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**Erickson Trucking Service, Inc. d/b/a Erickson's Inc. and Local 324, International Union of Operating Engineers (OPEIU), AFL-CIO.** Case 07-CA-178824

August 27, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, KAPLAN, AND EMANUEL

On August 11, 2017, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent 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<sup>1</sup> and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions<sup>3</sup>

<sup>1</sup> The Respondent has requested oral argument. The request is denied because the record, exceptions, and briefs adequately present the issues and the positions of the parties.

The General Counsel moved to strike the Respondent's Exhs. A and B to its supporting brief. The Respondent filed an opposition and, in the alternative, a motion to reopen the record. We deny the Respondent's motion to reopen the record, as the Respondent has not demonstrated that the exhibits constitute evidence that is newly discovered or previously unavailable. See Sec. 102.48(c)(1) of the Board's Rules and Regulations. Further, in R. Exh. A the Respondent impermissibly attempts to attack the judge's credibility resolutions. See *Hagar Management Corp.*, 313 NLRB 438, 438 fn. 1 (1993), enfd. 55 F.3d 684 (D.C. Cir. 1995). And in R. Exh. B, the Respondent seeks to proffer evidence concerning an alleged event that occurred after the close of the hearing. See *Allis-Chalmers Corp.*, 286 NLRB 219, 219 fn. 1 (1987). Accordingly, we grant the General Counsel's request to strike the exhibits.

No exceptions were filed to the judge's conclusions that the Respondent: (1) did not violate Sec. 8(a)(1) when payroll clerk Nancy Tejchma told Keith Stephenson not to speak with his union representative during a conversation about wages; (2) did not violate Sec. 8(a)(1) when Owner Steven Erickson told Matthew Rowe he was being discharged because Erickson knew some employees were not happy there anymore; and (3) did not violate Sec. 8(a)(5) when Erickson told recently discharged employees that they could get their jobs back if they got the Union to change its conduct.

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

only to the extent consistent with this Decision and Order.<sup>4</sup>

At a meeting on June 20, 2016, the Respondent, through President Steven Erickson, discharged employees Erin Baerman, Jason Baerman, and Nicholas Willer, informed them that they were being discharged because of the Union's actions on their behalf, and implicitly promised them that they could be reinstated if they convinced the Union to change the manner in which it represented them. The judge found that the discharges violated Section 8(a)(3) and (1) and that Erickson's statements, as described above, violated Section 8(a)(1), and we agree.<sup>5</sup>

decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

The Respondent also excepts to some of the judge's evidentiary rulings. It is well established that the Board will affirm an evidentiary ruling of a judge unless that ruling constitutes an abuse of discretion. See *Aladdin Gaming, LLC*, 345 NLRB 585, 587 (2005), review denied sub nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008). After a careful review of the record, we find no abuse of discretion in any of the challenged rulings.

<sup>3</sup> In affirming the judge's conclusions we do not rely on *PPG Aerospace Industries*, 355 NLRB 103 (2010), a decision that issued at a time when the Board lacked a quorum. In addition, the judge cited *Alton H. Piester, LLC*, 353 NLRB 369 (2008), a case that was also issued by a two-Member Board. However, prior to the issuance of the Supreme Court's decision in *New Process Steel v. NLRB*, 560 U.S. 674 (2010), the United States Court of Appeals for the Fourth Circuit enforced the Board's Order, see *NLRB v. Alton H. Piester, LLC*, 591 F.3d 332 (4th Cir. 2010), and there is no question regarding the validity of that court's judgment.

<sup>4</sup> We shall amend the judge's conclusions of law to conform to the violations found. Also, in his remedy, the judge ordered reinstatement and make-whole relief for the discriminatees both because the respondent discharged them and purportedly because it refused and failed to recall them. However, there was no allegation in the complaint that the Respondent unlawfully refused and failed to recall the employees, nor was this issue litigated at the hearing. Therefore, we correct the remedy to eliminate the reference to such an allegation. We shall modify the judge's recommended Order to conform to our findings, and we shall substitute a new notice to conform to the Order as modified.

<sup>5</sup> We further agree with the judge's findings that the Respondent violated Sec. 8(a)(3) and (1) of the Act by discharging employees Carlos Ocampo, Matthew Rowe, and Keith Stephenson, and Sec. 8(a)(1) of the Act by threatening E. Baerman with discharge and by informing Stephenson that he was being discharged because of the Union's actions.

In affirming the judge's finding that the Respondent independently violated Sec. 8(a)(1) of the Act by informing the employees that they were being discharged in part because of the Union's actions on their behalf, Members Kaplan and Emanuel note that the Respondent's exceptions to these findings challenge only the judge's credibility determinations and that there is no basis for reversing those determinations. However, in the view of Members Kaplan and Emanuel, the issue of whether advising employees that the reason for their discharge is due to protected concerted or union activity independently violates Sec. 8(a)(1) or, rather, is subsumed by an unlawful discharge violation warrants reconsideration in a future appropriate case. See, e.g., *Triple Play Sports Bar & Grille*, 361 NLRB 308, 316 fn. 2 (2014) (Member Miscimarra, dissenting in part, citing former Chairman Hurtgen's par-

During the same meeting, Erickson stated that the Union's business manager was "the most arrogant son of a bitch I've ever met who wants to run your union like Hitler." The judge found that this statement disparaging the Union was an additional violation of Section 8(a)(1). We disagree.<sup>6</sup> "[A]n employer may criticize, disparage,

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tial dissent in *Benesight, Inc.*, 337 NLRB 282, 285 (2001)), review denied sub nom. *Three D, LLC v. NLRB*, 629 Fed.Appx. 33 (2d Cir. 2015). Member Emanuel further notes that the credited statements at issue here expressly identified the Union as a reason for the Respondent's adverse action and thus would be unlawful on their face. This distinguishes them from the *Triple Play* employer's statements that it was discharging the employees because of their Facebook activity, statements that were not unlawful on their face; rather, to find those statements unlawful, the Board needed to make an intervening legal finding that the Facebook activity was protected.

<sup>6</sup> Member Pearce dissents. He agrees with the judge that Erickson's June 20 statement to the employees that Union Business Manager Doug Stockwell was "the most arrogant son of a bitch I've ever met who wants to run your union like Hitler" violates Sec. 8(a)(1). Employer statements disparaging a union are unlawful when, in context, they have a reasonable tendency to interfere, restrain, or coerce employees in the exercise of their Sec. 7 rights. See, e.g., *Turtle Bay Resorts*, 353 NLRB 1242, 1278 (2009), incorporated by reference 355 NLRB 706 (2010), enf.d. 452 Fed.Appx. 433 (5th Cir. 2011). Statements that might otherwise be lawful in isolation, violate the Act if "uttered in a context of other unlawful unfair labor practices that 'impart a coercive overtone' to the statements." *Shamrock Foods Co.*, 366 NLRB No. 117, slip op. at 14 (2018), citing *Reno Hilton*, 319 NLRB 1154, 1155 (1995). See also *Fred Meyer Stores*, 362 NLRB No. 82, slip op. at 3-4 (2015), enf. denied 865 F.3d 630 (D.C. Cir. 2017). Member Pearce finds that Erickson's disparagement of Stockwell occurred in just such an unlawful, coercive context.

The majority ignores this context, and in so doing ignores the coercive nature of this statement. Erickson uttered the disparaging statement about Stockwell *after* terminating Erin and Jason Baerman and Willer and telling them it was because of the Union and *before* informing the three that the situation could be reversed if they convinced the Union to back down. Sandwiched in a single conversation between laying the blame on the Union for the terminations and the implied promise of benefits, the disparaging statement was part and parcel of the Respondent's attempts to undermine the Union and convey to employees that continued reliance on their union representatives would be futile. Thus, in conjunction with the very conduct that the majority finds unlawful—telling employees they are being terminated because of the Union, the discharges, and the implied promise of benefits—Erickson stated that he was "done dealing with [Business Representative] Brandon [Poppo]" and was "not going to answer his calls or texts" and he was likewise done dealing with Stockwell (who he immediately termed an s.o.b. comparable to Hitler). Viewed contextually, the statements about the two union representatives, including the disparagement of Stockwell, conveyed "an implicit threat that employees' representation by the Union would be futile (i.e., that the Respondent would not fulfill its statutory obligations)" unless the employees change their representatives or the way the Union interacts with the Respondent. See *Regency House of Wallingford, Inc.*, 356 NLRB 563, 567 (2011).

Member Pearce finds that viewed from the employees' perspective, Erickson's disparagement of Stockwell was inextricably intertwined with his other unlawful actions and would reasonably tend to coerce the employees in the exercise of their Sec. 7 rights. See, e.g., *Cayuga Medical Center at Ithaca, Inc.*, 365 NLRB No. 170 slip op. at 7 (2017).

or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of employees." *Children's Center for Behavioral Development*, 347 NLRB 35, 35 (2006). Erickson's remark was merely ancillary to the unlawful conduct during the meeting. Although flip and intemperate, the remark did not convey a threat, imply a sense of futility,<sup>7</sup> or otherwise interfere with the employees' Section 7 rights. See *Trailmobile Trailer, LLC*, 343 NLRB 95, 95 (2004). It was therefore a lawful expression of Erickson's opinion, which is protected by Section 8(c) of the Act. See 29 U.S.C. § 158 (c); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Accordingly, we reverse the judge and dismiss this allegation.

#### AMENDED CONCLUSIONS OF LAW

Delete Conclusion of Law 3(c), and reletter the subsequent paragraph.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Erickson Trucking Service, Inc. d/b/a Erickson's Inc., Grand Rapids and Muskegon, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(d) and reletter the subsequent paragraphs accordingly.

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs accordingly:

"(c) Compensate Erin Baerman, Jason Baerman, Carlos Ocampo, Matthew Rowe, Keith Stephenson, and Nicholas Willer for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee."

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

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And, contrary to his colleagues, Member Pearce finds Sec. 8(c) is no defense to the Respondent's threat of futility in employees' union representation if they did not heed to his advice and its implicit threat of reprisal. The majority's decision to wrap its 8(c) defense around a statement cherry picked from its unlawful context flies in the face of Board jurisprudence and gives license to coercive conduct. See *Southern Bakeries, LLC*, 364 NLRB No. 64, slip op. at 2 (2016), enf. granted in part, denied in part 871 F.3d 811 (8th Cir. 2017). Accordingly, the disparaging statement violates Sec. 8(a)(1).

