

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SUBREGION 33

TROY GROVE A DIV. of RIVERSTONE GROUP)	)	
INC., VERMILION QUARRY, A DIV. OF	)	
RIVERSTONE GROUP INC.	)	
	)	
Employer,	)	
	)	Cases 25-CA-234477
and	)	25-CA-242081
	)	25-CA-244883
INTERNATIONAL UNION OF OPERATING	)	25-CA-246978
ENGINEERS, LOCAL 150, AFL-CIO	)	
	)	
Union.	)	

NOTICE OF REILING  
OF RESPONDENT’S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

RESPONDENT’S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE was timely e-filed yesterday (May 13, 2020) with the National Labor Relations Board, but was inadvertently filed as a post-hearing brief to the Regional Director instead of the Administrative Law Judge due to the attorneys for Respondent working remotely from home. Respondent’s brief, attached as Exhibit A, is being refiled today to be certain that the Administrative Law Judge is made aware that the filing has been made. Attached as Exhibit B is the NLRB email confirmation for the filing of the brief yesterday.

TROY GROVE QUARRY, a Division of RIVERSTONE GROUP, INC., and VERMILION QUARRY, a Division of RIVERSTONE GROUP, INC., Employer,

/s/Arthur W. Eggers  
By: \_\_\_\_\_  
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 14, 2020, the foregoing NOTICE OF REFILING OF RESPONDENT’S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE was electronically filed with the National Labor Relations Board and served upon the following:

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# **EXHIBIT A**

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25-CA-242081  
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RESPONDENT'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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RESPONDENT’S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

NOW COMES TROY GROVE QUARRY, a Division of RIVERSTONE GROUP, INC., and VERMILION QUARRY, a Division of RIVERSTONE GROUP, INC., (collectively “Respondent” or “Employer”), by and through its attorneys, Califf & Harper, P.C., and for its RESPONDENT’S POST-HEARING BRIEF TO THE ADMINSTRATIVE LAW JUDGE, states as follows:

**I. STATEMENT OF CASE**

Attorneys for the Office of the General Counsel (“General Counsel”) filed an Amended Consolidated Complaint (“Complaint”) dated February 12, 2020, combining the above-referenced charges and alleging Employer engaged in acts in violation of the National Labor Relations Act (“Act”). Employer filed its answer on February 25, 2020. The administrative hearing was conducted before Administrative Law Judge Melissa M. Olivero on March 10-11, 2020. Employer denies all charges in the Amended Consolidated Compliant.

With respect to Charge 25-CA-246978, Employer disciplined and terminated permanent replacement worker Matt Kelly for his repeated violations of the attendance policy, not for his

protected activities. Employer did not deny Kelly *Weingarten* rights because (1) as a permanent replacement worker during an on-going strike, Kelly has no *Weingarten* rights and (2) even if Kelly does have *Weingarten* rights, he was not denied his request to have a representative present during the investigatory meeting that preceded his termination.

With respect to Charge 25-CA-244883, Employer did not require permanent replacement worker Joe Ellena to sign a preferential hiring list to be considered for a vacancy. Employer's written response to Ellena's unconditional offer to return to work from strike informed Ellena there was no current vacancy and offered him the option of signing the preferential hiring list. Employer's letter imposes no requirement that Ellena add his name to the preferential hiring list himself in order to be considered when a vacancy becomes available.

With respect to Charge 25-CA-234477, Employer did not make a unilateral change in violation of the Act when it posted the five-minute punch-in notice prohibiting employees from punching in earlier than five minutes before their scheduled start time in order to get unscheduled, unauthorized overtime. What changed is that employees departed from their usual practice by punching in early for their scheduled shift in order to get additional overtime pay. Therefore, the posting of the five-minute punch-in notice was not a material, substantial, and significant change to a mandatory subject of bargaining in violation of the Act.

With respect to Charge 25-CA-242081, neither Employer nor its agent removed a Union picket sign to interfere with employees' Section 7 rights in violation of Section 8(a)(1) of the Act. 29 U.S.C. §§ 157, 158(a)(1). Employer's agent denies removal of the sign and no witness or evidence was presented that Employer's agent admitted or was observed removing the sign.

Employer believes the Amended Consolidated Complaint is based on charges filed by the Union in the Union's desperate attempts to block the June 11, 2018 decertification petition filed

by Josh Webber, as it has successfully done for almost two years. The Union's actions are an abuse of the Board's blocking charge policy that existed at the time the unfair labor practice charges were filed and are themselves a violation of workers' Section 7 right to choose to elect or decertify a collective bargaining representative. No vote has been scheduled by the Board. It has been 702 days since the decertification petition was filed—1 year, 11 months, and 2 days.

