

**BEFORE THE  
NATIONAL LABOR RELATIONS BOARD  
REGION TWENTY-FIVE  
SUB-REGION THIRTY-THREE**

In the Matter of:

TROY GROVE, A DIVISION OF )  
RIVERSTONE GROUP, INC., )  
AND VERMILLION QUARRY, )  
A DIVISION OF RIVERSTONE )  
GROUP, INC., )

Respondent, )

and )

INTERNATIONAL UNION OF )  
OPERATING ENGINEERS, )  
LOCAL NO. 150, AFL-CIO, )

Charging Party. )

Case No. 25-CA-234477  
25-CA-242081  
25-CA-244883  
25-CA-246978

**ANSWERING BRIEF OF LOCAL 150**

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Charging Party, International Union of Operating Engineers, Local 150, AFL-CIO (“Local 150” or “Union”), files this Answering Brief in response to the Exceptions filed by Respondent Troy Grove, A Division of Riverstone Group, Inc., and Vermillion Quarry, A Division of Riverstone Group, Inc., (“Respondent,” “Riverstone” or “Employer”) and hereby requests that the National Labor Relations Board (“Board”) adopt the Administrative Law Judge’s Rulings, Findings of Fact, Discussion and Analysis, Conclusions of Law, and Order.

On January 11, 2021, after the filing of unfair labor practice charges, the issuance of a Complaint and Amended Consolidated Complaint, and a hearing conducted on March 10 and 11, 2020, in Peoria Illinois, Administrative Law Judge Melissa M. Olivero (“ALJ”) concluded that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (“Act”) by changing the punch-in policy for unit employees without providing the Union with notice or an opportunity to bargain; violated 8(a)(3) and (1) of the Act by requiring employee Joe Ellena to sign a preferential hiring list; violated Section 8(a)(1) of the Act by removing a Union picket sign from public property; violated Section 8(a)(3) and (1) of the Act by disciplining and discharging employee Matt Kelly for his Union activity; and violated Section 8(a)(1) of the Act by interviewing employee Matt Kelly after denying his request for a Union representative (Administrative Law Judge Decision at page 20).<sup>1</sup>

On February 8, 2021, Respondent filed Exceptions and brief in support thereof enumerating 18 exceptions to various findings, conclusions and recommendations including: 1. that disciplining and discharging Matt Kelly violated Section 8(a)(3) and (1) of the Act; 2. that

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<sup>1</sup> Future references shall be as follows: Administrative Law Judge Decision shall be ALJ Dec. p. \_\_\_\_; Respondent’s Exceptions shall be (R. Exc. p. \_\_); Respondent’s Brief in support of Exceptions shall be (R. Br. p. \_\_\_\_); Answer to Amended Consolidated Complaint shall be (Ans. para. \_\_\_\_); General Counsel Exhibits from the hearing shall be (G.C. Ex. \_\_\_\_); Union Exhibits from the hearing shall be (U. Ex. \_\_\_\_); Respondent Exhibits from the hearing shall be (R. Ex. \_\_\_\_); and transcript from the hearing shall be (Tr. \_\_\_\_).

Matt Kelly was disciplined and discharged because of his protected Union activity instead of for his violation of workplace policies; 3. that retention of Jim Misercola as a “persuader” is evidence of anti-union animus rather than the exercise of rights pursuant to 8(c) of the Act; 4. that the superintendent’s comments support an inference of animus; 5. that the timing of issuance and the number of discipline warnings issued to Matt Kelly supports an inference of animus; 6. that Respondent departed from its policy in disciplining and discharging Matt Kelly and that this supports an inference of animus; 7. that Respondent was not consistent with its reason for discharging Matt Kelly and the discharge was pretextual; 8. that Respondent did not provide Matt Kelly with copies of his discipline and the discharge was pretextual; 9. that interviewing Matt Kelly after denying his request for a Union representative was a violation of Section 8(a)(1) of the Act; 10. that Matt Kelly was denied a request for a union representative when he was offered an alternative representative and he accepted; 11. that requiring Joe Ellena to sign a preferential hiring list is a violation of Section 8(a)(3) and (1) of the Act; 12. that Respondent required Joe Ellena to sign a preferential hiring list to fill a vacancy after he provided an unconditional offer to return to work; 13. that Joe Ellena was not returned to work because he did not sign a preferential hiring list; 14. that Respondent violated Section 8(a)(5) and (1) of the Act by changing the punch-in policy; 15. that Respondent may not unilaterally set terms and conditions of employment for permanent replacements<sup>2</sup> during a strike, including the punch-in policy; 16. that Respondent violated Section 8(a)(1) of the Act by removing a union picket sign; 17. that Jim Misercola, Respondent’s agent, removed a union picket sign from public property;

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<sup>2</sup> Throughout the entire process, as well as during other proceedings, Respondent has labeled the replacement workers as permanent replacements, however the Union objects to this label as the replacement workers are not permanent replacements, rather they are temporary replacements and therefore are herein identified as replacements.

and 18. that Respondent excepts to any and all other matters addressed in its brief that reference the Judge's findings or conclusions (R. Exc. pp. 1-3).

Charging Party files this Answering Brief and respectfully requests that the Board adopt the Administrative Law Judge's Rulings, Findings of Fact, Discussion and Analysis, Conclusions of Law, Remedy, and Order.

## **II. STATEMENT OF FACTS**

### **A. Local 150**

Local 150 is a labor organization within the meaning of the Act (G. C. Ex. 1(ee), Ans. para 3). Local 150 represents employees working in the construction industry in northwest Indiana, northern Illinois, and eastern Iowa. Local 150 is divided into eight districts which include the counties in which the Riverstone Troy Grove facility ("Troy Grove") and the Riverstone Vermillion Quarry facility ("Vermillion") are located. Local 150 has numerous collective bargaining agreements covering contractors and their employees throughout its jurisdiction.

#### **1. Stephen Russo**

Stephen Russo has been a Business Agent for Local 150 since 2006 (Tr. 128). His duties include answering member's complaints, negotiating, and administering various collective bargaining agreements, and filing grievances (*id.*). Local 150 has represented the employees at Troy Grove and Vermillion for decades. Russo is responsible for representing the members working for Riverstone at Troy Grove and Vermillion (Tr. 101, 120 and 128). The ALJ found Russo to be a credible witness (ALJ Dec. p. 11).

## **2. Retirees Tom Brown and Shane Bice**

Tom Brown was an Operator at Troy Grove for more than forty (40) years (Tr. 96). He has been a member of Local 150 for thirty-eight (38) years (*id.*). Shane Bice worked for Riverstone from 1976 to 2012 as an Operator at Troy Grove and Vermillion (Tr. 114). Bice has been a member of Local 150 since 1975 (*id.*). The ALJ found Brown and Bice to be credible witnesses (ALJ Dec. pp. 10-11).

### **B. Riverstone**

Riverstone is an employer engaged in commerce within the meaning of the Act (G.C. Ex. 1(ee) at Ans. para. 2(d)). It was established decades ago and previously known as Moline Consumers (Tr. 15). Riverstone's headquarters is in Davenport, Iowa (Tr. 16). It is a mining aggregate company (Tr. 15). It operates quarries in Illinois, Iowa, and Missouri, including Troy Grove and Vermillion in Illinois (Tr. 16). Troy Grove is located on the edge of the town of Troy Grove and Vermillion is located on the Vermillion River outside the town of Oglesby (*id.*). They are about 17 miles apart and it is about a 20 to 25 minute drive from one location to the other (Tr. 27).

Riverstone typically employs seven (7) Operating Engineers represented by Local 150, three (3) Operators at Troy Grove and four (4) Operators at Vermillion (*See* Charge No. 25-CA-216331 filed on March 12, 2018 identifying the number of workers at seven (7) as well as the four charges at issue in this hearing all of which identify the number of employees at seven (7)) (G.C. Exs. 1(a), (c), (e), (k), (m), (r), (v), and (x)). The decertification petition, 25-RD-221796, filed on June 11, 2018 identifies the number of employees at nineteen (19), with eight (8) employees participating in the strike (*See* 25-RD-221796). After the strike started in March 2018, Riverstone hired a total of thirteen (13) replacement workers in 2018 (Tr. 34).

## **1. Chuck Ellis and Mike Ellis**

Chuck Ellis is the President of Riverstone (Tr. 25). Mike Ellis has been one of its Vice-Presidents since 2018 (Tr. 26). Chuck and Mike Ellis are family members of the owner (Tr. 25 and 26). Neither testified at the hearing.

## **2. Marshall Guth**

Marshall Guth is the Vice-president of Operations and has held that position since before 1992 (Tr. 25-26). Guth oversees all the superintendents at all the sites (Tr. 26).

## **3. Scott Skerston**

Scott Skerston has worked for Riverstone for more than 28 years (Tr. 14). At the time of the hearing, he was Riverstone's superintendent (*id.*) and had that position since 1992 (Tr. 15). Skerston managed the work at the quarries and mine sites (*id.*) and had been at the Cleveland Quarry, another Riverstone site, since November 22, 2019 (Tr. 17). Prior to his transfer to Cleveland Quarry on November 22, 2019, he oversaw Troy Grove and Vermillion.<sup>3</sup> He is not a shareholder (Tr. 15). The ALJ found Skerston to be generally credible but she did not credit all of his testimony (ALJ Dec. p. 10).

## **4. James Misercola**

James Misercola is an agent of Riverstone within the meaning of Section 2(13) of the Act (G.C. Ex. 1(ee) at Ans. para 4(b)). He is a union buster (Tr. 111) and would regularly be on site

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<sup>3</sup> Skerston's testimony is generally unreliable. For example, he could not identify when he worked at the various Riverstone locations. He testified that he was in charge of Troy Grove and Vermillion in April and May 2018 (Tr. 87) and that he went to Vermillion when Becker took charge of Troy Grove which was in May 2018 (Tr. 86). This is patently incorrect because he disciplined Troy Grove and Vermillion employees throughout 2018 and into 2019. Skerston issued the following employees at Troy Grove and Vermillion discipline dated as follows: Kelly and Ellena on January 17, 2019 (G.C. Ex. 7 and 8); Kelly on May 6, 2019 (G.C. Ex. 9); Kelly on May 7, 2019 (G.C. Ex. 10); Kelly again on May 7, 2019 (G.C. Ex. 11); Kelly on May 8, 2019 (G.C. Ex. 12); Kelly on May 9, 2019 (G.C. Ex. 13); Kelly on July 10, 2019 (G.C. Ex. 17); Kelly on August 7, 2019 (G.C. Ex. 18); Kelly on August 14, 2019 (G.C. Ex. 20); Weber on June 15, 2018 (G.C. Ex. 23A); Parsons on September 27, 2018 (G.C. Ex. 23B); Weber on January 23, 2019 (G.C. Ex. 23C); and Gibson on April 30, 2019 (G.C. Ex. 23D). Therefore, Skerston was overseeing Troy Grove and Vermillion at all relevant times.

at Troy Grove and Vermillion - three to five times per week (Tr. 101). Riverstone argues it hired Misercola as a “persuader” since “the time that the petition was filed to decertify the union” at Troy Grove and Vermillion (Tr. 311 and 314), but in reality, he was a union buster (Tr. 111). The ALJ determined that Misercola lacked credibility (ALJ Dec. p. 12). For example, he was evasive and argumentative throughout cross-examination (Tr. 312-317). Misercola also stole the Union’s picket sign in violation of the Act (ALJ Dec. p. 15).