<sup>7</sup> We note that, contrary to the dissent's implication, the General Counsel's complaint did not allege that the statement at issue conveyed a sense of futility or implicitly threatened reprisal.

Dated, Washington, D.C. August 27, 2018

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Mark Gaston Pearce, Member

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Marvin E. Kaplan Member

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William J. Emanuel, Member

(SEAL) 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 terminate or otherwise discriminate against you because Local 324, International Union of Operating Engineers (OPEIU), AFL-CIO (the Union) acted to secure you higher wages or otherwise represented you.

WE WILL NOT threaten you with termination because of the Union's conduct on your behalf.

WE WILL NOT tell you that you are being terminated because of the Union's conduct on your behalf.

WE WILL NOT implicitly promise you that you can get your job back if you get the Union to change the way that it represents you.

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, offer Erin Baerman, Jason Baerman, Carlos Ocampo, Matthew Rowe, Keith Stephenson, and Nicho-

las Willer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Erin Baerman, Jason Baerman, Carlos Ocampo, Matthew Rowe, Keith Stephenson, and Nicholas Willer whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest, and WE WILL also make such employees whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Erin Baerman, Jason Baerman, Carlos Ocampo, Matthew Rowe, Keith Stephenson, and Nicholas Willer for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 7, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Erin Baerman, Jason Baerman, Carlos Ocampo, Matthew Rowe, Keith Stephenson, and Nicholas Willer, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

ERICKSON TRUCKING SERVICE, INC. D/B/A  
ERICKSON'S INC.

The Board's decision can be found at <https://www.nlr.gov/case/07-CA-178824> 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.



*Colleen J. Carol, Esq.*, for the General Counsel.  
*Keith E. Eastland* and *Matthew M. O'Rourke, Esqs. (Miller Johnson)*, for the Respondent.  
*Amy Bachelder, Esq. (Sachs Waldman, PC)*, for the Charging Party.

## DECISION

## STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This matter is before me on a complaint and notice of hearing (the complaint) issued on November 30, 2016,<sup>1</sup> arising from unfair labor practice charges that Local 324, International Union of Operating Engineers (OPEIU), AFL–CIO (the Union or the Local) filed against Erickson Trucking Service, Inc. d/b/a Erickson’s Inc. (the Respondent or the Company) on June 20.

Pursuant to notice, I conducted a trial in Grand Rapids, Michigan, on April 26–28, 2017, at which I afforded the parties a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. I left the record open on April 28, 2017, for the parties to file joint exhibits regarding the Respondent’s daily work orders. On May 26, 2017, the General Counsel and the Respondent filed a joint motion to admit Joint Exhibits 2 through 11 (consisting of over 3500 work orders for the period from July 1, 2016, through April 21, 2017), along with factual stipulations regarding them. The Charging Party had no objections. On June 2, 2017, I granted the motion, admitted the stipulated documents and factual stipulations, and closed the record.

## Issues

(1) Did Steven Erickson, the Respondent’s Owner/President, on May 16, when he terminated Matthew Rowe and Keith Stephenson, violate Section 8(a)(1) by stating that they were being terminated because of the Union’s conduct in representing them?<sup>2</sup>

(2) Did Erickson, in about late May, violate Section 8(a)(1) by threatening Erin Baerman with termination because of the Union’s conduct in representing employees?

(3) Did Erickson, on June 20, when he terminated Erin Baerman, Jason Baerman, and Nicholas Willer, violate Section 8(a)(1) by disparaging the Union; stating that they were being terminated because of the Union’s conduct in representing them; and implicitly promising that they could get their jobs back if they got the Union to change the way it was representing them?

(4) Did Nancy Tejchma, the Respondent’s payroll clerk, in about late December 2015, violate Section 8(a)(1) as an agent of the Respondent, by threatening Stephenson with unspecified consequences if he continued to communicate with Union Business Representative Brandon Poppo on wage rate issues?

(5) Did the Respondent violate Section 8(a)(3) and (1) by terminating the following employees because they sought the Union’s assistance on wage rate issues and/or because the Union acted to secure them higher wages or otherwise represented them?

A. Matthew Rowe and Keith Stephenson on May 16.  
B. Erin Baerman, Jason Baerman, and Nicholas Willer on June 20.

C. Carlos Ocampo on July 8.

(6) Did Erickson violate Section 8(a)(5) and (1) by bypassing the Union and engaging in direct dealing with Erin Baerman, Jason Baerman, and Willer when he terminated them on June 20; more specifically, implicitly promising that they could get their jobs back if they got the Union to change the way it was representing them?

For purposes of deciding the issues in this case, I concur with the Respondent (R. Br. at 82) that determining whether the Respondent recognizes the Union as a Section 8(f) construction industry bargaining agent, or a 9(a) bargaining agent, is unnecessary. Both the Respondent (R. Br. 82) and the General Counsel (GC Br. at 18) agree that regardless of which it is, the Respondent was obliged to avoid bypassing the Union and dealing directly with employees.

On June 1, 2017, I granted the General Counsel’s unopposed motion to withdraw the allegations in the complaint that the Respondent violated Section 8(a)(5) and (1) by, on about May 17, unilaterally discontinuing its practice of laying off employees by seniority.

## Witnesses and Credibility

The General Counsel called Union Business Representative Brandon Poppo; all of the six terminated employees named above; Cody Velat, who was laid off in December 2015; and current employee Jamey Foster.

The Respondent called Owner/President Steven Erickson (Erickson); Controller Brent Erickson, his son; and Payroll Clerk Nancy Tejchma, whose testimony was limited to denying that she had conversations about payroll with Erin Baerman in 2014 or 2015, or with Stephenson in December 2015.

Collectively, the General Counsel’s witnesses were generally consistent and credible.

None of them appeared to make any apparent efforts to embellish their testimony in their favor or to leave out information that might help the Respondent’s case.

Willer and brothers Erin and Jason Baerman all testified that at their June 20 layoff meeting, Erickson stated that he was going to sell the smaller cranes—consistent with Erickson’s account and defense, leading me to believe that they were candid. Moreover, all three gave somewhat similar but not identical accounts of what was said at that meeting, causing me to conclude that they testified from genuine recall rather than from a script. I note that Erin Baerman gave the most detailed recall of the three—perhaps due to his prior position as a police officer—and I find his version the most reliable.

Significantly, the Baerman brothers, Ocampos, Foster, Rowe, Stephenson, and Willer all attributed statements to Erickson—over a period of months—that demonstrated express or implied animus toward them for seeking the Union’s assistance with their wage rates, and/or toward Poppo or union officials in general for seeking higher wage rates for them. I simply cannot believe that all of them concertedly conspired to fabricate such testimony. Moreover, their credibility is buttressed by Erick-

<sup>1</sup> All dates hereinafter occurred in 2016 unless otherwise indicated.

<sup>2</sup> Despite Erickson’s use of the term “layoff,” all of the layoffs herein were permanent layoffs or terminations, as opposed to the short-term temporary layoffs that were a standard part of the Respondent’s business operation in the construction industry.

son's own statements expressing anger at the Union, in a December 23, 2015 email to union attorney Andrew Nickelhoff (GC Exh. 17): "It seems the current Local 324 representation wants to circumvent our company's policy as punishment for not signing a bogus contract they delivered to me a couple of months ago . . . I would expect that our Union would be better served if the representatives were trying to convert non-union contractors instead of pissing off the longstanding union contractor?"

I will now address rejected evidence that the Respondent sought to introduce to bear negatively on Erin Baerman's and Rowe's credibility. I precluded the Respondent's counsel from delving into what he proffered was Erin Baerman's termination as a police officer from the North Muskegon Police Department. In this regard, when I asked counsel for any documentation relating thereto, to review in camera, he responded that he had none and that he was unaware of any adjudication finding merit to the termination. In such circumstances, I stated, I would not allow the Respondent's counsel to go on a "fishing expedition." At the outset of the hearing, I cited, inter alia, Rule 611 (a) of the Federal Rules of Evidence, which provides that the court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as (1) make the interrogation and presentation effective for the ascertainment of the truth; (2) avoid needless consumption of time; and (3) protect witnesses from harassment or undue embarrassment. I adhere to my ruling on all three grounds.

On the same grounds, I adhere to my ruling barring the Respondent's counsel from introducing evidence of Rowe's prior felony conviction,<sup>3</sup> which occurred within the last 10 years. I reviewed the documentation in camera and determined that the conviction was not of the kind that would bear on Rowe's propensity for truthfulness and veracity.

The Respondent's counsel cited Rule 609 of the Federal Rules of Evidence for the proposition that a felony conviction within 10 years must be admitted. However, this is not necessarily so.

Rule 609 (a)(1)(A) provides that evidence of a prior conviction (within 10 years) to attack a witness' character for truthfulness must be admitted, subject to Rule 403, in a civil case in which the witness is not a defendant, if the crime was punishable by death or imprisonment for more than 1 year. Rule 403, which I also cited at the opening of the trial, provides that relevant evidence may be excluded if its probative value is substantially outweighed by, inter alia, the danger of unfair prejudice or confusion or the issues, or by considerations of undue delay and waste of time. Under that caveat, evidence of the conviction was properly excluded under Rule 609(a)(1).

Rule 609(a)(2) alternatively provides for admission of prior convictions for crimes involving dishonest acts or false statements, regardless of the potential punishment. As the Sixth Circuit of Appeals stated in *U.S. v. Washington*, 702 F.3d 886, 893 (6th Cir. 2012):

A crime of dishonesty or false statements involves some element of active misrepresentation. The 'dishonesty or false

statement' language excludes 'those crimes which, bad though they are, do not carry with them a tinge of falsification.' See *United States v. Ortega*, 561 F.3d 803, 806 (9th Cir. 1977). . . . The rule is intended to inform fact-finders that the witness has a propensity to lie, and , as morally repugnant as some crimes may be, crimes of violence or stealth have little bearing on a witness's character for truthfulness.

Inasmuch as the conviction was not for a crime entailing any element of dishonesty or falsification, I appropriately rejected evidence thereof.

Based on my observations of Erickson's demeanor and the manner in which he testified, I have no doubt that he is a seasoned, strong-willed businessperson with a forceful personality, as reflected by the times he had to be reminded to wait until the Respondent's counsel finished his question before answering, and his demonstrable annoyance when pressed to give direct answers. By his own testimony and that of other witnesses, Erickson maintains sole personal control over the Respondent's business decisions and obviously has a great deal of personal stake in the Company, which his family has owned since the early or mid-1920s. To the extent that his testimony downplayed his irritation at Popp and the other union officials for injecting the Union into employee wage disputes that he and Tejchma had previously handled internally, I do not credit him.