## **II. STATEMENT OF FACTS**

RiverStone Group, Inc. operates crushed stone quarries in several locations to provide builders with high quality aggregates (crushed stone, sand, and gravel) for use in a wide variety of construction, environmental, and agricultural applications. Troy Grove and Vermilion are RiverStone quarries located in northern Illinois. The union of the equipment operators and maintenance employees at Troy Grove and Vermilion is the International Union of Operating Engineers, Local 150, AFL-CIO ("Union" or "Local 150"). The collective bargaining agreement ("CBA") between Employer and Union became effective upon execution on July 30, 2014 and expired on May 1, 2016; Employer and Union have not agreed on a successor collective bargaining agreement. Article 17 of the expired CBA contained a no-strike provision. Exh. GC2.<sup>1</sup>

On March 20, 2018, twenty-three (23) months after the CBA expired, Union members went on strike and began picketing. Exh. R1. On April 9, 2018, Employer began hiring permanent replacement workers, requiring them to sign a Notification of Employment, which included terms and conditions of employment set by Employer and informed the workers that they were at-will employees. Exhs. R2, R7. The Union strike has been continuous, even as some strikers covered under the status quo of the expired CBA offered to return to work and

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<sup>1</sup> References to the transcript appear as "Tr. at [Page:Line]." Respondent's exhibits appear as "Exh. R[#]." General Counsel's exhibits appear as "Exh. GC[#]."

were reinstated by Employer. On June 11, 2018, a permanent replacement worker (Joshua L. Webber) filed a Decertification Petition (25-RD-221796). The Union continues to file blocking charges to delay the decertification election.

**A. Charge 25-CA-246978**

Permanent replacement worker Matthew Kelly was hired on May 14, 2018. His signed Notification of Employment was dated May 14, 2018. Exh. R2. Kelly submitted a strike letter informing Employer he was going on strike on May 9, 2019. Exh. GC14. Kelly offered to return to work on June 26, 2019 and was reinstated and returned to work by Employer on July 8, 2019. Exhs. GC15, GC16.

**1. Kelly's Attendance Violations & Discipline**

Kelly arrived to work late for his scheduled 6:00 a.m. start (Tr. 56:15-16, 184:15-16) on multiple occasions between May and August 2019 in violation of Employer's attendance policy that an employee punch in for work by the employee's scheduled start time. Kelly was late on May 2 (6:26 a.m.), May 8 (6:30 a.m.), August 7 (6:54 a.m.), and August 14th (No punch-in). The timecards and written warnings for Kelly's first three attendance violations appear in Exhs. R6, GC9, GC12, and GC18. Exhs. R6 at Bates# RSG CONS 006433-34, 006437, 006440-41), GC9, GC12, GC18. Employer policy as of the February 27, 2019 superintendent training was to give employees violating the attendance policy a written warning and counseling for the first two violations within a 12-month period; to give a final written warning, counseling, and possible suspension for the third violation; and to terminate the employee following the fourth violation. Exh. R4 at RSG CONS 001815-18. ; Tr. 242:22 – 249:15, 284:8 – 287:25. Each warning was to be signed by the counseled employee and his supervisor and a copy given to the employee. Exh. R4 at Bates# RSG CONS 001815-18; Tr. 245:1-12, 246:1-12. The supervisor was directed to

make note on the written warning if the employee refused to sign. A suspension pending investigation was available to supervisors to gather necessary facts to determine the appropriate discipline, if any. Supervisor training for disciplinary guidelines and the written warning forms revised in January 2019 occurred on February 27, 2019. Exh. R4 at Bates# RSG CONS 001815-18.

Following his first two attendance violations and consistent with policy, Kelly was counseled and given a first and second written warning by his supervisor, Superintendent Scott Skerston. Kelly refused to sign the written warnings as noted by Skerston on the warnings, but Kelly was provided copies of the written warnings. Exh. R6 at Bates# RSG CONS 006433-34, Exhs. GC9, GC12; Tr. 259:20 – 260:2. After his third violation, Kelly was counseled and given a final written warning. Exh. R6 at Bates# RSG CONS 006440-41; Exh. GC18; Tr. 69:19 – 71:14. Kelly refused to sign the third and final written warning as noted by Skerston on the warning, but Kelly was provided a copy. Exh. R6 at Bates# RSG CONS 006440-41; Exh. GC18; Tr. 69:19 – 71:14.

## **2. Kelly's Attendance Investigation & Termination**

After Kelly's fourth attendance violation on August 14, he was suspended pending an investigation into his fourth violation. Exh. GC19; Tr. 71:15 – 73:7. The Notice of Suspension Pending Investigation, signed and dated on August 14, 2019 by Kelly and Skerston, and the investigation Questions for Matt Kelly, signed and dated August 14, 2019 by Kelly, are included in General Counsel's Exhibits GC20 and GC21. Exhs. GC20, GC21; Tr. 73:8 – 79:10. Kelly asked to have employee Lyle Calkins present during the August 14th investigatory meeting for his fourth attendance violation. Tr. 77:3-15. Skerston told Kelly that he did not want to wait for Calkins to come down. Exh. GC21; Tr. 75:20 – 79:10. This is because Calkins was not at

Vermilion Quarry, which is where Skerston was talking to Kelly. *Id.* Instead, Calkins was working a twenty-minute drive away at Troy Grove, the other quarry. *Id.* Kelly accepted Skerston's suggestion of Kelly's co-worker Ben Gibson (a permanent replacement worker), who was at Vermilion. *Id.* Following the investigation, Kelly was terminated for violating the attendance policy after three written warnings and counseling for his three previous violations within the same 12-month period. Exhs. GC21, GC22. Tr. 75:20 – 80:17. The August 14, 2019 Termination of Employment letter for Kelly was admitted as General Counsel's Exhibit GC22. Tr. 79:14 – 80:17.

**B. Charge 25-CA-244883**

Joseph "Joe" Ellena is a permanent replacement worker hired on May 21, 2018. Exh. R7; Tr 159:3 – 18, 235:4 - 236:5. Ellena went on strike May 20, 2019. Exh. GC4. He offered to return to work on July 10, 2019. Ex. GC5. Superintendent Skerston responded to Ellena's offer to return to work with a written notice informing Ellena there was not an open position and that he could sign the preferential hiring list if he wished to do so. Exh.GC6(a)-(b); #Tr. 41:7 – 45:5. Specifically, Employer's notice to Ellena read in part:

I received the email from Steve Russo that had attached to it your letter stating your unconditional and immediate offer to return to work immediately.