## **5. Troy Grove**

In 2019, before the strike started, there were seven employees at Troy Grove including Lyle Calkins, Scott Currie and Brad Lower (Tr. 17). The Troy Grove entrance is 150 feet past the scale house (Tr. 22). There is a public right-of-way around the facility (Tr. 23). At various times, Skerston and Tom Becker were the superintendents and the highest-ranking supervisor/managerial employees at Troy Grove (Tr. 24). Since November 22, 2019, Becker has been in charge of the day-to-day operations at Troy Grove (Tr. 17 and 25).

### **a. Lyle Calkins**

Lyle Calkins is an Operator at Troy Grove (Tr. 36 and 143). Calkins started working for Riverstone in June 2018 (Tr. 144). He is the plant Operator (*id.*). He runs the controls that run the processing plant (*id.*). Calkins fills in and performs miscellaneous tasks (Tr. 19). His hours are Monday through Thursday, 6:00 a.m. to 4:00 p.m. (Tr. 144). On October 24, 2018, Russo sent notification to Riverstone that Calkins was the steward (Tr. 36-37 and 144, and G.C. Ex. 3). He is the only steward for both Riverstone locations – Troy Grove and Vermillion (Tr. 145 and 185).

As steward, Calkins represented Scott Currie in January 2019 (Tr. 145 and 154). There was an incident concerning plowing snow and Currie asked to be represented by Calkins and

Calkins represented Currie during a disciplinary investigation (Tr. 154). The ALJ found Calkins to be a credible witness (ALJ Dec. p. 4).

**b. Bradley Lower**

Bradley Lower currently works at Troy Grove (Tr. 136). He has worked there since October 2016 (*id.*). He is an Operator, and his duties include welding, loading trucks and operating the loader in the pit (Tr. 136). Lower also is the secondary Operator (Tr. 18) and he operates the plant making sure it is running smoothly (Tr. 19-20). He works 6:00 a.m. to 4:00 p.m. (Tr. 136). He has been a member of Local 150 since March 2018 (Tr. 137). The ALJ found Lower to be a credible witness (ALJ Dec. p. 11).

**c. Scott Currie**

Scott Currie works for Riverstone as a loader Operator (Tr. 152). As the pit loader, Currie feeds raw material into the crusher (Tr. 19). He started at Vermillion in 2001, was laid off in 2004, and returned to Riverstone in September 2008 to work at Troy Grove (Tr. 152-153). His hours are 6:00 a.m. to 4:00 p.m. (Tr. 153). He has been a member of Local 150 since August 2002 (*id.*). The ALJ found Currie to be a credible witness (ALJ Dec. p. 11).

**6. Vermillion**

In 2019, Dave Lewis, Jamie Gott, Josh Weber, Matt Kelly, Craig Parsons, and Casey Helm worked at Vermillion (Tr. 20-21). Joe Ellena (Tr. 37), Matt Kelly (Tr. 45), and Ben Gibson (Tr. 222) were hired as replacement workers to work at Vermillion. Vermillion has one entrance/exit road, which is off Illinois State Highway 178 (Tr. 23). There is a public-right-of-way between the highway and the facility (*id.*). Skerston was the highest-ranking supervisor/managerial employee at Vermillion until he was transferred in November 2019 (Tr. 25).

**a. Joe Ellena**

Joe Ellena was hired as a replacement worker at Riverstone and began working for Riverstone in May 2018 (Tr. 37 and 159). He is an Operator (Tr. 159.). He worked 6:00 a.m. to 4:00 p.m. Monday through Thursday (Tr. 161) at Vermillion (Tr. 163 and 169).<sup>4</sup> He is a member of Local 150 (Tr. 159). Ellena is the discriminatee in Charge No. 25-CA-244883. He was required to sign a preferential hiring list in order to be reinstated (Tr. 41 and 167, and G.C. Ex. 6(a) and (b)). The ALJ found Ellena to be a credible witness (ALJ Dec. p. 11).

**b. Matt Kelly**

Matt Kelly is a replacement worker hired to work at Vermillion (Tr. 45). He was hired in early May 2018 (*id.*). Riverstone laid off Kelly in January 2019. He was recalled in May 2019 (Tr. 184).<sup>5</sup> He was an Operator and performed maintenance (*id.*). He worked 6:00 a.m. to 4:00 p.m. (*id.*). He has been a member of Local 150 since October 2018 (*id.*). He was terminated on August 14, 2019 (Tr. 184 and G.C. Ex. 22). Kelly is the discriminatee in Charge No. 25-CA-246978 as he was denied a *Weingarten* representative during an investigatory/disciplinary investigation, and was disciplined, and ultimately terminated because of his Union activity and support. The ALJ found Kelly to be generally credible and “His testimony was largely corroborated by other witnesses and evidence. Therefore, [the ALJ] credit[ed] Kelly’s testimony” (ALJ Dec. p. 11).

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<sup>4</sup> Ellena initially misspoke and said he worked at Troy Grove (Tr. 159), but he corrected himself at Tr. 163 and 169.

<sup>5</sup> Skerston recalls that Kelly was recalled in April 2019 (Tr. 48). Although the testimony is similar – April or May – Kelly’s recollection is clearer and as he was the one who recalled it, is more logical that he would remember his recollection more accurately than Skerston. Additionally, Skerston’s testimony was confusing and at times contradictory, such as his testimony concerning when he worked at Troy Grove and Vermillion.

### **c. Ben Gibson**

Ben Gibson started working at Vermillion on May 14, 2018 (Tr. 222). He is an Operator (*id.*). Skerston was his supervisor, but later, Becker became his supervisor (Tr. 222-223). His regular hours were 6:00 a.m. to 4:00 p.m. (Tr. 229). The ALJ found Gibson to be a credible witness (ALJ Dec. p. 11).

### **C. The Contract between Local 150 and Riverstone**

The most recent contract between Local 150 and Riverstone for Troy Grove and Vermillion expired on May 1, 2016 (Tr. 33 and 128, and G.C. Ex. 2). Local 150 and Riverstone began negotiating for a successor agreement before May 1, 2016 but have not yet reached agreement (Tr. 34 and 129). The parties are not at impasse (ALJ Dec. p. 12). Russo took a ratification vote, and the contract was voted down (Tr. 129). He went back to the bargaining table and then back to the membership for a second ratification vote (*id.*). The members voted down the contract a second time (*id.*). After the members rejected the contract, Russo explained that he believed Riverstone committed unfair labor practices and the employees voted to strike for unfair labor practices (*id.*), (ALJ Dec. p. 3).<sup>6</sup>

### **D. Replacement Workers**

Kelly, Ellena, Gibson, Josh Weber, Casey Helm, Craig Parsons, Ignacio Gonzalez, Jamie Gott, Noah Smith, Josh Thomas, Dave Lewis, and Jeff Bean were hired as replacement workers (Tr. 303). When Riverstone hired replacement workers, it required the workers to sign a “Notification of Employment” (Tr. 235 and 303, and R. Ex. 7). The Union went on strike in March 2018 (Tr. 34). Riverstone started hiring replacement workers in April 2018 (*id.*). After the strike started in March 2018, Riverstone hired a total of thirteen (13) replacement workers in

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<sup>6</sup> This hearing concerns some of the unfair labor practices to which the members voted to strike.

2018 (*id.*). Skerston hired replacement workers for both Troy Grove and Vermillion and then split them between the two sites (Tr. 36).

#### **E. Respondent's Unilateral Change to its Punch In/Punch Out Policy**

The employees at Troy Grove and Vermillion work from 6:00 a.m. to 4:00 p.m. Monday through Thursday. Historically, some employees punched in at Troy Grove and Vermillion when they arrived at work (Tr. 146, 155, and 163). They are paid from the time they punch in (Tr. 239). This could result in overtime because the employees might work more than ten (10) hours in the day (Tr. 147 and 156). The employees had been punching in before the start time for a while. The contract does not prohibit punching early. Prior to the newly unilaterally implemented policy, Riverstone never had a policy prohibiting punching in before the start time and receiving overtime (Tr. 134).

Lower usually arrived at work at 5:30 a.m. and would make coffee and use the restroom but would not punch in until just before 6:00 a.m. (Tr. 140-141). Lower observed Jeff Bean, another Riverstone employee, punch in early frequently (Tr. 140). Without touching Bean's timecard, Lower could see the punch in time for at least one day which showed Bean's early punch ins (Tr. 141). Bean received overtime when he punched in early (*see* Tr. 138).

In early January 2019, Lower talked to Calkins, Currie and Ellena about punching in before his start time (Tr. 137, 145-146, and 155). They talked about other employees punching in before the start time and receiving overtime pay for that time (Tr. 138). The other employees that punched in before the start time would be paid from the minute they punched in and that time would be at time and one-half (Tr. 138 and 186).

Lower then decided to punch in when he arrived at work so that Riverstone would pay him overtime (Tr. 138 and 155). The first time he punched in early was mid-January 2019

(Tr. 138). He punched in at 5:30 a.m. for three consecutive days (*id.*). He received overtime pay for the time he punched in early (Tr. 139). On his next scheduled workday, Lower saw a notice that employees could not punch in more than five minutes before the start time (Tr. 139 and G.C. Ex. 27). Calkins and Currie saw the same notice (Tr. 147 and 156). Ellena saw the notice as well (Tr. 164). Kelly saw the notice as well (Tr. 185).<sup>7</sup> The notice was posted above the time clock in the break room (Tr. 140, 148, 156 and 185). Prior to this notice, Riverstone did not have a policy prohibiting punching early (Tr. 139, 148, and 156). Prior to the newly unilaterally implemented policy, Riverstone did not have a policy prohibiting punching in before the start time and receiving overtime (Tr. 134).<sup>8</sup> After the policy was posted, the employees stopped punching in more than five minutes before starting time (Tr. 186 and 230).

