

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

**TROY GROVE A DIV. OF RIVERSTONE GROUP
INC., AND VERMILLION QUARRY A DIV. OF
RIVERSTONE GROUP INC.**

and

**Cases 25-CA-234477
25-CA-242081
25-CA-244883
25-CA-246978**

**INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 150, AFL-CIO**

Raifael Williams, Esq. and
Ashley Miller, Esq.,
for the General Counsel.

Arthur Eggers, Esq. and
Carmen Green, Esq.,
for the Respondent.

Steven Davidson, Esq.,
James Connolly, Jr., Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Peoria, Illinois, on March 10 and 11, 2020. The International Union of Operating Engineers Local 150, AFL-CIO (Union or Local 150) filed the charge in Case 25-CA-234477 on January 22, 2019, and a first amended charge on April 30, 2019, filed the charge in Case 25-CA-242081 on May 24, 2019, filed the charge in Case 25-CA-244883 on July 15, 2019, and a first amended charge on December 26, 2019, and filed the charge in Case 25-CA-246978 on August 22, 2019, a first amended charge on October 8, 2019, and a second amended charge on December 20, 2019. (GC Exh. 1(a), (c), (e), (k), (m), (r), (v), (x).) The General Counsel issued a complaint on June 28, 2019, a consolidated complaint on August 28, 2019, another consolidated complaint on January 24, 2020, and an amended consolidated complaint on February 12, 2020. (GC Exh. 1(g), (o), (z), (cc).) Respondent timely filed answers and affirmative defenses to the various complaints, denying the relevant allegations. (GC Exh. 1(i), (j), (q), (bb), (ee).)

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my own observation of the demeanor of the witnesses,¹ and after carefully considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Troy Grove, a Div. of Riverstone Group, Inc., Vermillion Quarry, a Div. of Riverstone Group, Inc., a corporation, has been engaged in operating sand and stone quarries, at its facilities in Utica, Illinois, and Oglesby, Illinois, where it annually performs services valued in excess of \$50,000, in States other than the State of Illinois. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1(ee).)

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent’s Business and Labor Relations

Riverstone Group, Inc., (Riverstone) is a mining aggregate company with its headquarters in Davenport, Iowa. (Tr. 15.) Riverstone operates quarries in Illinois, Iowa, and Missouri. (Tr. 16.) Relevant here, Riverstone operates two quarries in LaSalle County, Illinois: Vermillion Quarry located in Utica and Troy Grove Quarry located in Oglesby. (Tr. 16.) These two quarries are about 17 miles, or about 25 minutes, apart from each other. (Tr. 26–27.)

Scott Skerston has been an employee of Riverstone since 1992. (Tr. 14.) In April and May 2018, Skerston held the position of Respondent’s Superintendent at both the Vermillion Quarry and the Troy Grove Quarry. (Tr. 86—87, 303-304.) In 2018, Tom Becker was hired as the superintendent at the Troy Grove Quarry. (Tr. 24.) After Becker’s arrival, Skerston was the superintendent only at the Vermillion Quarry. (Tr. 86—87.) In November 2019, Skerston transferred to become the superintendent at another Riverstone quarry. (Tr. 17.) Respondent admits, and I find, that Skerston is a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. (GC Exh. 1(ee).)

Since at least 2018, Respondent has employed James Misercola as a “persuader,” who provides people with information in order to secure no votes in union elections. (Tr. 311.) Respondent admits, and I find, that James Misercola is an agent of Respondent within the meaning of Section 2(13) of the Act. (GC Exh. 1(ee).)

¹ Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony and evidence presented at trial, as well as logical inferences drawn therefrom.

Furthermore, Respondent admits, and I find, that International Union of Operating Engineers, Local 150, AFL–CIO, (Union or Local 150) is a labor organization within the meaning of Section 2(5) of the Act. (GC Exh. 1(ee).) Respondent admits, and I find, that the Union represents the following appropriate unit of its employees:

5 The employees described in Article 1, Section 1 of the collective bargaining agreement between Respondent and the Charging Party which was effective from July 30, 2014 to May 1, 2016.

10 (GC Exh. 1(ee).) Local 150 represents employees at both of Respondent’s quarries. (Tr. 32.) Stephen Russo is an organizer/business agent for the Union. (Tr. 128.) Since October 24, 2018, Lyle Calkins has served as the only union steward for employees at both locations. (GC Exh. 3; Tr. 145.) The letter appointing Calkins as union steward states that the steward is to assist employees during investigatory interviews which might result in disciplinary action. (GC Exh. 15 3.)

 The most recent contract between Respondent and the Charging Party expired on May 1, 2016. (GC Exh. 2.) The parties met to negotiate for a successor collective-bargaining agreement, however, one was never reached. (Tr. 34, 129.) The Union’s members voted on a contract proposal, but did not approve it. (Tr. 129.) Instead, the Union’s members voted to go on strike for what the Union deemed unfair labor practices.² (Tr. 129.)

B. Respondent’s Safety and Disciplinary Policies

25 Respondent maintains a progressive disciplinary policy. (Tr. 27–28.) Skerston received training on Respondent’s disciplinary policy at a supervisor’s training on February 29, 2019. (R. Exh. 4; Tr. 243, 285.)

30 Respondent’s policy enumerates four categories of infractions: Safety; Performance; Attendance, and; Conduct. (R. Exh. 4; Tr. 29–31, 244–245.) For safety violations, employees receive a first written warning, then a final warning or suspension, followed by termination. (R. Exh. 4.) For performance and attendance issues, Respondent gives a first warning, a second written warning, a final warning or suspension, and then terminates the employee. (R. Exh. 4.) Attendance violations are tracked for a 12-month period. (R. Exh. 4.) Supervisors were told to 35 consider the full picture of the employee’s performance and length of service before going to the third or fourth step for attendance violations. (R. Exh. 4.) For conduct violations, employees first receive a first warning, then a final warning or suspension, and then are terminated. (R. Exh. 4.) A suspension for conduct may be from 1 to 5 days, depending on the severity of the offense. (R. Exh. 4.)

40 Respondent provided its supervisors with an employee warning notice form at the February 2019 training. (R. Exh. 4.) For repeated offenses, Respondent’s supervisors were trained to list previous infractions chronologically. (R. Exh. 4.) In addition, if an employee violated

² Russo did not describe these unfair labor practices, instead testifying, “We . . . explained to them about some of the, what we felt were [u]nfair [l]abor [p]ractices, so we took a strike vote . . . and then we ended up going out on strike.” (Tr. 129.)

Respondent's policies, supervisors were told to state when the employee was made aware of the policy. (R. Exh. 4.)

Respondent also maintains a policy concerning cell phone use. (R. Exh. 3; Tr. 263.) Cell phone use is not allowed outside of the shop or office areas, except in emergencies. (Tr. 263, 308.)

C. Strike and Ellena's Offer to Return to Work

Respondent's employees went on strike on March 8, 2018. (R. Exhs. 1, 2; Tr. 24.) Strike notices sent to Respondent indicated that the employees were on strike to protest Respondent's unfair labor practices. (R. Exhs. 1, 2.) Respondent began hiring permanent replacement employees in April 2018. (Tr. 34.) All of the replacement workers signed a "Notification of Employment," stating that they understood they were being hired as permanent replacement workers and would not be terminated solely to make room for a returning striker, unless required as part of a negotiated agreement or if required under the Act. (R. Exh. 7.)