There are no job openings at this time. The Company has established a preferential hiring list which you are welcome to sign if you wish to do so. The preferential hiring list is located at Vermilion.

If you have any questions, please call me at (815) 481-7445.

Ex. GC6(a).

**C. Charge 25-CA-242081**

At the time of the alleged violation of the Act in January 2019 and for more than six months prior, the work schedule set by Employer for the bargaining unit employees was 6:00

a.m. to 4:00 p.m., Monday through Thursday. *See, e.g.*, Tr. 56:15-16, 159:3 – 18, 161:1-2.

Employees punching in early for their scheduled start time are paid time and a half for the resulting unscheduled, unauthorized overtime. *See, e.g.*, Tr. 186:6-18, 239:13-21.

At the hearing, witnesses admitted that in December 2018, after observing a co-worker punching in early for his shift and getting overtime pay, they resolved to break from practice and clock in early for their shifts as well in order to get unscheduled overtime:

Tr. 137:

...

5 Q And to the best of your knowledge, have you ever  
6 had a discussion with other employees about punching in  
7 early?

8 A Yes, sir.

9 Q And who did you have that discussion with?

10 A Lyle Calkins, Scott Currie, and Joseph Allena.

11 Q And when did that discussion take place?

12 A Early January of 2019.

....

24 Q Okay, and what was discussed?

25 A There was an employee that I work with that punches

Tr. 138

1 in early, and Joseph Ellena was working at the  
2 Vermillion Quarry, and stated that there were employees  
3 down there punching in early, as well.

4 Q Okay.

5 A And they were being paid for their overtime.

6 Q Okay. So, when they punched in early, how were  
7 they getting paid?

8 A They would get paid from the minute they punched  
9 in.

10 Q Okay, would that be straight time or time and a  
11 half?

12 A Time and a half.

13 Q So that was overtime?

14 A Yes.

15 Q And what, if anything, did you do in response to

16 that discussion?

17 A I decided that I was going to punch in early and  
18 see if they paid me.

19 Q Okay, and when did you start doing that?

20 A It was mid-January of 2019.

21 Q And so on the first day of -- you said you clocked  
22 in early, what time did you clock in?

23 A I believe it was 5:30, give or take five minutes.

24 Q And how often did you do that?

25 A For three consecutive days.

Tr. 139

1 Q And what, if anything, happened on the fourth day?

2 A I believe the third day was a Thursday, and we  
3 don't work Fridays. We did not work the following  
4 Monday for cold weather, so when we showed up to work on  
5 Tuesday, there was a notice saying that we could punch  
6 in -- can't punch in more than five minutes before our  
7 start time.

Tr. 137:5 – 139:7.

Superintendent Scott Skerston reviewed Lower's December timecards, noting Lower punched in early repeatedly, sometimes as much as 30 minutes before his 6:00 a.m. scheduled start time. Exh. R8 (Bates # RSG CONS 00667-68); Tr. 237:17 – 242:6. No discipline was issued to Lower or any other operator for these early clock-ins, but Skerston later posted next to the time clock the five minute punch-in notice prohibiting employees from punching in earlier than five minutes before their scheduled start time. Exh. GC27; Tr. 242:3-6.

#### **D. Charge 25-CA-234477**

After employee Webber filed the Decertification Petition on June 11, 2018 (25-RD-221796), Employer contracted with Jim Misercola, a persuader under the Labor-Management Reporting Disclosure Act, to communicate with employees concerning the Decertification Petition. Tr. 314:4-19. The Complaint alleges that on January 2, 2019, Employer, through its agent, Jim Misercola, interfered with the employees' Section 7 rights by removing Union picket

signs from public property. Compl. ¶¶ 5(a), 9. Misercola denies removal of any Union picket sign. Tr. 312:1-3. General Counsel and the Union's witnesses admitted at the hearing that they knew Misercola was a persuader hired by Employer, they did not like him because of his role, they could identify him by sight, they were sitting in or standing immediately outside a truck 80 yards away when the alleged act took place, and they did not actually see him remove a sign: Tr. 97:7-23, 100:19-25, 101:1-14, 102:7-25.

### **III. ARGUMENT FOR CHARGE 25-CA-246978**

General Counsel's complaint alleges Employer disciplined and terminated permanent replacement worker Matt Kelly, violated his *Weingarten* rights, and made coercive statements to discriminate against Union supporters and discourage concerted activities. General Counsel is wrong. Employer did not discriminate against Kelly or discourage his protected activities in violation of the Act, but rather terminated Kelly for his repeated violations of the attendance policy after he was given the opportunity to have a representative at his investigatory meeting, even though he was not entitled to *Weingarten* rights as a permanent replacement employee.