Skерston testified that he was concerned when Lower punched in early three days in a row which resulted in overtime pay for those days; that no other employee had done that; and that was the reason for the punch in/punch out policy change (Tr. 239-242). However, Bean had punched in more than ten minutes early on numerous and consecutive occasions (Tr. 293-297, G.C. Ex. 29). Bean punched in more than ten minutes before the start time on November 18, 27, 28, 29 and 30, 2018, and on December 3, 4, 5, 6, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 2018 (*id.*).

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<sup>7</sup> A few days before the current policy was posted, Kelly saw a punch in policy notice that allowed employees to punch in up to 15 minutes prior to the start of the workday (Tr. 187). That notice was changed within a few days to the current notice which prohibits employees from punching in more than five minutes before starting time (*id.*). Gibson recalls two policies, ultimately resulting in prohibiting employees from punching in more than five minutes before starting time (Tr. 230).

<sup>8</sup> After the strike began, Russo made an information request for all policies concerning the terms and conditions of employment for the employees, which would include the punch in policy, but he never received any policy or rule concerning punching in before the start time (Tr. 134). The parties did not negotiate over any policy or rule concerning punching in before the start time (*id.*). Russo is not aware of any Company policy prohibiting punching in before the start time (*id.*). Likewise, Lower and Calkins did not know of any policy prohibiting punching in early (Tr. 139 and 148). Ellena was unaware of any punch in policy (Tr. 165). Kelly testified there was no punch in policy prior to the first policy he saw (Tr. 188).

It was not until Lower, a known Union supporter, started punching early that Skerston became concerned (Tr. 239-242).

#### **F. Respondent Stole the Union's Picket Sign**

Brown and Bice picketed Riverstone. Brown started picketing at Troy Grove on a daily basis starting on August 13, 2018 (Tr. 96). Bice started picketing on a regular basis starting October 2019 (Tr. 115). Picketing activities included putting out the picket signs when Brown and Bice arrived, walking back and forth, and sitting in their trucks (Tr. 97 and 115). Brown would arrive at Troy Grove at 6:45 a.m. to begin picketing (Tr. 96). Brown would picket until 3:30 p.m. (Tr. 97). Brown stopped picketing November 17, 2019 (*id.*). Brown would occasionally talk to people (*id.*).

The picket signs read "Local 150 on strike against Troy Grove Stone Quarry, a division of Riverstone Group, Inc., for unfair labor practice." (Tr. 98 and G.C. Ex. 26). "Local 150" was in red ink and "Troy Grove Stone" and "Riverstone" were in black marker (Tr. 98 and 123). The picket signs were made of laminated cardboard sized approximately 15 inches wide and 24 inches tall (Tr. 98). The signs were stapled to a piece of wood lath approximately 1/2 inch thick, 1 and 1/2 inches wide, and four feet long (Tr. 98). Rather than pound the signs into the ground, they put a 10-inch long by 2-inch diameter PVC pipe in the ground and slid the picket sign into the pipe (Tr. 99 and 116). There were two driveways at Troy Grove, and they put one sign on each side of each driveway and put some on their trucks (Tr. 99). At the end of each day, they took the signs home with them (Tr. 100).

Misercola is an agent for Riverstone (G.C. Ex. 1(ee) at Ans. para. 4(b)). Misercola came to Troy Grove three to five times per week (Tr. 101). Local 150 Business Agents Russo and Andy Moreno, another Local 150 Business Agent, identified Misercola to Brown (*id.*).

On January 2, 2019, one of the picket signs was stolen (Tr. 100). Brown arrived at Troy Grove at approximately 6:45 a.m. (*id.*) while Bice arrived at approximately 6:30 a.m. (Tr. 116). When Brown arrived, he put out the picket signs, walked around a bit, and sat in his truck to warm up (Tr. 100). At approximately 1:40 p.m. Misercola left Troy Grove, pulled next to one of the picket signs and when he left the sign was gone (Tr. 100 and 116-117). Brown and Bice remember that Misercola was driving a white SUV on January 2, 2019 (Tr. 101-102 and 117). Brown and Bice remember that Misercola was leaving Troy Grove when he took the picket sign (Tr. 102 and 117). Brown remembers Misercola pulling off the road next to the sign and then backing up and then pulling up and then backing up again (Tr. 102). Misercola drove back and forth about three times (Tr. 103). Bice testified that Misercola pulled back and forth “about three times.” (Tr. 117). Brown noticed the vehicle rocking as Misercola drove up to the sign because the plows had dug up the sod and piled the sod next to the sign (Tr. 102). Likewise, Bice remembers that his “car started like bouncing.” (Tr. 117). This process lasted about two minutes (Tr. 103). After Misercola left, Brown said to Bice: “Our sign is gone.” (Tr. 104). Bice said: “Well, do you think he ran it over?” to which Brown responded: “Well, he either ran it over or stole it.” (Tr. 104). Bice recalls that he said, “I think he is running over our sign over there” (Tr. 117).<sup>9</sup>

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<sup>9</sup> Neither Brown nor Bice could see Misercola take the sign because of the way Misercola positioned his vehicle which obstructed their view of the sign (Tr. 103 and 117-118). On cross examination, Respondent questioned Brown whether he “liked” Misercola (Tr. 108). Respondent cross examined Bice in the same manner (Tr. 123). Presumably, this line of questioning was to discredit Brown and Bice. However, Brown did not testify that he disliked Misercola, rather he testified that he (Bice) did not approve of him being a union buster (Tr. 111). Bice testified that he did not like Misercola and that he was paid by the Union (Tr. 123 and 126). Simply because a witness does not like another person’s profession does not establish that the witness is not credible. Brown and Bice testified with clarity and their testimony is consistent with the police report (G.C. Ex. 24) and consistent with each other’s testimony and therefore is credible. The witnesses also remember other details such as Brown remembering that the temperature was approximately 32 degrees and clear (Tr. 107). Finally, simply because the Union may pay a retiree does not make that witness less credible. If that were the case, then none of the Respondent’s witnesses would be credible because they are paid by Respondent.

Bice called Russo (Tr. 104 and 130). Bice told Russo that Misercola pulled out and the sign then suddenly “disappeared.” (Tr. 130). Russo told Bice to take pictures and to call the police (*id.*).<sup>10</sup> Bice walked over to where the picket sign was and noticed tire tracks next to the PVC pipe (Tr. 118). Bice took photographs of the tire tracks (Tr. 118-119 and G.C. Ex 25(a) and (b)). Bice walked around the area to make sure the sign was not laying somewhere (Tr. 120). The sign was missing. Bice has never had an occasion when a sign has fallen out of the PVC pipe (Tr 121). The wind could not have blown the sign away, and Brown has never had an incident when the wind blew a sign away (Tr. 107). Russo brought a new picket sign the following day (Tr. 122 and 131).<sup>11</sup>

**G. Respondent Violated the Act by Refusing to Return Ellena Back to Work Unless and Until He Signed a Preferential Hiring List**

Ellena was hired as a replacement worker (Tr. 37). Ellena began working for Riverstone in May 2018 (Tr. 159).<sup>12</sup> Skerston testified that he became aware of Ellena’s Union support about one and one-half months after he started working for Riverstone (Tr. 38, and G.C. Ex. 23A). Skerston testified that he knew he was a Union supporter because “he told everyone he did.” (Tr. 38). Ellena wore shirts displaying the Union insignia, which Skerston admitted seeing (*id.*). Skerston admitted seeing Ellena wearing his hard hat with Union stickers on it; seeing his lunch box with Union stickers on it; and seeing Union stickers on the back window of his

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<sup>10</sup> Bice wanted Russo to call the police (Tr. 130). Russo called the police (Tr. 121). The police were busy and could not make it to the site that day (Tr. 130). Brown and Bice talked to the police to report the incident the following day (Tr. 105 and G.C. Ex. 24). The police report reflects Brown’s and Bice’s testimony (G.C. Ex. 24).

<sup>11</sup> Russo prepares all of the picket signs (Tr. 131).

<sup>12</sup> Ellena initially misspoke and said he worked at Troy Grove (Tr. 159), but he corrected himself at Tr. 163 and 169.

personal vehicle (*id.*). Skerston admitted seeing Ellena with the Union stickers “almost daily.” (Tr. 39).<sup>13</sup>

On May 20, 2019, Ellena went on strike for unfair labor practices (Tr. 166 and 168, and G.C. Ex. 4).<sup>14</sup> Ellena made an unconditional offer to return to work from the strike (Tr. 39-40) via letter dated July 10, 2019 (Tr. 166 and G.C. Ex. 5). Skerston responded to the unconditional offer to return to work on July 12, 2019 (Tr. 41). Skerston advised Ellena that there were no job openings and at the time there was a preferential hiring list Ellena had to sign (Tr. 41 and 167, and G.C. Ex. 6(a) and (b)). This made Ellena think he no longer was an employee (Tr. 167). Ellena did not sign the preferential hiring list because he still is an employee (*id.*). Ellena testified that he “didn’t feel [he] should have to sign a list to get hired back when [he is] still employed.” (*Id.*). No one from Riverstone told him that he did not have to sign the list (Tr. 167-168). Ellena was the only employee who offered to return to work but who was not returned to work (Tr. 237).

Skerston admitted that Riverstone instituted and implemented the preferential hiring list at the same time Riverstone sent the letter to Ellena, which was July 12, 2019 (Tr. 44). The preferential hiring list is located at Vermillion (Tr. 88 and G.C. Ex. 6(a)). The preferential hiring list identifies both quarries (Tr. 88 and G.C. Ex. 6(b)). After Riverstone sent the letter to Ellena, there was no more communication between Riverstone and Ellena (Tr. 45). Ellena is still on strike because he has not received an offer to return to work since receiving the July 12, 2019 letter (Tr. 168).

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<sup>13</sup> Ellena confirmed that he wore a Union t-shirt, and had Union stickers on his hard hat, truck, and lunch box (Tr. 160).