Joe Ellena began working for Respondent at the Troy Grove Quarry as a replacement worker on May 21, 2018. (Tr. 37–39, 159.) Ellena is a member of Local 150. (Tr. 159.) He first indicated his support for the Union in July 2018 by wearing a union t-shirt to work. (Tr. 160.) He continued to wear the shirt about once a week for the rest of his time he was employed by Respondent. (Tr. 160.) Ellena also had union stickers on his lunchbox, hard hat, and truck. (Tr. 160.) Skerston was aware of Ellena's union support. (Tr. 38.)

On May 20, 2019, Ellena went on strike. (GC Exh. 4.) In his strike notice, Ellena indicated that he was protesting Respondent's unfair labor practices. (GC Exh. 4.) Ellena made an unconditional offer to return to work on July 10, 2019, by way of a letter to Skerston. (GC Exh. 5.) On July 12, Skerston sent a letter back to Ellena, informing him that he would need to sign a preferential hiring list because there were no jobs available. (GC Exh. 6(a).) The letter further stated that the preferential hiring list was located at Respondent's Vermillion Quarry facility. (GC Exh. 6(a).) Skerston's letter attached a preferential hiring list. (GC Exh. 6(b).) The list indicated that by signing it, Ellena was making an unconditional offer to return to work and that employees would be recalled to work based on the dates and times of their offers to return to work. (GC Exh. 6(b).) The list has one column for employee names and one column for the date and time the form was signed by the employee (GC Exh. 6(b).) Ellena never signed the list and he has not been called back to work. (Tr. 167, 236.)

D. Removal of Picket Sign

On January 2, 2019,³ Thomas Brown and Shane Bice were manning a Union picket line at the Troy Grove Quarry. (Tr. 100.) Brown and Bice are former employees of Respondent and members of the Union. (Tr. 95—96, 113.) The Troy Grove Quarry has two driveways used for entrance and egress. (Tr. 22, 99.) Brown and Bice had signs stating, "I.U.O.E. LOCAL #150 AFL-CIO ON STRIKE AGAINST Troy Grove Stone Quarry, a division of Riverstone Group Inc FOR UNFAIR LABOR PRACTICES." (Emphasis in original.)(GC Exh. 27; Tr. 98.) The

³ All dates herein are in 2019, unless otherwise noted.

signs were approximately 15 inches by 24 inches and were attached to 3- or 4-foot long strips of wood. (Tr. 98, 116.)

5 Brown and Bice had placed four 10-inch long pieces of PVC pipe into the ground, one on each side of the two driveways. (Tr. 99.) They often placed the signs into the pieces of pipe in the ground when they arrived in the morning and would remove them when they went home for the day. (Tr. 99–100; 115–116.) Sometimes the men would walk back and forth at the site and other times they would sit in their trucks with the signs in the PVC pipe in the ground. (Tr. 97, 115.)

10 At about 1:30 p.m. on January 2, Brown and Bice observed a vehicle driven by Misercola exiting the quarry using the other driveway. (Tr. 100, 117.) They observed the vehicle drive forward and backward a few times and then stop before exiting the driveway. (Tr. 102, 117.) Brown and Bice estimated that they were 50 to 80 yards away from Misercola’s vehicle at the time of this incident. (Tr. 102–103, 118.)

15 After Misercola’s vehicle left the area, Brown and Bice noticed that one of their picket signs was gone. (Tr. 103–140, 118.) Bice walked over to the other driveway to look for the sign but couldn’t find it. (Tr. 103–104, 120.) The PVC pipe was still in the ground, but the sign was gone. (Tr. 121.) Bice photographed tire tracks off the driveway in the area where the sign had been. (GC Exh. 25; Tr. 118.) Bice then called Russo to notify him of the missing sign. (Tr. 104, 120.) Russo called the LaSalle County Sheriff’s Department to report what had happened. (Tr. 120, 130.) When a deputy came to the Troy Grove Quarry the next day, Brown talked to him. (GC Exh. 24; Tr. 105.) Russo brought a replacement sign to Brown and Bice the next day. (Tr. 25 122, 131.)

Bice and Brown both testified that the sign did not blow away because its handle had been inside of the PVC pipe buried in the ground. (Tr. 107, 121.) Misercola denied removing the sign. (Tr. 312.)

30 *E. Employer’s Policy on Punching In*

35 Employees at the Troy Grove Quarry worked from 6:00 a.m. to 4:00 p.m., Monday through Thursday. (Tr. 136, 144, 153, 161, 223.) Employees punched in at various times, from 5:35 until 6:00 a.m. (Tr. 138, 147, 161, 185-186, 223.) Prior to January 2019, many employees punched in for work whenever they arrived at the quarry. (Tr. 163.) These workers were paid overtime for this extra time. (Tr. 137–138, 147.) Timecards presented at the hearing show that Ellena and another employee often punched in 10 to 20 minutes early and that Ellena punched in early as far back as June 2018. (GC Exhs. 29, 30, 31, 32; Tr. 293—302.)

40 In January 2019, Lower had a conversation with Calkins, Currie, and Ellena about punching in early. (Tr. 137, 146, 154–155.) All of them noticed that another employee at the Vermillion Quarry had been punching in early.⁴ (Tr. 137–138, 146, 155.) Lower decided that he was going to start punching in early and would see if he would be paid overtime. (Tr. 138, 146, 155.)

⁴ Calkins also admitted to punching in 10–15 minutes early, once or twice a week. (Tr. 147.) Ellena did not testify about this conversation.

5 Lower punched in 30 minutes early on 3 consecutive days starting in mid-January 2019. (Tr. 139, 237–241.) Lower was paid overtime for the time he punched in early. (Tr. 139.) The third day was a Thursday. (Tr. 139.) When he returned to work the following Tuesday, a new policy was posted. (Tr. 139.)

10 Around January 22, Skerston posted a notice to employees near the timeclock in the employee breakroom stating that employees could not punch in more than 5 minutes before the start of their shifts. (GC Exh. 27; Tr. 132, 139, 164–165, 185, 242.) Calkins notified Russo when the policy was posted. (Tr. 132.) All the witnesses agreed that prior to the posting of this policy, they were unaware of any policy regarding punching in early. (Tr. 139, 148, 156–157, 162, 188.)

15 After the strike began in 2018, the Union made information requests for all of Respondent’s policies. (Tr. 133–134.) The Union did not receive a copy of any policy or rule regarding punching in early. (Tr. 134.) Russo testified that he did not negotiate over any policy regarding punching in early and was not made aware of the policy posted by Skerston in January 2019 until Calkins sent him a picture of the posted policy. (GC Exh. 27; Tr. 132–134.)

20 *F. Employment of Matt Kelly*

Matt Kelly was hired as a replacement worker at the Vermillion Quarry in May 2018. (R. Exh. 2; Tr. 45, 215.) He was eventually terminated on August 14, 2019, for what Respondent asserts were attendance infractions. (GC Exh. 22.)

25 On January 17, 2019, Kelly was disciplined for engaging in a snowball fight with Ellena. (GC Exh. 7.) Ellena was disciplined for the same incident. (GC Exh. 8; R. Exh. 6.) Skerston spoke to other employees who witnessed the incident before disciplining Kelly and Ellena. (Tr. 46.) Skerston said that the decision to issue discipline for this incident was made in consultation with his supervisor, Marshall Guth. (Tr. 46.) Kelly signed the warning notice at the bottom. (GC Exh. 8.) This was the first time that Kelly was disciplined while employed by Respondent.