Erickson has owned the business and been its sole owner and officer since 1983. During that time, he has had collective-bargaining agreements not only with the Operating Engineers but also with the Iron Workers and International Brotherhood of Teamsters. He himself was a member of the Local from 1974–1983. According to his own testimony, disputes with operators over contractual pay rates have been a common occurrence. In these circumstances, I find quite implausible his claim that when Popp attempted to talk to him about employee wage disputes in late 2015, he believed that he was prohibited from doing so by privacy rules unless employees gave their express permission. Moreover, such a contention flies in the face of logic—if an employee seeks the Union's assistance in a wage dispute, the Union obviously needs to know the circumstances of the dispute in order to ascertain whether the employee has been properly paid.

Other factors undermined the reliability of his testimony. Firstly, Erickson was very confident and detailed when he was testifying on general business matters, such as the nature of his business or the types of cranes the Company has used. In contrast, when Erickson addressed matters going to the heart of the allegations herein, he had a much shakier, shifting, and uncertain recall. The following demonstrate this pattern.

When asked on direct examination about a telephone conversation he had with Popp in early January, Erickson first testified that Popp asked about resolving some outstanding issues, and he replied that he did not have the time to do at the moment.<sup>4</sup> However, when his counsel then asked further questions, Erickson expanded his answer:<sup>5</sup>

<sup>4</sup> Tr. 577.

<sup>5</sup> Tr. 578.

<sup>3</sup> R. Rejected Exh. 1 (sealed).

Q: Anything else you can recall about that discussion with Mr. Poppo?

A: Not that I recall.

Q: Was there any discussion about the Union potentially filing a legal action as an unfair labor practice?

A: I think that was—his initial conversation was we need to resolve some outstanding issues or there could be charges brought.

Q: Did he say that in that discussion?

A: Yes, that was the question he asked, yeah.

In describing his conversation with Foster in January, after Foster had taken over the position of shop steward, Erickson only later added that he told Foster that it was not good to have two camps in the shop, one for Foster, and the other for the previous steward.<sup>6</sup> Moreover, in describing that conversation, Erickson first said, “I didn’t say anything about Brandon Poppo,” but then testified, “I said I don’t think Brandon’s helping you by appointing you steward . . . I think Brandon’s putting you in a bad position.”<sup>7</sup>

When asked on direct examination if Stephenson said anything on May 20 in response to Erickson’s statements about the reasons for his layoff:<sup>8</sup>

A: I don’t remember what his—There wasn’t a lot of conversation. It was short. He was a little bit surprised and the conversation was pretty much over.

Q: Did he ask you what the real reason for the layoff was, anything like that?

A: He may have, yeah. I think he did ask me that question. . . And I explained. . . .

Q: Did Mr. Stephenson ask you if it had anything to do with the Union?

A: He may have asked if it had anything to do with him transferring to the Operating Engineers.

Although Erickson’s testimony on direct examination concerning the June 20 layoff meeting made no mention of Poppo, on cross-examination, he testified that he did say “it wasn’t helping that Brandon Poppo was ‘out taking the work away from us.’”<sup>9</sup>

Although Erickson was evasiveness in answering whether the Associated General Contractors agreement, which the Union wanted to apply, paid higher wages than his shop agreement, the August 3 position statement submitted on the Respondent’s behalf (GC Exh. 15) stated that the AGC rates resulted in a 30–40 percent increase in labor costs. When the General Counsel asked if he had had a concern that the demand for higher wages could result in a strike, he replied “no,”<sup>10</sup> again contrary to the position statement.

Finally, in describing the reasons the six terminated employees in 2016 were selected for layoff, Erickson said nothing on

direct examination about their not having an assigned crane being considered. However, on cross-examination, he brought this up, stating that the six employees operated either 40 or 60-ton cranes “[o]r didn’t have a crane assigned to them.”<sup>11</sup> This is curious in light of Respondent Exhibit 26, according to which five of the eleven crane operators who remained after the layoffs are listed as “not assigned.” Furthermore, he did not give a clear, coherent description of the criteria that he uses for short-term layoffs. Instead, he gave only a very nonspecific answer when asked if he has a general methodology that he uses to assess qualifications based on experience and other factors.

For all of the above reasons, I credit the General Counsel’s witnesses where their testimony conflicted with his.

Brent Erickson has been the controller only since March, after the Union had already filed grievances and unfair practice charges related to employees’ wage rates. He played no role in the decisions to terminate any of the six employees at issue. To the extent that his testimony primarily related to documents concerning the overall financial status of the Respondent, such documents were admitted without objection, and I find them reliable as far as their contents.

Payroll Clerk Nancy Tejchma’s testimony was so brief that I cannot base any credibility findings on its content or her demeanor. Stephenson was a credible witness and testified in much greater detail. He further testified that about 3 weeks after Tejchma spoke with him about payroll, in about late December 2015, Erickson made a remark to him that was very similar to hers. Accordingly, I credit his account of what she said. I note that although Stephenson had to be refreshed by his affidavit on what Erickson said to him at the time of his termination, his testimony concerning what Tejchma and Erickson told him in December 2015 and January was steady and unequivocal.

#### Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents, written and oral stipulations, and the helpful posttrial briefs that the General Counsel, the Respondent, and the Charging Party filed, I find the following.

At all times material, the Respondent has been a C corporation with offices and places of business in Grand Rapids and Muskegon, Michigan, engaged in providing crane, rigging, and heavy hauling services to the construction industry. During the calendar year ending December 31, 2015, a representative period, the Respondent performed services valued in excess of \$50,000 in States other than the State of Michigan. The Respondent has admitted the facts necessary to establish Board jurisdiction, and I so find.

The Respondent performs numerous services to its clients, including crane service, rental, and assembly; transportation of machinery; trucking and heavy transportation; moving machinery in and out of buildings; building modules, and rigging.

In 1983, Steven Erickson (Erickson) became the owner of the business, which his grandfather started in 1922. He is the

<sup>6</sup> Tr. 586–589.

<sup>7</sup> Tr. 587–588.

<sup>8</sup> Tr. 522, et. seq.

<sup>9</sup> Tr. 640.

<sup>10</sup> Tr. 607.

<sup>11</sup> Tr. 634.

sole shareholder and the sole officer (president and secretary/treasurer). Prior to assuming ownership, he was a member of the Local from 1974.

Erickson maintains a personal office at the Muskegon facility but not at the Grand Rapids location. The Company has four administrative departments: (1) accounting headed by Controller Brent Erickson, his son, with three other employees, including Payroll Clerk Nancy Tejchma; (2) engineering three employees; (3) operations Operations Manager Brian Sharp, who handles that Grand Rapids facility's day-to-day operations, and one other employee; and (4) sales three employees.

The Respondent currently employs about 70 employees total, with about 62 based in Grand Rapids and the remainder based in Muskegon. Three unions represent units of its employees: the Union, the International Brotherhood of Teamsters (Teamsters), and the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers (Iron Workers).

Of the current employees, 18 or 20 are permanent full-time operating engineers (operators) represented by the Union. All but one or two of them work out of Grand Rapids. The Union has represented employees for several decades, going back at least as far as May 1973 when Joseph Willer was hired. (GC Exh. 13 at 1; R. Exh. 16 at 2.)

Sixteen of the employees are represented by the Teamsters. Half of them drive trucks, and the other half are involved in performing maintenance on all of the equipment in the Respondent's fleet, including trucks, cranes, and facilities. The Respondent employs about 25-30 Iron Workers, who are engaged primarily in rigging services, moving machinery in and out of plants, and most crane assembly.

The Respondent and the Union are parties to a collective-bargaining agreement effective from May 1, 2014, through April 3, 2017 (GC Exh. 3), covering a number of counties in west Michigan, including those where Grand Rapids (Kent County) and Muskegon (Muskegon County) are situated. The unit description (art. I sec., 1) is:

All full-time and regular part-time Operating Engineers, including equipment operators, oilers, apprentices and on the job trainees employed within the State of Michigan in building, heavy, underground, highway, bridge and airport construction work, employed by the Employer at or out of their facilities located at [the Grand Rapids and Muskegon facilities].

Article I Section 2 provides:

The Employer agrees to inform the Union of its manpower requirements within the bargaining unit when additional manpower is required and will give the Union an opportunity to furnish applicants. Present employees shall be given first opportunity for new jobs.

Pursuant to this article, the Union operates a non-exclusive hiring hall, which gives the Respondent the right to hire "off the street." Erickson has generally directly hired permanent full-time employees, and then notified the Union of their hire. On the other hand, for short-term job-specific work, he has generally gone to the hiring hall. Additionally, as a matter of

practice, the Union has allowed the Company to use its retirees for up to 39 hours a month through direct hire. In the period from approximately late March to late July, the Respondent utilized six retirees. (GC Exh. 14 at 1, 10.)

Work for the operators is seasonal, with the summer months being the busiest, and the winter months the slowest. Many of the Respondent's permanent full-time operators have also had short-duration layoffs following the completion of a job, after which Erickson directly called them back to work.

As far as layoffs, nothing in the contract addresses the criteria that the Respondent should use. Moreover, the provision (Article 13(b)) that the Respondent furnish slips stating the reason for discharge or layoff and whether the termination is temporary or permanent has never been enforced or followed.

The grievance and arbitration procedure is contained in article 8. Step 1 is between the supervisor and the union steward; step 2, in writing, is between the supervisor and the union business representative; step 3 is between the Union's business manager or president and a company officer; step four is non-binding mediation; and step five is binding arbitration. There is no evidence that prior to 2015, the Union ever filed a grievance under the terms of the collective-bargaining agreement.<sup>12</sup>

Classifications and wage rates are at pages 21, et. seq. The three classifications, in descending order of qualifications and pay rate, are crane operators, forklift (or high-lo) operators, and oilers. Crane operators are the highest paid of the Company's unionized employees. Crane operator rates are based on the size of the crane. The 500 ton plus base rate is the highest rate; each 50 ton increment below that decreases, with the 1-20 ton crane being paid at the same rate as forklift operator. The lowest paid classification is crane oiler (only for new hires after May 1, 2004). All crane operators must possess a valid commercial driver's license (CDL), have safety training, and be a certified crane operator (CCO) for the crane that they are operating. All forklift operators must possess a valid CDL and forklift certification. The Union's training facility administers the tests and practical examinations that operators are required to pass to obtain certifications to operate particular pieces of equipment.