<sup>14</sup> Skerston testified that it “looks like [the date] was filled in after” he went on strike (Tr. 39). There is no record evidence that the date was filled in after the date written on the letter. Moreover, Skerston admitted knowing that Ellena went on strike but could not recall the exact date (*id.*).

## **H. Kelly was Denied his *Weingarten* Rights, and was Disciplined and Terminated Because of His Union Support**

Matt Kelly is a replacement worker hired to work at Vermillion (Tr. 45 and 183). He was hired in early May 2018 (Tr. 45). Kelly was laid off in early 2019.<sup>15</sup> He was recalled in May 2019 (Tr. 184).<sup>16</sup> He was terminated on August 14, 2019 (Tr. 184 and G.C. Ex. 22).

### **1. Kelly's Support for the Union was Well Known by Respondent.**

Skерston admitted that he became aware that Kelly was a Union supporter approximately one and one-half weeks after Kelly returned from layoff (Tr. 48), which was April 15, 2019 (Tr. 290). He came out as a Union supporter on May 6, 2019 (Tr. 188). Kelly arrived at the shop approximately 10-15 minutes before 6:00 a.m. (*id.*). There were only a couple of people in the shop at that time but as it neared 6:00 a.m. more employees arrived (Tr. 188-189). There were about six or seven employees in the shop at 6:00 a.m. (Tr. 189). The employees were there for the morning meeting, which was when Skерston explained the day's agenda (*id.*). After Kelly punched in and while everyone was still in the shop, he took off his sweatshirt to reveal his Local 150 shirt (*id.*). The Local 150 shirt was dark blue and had the phrases "Fighting 150" on the front and back and a Local 150 logo on it (Tr. 190). Kelly walked around the shop and when Skерston saw him, Kelly asked Skерston what he thought of his shirt (Tr. 49) and Skерston responded: "Oh geez, you've got to be kidding me. Are you taking Joe Ellena's place?" (Tr. 190).<sup>17</sup> Skерston testified that Kelly wore a Union shirt "off and on from the end of April on,"

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<sup>15</sup> Skерston testified that Riverstone laid off Kelly in December 2018 (Tr 48). This cannot be true because Skерston disciplined Kelly on January 17, 2019 and disciplined other employees during this time period (G.C. Ex. 7). (See footnote 3 above).

<sup>16</sup> Skерston recalls that he was recalled in April 2019 (Tr. 48). Although the testimony is similar – April or May – Kelly's recollection is clearer and as he was the one recalled it is more logical that he would remember his recall more accurately than Skерston would remember.

<sup>17</sup> Joe Ellena was a Union supporter who was "outed" months prior to Kelly outing himself (Tr. 190). Ellena regularly wore Local 150 apparel, including shirts and stickers (Tr. 191). (See Section G of the Statement of Facts).

(Tr. 49) “not daily but several times a week.” (Tr. 50). Skerston testified that he saw Kelly every time he wore the shirt (*id.*).

Kelly understood Skerston to mean that he thought Kelly was taking Ellena’s role as the spokesperson for the members (Tr. 191). Gibson witnessed this and heard Skerston ask Kelly if he was taking Ellena’s spot (Tr. 224).<sup>18</sup> Gibson took Skerston’s comment to mean that since Ellena was no longer working for Riverstone, Kelly was filling in for him (Tr. 224-225).<sup>19</sup>

Kelly put Local 150 stickers on his hard hat (Tr. 189). The stickers were of the Local 150 logo, steam gauge, and a rat (Tr. 190). Kelly wore Union stickers on his hard hat on a daily basis (Tr. 49).

## **2. Kelly Goes on Strike for Unfair Labor Practices and Later Returns to Work.**

On May 9, 2019, Kelly informed Skerston that he was going on strike to protest the unfair labor practices (Tr. 63-64 and 197, and G.C. Ex. 14).<sup>20</sup> On June 26, 2019, Kelly made an

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<sup>18</sup> Skerston denied immediately discussing with Kelly whether he was a Union supporter (Tr. 258). Skerston is not credible on this point for several reasons including that he admitted that he thought Kelly was joking (Tr. 49); later admitted that he said, “I just said I thought he was joking around” (Tr. 259) (emphasis added); and Kelly and Gibson testified that Skerston asked Kelly if he was taking Ellena’s spot (Tr. 190 and 224).

<sup>19</sup> Gibson testified that Ellena was a Union supporter and he wore Local 150 shirts regularly and had stickers on his lunchbox, hardhat, and truck (Tr. 225). Gibson testified that Kelly regularly wore Local 150 shirts (Tr. 226). Skerston also testified that he did not think Kelly would cross his own picket line if he supported the Union (Tr. 258). However, Skerston was aware of other Union supporters that crossed their own picket line. Skerston was aware that the strike started on March 20, 2019 (Tr. 262) but did not receive Calkins’s strike letter until April 8, 2019 (Tr. 261). Therefore, Calkins crossed the picket line to work from the start of the strike on March 20, 2019, until he gave his strike letter to Skerston on April 8, 2019. Currie and Lower, also Union supporters, crossed the picket line. The NLRA provides that freedom to employees.

<sup>20</sup> Skerston testified that Kelly told him he was quitting on Thursday, May 9, 2019, and was accepting another job elsewhere (Tr. 249). Obviously, Skerston’s recollection is wrong. Kelly went on strike on May 9, 2019, as indicated in his letter to Skerston. If Kelly were resigning and accepting a different job, there would be no reason for him to give a strike notification and no reason to offer to return to work at Riverstone as he later did (G.C. Ex. 15). Also, Respondent would not have “rehired” him had he quit because Skerston noted that allegedly he “did not show much initiative. Matt was tardy twice with in a week. Matt also left early twice in one week.” (R. Ex. 10 at Bates No. 6036). Respondent would not have “rehired” him unless it thought it was legally required to “rehire” him. Also, had Kelly resigned he would have completed the resignation form as provided for in the training policy. Kelly did not complete the form because he did not resign. Moreover, Kelly’s departure on May 9, 2019, whether it be to go on strike to protest unfair labor practices or resignation is irrelevant because he was recalled to work and later fired because of his Union support. Skerston believes Kelly’s signing various forms (R. Ex. 10 Bates Nos. 6037,

unconditional offer to return to work (Tr. 65 and 197-198. and G.C. Ex. 15). Kelly returned to work the week of July 8, 2019 (Tr. 67). The Respondent had not issued any of the May disciplines to Kelly prior to his return to work (Tr. 219-220). At that point, the only discipline Kelly had received was for the snowball fight in January 2019 (Tr. 220).

Prior to going on strike, Kelly had received only one discipline. However, approximately three months after his return to work, Respondent piled on numerous alleged disciplines. As discussed below, Respondent did not give the discipline to Kelly when the alleged rule violations occurred, rather it waited and piled on using the disciplines as the reason to terminate Kelly.

### **3. Riverstone's Disciplinary Policy.**

Riverstone has universal work rules that apply to all of its locations including Troy Grove and Vermillion (Tr. 27). Discipline is progressive including a first warning for a first offense, a second warning for a second offense and so on for most infractions (Tr. 28 and R. Ex. 4 at Bates No. 1818). The supervisors follow the chart (Tr. 28). The chart contains four categories, and some steps may be skipped (*id.*). Safety violations may result in a suspension or final written warning for a first offense depending on the severity of the offense, and for other offenses, a step might be skipped, but for every offense there is a first written warning (*id.*). Safety offenses may result in successive suspensions before termination or there could be a termination after the first written warning depending on the severity of the offense (Tr. 29).

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6038) is evidence that he quit. However, the documents Kelly signed were completed and signed after he gave his strike notice on May 9, 2019 (R. Ex. 10). None of the documents in R. Ex. 10 that are signed by Kelly indicate that he quit. Rather the only documents indicating that he quit are signed by Skerston alone. Simply because Kelly signed the "release for Reference Information" (R. Ex. 10 at Bates No. 6037) does not establish that he quit as contended by Skerston (Tr. 252). After Kelly gave the strike letter to Skerston, Skerston directed him to complete the paperwork (R. Ex. 10 at Bates No. 6040) and that is why those documents are signed by Kelly. Finally, in R. Ex. 10 at Bates No. 6040, Skerston writes Kelly "will not be back." However, Kelly returned to work from the strike as requested in his unconditional offer to return to work (G.C. Ex. 15).

For discipline related to conduct, the first step is a written warning as with all other discipline and for a second offense the employee would receive a second written warning (*id.*). If there is another infraction, the employee might receive a final written warning or a suspension (Tr. 30). If the employee committed another conduct violation, the employee would be terminated pending an investigation (*id.*).

Performance and attendance related discipline is similar. There is a first written warning, second written warning, third written warning/final warning/suspension and then the fourth offense is termination (Tr. 30-31 and 244-245, and R. Ex. 4). There is a rolling 12-month period for some discipline after which the discipline is not considered as part of the progression (R. Ex. 4 at Bates No. 1818). Skerston, the site superintendent, determines discipline, including termination (Tr. 31).

#### **4. Kelly's Alleged Disciplinary Offenses That Occurred Before He Went on Strike.**

Riverstone disciplined Kelly on January 17, 2019 (Tr. 45 and G.C. Ex. 7). Skerston decided to discipline Kelly because he and Ellena had a snowball fight in the shop (Tr. 46). Skerston testified that he made the decision to discipline them, but then explained that he always discussed discipline with his boss, Guth, first (*id.*). Skerston investigated the incident by talking to other employees before he decided to discipline them (*id.*). Kelly signed the bottom of the disciplinary notice (Tr. 187 and G.C. Ex. 7). This was Kelly's first discipline (Tr. 188).

Riverstone disciplined Kelly for being 16 minutes late on May 2, 2019 but the disciplinary form is dated May 6, 2019 (Tr. 51 and 191, and G.C. Ex. 9). May 6, 2019 is the day Kelly came out as a Union supporter (Tr. 188). The first time Kelly saw this discipline was on

August 7, 2019 (Tr. 192).<sup>21</sup> Kelly did not sign the discipline (Tr. 191). He did not refuse to sign the document even though there is printing on the discipline that he refused to sign it because he had not seen the document until August 7, 2019 (Tr. 192).

Riverstone disciplined Kelly for an offense allegedly committed on May 7, 2019 (Tr. 53 and G.C. Ex. 10). He was disciplined for a safety and conduct violation – driving while taking a video<sup>22</sup> (Tr. 54 and G.C. Ex. 10).<sup>23</sup> The equipment was in park when he used the cell phone (Tr. 217 and 220). Kelly did not sign the discipline (Tr. 192). Nor did he refuse to sign the document even though there is printing on the discipline that he refused to sign it because he did see this discipline until August 7, 2019 (*id.*).