#### **A. Kelly was disciplined and terminated for his attendance violations, not his protected concerted activity.**

Section 8(a)(3) of the Act prohibits discrimination in hiring, tenure, or other terms and conditions of employment to encourage or discourage union membership. 29 U.S.C. § 158(a)(3). The Board's *Wright Line* test is well-established as the legal framework for showing the requisite anti-union animus in 8(a)(3) charges against employers. *Contemporary Cars, Inc. v. NLRB*, 814 F.3d 859, 874-875 (7th Cir. 2016) (citing *Wright Line*, 251 NLRB 1083 (1980)). Under the *Wright Line* test, to prove an employer discriminated against an employee, the charging party must first establish the following: (1) the employee engaged in a protected activity, (2) the decision-maker knew it, and (3) the employer acted because of anti-union animus. *See, e.g., Big*

*Ridge, Inc. v. NLRB*, 808 F.3d 705, 713 (7th Cir. 2015). The burden then shifts to the employer “to either rebut that evidence or mount an affirmative defense that the [employer] would have taken the same action despite the employee’s protected activities.” *Id.* at 713-14.

In the instant case, General Counsel and the Union fail the third element of the *Wright Line* test because Employer did not terminate Matt Kelly for his protected concerted activity, but rather for his four violations of the attendance policy. The Attorney for the General Counsel also fails because Employer would have taken the same action despite the employee’s protected activity. Employer’s attendance policy requires that an employee punch-in for work by the employee’s scheduled start time. Kelly’s regularly scheduled start time was 6:00 a.m. Under Employer’s progressive discipline policy for attendance violations, adopted in March 2019, Kelly was given his first written warning and accompanying counseling by Superintendent Scott Skerston on May 6, 2019 because he was late for work on May 2, 2019, punching in sixteen minutes late at 6:16 a.m. Exhs. R6 at Bates# RSG CONS 006433-34; Exh. GC9. In addition to the required counseling regarding the attendance policy, the written warning notice, including the check boxes at the top of the form for first, second, and final warnings, with no box for a fourth warning, put disciplined employees on notice that the consequence for a fourth violation of the attendance policy, also described in the written warning, is a termination. Kelly’s second attendance violation occurred on May 8, 2019 when he arrived late for work, punching in 30 minutes late at 6:30 a.m. Exh. R6 at Bates# RSG CONS 006437; Exh. GC12. On the same day, he was counseled and given his second written warning by Skerston. *Id.* Kelly submitted his strike letter on May 9, 2019, one day after his second written warning. Exh. GC14. However, he offered to return to work in late June and did so as indicated by his signature on a July 8, 2019 letter from Skerston thanking him for returning to work. Exhs. GC15, R9.

Nearly a month after his return, Kelly's third attendance violation within a 12-month period occurred on August 7, 2019 when he arrived late for work, punching in 54 minutes late at 6:54 a.m. Exh. R6 at Bates# RSG CONS 006440-41; Exh. GC18. Skerston gave Kelly a final written warning and counseling, but did not suspend him. *Id.* One week later, on August 14, 2019, Kelly's fourth attendance violation occurred when he did not arrive for work and punch in by his 6:00 a.m. scheduled start time. Exhs. GC20, GC21. When Kelly had not arrived by 6:25 a.m., Skerston began drafting paperwork for a suspension pending investigation for Kelly's fourth violation. Exh. GC19. Kelly completed, signed, and dated the investigation Questions for Matt Kelly on August 14 and signed the Notice of Suspension Pending Investigation on the same day. Exhs. GC20, GC21. Following review of the answered Questions for Matt Kelly, Employer terminated Kelly on August 14, 2019 for his repeated attendance violations despite multiple written warnings and counseling. Exh. GC22.

Employer discharged Kelly for his attendance violations. The evidence presented at the hearing supports this, and nowhere in the record does Kelly or any other witness dispute his attendance violations. Employer did not discharge Kelly for engaging in a strike, supporting the Union, or any other protected concerted activity. The warning guidelines and revised written warning forms were adopted in March 2019. Kelly was disciplined before he went on strike for his attendance violations, and he was disciplined after he returned from strike for his continued attendance violations. Kelly was not treated differently because he went on strike or supported the Union. Therefore, because Kelly's protected concerted activity was not a factor in Employer's decision to terminate him for a legitimate business reason – repeated attendance violations, the Union's charge fails the *Wright Line* test.

**B. Kelly had no *Weingarten* rights, but was permitted to have a representative present during his investigatory meeting.**

There was no *Weingarten* violation because (i) as a permanent replacement worker, Kelly has no *Weingarten* rights and (ii) even if he would have *Weingarten* rights, they were granted because Employer permitted Kelly and Kelly agreed to have a fellow employee accompany him.

**1. Kelly is a permanent replacement worker not covered by the status quo for the expired collective bargaining agreement.**

It is settled law that an employer can make unilateral changes to terms and conditions of employment for replacement workers, hired as permanent replacements for economic strikers. *See, e.g., Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 246 (7th Cir. 1982). This is so because the “interests of strike replacements are different from those of strikers and the Union cannot be expected to effectively represent these conflicting interests.” *Id.* “Strike replacements can reasonably foresee that, if the union is successful, the strikers will return to work and the strike replacements will be out of a job. It is understandable that unions do not look with favor on persons who cross their picket lines and perform the work of strikers.” *Capitol-Husting*, 671 F.2d at 246 (quoting *Leveld Wholesale, Inc.*, 218 NLRB 1344, 1350 (1975)).