When members of the unit work outside the geographic area described in the contract, they come under the provisions of the "short-form" agreement into which the Respondent and the Union entered on November 12, 1984 (GC Exh. 4), which by its terms has been automatically renewed with each new contract between the Union and the Respondent. It provides that the Respondent agrees to abide by the wage rates, fringe benefits, and all other provisions in seven named multi-contractor collective-bargaining agreements, including the Associated General Contractors of America (AGC).

#### Events Involving Other Employees

Preliminarily, I will address conduct of the Respondent in 2015 that was the subject of an informal Board settlement agreement with a nonadmission clause, which was closed on compliance.

A settlement agreement with a nonadmission clause "may

<sup>12</sup> See Tr. 599 (Erickson).

not itself be used to establish anti-union animus.” *Steves Sash & Door Co.*, 164 NLRB 468, 476 (1967), *enfd.* in pertinent part 401 F.2d 676, 678 (5th Cir. 1968), quoting *Metal Assemblies, Inc.*, 156 NLRB 194, 194 fn. 1 (1965). Nevertheless, although such a settlement agreement itself is not admissible evidence that a respondent violated the Act, *Steves Sash & Door Co.* also stands for the proposition that presettlement conduct underlying the settlement agreement is properly permitted into evidence as background evidence establishing the motive or object of a respondent in its postsettlement activities. See *Northern California District Council (Joseph’s Landscaping Service)*, 154 NLRB 1384, 1384 fn. 1 (1965), *enfd.* 389 F.2d 721 (9th Cir. 1968); see also *Host International*, 290 NLRB 442, 442 (1998); *Electrical Workers Local 13 (M.H.E. Contracting)*, 227 NLRB 1954, 1954 fn. 1 (1977). In other words, the facts underlying the allegations that were settled may be admitted into evidence and considered to shed light on postsettlement conduct.

Erickson’s relationship with the Union changed for the worse in 2015, when he and the Union had a dispute regarding applicability of the AGC.<sup>13</sup> More specifically, the Union came to him in 2015 and wanted him, during the term of the contract, to increase the pay rates of operators whom he dispatched to do work under AGC, from the rates in his shop agreement to those in the AGC. This would have resulted in a 30 to 40 percent increase in his labor costs.

Additionally, prior to 2015, employees represented by the three unions to some degree performed interchangeable work for the Company. However, in 2015, the Union insisted on “jurisdictional rigidity,” i.e., that only its members perform operator work under their contract.<sup>14</sup>

The Union first became involved in operators’ wage issues in December 2015. The policy and practice before then was that employees with questions about whether they were properly paid, according to the appropriate contract, type of work they performed, or number of hours they worked, generally went to Payroll Clerk Tejchma. She would investigate and adjust their pay if there was a clerical error or she could otherwise resolve the matter. Otherwise, she would refer the issue to Erickson, or the employee would contact him. There is no evidence that prior to December, any operators who could not resolve their pay disputes with Erickson contacted the Union or took any other steps.

In approximately the first week of December 2015, Crane Operator Jamey Foster and Oiler Cody Velat had a dispute with the Respondent, contending that they were entitled to additional pay and fringe benefits for work they performed under the geographical jurisdiction of the Great Lakes Fabricators and Erectors Association (one of the seven contractor associations set out in the short-form agreement). After they could not resolve the matter with the Company, they contacted Poppo and informed him of the situation.

On about December 16, 2015, during a phone conversation on a separate topic, Poppo mentioned to Erickson that Velat and Foster had the above pay rate issue. Erickson replied that he refused to talk about wages to a business representative and that

Poppo did not have the right to receive such information without the employees’ permission. Poppo responded that he believed he had that right. He further stated that Erickson was on the verge of an unfair labor practice, and Erickson told him to file it.

On December 18, 2015, Erickson sent almost identical texts to Foster and Foster, stating that if they could not resolve a wage issue with Tejchma, they needed to contact him, and “I refuse to discuss wages with a business agent.” (GC Exhs. 9, 8.)

By a letter dated December 22, 2015, to Erickson, Union Attorney Andrew Nickelhoff threatened the filing of unfair labor practices if the Company persisted with the above conduct. (GC Exh. 16.) Erickson responded by email on December 23. (GC Exh. 17.) He said, *inter alia*, the following:

- (1) “The only statement that I have made regarding employee pay question is ‘our employees need to follow our written policy regarding any payroll questions, if they cannot follow simple rules they made need to find other employment.’ . . . ”
- (2) “Our employees have always followed the company rules regarding payroll questions and these questions have been resolved internally every time during my 40+ year tenure here. I have attached a copy of our policy concerning payroll questions for your review. . . . No payroll issue has ever went [sic] beyond step C. . . . ”
- (3) “Ericson’s [sic] has employed union labor since 1923 (currently 14+ separate union contracts) without any issues, until recently. It seems the current Local 324 representation wants to circumvent our company policy’s [sic] as punishment for not signing a bogus contract they delivered to me a couple of months ago (note: I have also been told that she should not expect to be sent any men when we call the hall, due to this same issue) I thought these bully tactics went out long ago”
- (4) “I would expect that our Union would be better served if the representatives were trying to covert non-union contractors instead of pissing off the longstanding union contractor?.”

The attached company rules (CP Exh. 1), entitled “Reminder,” states that employees with payroll questions “must follow the following steps, in order”:

- A. First discuss with Tejchma, to verify the time cards are correct and make sure the issue is not a simple data entry error.
- B. If not resolved with her, contact Erickson and discuss the issue by phone.
- C. If not resolved by phone, Erickson will set up a meeting with you to review the applicable union contract.  
If there is still no agreement, Erickson will schedule an appointment with your business representative and meet with both of you.

On December 28, 2015, the Union filed grievances on behalf of Foster and Velat concerning their dispute over proper pay. (GC Exh. 5.)<sup>15</sup> On the same day, it filed unfair labor practice

<sup>13</sup> Tr. 599, *et seq.* (Erickson); see also GC Exh. 17.

<sup>14</sup> Tr. 606–607 (Erickson).

<sup>15</sup> The grievances resulted in pay adjustments for Foster and Velat, and resolution of their disputes.

charges alleging violations of Section 8(a)(5) and (1) (GC Exh. 6, Case 07-CA-166694), based on the Respondent's conduct above.

The Union withdrew some of the charges on March 14, 2016 (R. Exh. 4), and on March 31, the Regional Director of Region 7 approved an informal Board settlement agreement with a nonadmission clause. (R. Exh. 5.) In the settlement agreement, the Respondent agreed it would:

- (1) Not prohibit employees from seeking assistance from the Union regarding wages and/or other terms and conditions of employment.
- (2) Rescind the December 18, 2015 text messages sent to employees on the subject.
- (3) Not Unilaterally impose preconditions, limitation or new procedures on enlisting the Union's assistance with payroll questions or other disputes concerning terms and conditions of employment.
- (4) Rescind the "Remind" issued on about December 24, 2015 on the subject.
- (5) Not Refuse to furnish the Union with requested information that is relevant and necessary to its role as bargaining representative.

The Regional Director closed the case on compliance on February 28, 2017. (R. Exh. 24.)

Both Erickson and Foster both testified that they spoke in Erickson's office in Muskegon after work hours in about early January 2016 and that their conversation started with Foster's job for the following day. However, because their accounts were so different, I cannot determine with certainty that it was the same conversation.

According to Foster, Erickson turned to the subject of Foster's grievance, stated that Popp was "playing games" and Erickson would play games back with him, Popp was leading employees down the wrong path and could jeopardize Foster's employment, and there would be a hostile work environment if Erickson had to "start laying guys off that[sic] worked there." (Tr. 180.)

I take into account that "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interest." *PPG Aerospace Industries*, 355 NLRB 103, 104 (2010), quoting *Flexsteel Industries*, 316 NLRB 745, 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996). Thus, current employee status may serve as a "significant factor," among others, on which reliance can be placed in resolving credibility issues. *Avenue Care & Rehabilitation Center*, 360 NLRB 152, 152 fn. 2 (2014); *Flexsteel*, above. Foster's status as union steward since early 2016 does not lessen his economic reliance on the Respondent. Foster appeared candid, and he answered questions without hesitation and with no apparent attempt to slant his testimony either for or against the Respondent. Erickson was not a full reliable witness. Accordingly, I ordinarily would credit Foster's account over Erickson's.

However, there is a complication. Foster gave an affidavit to the Board on January 21, 2016, so presumably he related his account of what Erickson told him. One of the allegations that

the Union subsequently withdrew in March 2016 was that the Respondent threatened employees with termination (which logically includes permanent layoff) if they communicated with and sought assistance from the Union regarding wages and other terms and conditions of employment; any such violation was not encompassed by the settlement agreement.

Paradoxically, Erickson's account of the relevant portion of their conversation, although quite different, also reflects his displeasure at Brandon and the Union, albeit for a different reason. According to Erickson, after discussing Foster's work assignment, he brought up the subject of the Union's recent appointment of Foster as union steward, replacing the previous steward, who had been elected: "I don't think Brandon is helping you by appointing you steward . . . I think Brandon's putting you in a bad position."<sup>16</sup>

Because of the uncertainties concerning Foster's account of the conversation vis-à-vis the unfair labor practice charges and settlement agreement, and whether Foster and Erickson were indeed addressing the same conversation, I will find as a background fact only that they had a conversation in early January 2016 in which Erickson made statements reflecting displeasure with Popp's conduct (whether related to the filing of a grievance or to the Union's appointment of a steward).

#### The 2016 Terminations

Prior to 2016, permanent, full-time operators who completed a job were subject to temporary layoffs, ranging from a day to weeks, depending on the season and what work was available. They retained their company keys and credit cards, and Erickson called them back to work directly after their layoffs.

The record does not reveal any occasions prior to 2016 when Erickson told any regular full-time employees who were laid off that they had to turn in their company keys and credit cards. However, he instructed all six employees "laid off" in 2016 to surrender all of their company property. Three of them were later called back for temporary, short-term jobs, two through the union referral hall, but Erickson did not directly recall any of them to return on a permanent basis.