Riverstone disciplined Kelly for performance issues, which is dated May 7, 2019 (Tr. 56 and G.C. Ex. 11). Specifically, Riverstone disciplined Kelly because he drove to the shop five times between 6:00 a.m. and 10:00 a.m. that morning (Tr. 56). Skerston testified that he reviewed Kelly's progress on the project and determined that he was accomplishing very little and decided to discipline him (Tr. 57). This was a two-week project (*id.*). Skerston testified that no other employee had ever been disciplined for this specific type of performance issue (Tr. 58). It is common for Kelly to return to the shop ten to fifteen times a day (Tr. 193-194). He returns

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<sup>21</sup> As with Kelly's subsequent disciplines, he did not see them until August 7, 2019, as more fully discussed below. Skerston testified that he issued the disciplines to Kelly on the dates indicated on the disciplines (Tr. 259-260). Skerston is not credible on this point. Kelly repeatedly and consistently testified that he did not receive the disciplines on the dates indicated on the disciplines. Likewise, he asked for copies of the disciplines at the August 14, 2019 termination meeting but Skerston said he threw them away, which statement is corroborated by Gibson. Had Skerston issued the disciplines on the dates indicated he would have copies of them in his personnel file. Finally, although Respondent arguably was not asking leading questions, the form of the questions was close to testimony which further diminishes Skerston's credibility (Tr. 260).

<sup>22</sup> Skerston testified that Respondent has a cell phone policy that prohibits employees from using a cell phone while in the plant (Tr. 263 and R. Ex. 3). There is no evidence that the employees were aware of this policy. Allegedly, there is a signature page (Tr. 265), but it was not admitted into evidence, nor was it ever produced.

<sup>23</sup> Respondent asked if Kelly ever drove the truck using a cell phone (Tr. 221). Kelly answered honestly that he thought he had but could not recall when (*id.*). Kelly operating the truck while using a phone in the past supports the Union's position that it was only after Kelly came out that Respondent was concerned about following this policy because Kelly was not previously disciplined for violating the policy.

to the shop on an as-needed basis (Tr. 194). No one talked to Kelly about his trips to the shop that day (*id.*). No one ever told Kelly that he had been going to the shop too often (Tr. 210). Prior to the current discipline, Kelly was never disciplined for going to the shop too often (*id.*). Other employees went into the shop frequently to perform repairs, retrieve parts, or use the restroom, as this was the only restroom on site (Tr. 209-210). Kelly did not sign the discipline (Tr. 193). Nor did he refuse to sign the document even though there is printing on the discipline that he refused to sign it because he had not seen it until August 7, 2019 (*id.*).

Riverstone issued Kelly a second warning for being tardy on May 8, 2019 (Tr. 59 and 194, and G.C. Ex. 12). Kelly arrived early and was parked outside the gate because it was locked, and he fell asleep waiting for someone to open the gate (Tr. 195). Kelly did not sign the discipline (Tr. 194). Nor did he refuse to sign the document and the first time Kelly saw this discipline was on August 7, 2019 (*id.*). Gibson is the only other employee disciplined for tardiness (Tr. 53 and 59).

Riverstone disciplined Kelly for bending the jack leg on the welder on May 9, 2019 (Tr. 60 and 195, and G.C. Ex. 13).<sup>24</sup> Skerston testified that he witnessed the event and tried to honk and wave at Kelly, but Kelly did not respond (Tr. 283). It appears from Skerston's testimony that he was watching Kelly a significant amount of time after his return from the strike.

The jack leg was never repaired (Tr. 210).<sup>25</sup> No other employee has been disciplined for this reason or for a similar reason (Tr. 62). Skerston checked the box "Employee" at the bottom of the page and testified that he always checks the box when he issues discipline (Tr. 63); however, he did not check the "employee" box (G.C. Exs. 7 and 8).

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<sup>24</sup> Skerston testified that the discipline was also for wearing earbuds in violation of the cell phone policy (Tr. 282).

<sup>25</sup> Skerston testified that the jack leg was replaced (Tr. 61), but the testimony reveals that it was not (Tr. 210).

Kelly did not sign the discipline (Tr. 196). Nor did he refuse to sign the document even though there is printing on the discipline that he refused to sign it because the first time Kelly saw this discipline was on August 7, 2019 (*id.*). Moreover, the Respondent had not issued any of the May disciplines to Kelly prior to his termination (Tr. 219).

#### **5. More Kelly Alleged Offenses After Kelly Returned to Work.**

On July 8, 2019, Kelly returned to work from the strike (*see* Tr. 67). Riverstone promptly issued discipline to Kelly that is dated July 10, 2019 (Tr. 67 and G.C. Ex. 17). Kelly did not properly lock out/tag out a piece of equipment (Tr. 68). Skerston neither investigated the issue nor interviewed Kelly because he observed the alleged violation (*id.*). Skerston asked Kelly to come down from the highlift, handed him a lock and said he forgot to lock out the conveyor and “Don’t let it happen again.” (Tr. 199).

Kelly remembers that Skerston was “nonchalant” about the incident and had a forgiving voice (Tr. 199). Kelly signed this discipline the next day (*id.*). This discipline occurred the same week he returned from the strike (Tr. 198).<sup>26</sup> Other than the snowball fight discipline on January 17, 2019 and this discipline, Kelly had not seen any other discipline until August 7, 2019 (Tr. 200).

Riverstone disciplined Kelly on August 7, 2019 for alleged tardiness (Tr. 69 and 200, and G.C. Ex. 18). Kelly refused to sign this discipline because it noted, “final warning” and Kelly had not received the prior disciplines (Tr. 200). Kelly asked Skerston for copies of his prior disciplines to which Skerston said he did not have them but that the Union had the disciplines (Tr. 201); Kelly texted Russo about this (Tr. 201 and G.C. Ex. 28). Russo had copies of the discipline and Kelly went to the Union Hall after work to review them (Tr. 203). This is the first

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<sup>26</sup> Skerston believes that Gibson was disciplined for a similar situation but is not sure (Tr. 68).

time that Kelly saw his discipline, but he had still not received copies of the disciplines from Riverstone.

**6. Kelly's Denial of his *Weingarten* Rights and His Termination.**

On August 14, 2019, Kelly was late because he blew a tire on his motorcycle on the way to work (Tr. 204). Skerston and Becker, Troy Grove superintendent, met with Kelly (Tr. 76). Becker drove from Troy Grove to Vermillion to attend the meeting (Tr. 92 and 150). Becker arrived at the meeting at approximately 9:30 a.m. (Tr. 76). Before the meeting started, Kelly asked for Calkins to attend the meeting because Calkins is the only Union steward (Tr. 77 and 204-205). Skerston testified that he denied Kelly's request because Calkins, who was working at Troy Grove, "was at a different site and couldn't come down at that time. He was too far away." (Tr. 77) (emphasis added). Troy Grove is only 20 minutes from Vermillion (Tr. 205) and Becker had enough time to drive from Troy Grove to Vermillion to attend the meeting (Tr. 92 and 150). Skerston told Kelly that Calkins was too busy to come to Vermillion for the meeting and asked Kelly if they could get someone else and suggested Gibson, and Kelly ultimately agreed (Tr. 78). Skerston radioed Gibson to come to his office without explaining the reason (Tr. 226). Gibson joined the meeting about ten minutes later (Tr. 206). Gibson was there as a witness (Tr. 227). Calkins was never given the opportunity to represent Kelly (Tr. 150). Gibson is not a steward and does not hold any position with the Union (Tr. 78 and 206).

The investigation consisted of Skerston having Kelly answer a questionnaire (Tr. 76 and 206, and G.C. Ex. 21). Skerston asked Kelly the questions from the questionnaire and after he completed asking the questions, Skerston handed a notice of suspension to Kelly (Tr. 206 and G.C. Ex. 20). Kelly signed the notice of suspension, but then crossed out his name and initialed the notice instead because he had not yet received the prior disciplines from Riverstone even

though he had asked for them (Tr. 206-207 and G.C. Ex. 20).<sup>27</sup> Kelly again asked to see the prior disciplines. After refusing to sign the discipline, Skerston said he had received the write ups from HR but threw them away because Kelly told him he was going to the Union Hall to review them (Tr. 207).<sup>28</sup> Kelly asked why the discipline was not in his personnel file, but Skerston could not provide a reason (*id.*).<sup>29</sup> Skerston did not give the prior disciplines to Kelly (Tr. 228). Kelly asked for a copy of the questionnaire and notice of suspension, but Skerston gave a copy of the notice of suspension but not the questionnaire to him (Tr. 207).<sup>30</sup> Skerston called Respondent's counsel and, after the telephone call Skerston, told Kelly: "I can't give this to you." (Tr. 208).

#### **7. Kelly's Termination.**

Riverstone terminated Kelly on August 14, 2019 (G.C. Ex. 22). Skerston testified that Kelly was terminated because he was late four different times (Tr. 79). Skerston testified that the decision to terminate Kelly was made "soon after August 14" 2019 (*id.*). Kelly had been late in the past without receiving any discipline (Tr. 209). It was only after Kelly came out as a Union supporter that Riverstone insisted on issuing discipline every time he was late. No other employee has been terminated for being tardy.

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<sup>27</sup> Gibson testified that Kelly crossed out his name and initialed the notice and explained that he crossed off his name because he had not received the prior discipline (Tr. 228).

<sup>28</sup> Gibson testified that Skerston said that he threw away the disciplines (*id.*). Skerston testified that he never said he threw out the discipline (Tr. 282). However, Kelly and Gibson clearly remember him saying that he threw them out. Additionally, Skerston did not give the disciplines to Kelly when he asked for them. Skerston's testimony is illogical. Skerston first testified that he completes the write ups but then told Kelly that he received them from HR. This is illogical and not credible.

<sup>29</sup> Gibson testified that Kelly told Skerston that he did not receive the prior disciplines from Riverstone (Tr. 228). Gibson also remembers Kelly asking why the disciplines were not in his personnel file (*id.*).

<sup>30</sup> Skerston did not recall if Kelly asked for copies of the questionnaire at the meeting, but he recalls Kelly asking for it at some time (Tr. 279). Skerston sent it to him on August 16, 2019 (R. Ex. 12).