There is no collective bargaining agreement currently in effect as the predecessor agreement has expired without renewal, the Union has struck, and no agreement has been reached between the Union and Employer regarding a new CBA. Therefore, after the Union struck on March 20, 2018, Employer began hiring permanent replacement workers and provided the replacements with terms and conditions of employment that differed from that due bargaining unit members under the predecessor CBA. Specifically, the permanent replacement workers were not granted pension participation, nor a grievance procedure. The permanent replacement workers were provided notice of the different terms subject to Employer’s discretion unless a collective bargaining agreement becomes effective or a settlement or NLRA proceeding

directs otherwise; thus, as to wages, hours, and terms and conditions of employment for permanent replacement workers, the Union is not the exclusive collective bargaining representative for the permanent replacement workers generally nor Matt Kelly specifically as to wages, hours, and terms and conditions of employment. Employer hired Matt Kelly on May 14, 2018 as a permanent replacement, and Kelly signed and dated the attached Notification of Employment acknowledging his terms of employment would differ from those under the expired CBA subject to Employer's discretion and that he was an at-will employee. Exh. R2.

**2. Permanent replacement workers not covered by a collective bargaining agreement during a strike do not have *Weingarten* rights.**

*Weingarten* rights do not exist for permanent replacement workers because (1) a union has a conflict of interest in representing both permanent replacement workers and the economic strikers they replace; (2) a union cannot change the imbalance between an employer and permanent replacements with whom an employer can deal directly and unilaterally set wages, hours, and terms and conditions of employment; and (3) imposing a *Weingarten* right would undermine the benefits of workplace investigations for permanent replacement workers.

**a. The Union does not represent the interests of the permanent replacement workers who replace the striking employees.**

Where a union economic strike exists and the employer hires permanent replacements, the union does not represent the interests of the permanent replacement workers who replace the striking employees and an employer may deal directly with permanent replacement workers and unilaterally set wages, hours, and terms and conditions of employment for the replacements. *See, e.g., Capitol-Husting*, 671 F.2d at 246. In establishing *Weingarten* rights, the emphasis was on granting an employee's request for the presence of a union representative because the union was duty bound to represent not just the individual employee, but the common interest of all members of the bargaining unit: "In *Weingarten*, the Supreme Court emphasized that a union

representative accompanying a unit employee to an investigatory interview represents and ‘safeguards’ the interest of the entire bargaining unit.” *IBM Corp.*, 341 NLRB 1288, 1291 (2004) (quoting *NLRB v. J. Weingarten*, 420 U.S. 251, 260 (1975)). The Board expounded, writing:

The union’s officials are bound by the duty of fair representation to represent the entire unit. Whatever the union representative accomplishes inures to the benefit of the entire unit, not just to the individual employee.

*IBM Corp.*, 341 NLRB at 1291.

However, there is no common interest representation by a union where there are striking employees and permanent replacement workers. *Weingarten* rights only apply to the entire bargaining unit when the union represents the common interest of all bargaining unit employees. In *E.I. DuPont & Co.*, 289 NLRB 627 (1988), the Board reaffirmed its view that “*Weingarten* rights apply only in a union setting” and “maintained its position that unrepresented employees do not possess a Section 7 right to the presence of a fellow employee in an investigatory interview.” *IBM Corp.*, 341 NLRB at 1291. “[T]he Board noted that because the employee representative in a nonunion setting has no obligation to represent the entire work force as does a union representative, he is less likely to ‘safeguard’ the interest of the entire workforce.” *Id.* Similarly, in the instant case, the common interest “safeguard” does not exist because the Union cannot represent both the striking employees and those who permanently replaced those same striking employees. The permanent replacement workers have an interest in keeping their jobs, and the Union has an interest in continuing the strike against Employer and/or returning strikers to the positions held by the permanent replacement workers. Therefore, because the Union does not have a common interest with the permanent replacement workers, *Weingarten* rights do not apply to Permanent Replacements, including permanent replacement Matt Kelly.

**b. The Union cannot redress the imbalance of power between Employer and permanent replacement workers.**

The Union cannot redress the imbalance of power between Employer and permanent replacement workers because Employer may deal directly with replacements on an individual basis and unilaterally set wages, hours, and terms and conditions of employment for the replacements. In overruling the Board's decision in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000), which overruled *E. I. DuPont & Co.*, 289 NLRB 627 (1988), in holding that *Weingarten* rights apply to all employees regardless of union representation, the *IBM Corp.*

Board returned to the policy advocated in *DuPont*, explaining as follows:

The *Epilepsy* result does not take into account the significant policy considerations relevant to a nonunion work force. The critical difference between a unionized work force and a nonunion work force is that the employer in the latter situation can deal with employees on an individual basis. The Board's decision in *Epilepsy* does not take cognizance of that distinction. Thus, for this reason as well, grounded in national labor policy, we choose not to follow *Epilepsy*."

*IBM Corp.*, 341 NLRB at 1292.

Similarly, in the instant case, *Weingarten* rights do not apply to the permanent replacement workers, with whom Employer is permitted to deal directly on an individual basis rather than the Union, because the Union's representation of the striking employees conflicts with the interests of the permanent replacement workers. As a result, the Union cannot redress the imbalance between Employer and the Permanent Replacements, and granting *Weingarten* rights to the presence of a Union representative for Permanent Replacements would provide no additional protection to Permanent Replacements governed by different terms and conditions of employment subject to Employer's discretion.