#### A. Keith Stephenson—May 16

Stephenson worked for the Respondent as a teamster from October 2005 until approximately August 2015, when he changed to being an operator, primarily out of Muskegon. He did so through contacting Popp and getting Erickson's approval. On an average of twice a month, he had pay issues, most of which he resolved through Tejchma or Erickson. In December 2015, he worked in Pennsylvania but did not get the paid the higher local rate that he believed applied. When he called Tejchma in about late December and told her this, she responded that Erickson would handle it and "You need to quit talking to Brandon."<sup>17</sup>

About 3 weeks later, Stephenson spoke in the evening with Erickson in the Muskegon facility warehouse. Erickson detailed what he was going to be paid for the Pennsylvania work and said that Tejchma had saved him money. He further stated

<sup>16</sup> Tr. 587, 588.

<sup>17</sup> Tr. 340.

that Stephenson should come to him with any further questions and “You need to quit talking to Brandon because he’s going to get you in trouble.”<sup>18</sup>

On Sunday, May 15, Erickson texted Stephenson and told him to report to Muskegon at 8 a.m. the following day. They met there in the lunchroom the next morning. Erickson stated that he had to let Stephenson go for lack of work and was letting him go first based on experience, qualifications, and certifications.

Stephenson first testified that he asked Erickson what the real reason was and asked if it had anything to do with the Union, and Erickson said no.<sup>19</sup> However, after the General Counsel refreshed his memory with his June 30 affidavit,<sup>20</sup> he testified that Erickson stated, “This has been in the works for a while. I asked what has been in the works. He said all this union stuff. He also said that there was [sic] a lot of unhappy people around here, and I seemed unhappy.”<sup>21</sup>

I see no reason to depart from the normal presumption that statements in an affidavit given shortly after the pertinent events occurred are normally more reliable than unrefreshed recall at trial. See, e.g., *Hobson Bearing International*, 365 NLRB No. 73, slip op. at 1 (2017); *El Vocero de Puerto Rico*, 365 NLRB No. 29, slip op. 6 fn. 10 (2017). These statements were similar to the statements that other employees attributed to Erickson. Accordingly, I credit Stephenson’s testimony, as refreshed.

The next day, Stephenson was referred through the union hiring hall to do a short-term job for the Respondent. He worked 3 days (Wednesday through Friday) and then was laid off on May 20 when the job was over. He has not since worked for the Company. Although the complaint alleges that this May 20 layoff was also a violation of Section 8(a)(3), his 3-day temporary employment was job specific and foreseeably terminated upon the job’s completion. Accordingly, it cannot be equated to permanent, regular employment. Therefore, the only operative date for the cessation of his employment is May 16.

I note Erickson’s testimony that at the time Stephenson wanted to change to the operator position, Erickson told him that operators were subject to layoffs. However, fully crediting him, Erickson did not say anything that indicated the layoffs would be anything more than short term and temporary.

#### B. Matthew Rowe—May 16

Rowe started with the Respondent in 2013 as an apprentice forklift operator and oiler but later also operated smaller cranes at times, primarily out of the Grand Rapids facility. At one point, Rowe voluntarily left employment for at most 3 months and then was directly hired back by Erickson. Rowe testified that he was never previously laid off (although he may have construed the question as permanently laid off).

Rowe had about five to ten pay disputes during his employment. Prior to 2016, he went to the Union once about pay,

when he was still an apprentice, but nothing in the record shows that the Respondent knew of this.

In approximately late April or the beginning of May, Rowe was paid under the AGC for work he was performing in setting up a crane in downtown Grand Rapids. He believed that he should have been paid the higher rate in the shop agreement and called Erickson. After Rowe explained his position, Erickson replied that he was wrong and hung up on him. Rowe contacted Joe Shippa, a union business representative in west Michigan, who resolved the matter with the Company.

About 3 days after Rowe’s conversation with Erickson, on May 15, Rowe received a typical Sunday evening text from Erickson. It told him to come in to the Grand Rapids yard the next day at noon, which was not a normal reporting time.

After Rowe arrived the next day, Erickson sent him another text, telling him to meet in the office. There, Erickson stated that the Company was going in a different direction, work was drying up in the Grand Rapids area, and he was selling all of the smaller cranes and laying people off according to seniority and ability; Rowe was one of the low men on the totem pole. Erickson also stated words to the effect that he guessed that Rowe knew this was coming and, toward the end of the conversation, that he felt that if some of the employees were not happy there anymore, there was no reason to keep them.

#### C. Erin Baerman, Jason Baerman, and Nicholas Willer—June 20

Erickson directly hired Willer in June 1998. Willer started as an apprentice and eventually became a full-fledged union member. He earlier ran high-lo cranes (forklifts), but for the past 4 or 6 years, he operated a 60-ton crane out of Muskegon most of the time. He was not qualified to run the crawler cranes. During duration of his employment, he was laid off several times, each for 2–4 days, and then recalled by Erickson, who would call him at night and tell him to report the following day. The last time that this occurred was a couple of years ago.

Jason Baerman (Jason) was an operator based out of Muskegon since April 2007. He had four crane certifications, and the tower crane was the only crane of the Respondent for which he was not certified. Although assigned a 60-ton crane, he had experience with larger cranes and at the time of his layoff had recently come off of a project where he used a 110-ton crane. He was laid off frequently in 2008 and 2009, usually for 1–2 days but as long as 2 weeks, and in those years was unemployed more than he worked. After 2009, his layoffs were mostly in the spring months. After all his layoffs, he was called back directly by Erickson or the dispatcher. Every couple of weeks, he had a payroll issue and contacted Tejchma. Most of the time, the check would be fixed, or he would have to call her again.

Erin Baerman (Erin) worked for the Respondent as permanent employee starting in 2013. He was an operator, generally out of Muskegon. He had no crane certifications when he started but later acquired them for all of the Company’s vehicles but the tower crane. In approximately 2014, he was laid off for the whole month of February, and at other times, he was laid off for periods of 1–2 days. Following all of those layoffs, Erickson recalled him by sending a text to be at the shop the next

<sup>18</sup> Tr. 343.

<sup>19</sup> Tr. 344–345.

<sup>20</sup> The June 30, 2013 date in the transcript is obviously an inadvertent error.

<sup>21</sup> Tr. 346–347.

morning. At least once a month, he went to Tejchma with paycheck issues, which were usually resolved by the next paycheck.

One morning in approximately late May, Erin was in Erickson's office in Muskegon. They had the following conversation.<sup>22</sup> Erin jokingly asked, "I'm not next to get the ax, am I?" Erickson replied that "Carlos and I might be because we were 40-ton guys and would be the next to go "unless this stuff stops with the Union. . . . I'm going to keep letting guys go until I get the guy I want unless this stuff stops with the Union."

When Erin and Jason Baerman and Willer reported to work on the morning of June 20, their names were on a posted job continuation order. (GC Exh. 10.) For job number, it had "324," and it said, "Meet with Steve after 8 a.m."

They met with Erickson in the break room at about 8 a.m. As might be expected, Erin and Jason Baerman and Willer did not give identical accounts of everything that was said in the meeting. However, on material points, they were fully consistent and in no way contradicted one another. Thus, all of them testified:

Erickson stated that he was selling the small cranes and laying them off because of the Union.

Erickson stated that Popp and/or Business Manager Doug Stockwell (to whom Popp reports) were "tyrants."

Erickson said that they could get their jobs back if they talked to Popp and Stockwell and got them to change the way they were dealing with the Respondent.

Jason brought up seniority and questioned why operators with less seniority were not being laid off.

Willer made a comment about his being there 18 years.

Erin provided the most detailed account, and I believe that his depiction was most likely the most complete. His great attention to details is not suspect in light of his training as a police officer. To the extent that Jason and Willer spoke, I believe that they would have the most precise recollection of what they said. Jason added some details not mentioned by Erin. They are consistent with other evidence of record, and I incorporate them into my factual findings. Based on these considerations, I find the following

Erickson stated that he was letting them go and that it was nothing personal,

[B]ut it is what the Union is forcing me to do. I'm done dealing with the Union. I'm done dealing w. Brandon Popp. I'm not going to let the Union tell me how to run my business, so I'm selling these 40s and 60s and letting go of the guys that run them. They don't make me any money. I have to subsidize the 90s. They don't real start making any money until the 120 crane. I don't why the Union doesn't want to pay these work hours in but if they are going to force me out of business then I'm going to help them ... but you guys can make this stop. You can go tell Stockwell that you don't want Brandon talking for you. I'm done dealing with Brandon. I'm not going to answer his calls or texts. I am done dealing with Stockwell also. He is about the most arrogant son of a bitch

I've ever met who wants to run your union like Hitler. Brandon and Stockwell are costing you your jobs. I've tried talking to them. They won't listen. But if I get rid of you guys, you guys could go talk to them and this could be reversed. We could go back to doing business like we'd done around here for the last 40 yrs.<sup>23</sup>

When Erickson said not to be angry at him but at the Union, Erin interjected that the Union had not hired them, Erickson had. Jason asked why Erickson was letting him go after he had been there 9 years but was keeping guys with a year or less who were making mistakes. Willer stated that he was there for 18 years and then fired in 5 minutes. Erickson responded that he was basing layoffs on qualifications, not seniority. In talking against Brandon and Stockwell, Erickson said that "the new contract they were trying to shove down his throat was going to get more people let go."<sup>24</sup>

I credit Erickson's testimony about the meeting only to the extent that it was consistent with the credited composite account of the three layoffs. I do not credit his testimony that Jason was the one who used the terms "tyrant" and "Hitler," in describing the way Erickson made decisions and did things on his own.

Willer has not worked for the Respondent since he was terminated on June 20. In approximately March 2017, the Respondent hired Jason, directly and not through the Union, to perform work on a temporary basis for a customer that specifically requested him. As of April 27, 2017, Erin had been working for about 3 weeks for the Respondent through the union hiring hall.

Carlos Ocampo—July 8

Ocampo was an operator since 2005. He obtained his crane certification about 5 years ago and had certifications to operate all of the Respondent's cranes except the lattice crawler and tower cranes. He was regularly assigned a 40-ton crane but moved around and also operated large hydraulic and small hydraulic equipment. Prior to 2016, he was laid off about five times for short periods, the longest 2 or 3 weeks. Each time, he was directly recalled. Ocampo had pay issues approximately five times annually. Prior to 2016, he resolved all of them either directly with Tejchma or, if she told him to call Erickson, with Erickson.

His last payroll disagreement was in January. He followed the normal procedure of calling Tejchma. She told him to call Erickson. He did so and left a message at about noon. Erickson called him back late that afternoon, and he explained that he did not understand the pay. Erickson responded to the effect that both were right, and the paperwork with his check would explain. That same day, Ocampo called Popp and reported the situation. After that, his pay was adjusted.

