters within the meaning of the parties' stipulation. Brian Wegman is a "wall and footer" carpenter because that is how he is designated on the timesheets. The fact that the timecards of the flatwork crews were segregated from those of the wall and footer crew lends credence to the proposition that these designations are job titles.

The fact that Benjamin Lewis, David Chavez, Franky Pineda, Junior Perez and Robert Rapka are designated as flatwork employees also cuts in favor of upholding the Union's challenge to their ballots. When a stipulation agreement excludes "all other employees" as does this one, it will be read to exclude from the unit any employee whose classification does not match the stipulated bargaining unit description, *Bell Convalescent Hospital,* 337 NLRB 191 (2001). The Union argues that if the flatwork crew employees are included in the unit, then the phrase "all other employees" in the stipulation has no meaning.

I find that Benjamin Lewis, David Chavez, Franky Pineda, Junior Perez and Robert Rapka are excluded from the bargaining unit regardless of whether the description of flatwork employees is a formal job title or not. In excluding 3 temporary employees from a unit in *National Public Radio,* 328 NLRB 75 and fn. 2 (1999) the Board relied upon employer action forms, that appear to be something less than a formal job title. In footnote 2 the Board stated that in determining the definition of job classifications sought to be included in a stipulated unit, it may rely on the employer's regular use of the classifications in a manner known to its employees. In this case, Respondent clearly distinguished between "wall and footer" employees and flatwork employees, e.g. Tr. 494.

Indeed, the record establishes that Respondent distinguished between "wall and footer" employees and flatwork employees when selecting employees for layoff and imposing discipline, e.g. (Tr. 56–57). Thus, I find that flatwork employees are the "all other employees" excluded from the bargaining unit by the parties' stipulation. Therefore, I uphold the Union's challenge to the ballots of the Benjamin Lewis, David Chavez, Franky Pineda, Junior Perez, and Robert Rapka. Their ballots should not be opened nor counted.

Respondent contends that these employees' votes should be opened and counted pursuant to the community-of-interest test. I reject this contention. However, in the event higher authority disagrees with my conclusions. I will address the community of interest standard if applied to this case.

In determining whether a group of employees possesses a separate community of interest, the Board examines such factors as the degree of functional integration between employees, common supervision, employee skills and job functions, contact and interchange among employees, fringe benefits, bargaining history, and similarities in wages, hours, benefits, and other terms and conditions of employment. *Home Depot USA, Inc.,* 331 NLRB 1289 (2000); *Esco Corp.,* 298 NLRB 837 (1990).

Neises argues that all of the challenged flatwork employees regularly did the same kind of work that employees on the footing and wall crew performed and often worked together with members of the wall and footing crew. The Union contends that there was very little interaction between the flatwork employees and the wall and footing crew employees. Moreover, the Union contends that the wall and footing work performed

[8] At Tr. 400, Schaafsma testified that he *usually* talks to Brian Neises in the morning about moving an employee from one crew to another. His answer suggests that there are times he makes such a decision without consulting with Brian Neises. Moreover, if an individual has authority to assign employees (in other than a routine or clerical capacity) that individual is a supervisor even if he or she does not exercise that authority, *Arlington Masonry Supply, Inc.,* 339 NLRB 817, 818 (2003).

[9] The Union has withdrawn its challenge to the ballot of Derrick Mann. Therefore, Mann's ballot should be opened and counted.

by the flatwork crew employees was not substantially similar to that performed by the wall and footing crew employees.

Although the record is not crystal clear on this point, Respondent's brief at pages 8-9 suggests there is a distinction between the type of footing that supports the foundation of a new house and a footing that supports other structures (garages, mailboxes, etc.) and a difference between a wall that constitutes the foundation and other types of walls (for stoops, risers, retaining walls, etc.). The wall and footing crews normally worked on the walls that constituted the house's foundation and the footings that supported these walls. The flatwork employees did not normally do this work. Indeed, when Respondent's witnesses testified as to the types of footings flatwork employees worked on, they omitted footings for new house foundations.

There is a great disparity in the testimony on the extent of interaction between the flatwork employees on the one hand and the wall and footing employees on the other. Respondent's witnesses, who are mainly flatwork employees, testified without being served with a subpoena. All of them testified to regular interaction with the wall and footing employees. I do not credit any of their testimony on this issue.[10]

The Union's witnesses, on the other hand, testified that there was very little interaction between the flatwork employees and the wall and footing employees. Two of these witnesses Dominic Valenta and Benny Leviner, had been terminated by Respondent. A third, Mitchell Weidinger, either quit or was terminated. I do not credit the testimony of any of these three witnesses on this issue.