**c. Imposing a *Weingarten* right undermines the benefits of workplace investigations.**

An employer is not required to conduct an investigatory interview and may decide a course of action without conducting an interview to avoid the burden of *Weingarten* rights. The

IBM Corp. Board recognized, “as did the *DuPont* Board, that the parties to a workplace investigation have the option to forego an interview, which allows the employer to reach a conclusion and impose discipline based on its independent findings.” *IBM Corp.*, 341 NLRB at 1294. However, employees covered under the terms of a CBA usually have a grievance procedure, which gives employees the opportunity to tell their side of the story even if an employer decides not to conduct an investigatory interview. It is very different for employees not covered by a CBA with a grievance procedure because the interview may be their only opportunity to tell their side of the story. The *IBM Corp.* Board recognized this distinction:

As for the employee involved, if the interview is not held, he loses the chance to tell his version of the incident under investigation because there typically is no grievance procedure in a nonunion setting to provide an alternative forum. This, in essence, forces the employer to act on what may possibly be, at best, incomplete information and, at worst, erroneous information.

*Id.* For this reason, the Board in *IBM Corp.* found that “on balance, the right of an employee to a coworker's presence in the absence of a union is outweighed by an employer's right to conduct prompt, efficient, thorough, and confidential workplace investigations.” *Id.* Although the *IBM Corp.* Board is discussing a non-unionized workforce, its analysis (and that of *DuPont* and *Epilepsy Foundation*) is addressing a situation in which workers' interests are not safeguarded by a union. Such is the case in the instant matter. Although a permanent replacement worker may support the Union, the terms and conditions of employment for permanent replacements are not governed by the expired CBA and the collective employment interest of the permanent replacement workers conflict with the Union's collective bargaining interest on behalf of the strikers the permanent replacement workers replaced. Thus, the Union does not represent the permanent replacement workers' interest, and the situation is analogous to that described in *IBM Corp.*—without union representation, policy favors denying *Weingarten* rights.

Finally, even if it is determined that Kelly was owed a right to the presence of a representative at his investigatory meeting, which he was not, Employer did allow Kelly to have an agreed representative present—his co-worker Ben Gibson. Kelly’s first choice, Lyle Calkins was denied by Employer because Calkin’s approximately 20-minute drive from his Troy Grove work location to Vermilion would have delayed the investigatory meeting at Vermilion, where Kelly was assigned. Tr. 75:20 – 79:10. Additionally, Skerston’s suggestion of Kelly’s co-worker at Vermilion, Ben Gibson, was accepted by Kelly, and Gibson was permitted to be present during the investigatory meeting. *Id.* The Board has “stressed the admonition in *Weingarten* that the right to choose representation should not interfere with an employer’s legitimate business interests, such as conducting investigatory interviews without undue delay.” *Anheuser-Busch, Inc. v. NLRB*, 338 F.3d 267, 277 (4th Cir. 2003). In *Pacific Gas & Electric Co.*, 253 NLRB 1143 (1981), the Board held that an employer is not required to delay an investigation for an unavailable off-site representative 20 minutes away where there was an available on-site representative). The *Pacific Gas* Board also recognized the holding in *Coca-Cola Bottling Co. of Los Angeles*, 227 NLRB 1276 (1977), that “w[h]ere another union representative was available, but the employee did not request him, the employer did not violate Section 8(a)(1) of the Act by proceeding with the interview in the absence of a representative.” *Pacific Gas*, 253 NLRB at 1143. Thus, although Employer was under no obligation to conduct the investigatory meeting or to allow Kelly to have a co-worker present during the meeting, Employer nevertheless allowed Kelly to have an agreed co-worker present and no violation of the Act or alleged, but inapplicable, *Weingarten* rights occurred.

#### **IV. ARGUMENT FOR CHARGE NO. 25-CA-244883**

General Counsel's Complaint alleges Employer violated Section 8(a)(3) by telling Ellena that he was required to sign the preferential hiring list:

Since about 7/12/2019, the above-named Employer, by its officers, representatives and agents, has interfered with the rights of former strikers upon their unconditional offer to return to work, by establishing a sign-up requirement for their addition to a preferential hire list.

The Complaint is wrong because (1) Employer did not require Ellena to sign the preferential hiring list in order to be rehired; (2) it is not necessary for Ellena's name to be placed on the preferential hiring list to establish order of recall because he is the only striker that offered to return to work when there was not a vacancy; and (3) Employer did not discriminate pursuant to Section 8(a)(3) of the Act against Ellena when it gave Ellena the opportunity to sign the preferential hiring list.

##### **A. Employer did not require Ellena to sign the preferential hiring list in order to be returned to work.**

Employer did not tell Ellena that he was required to sign the preferential hiring list.

Ellena was only told that he could sign the list if he "wished to do so" in order for Employer to be consistent with other employees who may be offered signing of the list in the future. Exh. GC6a-b. Joe Ellena offered to return to work on July 10, 2019 at 11:51 a.m. Exh. GC5. At the time those emails were received by Employer, Employer had one open position that it was attempting to fill. Specifically, the letter from Scott Skerston, Superintendent at Employer, states:

There are no job openings at this time. The Company has established a preferential hiring list which you are welcome to sign if you wish to do so. The preferential hiring list is located at Vermilion.

GC6a. The letter did not state that Ellena must come to Employer to sign the preferential hiring list in order to be recalled. *Id.* Employer has not interfered with Ellena's rights as a former striker

upon his unconditional offer to return to work because Ellena was not required to sign the preferential hiring list in order to be brought back to work at Employer.