Approximately a week or two after the Baerman brothers and Willer were terminated on June 20, Ocampo called Erickson on his cell phone about a work matter. After that subject, Ocampo asked if he could ask Erickson a question. Erickson said to go ahead, and Ocampo asked if he was next. Erickson replied,

<sup>22</sup> Tr. 312.

<sup>23</sup> Tr. 315.

<sup>24</sup> Tr. 261 (Jason Baerman).

“[N]ot right now.”<sup>25</sup>

On July 7, Ocampo was working in the Grand Rapids yard when Erickson texted him to stop and see him before he went home. Ocampo met him in one of the offices at that facility at about 4:30 p.m. Erickson something to the effect that “[y]ou probably know why you’re here.”<sup>26</sup> Ocampo replied that he had an idea because of what had been going on with guys getting laid off. Erickson then said that it was nothing that Ocampo did, that he had done a great job, but Erickson had to play by the rules and was not running small cranes anymore. He also said something to the effect that “Brandon is relentless, and no one seems to care about that.”<sup>27</sup>

After Ocampo’s layoff, 11 crane operators remained.<sup>28</sup> No operators have been permanently laid off since then. General Counsel’s Exhibit 7 shows that since 2010, the respondent requested referrals from the union hall 52 times: three in 2010, four in 2014, six in 2015, 26 in 2016 (all June 27 and after), and 13 in 2017 through April 18. The hours worked by operators decreased by approximately 11.4 percent from 2015 to 2016 (R. Exh. 16), but no records were provided to compare this change to previous years.

#### The Respondent’s Economic Defense

The Respondent avers that the six terminations were layoffs motivated solely by legitimate business considerations and had nothing to do with the Union; more specifically, changing market conditions have led him to decide to sell his 40- and 60-ton cranes and shift to more profitable larger cranes, in part in anticipation of his seeking work in the “windmill sector” in geographic areas outside west Michigan.

The Respondent owns 36 cranes.<sup>29</sup> (R. Exh. 6.) They include: (1) three carrydecks—small cranes used in rigging operations to lift over another machine in factory settings; (2) 14 under 120 tons; (3) 17 over 120 tons; and (4) two tower cranes—for large projects, such as apartment buildings. The under 120-ton category includes two 40-ton, one 55-ton, four 60-ton, two 75-ton, one 80-ton, and three 90-ton.

Erickson testified that the larger cranes produce the most revenue because they receive the highest rental rate. Thus, the largest crawler crane (900-ton) rents for \$125,000 a month and also requires considerable accessory equipment, thereby giving work to the Respondent’s trucking department. Most of the fleet of cranes are used within the State of Michigan, but the largest are used out of the state. He further testified that the trend for at least 10 years has been toward less work for small cranes in the Respondent’s geographic area and that he has been selling smaller cranes since 2003.

Respondent Exhibit 9, prepared in preparation for trial, is a summary of the hours and billing by category of crane from

2005 to 2016. It reflects a general trend since 2005 of lower billing and hours for the under 120-ton cranes, and higher billing and hours for the over 120-ton cranes.

Buying and selling equipment has always been part of the Respondent’s business. Generally, when cranes reach 10 years of age or 10,000 hours of use, they are put up for sale. Respondent’s Exhibit 7 shows that from 2005—2017, 22 cranes, or about 1.5 cranes per year, were sold (carrydecks are the smallest cranes, used in an ancillary fashion with other cranes):

- (1) 2003—2 (1 carrydeck; 1 under 120-ton)
- (2) 2005—1 (1 under 120)
- (3) 2006—2 (1 over 120, 1 under 120)
- (4) 2008—2 (2 under 120)
- (5) 2009—9 (2 carrydecks, 7 under 120, 2 over 120)
- (6) 2012—2 (both over 120)
- (7) 2013—1 (over 120)
- (8) 2015—1 (over 120)
- (9) 2017—2 (1 carry deck, 1 under 120)

Respondent’s Exh. 8(b) (sealed pursuant to a joint stipulation by the General Counsel and the Respondent) is a list of the Respondent’s five most recent crane purchases, from November 2013 to September 2016. All but one were in the over 120-ton classification.

Respondent’s Exhibit 15 is summary of the hours worked on each of the 40-ton and 60-ton cranes that were still for sale at the time of the hearing, from 2007 to 2015. With the exception of 2011, there was a continuous drop in hours each year for all four cranes. The Respondent also submitted time card average hourly pay reports for operators for March and April 2014 and for February 2016 (R. Exhs. 22, 23), which show a large drop in total hours worked. No such reports were furnished for any intervening months after April 2014 and before February 2016, or for the months of March to May 2016, so these time card records are of limited utility.

Erickson testified that in approximately March or April, he first discussed with Brent Erickson selling the smaller cranes. Based on the Respondent’s analysis of all equipment at the end of fiscal year 2015 (April 30, 2016), he then made the decision to sell the 40- and 60-ton cranes. He subsequently contacted three equipment brokers.

Respondent Exhibit 21 consists of a series of emails between Erickson and Gene Landres of Utility Cranes and Equipment, LLC, an equipment broker, from May 13–June 6. In the first email, Landres asked if the Respondent had anything for sale. On May 14, Erickson responded that he would have six–ten machines for sale this year and would provide details in a couple of weeks, and the next day he stated that he would send a list of smaller cranes for sale when he got it done.

By an email of July 13 (GC Exh. 18) to Landres, Erickson attached a spreadsheet of the cranes and accessories that he had for sale. As far as cranes, their sizes were as follows:

- (1) 14-ton—1
- (2) 15-ton—1
- (3) 40-ton—2
- (4) 55-ton—1
- (5) 60-ton—2
- (6) 75-ton—2

<sup>25</sup> Tr. 208.

<sup>26</sup> Tr. 210.

<sup>27</sup> Tr. 210; see also Tr. 211.

<sup>28</sup> See R. Exh. 26 at 1–4. It does not include the four forklift operators who also continued their employment.

<sup>29</sup> The Respondent’s brief (at 28 fn. 10) asserts that in June 2017, the Respondent sold two 40-ton, two 60-ton, and two 90 ton cranes. However, statements of counsel are not evidence. *Chicago Typographical Union 16 (Chicago Sun-Times)*, 296 NLRB 180, 182 fn. 4 (1989).

- (7) 82-ton—1
- (8) 90-ton—1
- (9) 275-ton—1
- (10) 300-ton—3
- (11) 500-ton—1

Landres replied by an email of July 14 (GC Exh. 19), saying that the market for those cranes was slow, and suggesting optimal sales prices and that the equipment be cleaned up before putting them up for sale.

General Counsel Exhibit 20 consists of further emails between Erickson and Landres, from August 29 to September 14. They include one from Landres to Erickson on August 29 (p. 5), in which he stated: "SALES LIST: July 13 you emailed a list, we replied on July 14 but did not hear back from you, are you still interested in selling?" Landres also stated that the market had further declined. Erickson replied that same day (p. 4), saying that he was interested in selling some machines but that "I am not in a hurry to sell anything and will wait for the right buyer that wants well maintained equipment."<sup>30</sup>

General Counsel Exhibit 21 consists of emails between Erickson and Landres on October 7 and 8, in which they confirmed the asking prices for certain cranes, and made arrangements for Landres to have sales photographs taken. As of the time of the trial, none of the 40- or 60-ton (or 75-ton) cranes referenced in GC Exh. 18 had been sold (see R. Exh. 14), and at least the four 40- and 60-ton cranes were still being used occasionally.

#### The Respondent's Selection of the Six Employees

Erickson was the sole decision maker in determining who would be permanently laid off in 2016. He testified at various points that he took into account certifications, skills, training, and qualifications, with experience on particular equipment, "extremely important,"<sup>31</sup> in laying off the six crane operators and retaining 11 others (15 adding forklift operators). As I earlier noted, only later in his testimony did he add the additional factor of whether the operator was assigned to a particular crane, and he gave a very nonspecific answer when asked if he has a general methodology that he uses to assess qualifications based on experience and other factors.

The contract does not provide for a seniority list or say anything about the role of seniority in layoffs, and Erickson did not consider it a factor. He testified that he did use hire date in determining to keep Bruce Springer (who was assigned to a 90-ton crane and qualified for all cranes smaller than that) over Jason Berman, inasmuch as he considered them similar in qualifications.

<sup>30</sup> GC Exhs. 19 and 20 contradict Erickson's testimony that he believed the cranes were put up for sale on the web in July. They also shed doubt on his testimony that the delay in putting them up for sale was due to logistics issues regarding Landres's getting professional photographs of the equipment, rather than in large measure to his own actions or inactions.

<sup>31</sup> Tr. 485.

#### Analysis and Conclusions Independent 8(a)(1) Allegations By Tejchma

In about early January, when Stephenson called Payroll Clerk Tejchma concerning a dispute of what contractual pay rate applied, she stated that Erickson would handle it and "You need to quit talking to Brandon." About 3 weeks later, Erickson told him, "You need to quit talking to Brandon because he's going to get you in trouble." Only Stephenson's conversation with Tejchma is alleged as a violation.

The General Counsel does not contend that Tejchma was a supervisory employee; rather, the General Counsel avers that she was a Section 2(13) agent as far as payroll matters were concerned. The Respondent disagrees. If she was an agent, then her statement to Stephenson violated Section 8(a)(1), because telling an employee during a conversation about a wage disagreement to stop talking to his business representative was clearly coercive of his Section 7 rights.

When agency status under section 2(13) is at issue, the Board applies common law principle of agency in examining whether an employee is an agent while making a particular statement or taking a particular action. *Cooper Industries*, 328 NLRB 145, 145 (1999). Using these common law principles, the Board may find agency based on either actual or apparent authority to act for the employer, with the latter resulting from "a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. *Ibid*; *South-ern Bag Corp.*, 315 NLRB 725, 725 (1994). The test is whether, under all the circumstances, employees would reasonably believe that the alleged agent "was reflecting company policy and speaking and acting for management." *D & F Industries*, 339 NLRB 618, 619 (2003), quoting *Cooper Industries*, above.

Tejchma could on her own resolve payroll issues turning on errors in employee reporting or in the way the Respondent calculated their hours, but she had to refer to Erickson matters involving what contractual pay rate applied. Moreover, if she and the employee could not agree, the pay dispute went to Erickson. These policies were generally communicated to employees. In these circumstances, I conclude that operators would reasonably have considered her role to be essentially clerical rather than managerial. Her one statement to Stephenson strikes me as insufficient to have led him to reasonably believe that she was talking on Erickson's behalf. His conversation with Erickson, in which Erickson said the same thing, occurred later. Had it been earlier, an argument could be made that her reiteration would have indeed caused him to conclude that she spoke for Erickson. Such was not the case. I therefore find no violation by Tejchma.