The Union's fourth witness, Mike Benko, is still employed by Respondent. He was laid off on January 5, 2015, for the second time in 23 years of employment with Respondent and was still on layoff during the February 9–11, 2015 hearing.

I find Benko to be the most credible witness with regard to the interaction between the flatwork employees and the wall and footing employees. The Board has recognized that the testimony of current employees, that is adverse to their employer, is particularly reliable in that it is adverse to their pecuniary interest, a risk not lightly undertaken, *Gold Standard Enterprises, Inc.,* 234 NLRB 618, 619 (1978); *Flexsteel Industries,* 316 NLRB 745 (1995). Given the likelihood that Benko would like to be recalled from layoff as soon as possible, I deem it highly unlikely that he would testify untruthfully or exaggerate. I therefore credit his testimony in full and credit it over any testimony to the contrary.

The timecards for the flatwork crew and the wall and footing crews were separated at Respondent's facility. The crews used some of the same tools, but some of their tools differed. Benko testified to the interchangeability of flatwork and wall/footing employees during the period January 1, 2014 through August 29, 2014. Benko himself worked exclusively on the wall/footer crew except for 2 weeks in the January-March 2014 timeframe when he performed labor tasks for the flatwork crew.

During this period he never saw Benjamin Lewis do wall and/or footer work. I discredit Lewis' testimony to the contrary and indeed find his testimony not credible.

David Chavez helped the wall crew for about a period of 2 weeks during the January-August timeframe.

Franky Pineda and Junior Perez did labor tasks, such as setting forms with the wall/footing crew on about 12–14 occasions during the January-August time period, usually when it rained. I discredit Pineda and Perez's testimony to the contrary (that they worked with wall/footing crew 2–3 days a week). Moreover, I find them generally incredible witnesses.[11]

Flatwork crew leader Robert Rapka helped tear down wall forms on about 4 occasions during the period January–August 2014.[12] I find that Benjamin Lewis, David Chavez, Franky Pineda, Junior Perez and Robert Rapka should be excluded from the bargaining unit even if the community of interest test is applied to this case. I do so on the basis of the very limited interaction between these employees and those on the wall and footer crews and the fact that the two crews had different supervisors. Moreover, Respondent generally treated the wall and footer crews as distinct entities from the flatwork crew employees.

On the other hand, Brian Wegman, another flatwork crew leader, acted as wall crew foreman when the regular foreman, Jim Andrisko, was on vacation, or was not at work for other reasons. Based on Brian Wegman's classification on the timesheets as a footer and wall employee and the extent of his work with the wall crew, I find that Brian Wegman's ballot should be opened and counted.

The Objections to the Election

After the ballots of Dominic Valenta, Benny Leviner, Derrick Mann and Brian Wegman are opened and counted, if a majority of the ballots are cast in favor of the Union, it should be certified as the exclusive collective bargaining representative of all full-time and part-time wall and footer carpenters employed by the Employer working out of its facility located at 1640 East North Street, Crown Point Indiana. If the majority of the ballots cast are not in favor the Union, the results of the October 3, 2014 election must be set aside and a new election held that properly reflects the will of the employees free from unfair labor practices or other objectionable conduct.

[10] I also do not credit the testimony of wall crew foreman James Andrisko as to how often flatwork employees worked with the wall crew. David Chavez, a flatwork employee whose ballot was challenged by the Union, did not testify at trial. I would note that all the flatwork employees who testified had an additional incentive to testify favorably for Respondent since they were all working during the trial while all the footer and wall crew employees had been laid off.

[11] Although, I am not a great believer that a trier of fact can discern anything from a witness' demeanor, I was struck by Perez's discomfort in testifying. I infer that he was testifying to facts about which he knew were at a minimum, exaggerated.

At p. 20 of its brief Respondent states that Mitchell Weidinger, in his rebuttal testimony at Tr. 607 confirmed that Pineda worked with the wall and footer crews 2–3 times a week during the period of January-August 2014. It is evident that Tr. 607, line 24 is either mistranscribed or that Weidinger misspoke. Tr. 607 lines 11–21 make that readily apparent.