### III. ARGUMENT

#### A. Respondent's Issues/Arguments (R. Br. p. 10).

Respondent argues that the Board should vacate the ALJ's Decision and dismiss the Complaint in its entirety based upon the following issues it presents:

- Whether disciplining a permanent replacement, Matt Kelly, who supports the Union and engaged in protected activities for admitted workplace violations is a violation of Section 8(a)(3) and (1) of the Act;
- Whether a permanent replacement has *Weingarten* rights while a strike is on going;
- Whether an employer commits an unfair labor practice when it offers an alternative representative which the employee accepts when the employee exercises his *Weingarten* rights;
- Whether the retention of Jim Misercola, "persuader," is proof of anti-union animus;
- Whether giving an employee the opportunity to sign a preferential hiring list requires the employee to do so;
- Whether it is necessary to create a preferential hiring list for only one employee offering to return to work;
- Whether an employer may unilaterally change a punch-in policy for permanent replacements workers; and
- Whether prohibiting employees from punching in earlier than the start time is a unilateral change or a lawful response to a unilateral change by the employees.

#### B. Credibility

Throughout the Decision, the ALJ made numerous credibility determinations. Specifically, at pages ten through twelve the ALJ addressed the credibility of the witnesses. The Board's established policy is "not to overrule an [administrative law judge's] resolutions as to credibility except where the clear preponderance of *all* the relevant evidence convinces [the Board] that [the administrative law judge's resolution was] incorrect." *Standard Dry Wall*

*Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951)(italics in original). The ALJ made her credibility determinations based on all the relevant evidence and a myriad of factors including but not limited to the context of testimony and demeanor of the in-person witnesses,<sup>31</sup> the weight of the evidence, the facts as established and/or admitted, and the probabilities and inferences made from the entire record. There is nothing in the record that would provide for the overruling of any of the ALJ's credibility determinations.

**C. Respondent's first issue - Whether disciplining a permanent replacement, Matt Kelly, who supports the Union and engaged in protected activities for admitted workplace violations is a violation of Section 8(a)(3) and (1) of the Act – is a mischaracterization of the matter and regardless, the ALJ correctly determined that Respondent violated the Act when it disciplined and discharged Matt Kelly**

Section 8(a) of the Act states in part: “It shall be an unfair labor practice for an employer . . . (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .” 29 U.S.C. § 158 (a). It is also well-settled that an employer violates Section 8(a)(1) and (3) of the Act when it disciplines and/or terminates an employee in whole or in part because of his concerted and/or union activities. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398 (1983); *NLRB v. Joy Recovery Tech Corp.*, 134 F.3d 1307, 1314 (7th Cir. 1998); *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263, 1266 (7th Cir. 1997). To establish a prima facie case of discrimination based on union activity, one must show: (1) that the employee engaged protected union activity; (2) the employer harbored animus toward the union or union activity; and (3) that the employer knew of such activity. *Senior Citizens Council of Riverbay Community*, 330 N.L.R.B. No. 154 (2000); *Wright Line, Wright Line Div.*, 251 NLRB 1083 (1980). A causal

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<sup>31</sup> The hearing in this matter was conducted in-person and not via a remote platform.

relationship must exist between the Company's knowledge and the adverse employment action and the employee's protected activity that influenced or played a significant role in such decision. *M&G Convoy*, 287 NLRB 686 (1988); *Garrett Flexible Prods.*, 270 NLRB 1147 (1984). Kelly was not a "permanent" replacement. Regardless, all employees are entitled to the protections provided for in the Act. All of the elements of a violation of the Act are satisfied in this case.

### **1. Matt Kelly Was Engaged in Protected Activity.**

Matt Kelly was a proud Union supporter and demonstrated his support daily by donning a Local 150 shirt while working (Tr. 189-190) and putting Local 150 stickers on his hard hat (Tr. 189). *See Big Ridge, Inc. v. N.L.R.B.*, 808 F.3d 705, 713-714 (7th Cir. 2015) (Protected activity includes open and active support for a union including wearing union shirts, wearing union stickers on hardhats). Moreover, Kelly went out on strike on May 9, 2019 to protest Riverstone's unfair labor practices (Tr. 63-64 and 197 and G.C. Ex. 15). Kelly's decision to go on strike for unfair labor practices is likewise protected activity. *See Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 296, 76 S.Ct. 349, 365 (1956) (where an employer's unfair labor practice causes a strike, employees are given rights under Section 8 of the Act); *see also N.L.R.B. v. Wagner Iron Works*, 220 F.2d 126, 142 (7th Cir. 1955) (holding that strike was a protected concerted activity caused by respondent's unfair labor practices). Therefore, Kelly was engaged in protected activity.

### **2. Riverstone Harbored Animus Toward the Union and Protected Activity.**

Riverstone's animus toward the Union and Kelly's and Ellena's protective activity was obvious. The ALJ correctly determined that Respondent harbored animus. The ALJ considered both direct and circumstantial evidence, including direct statements from Respondent's agents,

and circumstantial evidence such as the timing of discipline, the Respondent's failure to follow its own procedures and Respondent's shifting defenses (ALJ Dec. pp. 15-18).

Upon Kelly's return from layoff when he revealed his support through his Local 150 clothes and hard hat stickers, Skerston said to Kelly, "Oh geez, you've got to be kidding me. Are you taking Joe Ellena's place?" (Tr. 190). Kelly understood Skerston to mean that he thought Kelly was taking Ellena's role as the "spokesperson" for the Union members (Tr. 190-191). Furthermore, Riverstone hired Misercola as a "persuader" "to decertify the union" at Troy Grove and Vermillion (Tr. 311, 314). Misercola's job at Riverstone for two years was "to secure a No vote in a union election" (*id.*). In other words, Riverstone has been paying Misercola for two years to rid its Troy Grove and Vermillion facilities of the Union. Riverstone's animus toward the Union could not be clearer.<sup>32</sup> Additionally, the ALJ found Misercola not to be credible and that he removed the Union's picket sign in violation of the Act, which is more evidence of animus. For these reasons, Misercola's actions were not protected by Section 8(c) of the Act. Other factors demonstrating animus which the ALJ found include Respondent's failure to follow its own procedures, suspicious timing, shifting defenses, inadequate investigation and tolerating similar behavior from other employees (ALJ Dec. pp. 15-18).

### **3. Riverstone Had Knowledge of Kelly's Union Activities.**

Riverstone admitted that it had knowledge of Kelly's Union activities. Upon Kelly's return from layoff when he revealed his support through his Local 150 clothes and hard hat stickers, Skerston said to Kelly, "Oh geez, you've got to be kidding me. Are you taking Joe

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<sup>32</sup> Riverstone's Superintendent Training 2019 listed questions not to ask applicants for hire and those prohibited questions including Marital Status; Race or National Origin; Religion; Protected Activities, such as past filings of workers' compensation claims; Children/Parental Status; Age (unless for age requirements of the position); and Sexual Orientation (R. Ex. 4 at Bates No. 1809). Conspicuously absent from the list of prohibited questions is Union Status, even though Training identified "Protected Activities."

Ellena's place?" (Tr. 190). At this point, Riverstone was well aware of Ellena's support for the Union. Kelly understood Skerston to mean that he thought Kelly was taking Ellena's role as the "spokesperson" for the Union members (Tr. 190-191). Riverstone had knowledge of Kelly's union support.

**4. Riverstone Disciplined and Discharged Kelly Because of His Union Activity and Riverstone's Proffered Reasons for Discharging Matt Kelly Are Pretextual.**

Board law is clear that a showing that unlawful motivation played any role in an adverse employment action effectively destroys an employer's *Wright Line* defense. *Sea Ray Boats, Inc.*, 336 NLRB No. 70 (2001). To establish a *Wright Line* defense to an 8(a)(3) charge, "the employer must affirmatively introduce enough evidence to persuade the Board that the challenged personnel action would have taken place regardless of the employee's protected activity and the employer's union animus." *Hicks Oils & Hickgas, Inc.*, 293 NLRB 84 (1989). "The Act does not allow employers to substitute 'good' reasons for 'real' reasons." *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352 (7th Cir.). An employer cannot carry its *Wright Line* burden simply by showing that it had a legitimate reason for the adverse employment action but must prove by a preponderance of the evidence that it would have made the same decision absent the protected conduct. *Centre Property Management*, 277 NLRB 1376 (1985); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984). In other words, the mere presence of legitimate business reasons for disciplining or discharging an employee does not automatically preclude the finding of discrimination. *J.P. Stevens & Co. v. NLRB*, 638 F.2d 676, 681 (4th Cir. 1981).

Moreover, motivation is a question of fact that may be inferred from either direct or circumstantial evidence. *NLRB v. Link-Belt Co.*, 311 U.S. 584 (1941); *NLRB v. Chem Fab Corp.*, 691 F.2d 1252, 1259 (8th Cir. 1982). Circumstantial evidence of an employer's unlawful

motivation includes suspicious timing of the adverse action, the pretextual nature of the employer's proffered justification, and the failure to adequately investigate alleged misconduct. *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 3-4 (2011) (timing); *Center Service System Division*, 345 NLRB 729, 749-750 (2005) (pretext), enf'd. in relevant part 482 F.3d 425 (6th Cir. 2007); *Temp Masters, Inc.*, 344 NLRB 1188, 1193 (2005) (all factors); *Promedica Health Systems, Inc.*, 343 NLRB 1351, 1361 (2004) (all factors); *Whitesville Mill Service Co.*, 307 NLRB 937, 937 (1992) (pretext). Accordingly, the burden is on Riverstone to establish that it would have made the same employment decisions in the absence of the protected activity. See *Wright Line*, 251 NLRB 1083, 1098 (1980); enf'd 662 F.2d 899 (1st Cir. 1981).

Here, Riverstone cannot meet its burden because it was unlawfully motivated to discriminate against union supporter Kelly. Riverstone's stated reason for terminating Kelly was because he was late on four separate occasions within the year (G.C. Ex. 22) but that was a pretext.

Attendance-related discipline is a four-step progression. There is a first written warning, second written warning, third written warning/final warning/suspension and then the fourth offense is termination (Tr. 30-31 and 244-245, and R. Ex. 4). The site superintendent determines discipline, including termination (Tr. 31). There is a rolling 12-month period (Tr. 29).