#### By Erickson

The Respondent (R. Br. at 77-78) cites Section 8(c) of the Act as privileging Erickson to speak to employees about issues facing the Company and the industry. Section 8(c) provides that an employer's expression of views, argument, or opinion is not an unfair labor practice if it contains "no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

Consistent with Section 8(c), threats to discharge employees, either express or implicit, for their protected concerted activity of voicing employment-related complaints are found to violate Section 8(a)(1). *Alton H. Piester, LLC*, 353 NLRB 369, 370 (2008); *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 669 fn. 2 (2007). Similarly, an employer's statements connecting displeasure with a steward's activities on behalf of employees to taking adverse actions against employees violate Section 8(a)(1). *Coyne International Enterprises Corp.*, 326 NLRB 1187, 1193 (1998).

The complaint alleges that Erickson committed four independent violations of Section 8(a)(1), three when he was terminating employees, and the fourth in a separate context. The Board has held that an employer's statements linking an unlawful discharge to the employee's protected activity independently violates Section 8(a)(1). *Three D, LLC*, 361 NLRB 308 fn. 2; *Benesight, Inc.*, 337 NLRB 282, 283-284 (2001).<sup>32</sup> Therefore, I will treat these incidents the same.

On May 16, when Erickson told Stephenson that he was permanently laid off, Erickson stated, "This has been in the works for a while. When Stephenson asked what had been in the works, Erickson replied "all this union stuff" and added that there were a lot of unhappy people around there, and Stephenson seemed unhappy.

Erickson's statements would reasonably have caused Stephenson to believe that there was a nexus between his termination and the way the Union was representing employees. Accordingly, Erickson violated Section 8(a)(1) by stating that Stephenson's layoff was connected to the Union.

On the same day, when Erickson terminated Rowe, he stated words to the effect that he guessed that Rowe knew this was coming and, toward the end of the conversation, that he felt that if some of the employees were not happy there anymore, there was no reason to keep them.

As opposed to Erickson's statements to Stephenson, his remarks to Rowe were too ambiguous and nonspecific to reasonably infer a connection between the layoff and the Union. Accordingly, I find no violation as to Rowe.

In approximately late May, in Erickson's office in Muskegon, when Erin Baerman jokingly asked, "I'm not next to get the ax, am I?" Erickson replied that "Carlos and I might be because we were 40-ton guys and would be the next to go "unless this stuff stops with the Union . . . I'm going to keep letting guys go until I get the guy I want unless this stuff stops with the Union."

Erickson's statements to Erin Baerman were explicit threats that the latter and other employees would be terminated because of his animus toward the Union for the way it was representing employees. Accordingly, this was a violation of Section 8(a)(1).

When Erickson terminated the Baerman brothers and Willer on June 20, he mentioned economic considerations but emphasized that they were being laid off because of the Union, which

was telling him how to run his business, forcing him out of business, and "costing you your jobs." He used pejorative language, referring to Stockwell as "the most arrogant son of a bitch I've ever met who wants to run your business like Hitler." He said that they could get their jobs back if they got Popps and Stockwell to change the way the Union was dealing with him. Finally, he threatened more layoff because of "the new contract that they were trying to shove down his throat."

I conclude that Erickson violated Section 8(a)(1) by (1) telling employees that they were being terminated because of the Union's conduct in representing them, and (2) disparaging the Union and its leadership. As to the disparagement, Section 8(c) of the Act, protecting an employer's right of free speech to express an opinion, does not shield an employer's statements denigrating a collective-bargaining representative if they contain express or implicit threats of reprisal or force or promise of benefit in violation of Section 8(a)(1). *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); *Regency House of Wallingford, Inc.*, 356 NLRB 563, 567 (2011). Here, they were integrally enmeshed with terminations that Erickson blamed on the Union.

The General Counsel alleges that Erickson's statement at the June 20 meeting, that the employees could get their jobs back if they got the Union to change its conduct, violated Section 8(a)(5) and (1) by amounting to a bypass of the Union and direct dealing with unit employees. See complaint paragraph 17.

A respondent violates Section 8(a)(5) and (1) when it bargains directly with employees outside the presence of their designated bargaining representatives. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683-685 (1944); *Georgia Power Co.*, 342 NLRB 199, 199 (2004), *enfd.* 427 F.3d 1354 (11th Cir. 2005); *Kens Building Supplies*, 142 NLRB 235, 235 (1963), *enfd.* 333 F.2d 84 (6th Cir. 1964).

Conceptually, I have a problem with this statement constituting any kind of "bargaining" over terms and conditions of employment. Nothing in his statement contained proposals or offers on their wages, or otherwise. Rather, Erickson was implicitly promising the employees re-employment if they got the Union to change the way that it was representing them. I therefore do not consider bypassing the Union to be the appropriate framework. Instead, I find that the statement was coercive and constituted another independent violation of Section 8(a)(1).

#### The Terminations

The framework for analyzing alleged violations of Section 8(a)(3) turning on employer motivation is *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). *General Motors Corp.*, 347 NLRB No. 67 fn. 3 (2006) (not reported in Board volumes). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

Under *Wright Line*, if the General Counsel establishes a pri-

<sup>32</sup> Now Chairman Miscimarra dissented on point in *Andronaco Industries*, 364 NLRB No. 142, slip op. at 1 fn. 1 (2016), taking the position that any such statement is essentially subsumed by the discharge itself.

ma facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of such activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), *enfd.* 127 F.3d 34 (5th Cir. 1997) (*per curiam*). To meet this burden, “[A]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.” *Serrano Painting*, 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984).

If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for the employer's actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of “dual motivation,” that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

As far as the terminated employees' engagement in union activity, this case is atypical. Erickson expressed displeasure at operators going to the Union with wage disputes instead of trying to resolve them directly with the Company. The violations listed in the earlier settlement agreement, as well as statements that Erickson made to Pops and various employees clearly show this. However, Erickson's statements to employees emphasized his frustration and anger at the Union's leadership for the actions it was taking on their behalf, as did his statements to union representatives. The record establishes that this was due primarily to the Union's conduct in: (1) taking steps, including the filing of grievances and/or unfair labor practices, to ensure that employees were paid higher wages when they were entitled to such; and (2) pressing the Respondent to agree to mid-term changes in the shop agreement that would provide the operators with higher wages.

Prior to their terminations, Ocampo, Rowe, and Stephenson had taken their pay disputes to the Union, which resolved them with the Respondent, thereby establishing union activity and employer knowledge. The record does not reveal whether the remaining three terminated operators also engaged in such activity. However, this is not a fatal flaw in the General Counsel's case. Firstly, employees are protected from discriminatory conduct by an employer due to their suspected union or other protected activity, even if the employer's belief is mistaken. See *NLRB v. Link Belt Co.*, 311 U.S. 584, 589–590 (1941); *Alternative Energy Applications, Inc.*, above at slip op. 4 fn. 8 (2014). Secondly, in mass layoff situations where the purpose is discouraging employees from engaging in union activity, or retaliating against them for such activity, the General Counsel does not need to establish each individual employee's union

activity and knowledge, or that all union adherents were laid off. *ACTIV Industries, Inc.*, 277 NLRB 356, 356 fn. 3 (1985); *Pyro Mining Co.*, 230 NLRB 782, 782 fn. 2 (1977) (“The layoff itself, not the selection of employees, was unlawful.”); *Birch Run Welding & Fabricating Inc. v. NLRB*, 761 F.2d 1175, 1179–1180 (6th Cir. 1985) (“The rationale underlying this theory is that general retaliation by an employer against the workforce can discourage the exercise of section 7 rights just as effectively as adverse action taken against only known union supporters.” 761 F.2d at 1180). Finally, the Union's conduct on behalf of operators in general, and Erickson's knowledge thereof, are undeniable. I therefore find that the General Counsel has established the elements of union activity and employer knowledge.

Turning to animus, the events in December 2015 underlying the informal Board settlement agreement that the Region Director approved on March 31 can be considered as background evidence. The Respondent therein agreed it would:

- (1) Not Prohibit employees from seeking assistance from the Union regarding wages and/or other terms and conditions of employment.
- (2) Rescind the December 18, 2015 text messages sent to employees on the subject.
- (3) Not Unilaterally impose preconditions, limitation or new procedures on enlisting the Union's assistance with payroll questions or other disputes concerning terms and conditions of employment.
- (4) Rescind the “Remind” issued on about December 24, 2015 on the subject.
- (5) Not Refuse to furnish the Union with requested information that is relevant and necessary to its role as bargaining representative.

I have found that Erickson violated Section 8(a)(1) by:

On May 16, telling Stephenson that he was being terminated because of the Union's conduct in representing employees.

In late May, threatening Erin Baerman that he and other employees would be terminated because of the Union's conduct in representing employees.

On June 20, disparaging the Union to the Baerman brothers and Willer; telling them that they were being terminated because of the Union's conduct in representing employees; and implicitly promising that they could get their jobs back if they got the Union to change the way it was representing them.

Furthermore, in early January, Erickson made statements to Foster reflecting displeasure with Pops' conduct as union business representative, and Erickson's December 2015 email to Union Attorney Nickelhoff expressed antagonism toward the Union's leadership.

In light of the above, I find express the element of animus satisfied.

Undeniably, the Respondent terminated all six employees on May 16, June 20, or July 7, so the final element of employer action is also satisfied. The General Counsel has therefore established a prima facie case that the layoffs were unlawful.

#### The Respondent's Defense

The Respondent asserts that all of the permanent layoffs

were economically motivated, more specifically the transition of the Company's business as a result of changing market conditions, resulting in selling smaller cranes and buying larger ones. In particular, the Respondent contends (and Erickson told the layoffs) that it was selling the 40- and 60-ton cranes. Based on the following factors, I conclude that the Respondent's economic defense is a pretext: (1) no regular full-time operators were ever permanently laid off or terminated in the several decades prior to 2016; (2) the terminations closely followed the Union's leadership taking a more proactive stance in representing employees' interests; (3) Erickson repeatedly made statements to employees that tied in terminations with the Union's conduct; and (4) Erickson, by his actions and his own words, was "in no hurry" to sell any of the cranes that he offered for sale, including the 40- and 60-ton cranes.

Assuming arguendo that this is treated as a dual motivation case, the Respondent's defense still fails for the following reasons.