30 On May 6, 2019, Kelly revealed himself as a union supporter. He removed his sweatshirt at a work meeting and showed that he had a union shirt on underneath. (Tr. 189, 224.) Kelly asked Skerston what he thought of his shirt. (Tr. 49.) Skerston thought Kelly was joking. (Tr. 49, 257.) According to Kelly and Gibson, Skerston asked Kelly if he was taking Joe’s [Ellena’s] place and said, “you’ve got to be kidding me.” (Tr. 190, 224.) Kelly began wearing a union shirt to work and wearing union stickers on his hardhat after that day. (Tr. 189.) He also placed union stickers on his lunchbox and truck. (Tr. 189–190.)

40 On Monday, May 6, Kelly informed Skerston that he would be quitting effective Thursday, May 9 to take another job. (Tr. 249.) Kelly filled out paperwork and Skerston sent notice to Respondent’s human resources department that Kelly had quit. (R. Exh. 10; Tr. 250–252.) Kelly signed a release of information for references on May 9, verifying that he had quit. (R. Exh. 10; Tr. 252.)

On May 6, Kelly reported to work 16 minutes late. (GC Exh. 9.) Skerston prepared a warning notice for Kelly. (GC Exh. 9.) A copy of Kelly's timecard indicating his lateness is attached to the warning notice. (GC Exh. 9.) The warning notice indicates that Kelly refused to sign it. (GC Exh. 9; Tr. 52.) Kelly does not dispute that he was late that day, however, he testified that he did not receive a copy of the warning notice until around the time he was discharged in August 2019. (Tr. 192.)

On May 7, Skerston observed Kelly taking a cell phone video while driving a company truck. (GC Exh. 10; Tr. 54–55.) Kelly admits making a video but claims that the truck was parked at the time. (Tr. 192–193, 217.) Skerston completed another employee warning notice for Kelly regarding this incident. (GC Exh. 10.) Skerston did not investigate before deciding to discipline Kelly because he observed the incident himself. (Tr. 54.) Skerston testified that he spoke with Kelly when he met with him to issue the discipline. (Tr. 54.) Skerston told Kelly it was inappropriate and unsafe to violate the company's cell phone policy while driving. (Tr. 55.) The warning notice again indicates that Kelly refused to sign it. (GC Exh. 10.) Kelly stated that he did not see this warning notice until August. (Tr. 192.)

Later on May 7, Skerston decided to discipline Kelly for entering the shop 5 times when he was supposed to be in the pit working. (GC Exh. 11; Tr. 56.) Earlier that day, Skerston went to see what Kelly was supposed to be working on and saw that there was very little progress being made. (Tr. 57.) Kelly admits that he went to the shop multiple times, but claims it was to get parts or tools, and that entering the shop multiple times is normal. (Tr. 193–194.) The warning notice indicates that Kelly refused to sign. (GC Exh. 11.) However, Kelly again testified that he did not see this warning notice until August. (Tr. 193.) Kelly also testified that Skerston did not talk to him about this incident on May 7. (Tr. 193–194.)

On May 8, Kelly failed to punch in on time. (GC Exh. 12; Tr. 59.) Skerston saw Kelly sleeping in his truck outside the gate that morning and reviewed his timecard to verify that he punched in late. (Tr. 59.) A copy of Kelly's timecard is attached to the warning notice. (GC Exh. 12.) Skerston did not interview anyone prior to issuing this warning. (Tr. 59.) Kelly does not dispute that he was late on May 8. (Tr. 194–195.) The warning notice again indicates that Kelly refused to sign. (GC Exh. 12.) Kelly testified that Skerston talked to him about the incident on May 8, but that he did not see the employee warning notice until August. (Tr. 194.)

On May 9, Kelly dragged a portable welder with the jack leg down, causing damage to company property. (GC Exh. 13.) Skerston observed this incident. (Tr. 61.) Skerston yelled and waved at Kelly to stop, but Kelly did not hear him.⁵ (Tr. 282–283.) The jack leg needed to be replaced as a result of this incident. (Tr. 61.) Kelly acknowledged that he dragged the welder while the jack leg was still down. (Tr. 196.) Kelly did not sign the warning notice. (GC Exh. 13.) Skerston instead noted, "EMPLOYEE MATT KELLY QUIT TODAY," on the line for employee signature.⁶ (GC Exh. 13.) Kelly denied receiving the employee warning notice until August. (Tr. 197.)

⁵ Skerston stated that Kelly was wearing earbuds at the time of this incident, but Kelly denies wearing earbuds. (Tr. 217–218; 282.)

⁶ As noted above, Kelly had given notice to Skerston on May 6 that May 9 would be his last day.

Kelly went on strike on May 9. (GC Exh. 14) His strike notice indicated that he was protesting Respondent's unfair labor practices. (GC Exh. 14.) On June 26, 2019, Kelly made an unconditional offer to return to work by way of a letter to Skerston. (GC Exh. 15.) Skerston sent an email in reply to Kelly's offer indicating that he was on vacation. (GC Exh. 16.) Kelly returned to work on July 8. (R. Exh. 9.)

On July 10, Kelly was issued a final written warning for a safety violation. (GC Exh. 17.) Skerston witnessed Kelly working on a conveyor without a lock out or tag out on the breaker. (GC Exh. 17.) Kelly admits that he was working on the conveyor without a lockout/tagout. (Tr. 199.) Skerston presented the warning notice to Kelly then next day. (Tr. 199.) The notice does not mention any of Kelly's prior discipline. (GC Exh. 17.) Kelly signed the disciplinary notice but testified that he did not realize that it was a final written warning. (GC Exh. 17; Tr. 199.)

On August 7, Kelly was late to work again. (GC Exh. 18.) He punched in at 6:54 a.m., although his shift started at 6:00 a.m. (GC Exh. 18.) A copy of Kelly's timecard is attached to the employee warning notice. (GC Exh. 18.) The warning notice indicates that it is a final written warning for attendance. (GC Exh. 18.) Skerston looked at Kelly's timecard, but did not interview anyone, including Kelly, before issuing the discipline. (Tr. 70.) Kelly did not sign this warning notice because it said, "final warning" and he had not received prior disciplinary notices for attendance. (GC Exh. 18; Tr. 200.)

Kelly texted Russo after being disciplined on August 7. (GC Exh. 28.) Kelly asked Russo if he had copies of all of his writeups. (GC Exh. 28.) Kelly stated, "that last week Scott never showed me any writeups." (GC Exh. 28.) Russo indicated that he had the disciplinary forms and one said that Kelly had quit. (GC Exh. 28.) Kelly stated, "we need to fight them," and that he would see Russo at the union hall later. (GC Exh. 28.)

On August 14, Kelly was again late to work. (GC Exh. 20.) Kelly was supposed to report to work at 6:00 a.m., but did not arrive until 11:30 a.m. (Tr. 202–203.) Kelly called Skerston that morning to tell him he had a flat tire on his motorcycle. (Tr. 203.) He was issued a notice of suspension pending investigation. (GC Exh. 20.) Skerston did not interview anyone prior to issuing this discipline, but emailed Respondent's human resources department at 6:25 a.m. that morning stating his intention to discipline Kelly. (GC Exh. 19; Tr. 74.)

Kelly denied receiving many of the employee warning notices listed above until August, when he was provided copies by the Union.⁷ (Tr. 212.) Skerston always checked the box indicating that the notice was given to the employee whether or not the employee received the notice. (Tr. 62–63.)