Despite the progressive discipline policy and lack of consistency in disciplining similarly situated employees, Riverstone suspiciously disciplined Kelly an inordinate amount. Riverstone disciplined Kelly for being 16 minutes late on May 2, 2019 but the disciplinary form is dated May 6, 2019 (Tr. 51 and 191, and G.C. Ex. 9). May 6, 2019 is the day Kelly came out as a Union supporter (Tr. 188). However, the first time Kelly saw this discipline was on August 7, 2019 (Tr.

192).<sup>33</sup> Kelly did not sign the discipline (Tr. 191). He did not refuse to sign the document even though there is printing on the discipline that he refused to sign it because he had not seen the document until August 7, 2019 (Tr. 192).

Riverstone disciplined Kelly May 7, 2019 for a safety and conduct violation – driving while taking a video (Tr. 53-54 and G.C. Ex. 10).<sup>34</sup> The equipment was in park when he used the cell phone (Tr. 217 and 220). Kelly neither signed the discipline, nor did he refuse to sign the document even though there is printing on the discipline that he refused to sign it because he did see this discipline until August 7, 2019 (Tr. 192).

Riverstone also disciplined Kelly for performance issues, dated May 7, 2019 because he drove to the shop five times between 6:00 a.m. and 10:00 a.m. that morning (Tr. 56, G.C. Ex. 11). Skerston testified that he reviewed Kelly's progress on the project and determined that he was accomplishing very little and decided to discipline him (Tr. 57). This is a two-week project (Tr. 57). Skerston admitted that no other employee had ever been disciplined for this specific type of performance issue (Tr. 58). It is regular for Kelly to return to the shop ten to fifteen times in a day (Tr. 193-194). It is as-needed (Tr. 194). Other employees went into the shop frequently to fix something, retrieve parts, or use the restroom, as this was the only restroom on

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<sup>33</sup> As with Kelly's subsequent disciplines, He did not see them until August 7, 2019, as more fully discussed below. Skerston testified that he issued the disciplines to Kelly on the dates indicated on the disciplines (Tr. 259-260). Skerston is not credible on this point. Kelly repeatedly and consistently testified that he did not receive the disciplines on the dates indicated on the disciplines. Likewise, he asked for copies of the disciplines at the August 14, 2019 termination meeting but Skerston said he threw them away, which is corroborated by Gibson. Had Skerston issued the disciplines on the dates indicated he would have copies of them in his personnel file. Finally, although Respondent arguably was not asking leading questions, the form of the questions was close to testimony (Tr. 260).

<sup>34</sup> Skerston testified that Respondent has a cell phone policy that prohibits employees from using a cell phone while in the plant (Tr. 263 and R Ex. 3). There is no evidence that the employees were aware of this policy. There is a signature page (Tr. 265) but it was not admitted into evidence, nor was it ever produced. Respondent asked if Kelly ever drove the truck using a cell phone (Tr. 221). Kelly answered honestly that he thought he had but could not recall when (Tr. 221). Whether Kelly operated the truck while using a phone in the past supports the Union's position that it was only after Kelly came out that Respondent was concerned about following this policy.

site (Tr. 209-210). Kelly neither signed the discipline, nor did he refuse to sign the document even though there is printing on the discipline that he refused to sign it because he did see this discipline until August 7, 2019 (Tr. 193). No one talked to Kelly about his trips to the shop that day (Tr. 194). No one ever told Kelly that he had been going to the shop too often (Tr. 210). Prior to the current discipline, Kelly was never disciplined for going to the shop too often (Tr. 210).

Riverstone issued Kelly a second warning for being tardy on May 8, 2019 (Tr. 59 and 194 and G.C. Ex. 12). This was two (2) days after he revealed himself as a Union supporter. Kelly neither signed the discipline, nor did he refuse to sign the document even though there is printing on the discipline that he refused to sign it because he did see this discipline until August 7, 2019 (Tr. 194). Kelly arrived early and was parked outside the gate because it is locked, and he fell asleep waiting for someone to open the gate (Tr. 195).

Riverstone also issued additional discipline to Kelly for bending the jack leg on the welder on May 9, 2019 (Tr. 60 and 195, and G.C. Ex. 13). Skerston testified that he witnessed the event and tried to honk and wave at Kelly, but Kelly did not respond (Tr. 283). It appears from Skerston's testimony that he was surveilling Kelly a significant amount of time after his return from the strike. Kelly neither signed the discipline, nor did he refuse to sign the document even though there is printing on the discipline that he refused to sign it because he did see this discipline until August 7, 2019 (Tr. 196). The Respondent had not issued any of the above-discussed May 2019 disciplines to Kelly prior to his termination (Tr. 219).

Prior to going on strike, Kelly had received only one discipline. However, approximately three months after Kelly's return to work, Riverstone piled on a number of disciplinary documents that allegedly occurred in May 2019. Riverstone waited and piled on the inordinate

number of disciplines to Kelly in August 2019 as a pretext to suspend and subsequently terminate Kelly.

In accordance with the well-settled law cited above, the timing of disciplining Kelly when he came out as a Union supporter and the numerous amounts of discipline that Riverstone attributed to Kelly without consistently issuing discipline to other similarly situated employees is suspicious and prove that these reasons were pretextual. From August 15, 2017 to May 6, 2019, Riverstone issued only seven (7) disciplines to employees company-wide (Tr. 84 and G.C. Exs. 7, 8 and 23 (a-e)). From May 6, 2019 to the date of the hearing, Riverstone issued a total of twenty-two (22) disciplines of which eight (8) were issued to Kelly (R. Ex. 6 at Bates Nos. 6425-6449). Of the remaining fourteen (14) disciplines, one (1) was issued to Ellena, a known Union supporter, and two (2) were issued to Jolene Fitzgerald, who is not in the bargaining unit (R. Ex. 6). Gibson received four (4) disciplines between April 30, 2019 and July 1, 2019 and one (1) discipline on December 19, 2019 (R. Ex. 6 at Bates Nos. 6427-6431). Gibson was not terminated. Finally, only one (1) other discipline involved attendance. It was only after Kelly revealed himself as a Union supporter that Riverstone starting disciplining Kelly.

The suspiciousness of the timing combined with the inordinate number of disciplines issued to Kelly long-after they allegedly occurred but soon after he came out as a Union supporter creates a strong inference that Riverstone's motives were malevolent and ill-willed. Had Kelly not supported the Union, or had Riverstone not known about Kelly's support for the Union, Riverstone cannot argue with a straight-face that it would have disciplined Kelly regardless of his support for the Union—Riverstone's reasons for disciplining Matt Kelly were pretextual. The ALJ also correctly considered Respondent's shifting defenses and the fact that it

did not provide him with copies of the discipline as pretext.<sup>35</sup> For these reasons, Riverstone violated Sections 8(a)(1) and 8(a)(3) of the Act when it unlawfully disciplined and discharged Kelly for his Union support.

**D. Respondent's second and third issues - Whether a permanent replacement has Weingarten rights while a strike is on going; and whether an employer commits an unfair labor practice when it offers an alternative representative which the employee accepts when the employee exercises his Weingarten rights – were correctly decided by the ALJ**

The ALJ correctly decided these issues (ALJ Dec. pp. 18-19). The ALJ determined that Kelly had a right to representation, which was denied, and the offer of a replacement representative was not adequate for various reasons and particularly since the Union steward was working at the same location as the site superintendent who was able to travel from one location to the other, while Respondent argued that the Union steward could not travel the same distance at the same time (*id.*).

Kelly was hired in early May 2018 as a replacement worker to work at Vermillion (Tr. 45 and 183). On August 14, 2019, Kelly was late because he blew a tire on his motorcycle on the way to work (Tr. 204). Skerston and Becker, Troy Grove superintendent, met with Kelly (Tr. 76). Becker drove from Troy Grove to Vermillion to attend the meeting (Tr. 92 and 150). Before the meeting started, Kelly asked for Calkins to attend the meeting because Calkins is the only Union steward (Tr. 77 and 204-205).

At that moment, Kelly asserted his *Weingarten* rights by requesting his union representative be present at the meeting. Skerston explained that he denied Kelly's request

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<sup>35</sup> Respondent argues that Matt Kelly received other discipline "but was not terminated for the other discipline" but then proceeds to identify the other alleged discipline (R. Br. pp. 5-6). If Respondent did not consider the other discipline when deciding to terminate him, it would not have identified the other discipline. However, Respondent identified the other discipline because it relied upon it and thus again is shifting its rationale for terminating him and thereby further establishes animus and pretext.

because Calkins, who was working at Troy Grove, “was at a different site and couldn’t come down at that time and he was too far away” (Tr. 77) (emphasis added). In fact, Becker made the drive from Troy Grove, where Calkins was working, to be at Kelly’s disciplinary meeting—Troy Grove is only 20 minutes away from Vermillion. (Tr. 77 and 205). The investigation consisted of Skerston having Kelly answer a questionnaire (Tr. 76 and 206, and G.C. Ex. 21). Skerston asked Kelly the questions from the questionnaire and after he completed asking the questions, Kelly’s reasonable belief that the interview would result in discipline came to fruition when Skerston immediately handed a notice of suspension to Kelly. (Tr. 206 and G.C. Ex. 20). Kelly signed the notice of suspension, but then crossed out his name and initialed the notice instead because he had not yet received the prior disciplines from Riverstone even though he had asked for them (Tr. 206-207 and G.C. Ex. 20).