Initially, it is important to keep in mind that the six layoffs in 2016 were permanent layoffs or terminations, in contrast to earlier short-term layoffs after which Erickson directly called the employee back to work. Of great significance, there is no evidence that this type of permanent layoff ever occurred at any time prior to 2016, even though the Respondent has recognized the Union for over 40 years.

In this regard, Erickson testified that the trend for at least 10 years has been toward less work for small cranes in the Respondent's geographic area and that he has been selling smaller cranes since 2003, yet he never permanently laid off employees until 2016. Moreover, Respondent's Exhibit 7 does not corroborate his testimony; rather it shows no pattern in recent years of selling smaller cranes. On the contrary, after 2009, four of the six cranes he sold were over 120 tons, one was under 120 tons, and one was a carrydeck (ancillary crane). Furthermore, of the 16 cranes that the Respondent put up for sale in 2016, only four were 40- or 60-ton, and nine were over 60-ton (the largest were 275, 300, and 500 tons).

Erickson's testimony that that in approximately March or April, he first discussed with Brent Erickson selling these smaller cranes was at odds with his testimony that divesting the Company of smaller cranes was a longstanding business decision due to changes in the industry going back at least a decade. He further testified that based on the Respondent's analysis of all equipment at the end of fiscal year 2015 (April 30, 2016), he then made the decision to sell the 40- and 60-ton cranes, and subsequently contacted three equipment brokers. However, none of them were up for sale at the time of the last layoff, on July 8. In fact, it appears from the email correspondence between Erickson and Landres of Utility Cranes (GC Exh. 21) that they were not actually put on the market until after October 8. They were still in use at the time of the trial.

The following, in and of itself, sheds considerable doubt on whether the timing of the layoffs was based on bona fide business considerations. By an email of August 29 to Erickson (GC Exh. 20), Landres stated: "SALES LIST: July 13 you emailed a list, we replied on July 14 but did not hear back from you, are you still interested in selling?" Erickson replied that same day and said he was "not in a hurry to sell anything. . . ."

It also is noteworthy that the Respondent markedly increased its use of the union hiring hall for temporary hires starting in mid-2016—during the period of the layoffs—and continued to do so into 2017. Thus, in 2016, the Respondent requested double the number of referrals than it had requested in all the years 2010–2015, and the number of referrals from January 1 through April 18, 2017 (approximately 3-1/2 months), equaled the number of referrals from 2010–2015. This undercuts the Respondent's claim that decreased work for operators in mid-2016 justified the six layoffs.

In sum, I do not doubt Erickson's contentions concerning general business trends in the industry and his long-term plans to adapt to them. However, the Respondent has not satisfactorily demonstrated that the timing of the layoffs in 2016 was based on specific economic conditions or events occurring in the months immediately preceding them, rather than on animus toward the Union for its increased assertiveness in representing unit employees. See *Rain-Ware, Inc.*, 263 NLRB 50, 55 (1982); enforced 732 F.2d 1349, 1354 (7th Cir. 1984).

I conclude that the terminations were motivated by Erickson's frustration and anger at the Union for the conduct of its officials in seeking to secure higher pay for the operators whom they represented, including the filing of grievances and unfair labor practice charges. The Respondent's selection of the six employees was due not to any particular union activity on their parts as individual individuals but rather was meant to send a message to the Union, and to unit employees to pressure the Union, to retreat from those efforts. Indeed, Erickson implied this to Erin Baerman in late May, and expressly said it to the Baerman brothers and Willer on June 20 ("You can go tell Stockwell that you don't want Brandon talking for you. . . .

I've tried talking to them. They won't listen. But if I get rid of you guys, you guys could go talk to them and this could be reversed. . . ."). In light of this determination, I need not individually address the qualifications or experience of specific employees, including weighing Jason Baerman's possession of certifications to run all cranes under the tower crane, and his recent operation of a 120-ton crane; Erin Baerman's possession of certifications to run all cranes under the tower crane; or Willer's 18 years' employment with the Company.

As the owner of a long-established family business, Erickson's vexation with the Union's greater advocacy on behalf of unit employees might have been understandable, but it did not afford him the legal right to take out such displeasure on the employees.

The Respondent having failed to rebut the General Counsel's prima facie case, I conclude that it violated Section 8()(3) and (1) by terminating the six employees.

#### CONCLUSIONS OF LAW

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

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

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act:

(a) Threatened employees with termination because of the conduct of the Union on their behalf.

(b) Told employees that they were being terminated because of the conduct of the Union on their behalf.

(c) Disparaged the Union in conjunction with telling employees that they were being terminated because of the Union's conduct on their behalf.

(d) Implicitly promised employees that they could get their jobs back if they got the Union to change the way it represented them.

4. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) of the Act:

(a) Terminated Matthew Rowe and Keith Stephenson on May 16, 2016.

(b) Terminated Erin Baerman, Jason Baerman, and Nicholas Willer on June 20, 2016.

(c) Terminated Carlos Ocampo on July 8, 2016.

#### REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily terminated Erin Baerman, Jason Baerman, Carlos Ocampo, Matthew Rowe, Keith Stephenson, and Nicholas Willer, must make them whole for any losses of earnings and other benefits suffered as a result of their terminations.

Specifically, the Respondent shall make Erin Baerman, Jason Baerman, Ocampo, Rowe, Stephenson, and Willer whole for any losses, earnings, and other benefits that they suffered as a result of their unlawful terminations and, where applicable, the unlawful refusal and failure to recall them. The make whole remedy 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). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate Erin Baerman, Jason Baerman, Ocampo, Rowe, Stephenson, and Willer for search-for-work and interim employment expenses regardless of whether those expenses exceed [his/her/their] 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*, supra., compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), the Respondent shall compensate Erin Baerman, Jason Baerman, Ocampo, Rowe, Stephenson, and Willer for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), the Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 7 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission

of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

The Respondent also having discriminatorily failed and refused to recall Erin Baerman, Jason Baerman, Ocampo, Rowe, Stephenson, and Willer must offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed. To the extent that the Respondent argues (R. Br. at 12, 80–82) that no work is available for the six employees, that would be a compliance matter.

The Respondent shall expunge from its records any and all references to the terminations of Erin Baerman, Jason Baerman, Ocampo, Rowe, Stephenson, and Willer.

The General Counsel requests the special remedy that Erickson be required to read the notice to employees on work time, in the presence of a Board agent, at a meeting or meetings scheduled to ensure the widest possible attendance of its employees. Alternatively, the General Counsel seeks an order requiring that Respondent promptly have a Board agent read the notice to employees during work time in the presence of all employees.

Such a special remedy is appropriate where a normal remedy is inadequate because the respondent's unfair labor practices are "so numerous, pervasive and outrageous" that the remedy is needed to "dissipate fully the coercive effects" of those unfair labor practices. *Fielcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995); see also *Federated Logistics & Operations*, 340 NLRB 255, 256 257 (2003). I recognize that the seriousness of the Respondent's violations, including six unlawful terminations and several unlawful statements by its sole owner and officer. However, the record does not indicate that prior to January 2016, any unfair labor practice charges have ever been filed against the Respondent in the approximately 34 years that Erickson has been the owner and dealt throughout this period with three labor organizations, including the Union. The charges relating to his conduct in December 2015 were the subject of a settlement agreement with a nonadmission clause, which was closed on compliance. Thus, this is not a situation where the Respondent has demonstrated a pattern of committing violations or has ever breached the terms of a settlement agreement. In these circumstances, I decline the General Counsel's request for a special remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>33</sup>

#### ORDER

The Respondent, Erickson Trucking Service, Inc. d/b/a Erickson's Inc., Grand Rapids and Muskegon, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating or otherwise discriminating against employees because Local 324, International Union of Operating Engi-

<sup>33</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

neers (OPEIU), AFL-CIO (the Union), their collective-bargaining representative, acted to secure them higher wages or otherwise represented them.

(b) Threatening employees with termination because of the Union's conduct on their behalf.

(c) Telling employees that they are being terminated because of the Union's conduct on their behalf.

(d) Disparaging the Union in conjunction with telling employees that they are being terminated because of the Union's conduct on their behalf.

(e) Implicitly promising employees that they can get their jobs back if they get the Union to change the way it represents them.

(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 Erin Baerman, Jason Baerman, Carlos Ocampo, Matthew Rowe, Keith Stephenson, and Nicholas Willer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Erin Baerman, Jason Baerman, Carlos Ocampo, Matthew Rowe, Keith Stephenson, and Nicholas Willer, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful terminations of Erin Baerman, Jason Baerman, Carlos Ocampo, Matthew Rowe, Keith Stephenson, and Nicholas Willer, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its facilities in Grand Rapids and Muskegon, Michigan, copies of the attached notice marked "Appendix."<sup>34</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, 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

<sup>34</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet set, 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 May 16, 2016.

(f) 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 be dismissed insofar as it alleges violations of the Act not specifically found.

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

#### 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.

Local 324, International Union of Operating Engineers (OPEIU), AFL-CIO (the Union) is the collective-bargaining representative of a unit of our employees.

WE WILL NOT terminate or otherwise discriminate against you because the Union has acted to increase your wages or other benefits, or has otherwise represented you.

WE WILL NOT threaten you with termination, or tell you that you are being terminated, because the Union has engaged in conduct on your behalf.

WE WILL NOT disparage the Union in connection with telling you that you are being terminated because the Union has engaged in conduct on your behalf.

WE WILL NOT implicitly promise you that you can get your jobs back if you get the Union to change the way that it represents you.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL within 14 days from the date of the Board's Order, offer Erin Baerman, Jason Baerman, Carlos Ocampo, Matthew Rowe, Keith Stephenson, and Nicholas Willer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

ment to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Erin Baerman, Jason Baerman, Carlos Ocampo, Matthew Rowe, Keith Stephenson, and Nicholas Willer whole for any loss of earnings and other benefits they suffered as a result of our discrimination, with interest.

WE WILL remove from our files any references to the terminations of Erin Baerman, Jason Baerman, Carlos Ocampo, Matthew Rowe, Keith Stephenson, and Nicholas Willer, and we will, within 3 days thereafter notify them in writing that this has been done and that the terminations will not be used against them in any way.

ERICKSON TRUCKING SERVICE, INC. D/B/A ERICKSON'S  
INC.

The Administrative Law Judge's decision can be found at [www.nlr.gov/case/ 07-CA-178824](http://www.nlr.gov/case/07-CA-178824) 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.