⁷ Kelly gave conflicting testimony on receiving copies of his warning notices. In his affidavit to the Board, he indicated that he did not receive any of the disciplinary notices until after his termination in August 2019. (Tr. 213.) At the hearing, he testified that he saw the warning notices on August 7 but did not receive copies until August 14. (Tr. 212.) He was not sure when Russo received the disciplinary forms. (Tr. 213.) Regardless of when Kelly ultimately received copies of the employee disciplinary notices, which I find was on August 7 or 14, I do not find that this minor contradiction detracts from his overall credibility.

In the 2 years prior to Kelly's termination, the following other employees were disciplined by Respondent: J. Fitzgerald for not keeping company information confidential on March 20, 2018 (GC Exh. 23(e); R. Exh. 7); J. Webber for harassment of a pro-union employee on June 15, 2018 (GC Exh. 23(a); R. Exh. 7); C. Parsons for damaging company property on September 27, 2018 (GC Exh. 23(b); R. Exh. 7); J. Webber for pushing another employee on January 7, 2019 (GC Exh. 23(c); R. Ex. 7); J. Ellena for conduct on January 17, 2019 (R. Exh. 6); B. Gibson for performance on April 30, 2019 (GC Exh. 23(d); R. Exh. 7); B. Gibson for conduct on May 7, 2019 (R. Exh. 7; Tr. 68.); B. Gibson attendance/tardiness on June 13, 2019 (R. Exh. 7); B. Gibson for attendance/tardiness on July 1, 2019 (R. Exh. 7); H. Lewis for damaging company equipment on July 1, 2019 (R. Exh. 7); H. Lewis for cell phone use on July 2, 2019 (R. Exh. 7); and J. Fitzgerald for performance on July 9, 2019 (R. Exh. 7). For the period from March 20, 2018 through August 14, 2019, Respondent disciplined Matt Kelly 8 times and disciplined other employees 12 times. There is no evidence that any other employee was terminated for attendance, or any other reason, during this time period.

G. August 14 Interview of Matt Kelly

On August 14, Skerston conducted an in-person interview of Kelly concerning his tardiness. (Tr. 76.) Skerston used a prepared list of questions for his interview of Kelly. (GC Exh. 21.) On the list of questions, Skerston noted that Kelly asked for a witness, so he waited to start the interview. (GC Exh. 21.) Kelly asked for Lyle Calkins to be present at the beginning of the meeting.⁸ (Tr. 77, 204–205.) Skerston said no because Calkins was at the other quarry and was too far away. (Tr. 77, 205.) Skerston said they could get someone else and said, "How about Ben Gibson?" (Tr. 78, 205.) Gibson does not have any position with the union. (Tr. 78, 206.) Gibson came into the office and sat in on Kelly's interview. (Tr. 226.) Gibson also asked for Calkins to be present for the interview. (Tr. 77–78.) Tom Becker, the site superintendent from the Troy Grove Quarry, was also present for the interview.⁹

Skerston asked Kelly questions about his tardiness on August 14. (GC Exh. 21.) Kelly admitted calling Skerston on August 14 at about 5:46 a.m., informing Skerston that he had a flat tire. (GC Exh. 21.) Kelly further admitted that he was supposed to start work at 6:00 a.m. that day. (GC Exh. 21.) Skerston asserted that Kelly made conflicting statements about the location of his motorcycle at the time he got the flat tire. (GC Exh. 21.)

At the end of the interview, Skerston gave Kelly a notice of suspension pending investigation and asked him to sign it. (GC Exh. 20; Tr. 206, 227.) The notice indicated that Kelly was suspended for attendance and what he told Skerston on August 14. (GC Exh. 20.) Kelly initially signed the form, but later crossed out his signature and initialed it. (Tr. 206-207, 228.) Kelly said that he crossed out his signature because he had not received the write-ups mentioned on the form. (Tr. 207, 228.) On the form, Skerston indicated, "Matt says he hasn't seen any write ups and didn't sign final warning. Saw lock out tag [out] and saw final warning. Said wanted this noted." (GC Exh. 20.) Skerston said he could not give Kelly copies because he had thrown the

⁸ Kelly did not request his union steward, but instead asked for Calkins by name.

⁹ No effort was made to explain how Becker was able to come from the Troy Grove Quarry for the interview, but Calkins could not. Becker did not testify at the hearing.

write-ups away.¹⁰ (Tr. 207, 228.) Skerston told Kelly that he had sent copies of the disciplinary forms to the Union. (Tr. 228.) Kelly was allowed to leave, and Gibson was sent back to work. (Tr. 208, 229.)

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H. Discharge of Matt Kelly

On August 14, Respondent issued a notice of termination to Kelly by way of a letter from Skerston to Kelly. (GC Exh. 22.) The reason given for the termination in the letter was that he had been late 4 times (on August 7 and 14, May 6 and 8). (GC Exh. 22.) The decision to terminate Kelly's employment was made by Skerston soon after the interview of August 14 and the notice was sent to him via certified mail. (Tr. 79–80.)

10

DISCUSSION AND ANALYSIS

15

A. Witness Credibility

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622. Some of my credibility findings are incorporated into the findings of fact set forth above.

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25

I found Skerston to be a generally credible witness. He appeared forthright and steady while testifying and his testimony did not waver on cross-examination. Specific variances between Skerston's testimony and that of other witnesses are resolved above.

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However, I did not credit Skerston's testimony that he did not say that he threw away Kelly's employee warning notices, as his testimony was contradicted by Gibson and Kelly. Furthermore, although he checked a box on each of Kelly's disciplinary forms indicating that Kelly had received copies of the forms, I find that Kelly did not receive them. Skerston later revealed that he always checked that box and suggested that Kelly had not received copies of the forms, as he testified that he had sent the forms to Russo. Thus, I find that Skerston did not issue any of the employee warning notices that he prepared for Kelly between May 6 and 9, 2019, to him despite checking a box that he had done so.

35

I found Thomas Brown to be a credible witness. His brief testimony was given without hesitation or exaggeration. He candidly testified that he was about 80 yards away from Misercola when he observed the latter's truck pull up and back several times. The evidence shows that he and Bice took prompt action after this incident by calling Russo and speaking with law enforcement. Therefore, I credit Brown's testimony.

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¹⁰ Skerston denied stating he had thrown away the copies of Kelly's write-ups. (Tr. 282.) I do not find this variance in his testimony from that of Kelly and Gibson to be material.

I also found Shane Bice to be a credible witness. His testimony was given in a forthright and sure manner. On cross-examination, he candidly answered that he did not like Misercola and wants to see the Union prevail in its labor dispute with Respondent. He also honestly admitted that he was at least 50 yards away from Misercola's vehicle and did not see Misercola steal the sign. As such, I credit Bice's testimony.

Stephen Russo also presented credible testimony. His testimony consisted mostly of a description of the picket signs used in the labor dispute between the Union and Respondent and his actions following the incident of January 2, 2019, when a picket sign went missing. Respondent did not cross-examine Russo. As such, I credit Russo's testimony.

I found Brad Lower to be a credible witness. He is a current employee of Respondent and, as such, his testimony is likely to be particularly reliable because he is testifying adversely to his pecuniary interest.¹¹ *Advocate South Suburban Hospital*, 346 NLRB 209 fn. 1 (2006), citing *Flexsteel Industries*, 316 NLRB 745 (1995), affd. mem. *NLRB v. Flexsteel Industries*, 83 F.3d 419 (5th Cir. 1996); see also *American Wire Products*, 313 NLRB 989, 993 (1994) (Current employee providing testimony adverse to his employer is at risk of reprisal and thus likely to be testifying truthfully). Lower testified in a frank and sound manner. He candidly testified that he punched in early to test Respondent's practice of paying overtime for those who punched in early. Respondent did not cross-examine Lower. Therefore, I credit Lower's testimony.