**B. Ellena's not signing the preferential hiring list has no effect on his eligibility to return to work or his wages, hours, or terms and conditions of employment.**

The preferential hiring list does not negatively affect Ellena. Ellena is the only striker that offered to return to work when there was not a vacancy, and he currently is the only striker seeking return to work. Therefore, it is not necessary for his name to be on a preferential hiring list to establish recall because he will be returned to work for the next vacancy, and there are no names on the list that take precedence over him. According to *Merriam-Webster*, a "list" is defined as "a simple series of words or numerals (such as the names of persons or objects)." *Merriam Webster*, "List" last visited Dec. 31, 2019 <https://www.merriam-webster.com/dictionary/list> (emphasis added). This definition demonstrates that a list must contain more than just one word, numeral, or name of a person. The language of *Peerless Pump Co.*, 345 NLRB 371, 375 (2005), indicates the same line of thinking as to who must be included on a preferential hiring list: "individuals," as opposed to a single individual such as Ellena.

In *Peerless Pump*, a large group of former strikers gave their unconditional offer to return to work and, therefore, were seeking reinstatement. The need and requirement for a list as established in *Laidlaw Corp.*, 171 NLRB 1366 (1968), was logical: "...Respondent was obliged under *Laidlaw* to reinstate those individuals to their former jobs or, if no vacancy then existed, to place them on a nondiscriminatory recall list until a vacancy occurred." *Peerless Pump*, 345 NLRB at 375. However, in our case, although Employer was not required to establish a preferential hiring list because no list could be created with just a single name (Ellena), Employer still offered Ellena the option of signing his name to the "list." Regardless of whether Ellena chose to place his name on the preferential hiring list or not, Ellena would be the first to

be recalled to work. Thus, Ellena's signing or not signing the preferential hiring list does not violate Section 8(a)(3) of the Act because it will not affect his wages, hours, or other terms and conditions of employment.

**C. Employer did not discriminate under section 8(a)(3) against Ellena by offering him the opportunity to sign the preferential hiring list.**

Employer giving Ellena the opportunity to sign the preferential hiring list is not Section 8(a)(3) discrimination. There was no vacancy when Ellena offered to return to work on July 12, 2019. Similarly, no employee has been hired by Employer since 7/12/2019. Therefore, Ellena has not been treated less favorably than other employees who have offered to return to work when there were no vacancies because there are no such employees.

In *Peerless Pump*, a large number of former strikers were seeking job reinstatement. The establishment of a preferential hiring list was necessary to establish order of recall for the workers that offered to return to work. However, the employer in that case placed additional burdens on the former strikers by requiring them to come to employer directly in order to sign the preferential hiring list. In our case, Ellena was the only former striker seeking reinstatement when there were no available positions, and because there is no such thing as a list of just one thing, item, or person, it was not necessary for Employer to establish and place Ellena's name on a preferential hiring list. Additionally, because Ellena is the only former striker seeking reinstatement, there are no comparators that could be similarly situated to Ellena because in order to have a comparator, there must be at least two or more people. Employer has not and cannot place additional burdens on Ellena as a former striker that would put him higher up on the preferential hiring list because he is on a so-called "list" of one. Therefore, it is impossible for Employer to discriminate against Ellena under Section 8(a)(3) because Ellena is the sole former striker seeking reinstatement.

**V. ARGUMENT FOR CHARGE 25-CA-234477**

The Complaint alleges Employer violated the Act by making a unilateral change to the punch-in policy in January 2019 “to require that employees punch in no more than five minutes before the start of their scheduled shifts” without prior notice to Union or opportunity to bargain. Compl. ¶ 8. Employer did not unilaterally change terms and conditions of employment subject to mandatory bargaining when it posted the five-minute punch-in notice because it was neither a change, nor a mandatory subject of bargaining (the Union waived its rights to bargain under the management rights clause).

In December 2018, several employees were punching in significantly earlier than they were scheduled to start in order to get unscheduled, unauthorized overtime pay. Indeed, at the hearing, witnesses from the bargaining unit admitted to noticing in December that some employees were clocking in early and that the witnesses resolved to depart from their authorized schedule to punch in early, which they did.

Tr. 137

...

5 Q And to the best of your knowledge, have you ever  
6 had a discussion with other employees about punching in  
7 early?

8 A Yes, sir.

9 Q And who did you have that discussion with?

10 A Lyle Calkins, Scott Currie, and Joseph Allena.

11 Q And when did that discussion take place?

12 A Early January of 2019.

....

24 Q Okay, and what was discussed?

25 A There was an employee that I work with that punches

Tr. 138

1 in early, and Joseph Ellena was working at the  
2 Vermillion Quarry, and stated that there were employees  
3 down there punching in early, as well.

4 Q Okay.  
5 A And they were being paid for their overtime.  
6 Q Okay. So, when they punched in early, how were  
7 they getting paid?  
8 A They would get paid from the minute they punched  
9 in.  
10 Q Okay, would that be straight time or time and a  
11 half?  
12 A Time and a half.  
13 Q So that was overtime?  
14 A Yes.  
15 Q And what, if anything, did you do in response to  
16 that discussion?  
17 A I decided that I was going to punch in early and  
18 see if they paid me.  
19 Q Okay, and when did you start doing that?  
20 A It was mid-January of 2019.  
21 Q And so on the first day of -- you said you clocked  
22 in early, what time did you clock in?  
23 A I believe it was 5:30, give or take five minutes.  
24 Q And how often did you do that?  
25 A For three consecutive days.

Tr. 139

1 Q And what, if anything, happened on the fourth day?  
2 A I believe the third day was a Thursday, and we  
3 don't work Fridays. We did not work the following  
4 Monday for cold weather, so when we showed up to work on  
5 Tuesday, there was a notice saying that we could punch  
6 in -- can't punch in more than five minutes before our  
7 start time.