[12] Respondent at page 24 of its brief cites Benko's testimony regarding Brian Wegman at Tr. 331 incorrectly by stating he was testifying about Robert Rapka. Rapka did not fill in for James Andrisko as wall foreman.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) of the Act, and engaged in objectionable conduct in threatening stricter enforcement of its requirement for a CDL license during the critical period between the filing of the representation petition and the election.

2. Respondent violated Section 8(a)(3) and (1) and engaged in objectionable conduct by threatening Robert Carpenter and Mike Keilman with termination for attendance issues during the critical period.

3. Respondent violated Section 8(a)(1) of the Act , and engaged in objectionable conduct in distributing a flyer during the critical period in which it stated that if employees chose union representation, bargaining would begin "from scratch."

4. Respondent violated Section 8(a)(3) and (1), and engaged in objectionable conduct in terminating Dominic Valenta on August 29, 2014.

THE REMEDY

The Respondent, having discriminatorily discharged Dominic Valenta, it must offer him reinstatement and make him whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010).

Respondent shall reimburse the discriminatee in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits the discriminatee's backpay to the proper quarters on his Social Security earnings record.[13]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Neises Construction Corp., Crown Point, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for engaging in union or other protected activity.

(b) Initiating any new rules or policies designed to discourage employees from selecting union representation.

(c) Threatening employees with stricter enforcement of Respondent's rules or policies to discourage them from selecting union representation

(d) Threatening employees with termination for absences or tardiness to discourage them from selecting a union to represent them.

(e) Suggesting to employees that it would be futile to select a union as their collective-bargaining representative because Respondent will start bargaining "from scratch."

(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.

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

(a) Within 14 days from the date of the Board's Order, offer Dominic Valenta full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Dominic Valenta whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Dominic Valenta, and within 3 days thereafter notify Dominic Valenta in writing that this has been done and that the discharge will not be used against him in any way.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful reprimands issued to Robert Carpenter and Mike Keilman and within three days notify them in writing that this has been done and that these reprimands will not be used against them in any way.

(e) Rescind any new rules or policies that were initiated between the filing of the Union's representation petition and the representation election on October 3, 2014.

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

(g) Within 14 days after service by the Region, post at its Crown Point, Indiana facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 13, 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 employ-

[13] I decline to order reimbursement for Dominic Valenta's expenses while searching for interim employment, in the absence of a Board Order changing existing law.

[14] 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.

[15] 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."

ees and former employees employed by the Respondent at any time since August 29, 2014.

(h) 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.

Dated, Washington, D.C., April 10, 2015

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 discharge or otherwise discriminate against any employee for engaging in union or other protected activity.

WE WILL NOT threaten you with stricter enforcement of any rules or policies in order to discourage you from selecting union representation.

WE WILL NOT initiate any new rules or policies in order to discourage you from selecting union representation.

WE WILL NOT convey the impression to you that selecting union representation will be futile by telling you that collective bargaining will begin "from scratch."

WE WILL within 14 days of this Order offer Dominic Valenta full reinstatement to his former job, or if that no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Dominic Valenta whole for any loss of earnings and benefits suffered as a result of his discharge, less any net interim earnings, plus interest.

WE WILL compensate Dominic Valenta for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days of this Order, remove from our files any reference to our unlawful termination of Dominic Valenta and our unlawful reprimands issued to Robert "Doug" Carpenter and Mike Keilman on September 9. 2014. WE WILL, within 3 days thereafter, notify them inwriting that this has been done and that Dominic Valenta's discharge and Robert Carpenter and Mike Keilman's reprimand will not be used against them in any way.

WE WILL rescind any changes to our rules and policies that were initiated during the period between the Union's filing of a representation petition on August 29, 2014 and the October 3, 2014 and WE WILL NOT enforce these rules and policies more strictly than they were being enforced prior to August 29, 2014.

WE WILL if the Union prevails in the final counting of the ballots from the October 3, 2014 election, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and part-time wall and footer carpenters employed by the Employer working out of its facility located at 1640 East North Street, Crown Point Indiana.
>
> Excluded: All other employees, all employees who are currently represented by other labor organizations, managerial employees, professional employees, confidential employees, clerical employees, supervisors, and guards as defined by the Act.

NEISES CONSTRUCTION CORP.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/13–CA–135991 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.