I found Lyle Calkins to be a credible witness. Like Lower, Calkins is a current employee of Respondent. His brief testimony was given in an earnest manner. Respondent did not cross-examine him. Therefore, I credit Calkins' testimony.

I found Scott Currie to be a credible witness. He is a current employee of Respondent. His brief testimony was given in an authentic manner. Respondent did not cross-examine him and, thus, I credit Currie's testimony.

I also found Joe Ellena to be a credible witness. He is a current employee of Respondent. Respondent did not cross-examine Ellena. I found him to be sincere while testifying. Therefore, I credit Ellena's testimony.

I found Matt Kelly to be generally credible. Kelly candidly admitted to committing all of the disciplinary, safety, and attendance infractions alleged by Respondent. Although his hearing testimony slightly contradicted his affidavit testimony about when he received copies of his employee warning notices, I do not find that this minor misstep detracts from his overall credibility. His testimony was largely corroborated by other witnesses and evidence. Therefore, I credit Kelly's testimony.

I found Ben Gibson to be a credible witness. Gibson is a current employee of Respondent. His brief testimony was given without hesitation and in a direct manner. Respondent did not cross-examine him. Therefore, I credit his testimony.

¹¹ A witness' status as a current employee is among the factors that a judge may utilize in resolving credibility issues. See, e.g., *DHL Express, Inc.*, 355 NLRB 1399, 1404 fn. 13 (2010).

I did not find James Misercola to be a credible witness. His testimony was given in an equivocal and indirect manner. He refused to answer even most basic questions, including when he started working for Respondent and at which of Respondent's quarries he was working on January 2, 2019, the date of the picket sign incident. On direct examination he testified that he did not remove a picket sign from Respondent's property or the public right-of-way. However, on cross-examination he testified only that he did not remember doing so. (Tr. 312, 315.)

Misercola also quibbled with the Union's counsel on cross-examination. For example, Misercola gave the following testimony

Q: On January 2nd, 2019, do you recall leaving one of those quarries and actually driving off the road and onto the right of way?

A: I don't recall that exactly but if I was there and I drove off, it would have been one of several times over the course of the past two years that I've been on that property.

(Tr. 315–316.) He further testified that he did not remember what he was doing on January 2, 2019 because, “[T]hat was a long time ago.” (Tr. 315.) When asked whether he spoke to a law enforcement officer, Misercola said yes, but when asked what the conversation was about he replied, “The law enforcement officer was on the property and had asked to speak to me.” (Tr. 317.)

Given his demeanor on the witness stand and his limited recall of the events at issue, I do not credit Misercola's testimony unless it constitutes an admission against interest or is corroborated by a more credible witness or other evidence.

B. Change to Respondent's Punch-Policy (Complaint Pars. 8(a), (b), and (c))

The General Counsel alleges that Respondent violated Section 8(a)(5) and (1) of the Act by changing its punch-in policy to require that unit employees punch in no more than 5 minutes before their the start of their scheduled shifts, without affording the Union notice or an opportunity to bargain. I find that the General Counsel has proven this violation.

The most recent collective-bargaining agreement between Respondent and the Union expired on May 1, 2016. (GC Exh. 2.) Although the parties met to bargain, a successor agreement was never reached. However, there is no evidence that the parties ever reached a valid impasse.

As I have found, prior to January 2019, employees punched in for work whenever they arrived at the quarry and these workers were paid overtime for this extra time. The witnesses agreed that prior to the posting of this policy, Respondent had no policy regarding punching in early.

Around January 22, 2019, Skerston posted a notice to employees near the timeclock in the employee breakroom stating that employees could not punch in more than 5 minutes before the start of their shifts. Calkins notified Russo when the policy was posted, but there is no evidence

that Respondent notified the Union of the policy either before or after it was posted or that Respondent offered the Union an opportunity to bargain over the new policy.

5 An employer's duty to bargain under Section 8(a)(5) includes the obligation to refrain from changing its employees' terms and conditions of employment without first bargaining to impasse with the employees' bargaining representative concerning the contemplated changes. *NLRB v. Katz*, 369 U.S. 736 (1962). However, after a collective-bargaining agreement expires, different principles govern the obligations of parties to a bargaining relationship. *Nextstar Broadcasting, Inc.*, 369 NLRB No. 61, slip op. at 4 (2020). In *MV Transportation, Inc.*, the Board adopted the contract coverage standard and applied it retroactively to all pending cases. 368 NLRB No. 66, slip op. at 2 (2019). Under the contract coverage standard, the Board will "examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally." *Nextstar Broadcasting* at 3, quoting 368 NLRB No. 66, slip op. at 2.

15 The Board applies ordinary principles of contract interpretation in conducting its analysis. *Id.* Where contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated Section 8(a)(5). *Nextstar Broadcasting* at 3, citing *MV Transportation* at 11. Furthermore, provisions in an expired collective-bargaining agreement do not cover post-expiration unilateral changes unless the agreement contained language explicitly providing that the relevant provision would survive contract expiration. *Nextstar Broadcasting* at 3.

25 In this case, the parties' most recent collective-bargaining agreement expired in 2016. It is not clear from the record when the parties last met and bargained. However, there is no evidence in the record that the parties have reached impasse. There is no provision in the expired contract concerning punching in early. (GC Exh. 2.) There is further no language in the expired contract indicating that any of its provisions would survive its expiration. (GC Exh. 2.) Given the lack of evidence regarding impasse and the absence of language in the expired collective-bargaining agreement concerning punching in early, Respondent's ability to act unilaterally regarding punching in, or that any such right, if it existed, would survive the agreement's expiration, I find Respondent's unilateral implementation of a punch-in policy in January 2019 violated Section 8(a)(5) and (1) of the Act.

35 *C. Ellena's Offer to Return to Work (Complaint Pars. 6(a), (b), and (c))*

40 Respondent's employees commenced a strike on March 8, 2018. Joe Ellena was hired as a replacement worker in May 2018. On May 20, 2019, Ellena went on strike. On July 10, he made an unconditional offer to return to work. The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act when it required Ellena to sign a preferential hiring list in order to return to work. I find that the General Counsel has proven this violation.

45 The Board requires that if striking employees make an unconditional offer to return to work but there are no jobs available, employers must maintain a nondiscriminatory recall list, so that when openings become available, the un-reinstated striker could be recalled to his or her former or a substantially equivalent position. *Laidlaw Corp.*, 171 NLRB 1366 (1968), *enfd.* 414 F.2d 99

(7th Cir. 1969), cert. denied 397 U.S. 920 (1970). As correctly pointed out by counsel for General Counsel on brief, requiring former strikers to take steps beyond making an unconditional offer to return, such as completing additional paperwork, violates the Act. *NTN Bower Corp.*, 356 NLRB 1072, 1123 (2011), citing *Peerless Pump Co.*, 345 NLRB 371, 375 (2005). Imposing prerequisites on strikers to preserve their rights to their pre-strike jobs violates employees' Section 7 rights, absent a legitimate and substantial business justification. *Peerless Pump Co.*, 345 NLRB at 375, citing *Pirelli Cable Corp.*, 331 NLRB at 1539 (employer violated Sec. 8(a)(3) by unilaterally imposing requirement that former strikers advise employer of desire and availability for reinstatement as condition precedent to placement on preferential hiring list).