Tr. 137:5 – 139:7.

Superintendent Skerston reviewed employee timecards, confirming frequent and significant early punch-ins. Exh. R8 (Bates # RSG CONS 00667-68); Tr. 237:17 – 242:6. Skerston issued no discipline, but he did post the five-minute punch-in notice next to the time clock. Exh. GC27; Tr. 242:3-6.

**A. Employer did not make a change.**

“An employer violates Section 8(a)(5) and (1) if it makes a material, substantial, and significant change regarding a mandatory subject of bargaining without first providing the union notice and a meaningful opportunity to bargain about the change to agreement or impasse, absent a valid defense.” *MV Transp., Inc.*, 368 NLRB No. 66, slip op. at 3 (Sept. 10, 2019) (citing *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991); *Alamo Cement Co.*, 281 NLRB 737, 738 (1986)). The posting of the five-minute punch-in notice on or about January 2019 was not a unilateral change in violation of the Act. First, there has been no change to policy. Employer did not create a new policy, but rather was enforcing the existing work schedule, consistent with its past practice and the status quo of the terms of the expired collective bargaining agreement for employees covered by the Agreement. At the time of the alleged violation of the Act in January 2019 and for more than six months prior, the work schedule set by Employer for the bargaining unit employees was 6:00 a.m. to 4:00 p.m., Monday through Thursday. Tr. at 135:16-25, 136:17-20.

General Counsel’s employee witnesses admitted in their testimony that in December 2018 they departed from their usual practice by punching in early for their scheduled shift in order to get additional overtime pay. Tr. 137:5 – 139:7. Early punch-ins are problematic for Employer because, among other things, they result in unscheduled, unauthorized overtime paid at time and a half. *See e.g.*, Tr. 239:11-21. An employee clocking in at 5:30 a.m. when he was scheduled to start at 6:00 a.m. is not adhering to the work schedule set by Employer, and Employer’s five-minute punch-in notice is consistent with the existing work schedule.

**B. Employer enforced its existing work schedule as was its right consistent with its past practice.**

If the charge were permitted to stand, Employer would essentially be required to negotiate with the Union over whether Employer can require employees to follow the work

schedule and whether Employer can decide when to schedule overtime, rights that certainly remain with Employer as a matter of practice and of contractual right under the status quo for the expired CBA.

**C. The five-minute punch-in notice was not a material, substantial, and significant change.**

Even if the five-minute punch-in notice is found to have been a unilateral change, which it was not, it cannot be considered a material, substantial, and significant change regarding a mandatory subject of bargaining. Employer sets the schedule for employees. Employees punching in more than five minutes before their scheduled start time build unscheduled, unauthorized overtime. Compliance with the five-minute punch-in does not deprive employees of any benefit for which they are entitled, and Superintendent Skerston imposed no discipline on employees for the unscheduled, unauthorized overtime that occurred prior to the five-minute punch-in notice.

**VI. ARGUMENT FOR CHARGE 25-CA-242081**

The Complaint alleges Employer through its agent, Jim Misercola, interfered with the section 7 rights of employees in violation of section 8(a)(1) by removing Union picket signs from public property on or about January 2, 2019. Compl. ¶¶ 5(a), 9. Employer denies these allegations. First, Misercola, Employer's persuader, denies having removed any sign. Tr. 312:1--3. Second, General Counsel and the Union's witnesses admitted at the hearing they knew Misercola was a persuader hired by Employer, they did not like him because of his role (the police report entered as Exhibit GC24 further state their animosity for Misercola in that they regard him as a "Union buster"), they could identify him by sight, they were sitting in or standing immediately outside a truck 80 yards away when the alleged act took place, and they did not actually see him remove a sign. Tr. 97:7-23, 100:19-25, 101:1-14, 102:7-25.



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UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SUBREGION 33

TROY GROVE A DIV. of RIVERSTONE GROUP)	)	
INC., VERMILION QUARRY, A DIV. OF	)	
RIVERSTONE GROUP INC.	)	
	)	
Employer,	)	
	)	Cases 25-CA-234477
and	)	25-CA-242081
	)	25-CA-244883
INTERNATIONAL UNION OF OPERATING	)	25-CA-246978
ENGINEERS, LOCAL 150, AFL-CIO	)	
	)	
Union.	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 13, 2020, the foregoing RESPONDENT'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE was electronically filed with the National Labor Relations Board and served upon the following:

by Email to:

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TROY GROVE QUARRY, a Division of RIVERSTONE  
GROUP, INC., and VERMILION QUARRY, a Division of  
RIVERSTONE GROUP, INC., Employer,

/s/Arthur W. Eggers

By:

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# **EXHIBIT B**

**RE: 25-CA-234477 - Post-Hearing Brief**

NLRBRegion25@nlrb.gov <e-Service@service.nlrb.gov>

Wed 5/13/2020 5:47 PM

To: Arthur W. Eggers <aegggers@califf.com>

**Confirmation Number: 1036048362**

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Date Submitted:	Wednesday, May 13, 2020 6:43 PM (UTC-05:00) Eastern Time (US & Canada)
Regional, Subregional Or Resident Office:	Region 25, Indianapolis, Indiana
Case Name:	Troy Grove and a div. of Riverstone Group Inc., Vermillion Quarry a div. of Riverstone Group Inc.
Case Number:	25-CA-234477
Filing Party:	Charged Party / Respondent
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Attachments:	Post-Hearing Brief: Respondent's Post-Hearing Brief to the ALJ.pdf

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