Similarly, in this case, Respondent's requirement that Ellena sign a preferential hiring list violates Section 8(a)(3) and (1) of the Act. Respondent adduced no substantial business justification for asking Ellena to sign the preferential hiring list. In its brief, Respondent asserts that it did not tell Ellena that he was required to sign the preferential hiring list. (R. Br. at 18.) However, in its letter to Ellena of July 12, 2019, Respondent indicated that it had no job openings, had established a preferential hiring list that Ellena was welcome to sign if he wished to do so, and that the list was located at the Vermillion Quarry. Clearly, the import of this statement was that, in the absence of job openings, Ellena should get his name on the list in order to be recalled. The copy of the preferential hiring list attached to the letter stated that signing the list constituted an unconditional offer to return to work and that employees, "will be recalled to work based on the date and time of their offer to return to work." (GC Exh. 6(b).) Furthermore, the list has a column for the date and time the employee signed the form. (GC Exh. 6(b).) This column clearly implies that the date the form was signed was the date that Respondent would consider as the date that employee made his offer to return to work. Ellena had already transmitted his unconditional offer to return to work to Respondent at the time he received Respondent's letter and form. Thus, Respondent was asking Ellena to come to Respondent's facility to complete additional paperwork. These additional requirements imposed by Respondent on Ellena in order to return him to work violated Section 8(a)(3) and (1) of the Act.

D. Removal of Picket Sign (Complaint Par. 5(a))

The General Counsel alleges that on January 2, 2019, Respondent violated Section 8(a)(1) of the Act when Joe Misercola removed union picket signs from public property. I find that the General Counsel has proven this allegation.

At about 1:30 p.m. on January 2, Brown and Bice observed a vehicle driven by Misercola exiting the quarry. They observed the vehicle drive forward and backward a few times and then stop before exiting the driveway. When the picketers looked over again, their sign was gone and they could not find it. I have already declined to credit Misercola's general and hedging denial of this incident. Therefore, I find that, Misercola removed or destroyed the sign.

Both Brown and Bice testified without embellishment or hesitation. Both men candidly testified that they did not see Misercola remove the sign. However, both saw Misercola pull his vehicle up and back repeatedly in the area of the sign, then stop and exit his vehicle. Before Misercola came, the sign was there. After he pulled away, the sign was missing, and tire tracks

were seen in the area where the sign had been located. Therefore, I find, by a preponderance of the evidence, that Misercola removed the picket sign.

Misercola's conduct impermissibly interfered with the Section 7 rights of the employees to place picket signs in support of the strike. Removing or destroying picket signs violates Section 8(a)(1) of the Act. *Slapco, Inc.*, 315 NLRB 717, 720; *Muncy Corp.*, 211 NLRB 263, 272 (1974). See also, *Florida Wire & Cable, Inc.*, 333 NLRB 378, 382 (2001) ("Confiscation of picket signs . . . violated Section 8(a)(1).") Therefore, I find that Respondent violated Section 8(a)(1) of the Act by removing the Union's picket sign.

E. Discipline and Discharge of Matt Kelly (Complaint Pars. 6(d), (e), (f), (g), (h), (i), and (j))

The General Counsel alleges that Respondent violated Section 8(a)(3) and (1) of the Act when it disciplined employee Matt Kelly on May 6, 7, 8, 9, July 10, and August 7, 2019, and when it terminated Kelly's employment on August 14, 2019. I find that the General Counsel has proven these allegations.

Section 8(a)(3) of the Act prohibits employers from discriminating in regard to an employee's tenure of employment . . . to encourage or discourage membership in any labor organization. *Roemer Industries, Inc.*, 367 NLRB No. 133 slip op. at 20 (2019), enfd 824 Fed.Appx. 396 (6th Cir. 2020). In order to establish a violation of Section 8(a)(3) and (1) in cases where discipline and discharge are alleged, the General Counsel has the burden to prove that the disciplinary action and/or discharge was motivated by employer antiunion animus. *Id.*

In determining whether adverse employment actions are attributable to unlawful discrimination, the Board applies the analysis set forth in *Wright Line*, 251 NLRB 108 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel has the initial burden of establishing, by a preponderance of the evidence, that the employee's protected activity was a motivating factor in the decision to issue discipline or to discharge the employee. *Volvo Group North America, LLC*, 370 NLRB No. 52, slip op. at 2 (2020). The Board has most often summarized the elements commonly required to support the General Counsel's initial burden as (1) union or other protected activity by the employee, (2) employer knowledge of that activity, and (3) antiunion animus, or animus against protected activity, on the part of the employer. *Id.* But the General Counsel does not invariably sustain his burden by producing any evidence of animus or hostility toward union or other protected concerted activity. Rather, the evidence must be sufficient to establish a causal relationship between the employee's protected activity and the employer's adverse action against the employee. *Id.*, citing *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 6-8 (2019).

Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428-1429 (11th Cir. 1985). Direct evidence of unlawful motivation is seldom available, and, therefore, the General Counsel may rely upon circumstantial evidence to meet the burden. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Circumstantial evidence is used frequently to establish knowledge and animus because

an employer is unlikely to acknowledge improper motives in discipline and termination. *NLRB v. Health Care Logistics*, 784 F.2d 232, 236 (6th Cir. 1986), enfg. in part 273 NLRB 822 (1984); see also *Overnite Transportation Co.*, 335 NLRB 372, 375 (2001) (“The Board has long recognized that direct evidence of an unlawful motive, i.e., the proverbial smoking gun, is seldom obtainable. Hence, an unlawful motive may be inferred from all of the surrounding circumstances.”).

If the General Counsel makes the initial showing, the burden shifts to the Respondent to establish that it would have disciplined or discharged the employee for a legitimate, nondiscriminatory reason. *Tschiggfrie Properties*, 368 NLRB No. 120, slip op. at 3 (2019). An employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996), and *T & J Trucking Co.*, 316 NLRB 771 (1995).

In this case, the evidence clearly establishes that Kelly engaged in union activity and that Respondent was aware of this activity. Kelly began wearing union shirts and displaying union stickers at work beginning on May 6, 2019. (Tr. 188.) Skerston saw Kelly wearing the union shirt and asked him about it. Furthermore, Skerston was well aware of Kelly’s strike activity beginning in May 2019. Thus, the General Counsel has established that Kelly engaged in union activity and that Skerston was aware of this activity.

The evidence further establishes that Respondent bore animus toward Kelly’s union activity and toward the Union in general. Respondent hired Misercola to discourage union activity by its employees. With regard to Kelly specifically, when Skerston saw Kelly wearing a union shirt at work for the first time, he asked, “Are you kidding me?” He further compared Kelly to Joe Ellena, another replacement worker who had gone on strike in support of the Union.

Moreover, animus can be inferred from other evidence, such as “suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct, departures from past practices, tolerance of behavior for which the employee was allegedly [disciplined], and disparate treatment.” *Medic One, Inc.*, 331 NLRB 464, 475 (2000). See also *Temp Masters, Inc.*, 344 NLRB 1188, 1193 (2005) (timing); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999) and *Roadway Express*, 327 NLRB 25, 26 (1998) (disparate treatment); *Baptist Hospital, Orange*, 328 NLRB 628, 635 (1999) (failure to follow established procedures).

The timing of Respondent’s discipline of Kelly provides strong evidence of animus. Skerston prepared a disciplinary notice for Kelly on the very same day that Kelly first wore a union shirt at work. In fact, Skerston prepared 5 disciplinary notices for Kelly that were dated between May 6 and 9. The timing of these disciplinary actions provides evidence of animus.

Furthermore, Kelly went on strike from May 9 until he returned to work on July 8. Two days later, on July 10, Skerston prepared another employee warning notice for Kelly. Less than a month later, on August 7, Skerston prepared a disciplinary notice for Kelly for being late to work. One week later, on August 14, when Kelly was again tardy, Skerston decided to terminate his employment. During the period between May 6 and August 14, Kelly was present at the

Vermillion Quarry (and not on strike) for just under 8 weeks. During this timeframe, Skerston prepared seven employee warning notices for Kelly. For the period from March 20, 2018 through August 14, 2019, Respondent disciplined Matt Kelly 8 times and disciplined other employees 12 times. Thus, of the 20 disciplinary records provided at the hearing for this time period, Kelly accounted for 40 percent.

The evidence establishes that Kelly was the only employee discharged for attendance, or any other reason between March 2018 and August 2019. Furthermore, he received 40 percent of all discipline issued by Respondent during that period.

Respondent further failed to follow its own policies in disciplining Kelly. Respondent allegedly disciplined Kelly for a lock out/tag out (safety) violation, excessively entering the shop (performance), using a cell phone while driving a truck (safety), and damaging company equipment (safety) between May 7 and July 10. Skerston indicated that the damage to company equipment on May 9 was Kelly's final warning for safety. (GC Exh. 13.) Despite this final warning, Kelly was issued another final warning for safety on July 10. (GC Exh. 17.) Respondent's own disciplinary policies call for termination of employment after a final warning for safety. Kelly's warning notices also fail to mention his prior infractions. Failure to follow established disciplinary procedures provides support for a finding of unlawful motivation. *Baptist Hospital, Orange*, 328 NLRB at 635. In this instance, Skerston failed to follow Respondent's disciplinary policies and I find this supports a finding of unlawful motivation on the part of Respondent.

The burden now shifts to Respondent to establish that it would have discharged Kelly in the absence of his protected conduct. *Monroe Mfg.*, 323 NLRB 24, 27 (1997); *T & J Trucking Co.*, 316 NLRB 771, 771 (1995), enfd. mem.86 F.3d 1146 (1st Cir. 1996). ". . . [A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). A number of factors point out that Respondent's defenses are pretextual, and Respondent therefore failed to meet its burden.

Respondent asserts that it discharged Kelly for his attendance violations. When an employer is unable to maintain a consistent explanation for its conduct, but rather resorts to shifting defenses, "it raises the inference that the employer is 'grasping for reasons to justify' its unlawful conduct." *Meaden Screw Products Co.*, 336 NLRB 298, 302 (2001), citing *Royal Development Co. v. NLRB*, 703 F.2d 363, 372 (9th Cir. 1983). See also *Master Security Services*, 270 NLRB 543, 552 (1984) (animus demonstrated where an employer used a multiplicity of reasons to justify disciplinary action). In this case, despite writing up Kelly for a multiplicity of reasons, over a short period of time, Skerston only relied on the attendance violations as the reason for discharging Kelly.

Although Kelly was written up 5 times between May 6 and 9, he was not provided with copies of the warning notices allegedly issued to him until August. Failure to present employees with copies of written disciplines supports finding of pretext. *Lord Industries, Inc.*, 207 NLRB 419, 422 (1973). Skerston's failure to present Kelly with his employee warning notices is

supported by Kelly's reacting at his interview on August 14 and his text message to Russo on August 7. In both instances, Kelly indicated that he had not received the notices. It is also supported by Skerston's statement on August 14 that he had supplied the disciplinary forms to Russo. Two of the disciplines that Respondent failed to provide to Kelly formed the basis for his discharge. As such, I find that Respondent's asserted reason for discharging Kelly was pretextual.

The General Counsel has met his burden to establish that Matt Kelly engaged in union activity, that Respondent was aware of this activity, and that Respondent bore animus toward this activity. Respondent has not met its responsive burden to establish that it would have taken the same actions against Kelly in that absence of his union activity. Therefore, I find that Respondent violated Section 8(a)(3) and (1) of the Act when it disciplined employee Matt Kelly on May 6, 7, 8, 9, July 10, and August 7, 2019, and when it terminated Kelly's employment on August 14, 2019.

F. *Interview of Matt Kelly (Complaint Pars. 5(b), (c), and (d))*

The General Counsel alleges that on August 14, 2019, Respondent violated Section 8(a)(1) of the Act when it interviewed employee Matt Kelly after denying his request for a union representative during the interview, which Kelly reasonably believed could result in discipline. I find that the General Counsel has proven this violation.

Section 7 guarantees an employee the right (generally referred to as a "*Weingarten* right") to be accompanied and assisted by a union representative at an "investigatory" interview, which is one the employee reasonably believes may result in disciplinary action. *NLRB v. Weingarten*, 420 U.S. 251, 260 (1975). In *Weingarten*, 420 U.S. 251, 256 (1975), the Supreme Court held that an employee had the right to union representation at "an interview which he reasonably fears may result in his discipline." The Court noted that a "lone employee" confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." *Id.* at 262-263. The presence of "[a] knowledgeable union representative" would protect the employee from being overpowered by the employer and assist the investigation. *Id.* at 263.

It is beyond dispute that an employer has a legitimate interest in investigating facially valid complaints of employee misconduct, such as Kelly's in this case. *PAE Applied Technologies, LLC*, 367 NLRB No. 105, slip op. at 5 (2019), citing *Fresenius USA Mfg. Inc.*, 362 NLRB 1065, 1065 (2015), and *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000), *enfd.* 263 F.3d 345 (4th Cir. 2001). As in *PAE Applied Technologies*, Respondent here had a legitimate interest in getting Kelly's side of the story and determining what level of discipline was merited. However, the interview could have been delayed until Calkins could arrive.

While *Weingarten* rights do not apply where the sole purpose of a meeting is the imposition of predetermined discipline, if the employer goes beyond merely informing the employee of a previously made disciplinary decision the full panoply of protections accorded the employee under *Weingarten* may be applicable. *PAE Aviation & Technical Services, LLC*, 366 NLRB No.

95 slip op. at 2 (2018). Thus, if the employer seeks facts or evidence in support of its disciplinary action . . . the employee's right to union representation would attach.” *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979). In this instance, Skerston asked Kelly questions about the events surrounding his tardiness on August 14. The notice of suspension pending investigation given to Kelly indicated that he was suspended, in part, for what he told Skerston on August 14. Therefore, this meeting was an investigatory interview at which Kelly had *Weingarten* rights.

Once an employee makes a valid request for union representation, the employer is permitted one of three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview unaccompanied by a union representative or having no interview at all. *Washoe Medical Center, Inc.*, 348 NLRB 361, 367 (2006), citing *Consolidated Freightways Corp.*, 264 NLRB 541, 542 (1982), and *General Motors Co.*, 251 NLRB 850, 857 (1980). Under no circumstances may the employer continue the interview without granting the employee union representation unless the employee voluntarily agrees to remain unrepresented. *Washoe Medical Center*, 348 NLRB at 367. Respondent cites no case law in support of its assertion that *Weingarten* rights do not attach to replacement workers hiring during a strike.

The credited evidence establishes that Kelly asked for Lyle Calkins to be present for his interview. Calkins is the only union steward for employees at both of Respondent’s LaSalle County quarries and his appointment letter specifically states that he should be present for any investigatory interviews of unit employees. Skerston declined Kelly’s request, stating that Calkins was too far away at the other quarry. Instead, Skerston found another employee, with no position with the Union, to represent Kelly in the interview. Gibson was not “[a] knowledgeable union representative,” who could protect Kelly from being overpowered by the employer. See *Weingarten*, 420 U.S. at 263. Furthermore, while claiming that Calkins was unavailable because he worked at the other quarry, Respondent offered no explanation as to how Tom Becker, the site superintendent from the other quarry, came to be present for the meeting. Instead of proceeding with the meeting, Skerston should have delayed the meeting until Calkins or another union official could be present. By proceeding with the investigatory interview after denying Kelly’s request for a union representative, Respondent violated Section 8(a)(1) of the Act.

G. Respondent’s Affirmative Defenses

In its answer to the complaint in this case, Respondent raised three affirmative defenses: that the allegations in the complaint are time-barred under Section 10(b) of the Act; that Matt Kelly did not have *Weingarten* rights as a permanent replacement worker; and that Respondent would have discharged Kelly regardless of his concerted activity. (GC Exh. 1(ee).) I have already addressed the second and third defenses regarding Kelly above. Respondent did not present any

evidence, testimony, or citations to case law in support of its Section 10(b) defense. The proponent of an affirmative defense has the burden of establishing it. *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1140 (2014), citing *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004) (finding the burden on the party raising an untimely charge defense under Sec. 10(b) of the Act), enfd. 483 F.3d 628 (9th Cir. 2007). As Respondent presented no evidence supporting its 10(b) affirmative defense, and the affirmative defense was not raised in Respondent's brief, I will not address it further.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. International Union of Operating Engineers, Local 150, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. By changing the punch-in policy for unit employees without providing the Union with notice or an opportunity to bargain, Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act.
4. By requiring employee Joe Ellena to sign a preferential hiring list located at its Vermillion Quarry, Respondent has violated Section 8(a)(3) and (1) of the National Labor Relations Act.
5. By removing union picket signs from public property, Respondent has violated Section 8(a)(1) of the National Labor Relations Act.
6. By disciplining and discharging employee Matt Kelly for his union activity, Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act.
7. By interviewing employee Matt Kelly after denying his request for a union representative, Respondent violated Section 8(a)(1) of the National Labor Relations Act.
8. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

Respondent, having unlawfully discharged Matt Kelly, must offer him reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed. Respondent shall make Matt

Kelly whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. 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).
 5 In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall compensate Matt Kelly for search-for-work and interim employment expenses regardless of whether those expenses exceed his 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
 10 (2014), the Respondent shall compensate Matt Kelly for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). 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 25 a report
 15 allocating Matt Kelly's backpay to the appropriate calendar year or years. 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. Respondent shall also be required to remove from its files any references to the unlawful discipline and discharge of Matt Kelly and to notify him in writing that this has been done and that the discipline and discharge
 20 will not be used against him in any way.

Furthermore, having unilaterally changed the punch-in policy for its unit employees, Respondent shall, at the request of the Union, rescind the policy.

25 Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Respondent's Vermillion Quarry and Troy Grove Quarry wherever notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices
 30 shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed either or both of the facilities involved in these proceedings,
 35 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 January 2, 2019. When the notice is issued to Respondent, it shall sign it or otherwise notify Region 25 of the Board what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹²

¹² 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.

ORDER

Respondent, Troy Grove, a Div. of Riverstone Group, Inc., and Vermillion Quarry, a Div. of Riverstone Group, Inc., Moline, Illinois, and its officers, agents, successors, and assigns, shall

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1. Cease and desist from

- 10 (a) Unilaterally, and in the absence of a good-faith bargaining impasse in negotiations, implementing a change with respect to the punch-in policy, a mandatory subject of bargaining that relates to wages, hours, or other terms and conditions of employment.
- (b) Requiring employees who were former strikers, as a condition of exercising their reinstatement rights, to sign a preferential hiring list located at its facility.
- 15 (c) Removing union picket signs in support of a strike by our employees from public property.
- (d) Disciplining and/or discharging employees for union or other protected, concerted activity.
- 20 (e) Denying an employee request for a union representative at an investigatory interview that the employee reasonably believes might result in discipline.
- 25 (f) In any like or related manner interfering with, restraining, or coercing employees 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.

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(a) Upon request of the Union, rescind the punch-in policy posted in January 2019.

(b) If it has not already done so, place Joe Ellena on its preferential hiring list, effective July 10, 2019.

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

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

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(e) Compensate Matt Kelly for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file with the Regional Director for Region 25, within 21 days of the date the amount of backpay is fixed, either by agreement or board order, a report allocating Matt Kelly's backpay award to the appropriate calendar year or years.

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

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(g) Within 14 days after service by the Region, post at its facilities in Oglesby and Utica, Illinois, copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2, 2019.

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(h) Within 21 days after service by the Region, file with the Regional Director for Region 25 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.

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Dated, Washington, D.C. January 11, 2021.



Melissa M. Olivero
Administrative Law Judge

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¹³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT, upon request, fail and refuse to bargain collectively and in good faith with International Union of Operating Engineers, Local 150, AFL-CIO, (Union) as the exclusive collective-bargaining representative of our employees in the following appropriate bargaining unit:

The employees described in Article 1, Section 1 of the collective bargaining agreement between Respondent and the Charging Party which was effective from July 30, 2014 to May 1, 2016.

WE WILL NOT, refuse to meet and bargain in good faith with your Union about any proposed changes in wages, hours, and working conditions, including our policy regarding employee punch-in times, before putting such changes into effect.

WE WILL NOT, will not require employees who make unconditional offers to return to work to come into our facility to sign a preferential hiring list.

WE WILL NOT, remove union picket signs in support of a strike by our employees from public property.

WE WILL NOT, discipline you because of your union or other protected, concerted activity.

WE WILL NOT, discharge you because of your union or other protected, concerted activity.

WE WILL NOT, deny your request for union representation during an investigatory interview at which you reasonably believe disciplinary action will be taken against you.

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

WE WILL, upon request, meet and bargain in good faith with the Union as the exclusive collective-bargaining representative of our unit employees.

WE WILL, if requested by the Union, rescind our policy prohibiting employees from punching in more than five minutes prior to the start of their shift.

WE WILL, if we have not already done so, place Joe Ellena on the preferential hiring list.

WE WILL, offer Matt Kelly immediate and full reinstatement to his former job, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL, pay Matt Kelly for the wages he lost because we unlawfully suspended and discharged him.

WE WILL, remove from our files all references to the discipline of Matt Kelly and **WE WILL** notify him in writing that this has been done and that the discipline will not be used against him in any way.

WE WILL, remove from our files all references to the discharge of Matt Kelly and **WE WILL** notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL, compensate Matt Kelly for any adverse tax consequences that may result from receiving a lump-sum backpay award.

WE WILL, file a report with the Regional Director of Region 25 allocating the backpay award to the appropriate calendar year or years for purposes of reporting to the Social Security Administration.

**TROY GROVE, A DIV. OF RIVERSTONE
GROUP, INC., AND VERMILLION QUARRY,
A DIV. OF RIVERSTONE GROUP, INC.**

(Employer)

Dated _____ By _____
(Representative) (Title)

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

575 North Pennsylvania Street, Room 238, Indianapolis, IN 46204-1577
(317) 226-7381, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/25-CA-234477> 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.



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

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