Because of Kelly’s replacement worker status, Riverstone argues that Kelly cannot possibly have *Weingarten* rights to request a union representative if he reasonably believes an interview will lead to discipline. The Supreme Court held that an employer violates Section 8(a)(1) of the Act by denying an *employee’s* request to have a union representative present at an investigatory interview which the employee reasonably believes might result in disciplinary action. *NLRB v. Weingarten*, 420 U.S. 251, 260 (1975). The Court explained that the right to the presence of a representative is derived from Section 7 of the Act giving employees the right to engage in concerted activities for mutual aid or protection. *Id.* at 260-261. The Court stated that the union representative whom an employee seeks to include in an interview “safeguard[s] not

only the particular employee's interest, but also the interests of the entire bargaining unit ....” *Id.* at 260; *In Re IBM Corp.*, 341 NLRB 1288, 1290 (2004).<sup>36</sup>

In this case, Local 150 is the exclusive bargaining representative of all of Riverstone’s bargaining unit *employees*. The bargaining unit has not been decertified, and therefore Riverstone’s workplace is still unionized. There is no question that replacement workers hired to replace strikers are themselves “employees” under the Act. When the Supreme Court first endorsed the right of employers to hire striker replacements, the first substantive issue it addressed was whether strikers remained employees protected by the Act. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345 (1938). The statutory definition anticipated such an issue including with the term “employee,” “any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute.” *Id.*; 29 U.S.C. § 152(3). That replacements were likewise employees within the meaning of the Act was obvious to the Court. While nothing in the Act, 29 U.S.C. § 163, was to be “construed so as to interfere with, impede or diminish in any way the right to strike.” *Mackay Radio & Telegraph Co.*, *supra*, at 345-346:

[I]t does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice, nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. But the claim put forward is that the unfair labor practice indulged by the respondent was discrimination in reinstating striking employees by keeping out certain of them for the sole reason that they had been active in the union. As we have

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<sup>36</sup> On the other hand, while a unionized employer acts unlawfully when denying its employees *Weingarten* rights, a nonunionized employer does not act unlawfully under the Act and current Board law, when denying its employees the same *Weingarten* rights that are available to employees in a unionized employer setting under *Weingarten*. *Wal-Mart Stores, Inc. & Ryan Cook, an Individual*, No. 28-CA-167277, 2016 WL 4547576 (Aug. 31, 2016).

said, the strikers retained, under the act, the status of employees. Any such discrimination in putting them back to work is, therefore, prohibiting by section 8.

*See also N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85, 91, 116 S. Ct. 450, 454 (1995) (paid union organizers that work for a company are “employees” within the terms of the Act); *see also Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891, 104 S.Ct. 2803, 2808, (1984) (the Act covers undocumented aliens), where the Court wrote that the “breadth of § 2(3)'s definition is striking: the Act squarely applies to ‘any employee.’ ” 467 U.S. at 891, 104 S.Ct., at 2808; *see also NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 189-190, 102 S.Ct. 216, 228-229, 70 L.Ed.2d 323 (1981) (certain “confidential employees” fall within the definition of “employees”); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-186, 61 S.Ct., 845, 848-849 (job applicants are “employees”).

Moreover, a union’s duty of fair representation is rooted in Section 7 of the Act.

The duty of fair representation exists because it is the policy of the National Labor Relations Act to allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative. In such a system, if individual employees are not to be deprived of all effective means of protecting their own interests, it must be the duty of the representative organization “to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” *DelCostello v. Int’l Bhd. of Teamsters*, 462 U.S. 151, 165, 103 S. Ct. 2281, 2291, Fn. 14 (1983) (citing *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903 (1967)) (*See generally Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 65 S.Ct. 226 (1944)).

The representation and bargaining obligations cover employees in the bargaining unit, and when an employer hires permanent replacements during a strike, the bargaining unit is expanded to the extent that it consists of “nonstrikers, strikers, returning strikers, and striker replacements.”

*National Upholstering Co.*, 311 NLRB 1204, 1210 (1993). A striking employee, even if replaced, retains employee status, and is entitled to all benefits and protections provided under the Act, including normally the right to reinstatement on application at the termination of the strike. *Capitol-Husting Co. v. N.L.R.B.*, 671 F.2d 237, 247 (7th Cir. 1982). The Supreme Court observed in *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 790-791 (1990), the interests of the union and those of the striker replacements are not necessarily always at odds. As the Seventh Circuit discussed in *Capitol-Husting Co.*, “returning strikers are and remain members of the bargaining unit even though they find themselves on the opposite side of the picket line from the strikers.” 671 F.2d at 247-248. In that case, the employer had a duty to bargain with the union before changing any of the benefits being received by returning strikers, and by failing to do so the employer bypassed the exclusive bargaining representative of the returning strikers. *Id.* at 247. “To permit such conduct would result in a serious undermining of the Union’s authority and leave the impression with all employees that the Union is powerless.” *Id.* at 248.

Regardless of the status Kelly held—whether a permanent replacement worker, unfair labor practice striker, or a returning striker—Kelly retains Section 7 rights. Such rights are the foundation of *Weingarten* rights and enjoyed by Kelly because he is an employee as defined by the Act. As shown above, Kelly is an employee who asserted his *Weingarten* rights rooted in Section 7 of the Act when he reasonably believed his August 14, 2019 interview would result in discipline. When Riverstone refused to provide Kelly his union representative, it violated Section 8(a)(1) of the Act.

Likewise, the ALJ is correct that the Respondent denied Kelly his *Weingarten* rights when it offered a replacement to act as his representative (ALJ Dec. p. 19). The representative

offered by the Respondent was not a knowledgeable representative. Respondent did not and could not justify refusing to wait for the Union steward particularly since the Union steward and the superintendent who was allowed to attend the meeting were at the same location when the issue of Union representation first arose. Finally, simply because Kelly “accepted” the other employee as his representative does not establish that the Respondent did not violate the Act. Kelly was given a “take it or leave it” proposition to accept an unskilled replacement and the Respondent was proceeding with the illegal interview regardless of Kelly’s acceptance of the representation.

**E. Respondent’s fourth issue - Whether the retention of Jim Misercola, “persuader,” is proof of anti-union animus – was correctly decided by the ALJ.**

Respondent framed the issue as whether hiring a “persuader” is proof of animus but then argues that the ALJ erred in finding that Respondent interfered with the Section 7 rights of the employees by removing the Union’s picket sign (R. Br. 35-37). The ALJ correctly determined that Respondent violated the Act when its agent removed the Union’s picket sign (ALJ Dec. p. 15 and cases cited therein).

The ALJ did not find Misercola to be a credible witness (ALJ Dec. p. 12). Misercola was evasive, indirect, and could not answer the most basic questions. He quibbled with counsel on cross examination, could not remember certain things and had limited recall (*id.*). Misercola was engaged in much more than Section 8(c) rights. Misercola was a Union buster not a persuader (Tr. 111). Also, Section 7 of the Act was violated when he removed<sup>37</sup> the Union picket sign (ALJ Dec. p. 15). His actions were much more than simply expressing Riverstone’s views.

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<sup>37</sup> “Removed” is a diplomatic way of saying “stole.” The picket sign was never found. If he removed it and it was never found, then he stole it.

Additionally, as argued throughout this brief, Respondent's animus toward the Union was manifested in many other ways.

The NLRA guarantees “[e]mployees... the right to self-organization, to form, join, or assist labor organizations... and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection...” 29 U.S.C. § 157. The rights provided in Section 7 of the Act extend to all “employees” covered by the Act. The Act defines an “employee” as “any employee, and shall not be limited to the employees of a particular employer.” 29 U.S.C. § 152(3).

Section 8(a)(1) of the Act prohibits an employer from engaging in conduct that interferes with, restrains, or coerces employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a)(1). The right to engage in peaceful, lawful picketing with the assistance of a labor organization is protected by Section 7 of the Act. *Lechmere, Inc., v. NLRB*, 502 U.S. 527, 533 (1992); *NLRB v. Fruit Packers (Tree Fruits)*, 377 U.S. 58, 62-63 (1964); *NLRB v. Drivers*, 362 U.S. 274, 279 (1960).

On August 13, 2018, Local 150 retiree Brown started picketing at Troy Grove daily (Tr. 96). Fellow Local 150 retiree Bice began picketing on a regular basis in October 2018 (Tr. 115). Brown and Bice would picket with signs that read: “Local 150 on strike against Troy Grove Stone Quarry, a division of Riverstone Group, Inc. for unfair labor practices” (Tr. 98, and G.C. Ex. 26). As explained in the facts above, the signs were stapled to a piece of wood lath approximately one half (1/2) inch thick, 1 and 1/2 inches wide, and four feet long (Tr. 98). Rather than pound the signs into the ground, the signs were placed in a 10-inch long by 2-inch diameter PVC pipe which was secured in the ground (Tr. 99 and 116). Due to how the picket signs were secured in the PVC pipe, neither Brown nor Bice observed the wind blow a sign out

of the PVC pipe (Tr. 121). One sign was placed on each side of the driveway at Troy Grove, and at the end of each day, Brown and/or Bice would take the signs home with them (Tr. 100).

On January 2, 2019, Brown and Bice arrived at 6:45 a.m. and placed a picket sign in the PVC pipe located on each side of the driveway leading out of the Troy Grove facility (Tr. 100 and 116). Before 1:40 p.m., the picket signs were still in the PVC pipes (Tr. 100 and 116-117). At approximately 1:40 p.m., James Misercola, an agent for Riverstone, pulled his white SUV next to one of the picket signs, and removed the sign from the PVC pipe as he was leaving Troy Grove (Tr. 100 and 116-117). When Misercola drove off after approximately two minutes, Brown and Bice saw that the sign was gone (Tr. 103-104).

Here, Riverstone directly interfered with Local 150's lawful picket outside of Troy Grove by the theft of Brown and Bice's picket sign. The right to engage in peaceful, lawful picketing with the assistance of a labor organization is protected by Section 7 of the Act. *Lechmere, Inc.*, 502 U.S. at 533; *Tree Fruits*, 377 U.S. at 62-63; *NLRB v. Drivers*, 362 U.S. at 274 (1960). The right to picket an employer's premises for purposes of picketing is a right protected under the Act, and interference with such rights by an employer violates the Act. *See Interboro Contractors*, 157 NLRB 1295, 1298 (1966), *enf'd*. 388 F.2d 495 (2d Cir. 1967). As determined by the ALJ and cases cited therein, by stealing the Union's picket sign, Riverstone, through Misercola, plainly and obviously interfered with the Union's picket, in violation of Section 8(a)(1) of the Act (ALJ Dec. p. 15). Likewise, this violation of the Act is evidence of the animus Respondent had against the Union.

**F. Respondent's fifth and sixth issues - Whether giving an employee the opportunity to sign a preferential hiring list requires the employee to do so; and whether it is necessary to create a preferential hiring list for only one employee offering to return to work – was correctly decided by the ALJ**

Ellena was hired as a replacement worker (Tr. 37). Ellena began working for Riverstone in May 2018 (Tr. 159). He was a proud Union supporter. Riverstone became aware of Ellena's support for the Union as early as June 2018—one and a half months after Ellena's employment began with Riverstone (Tr. 38 and 159, and G.C. Ex. 23A). Ellena was not shy about showing his support for the Union, as he wore shirts at Vermillion with the Local 150 insignia, Local 150 stickers on his hardhat, his lunchbox, and even a Local 150 window decal on the rear window of his personal vehicle (Tr. 38-39, 160, 163, and 169). Skerston admitted to seeing Ellena's support for the Union "almost daily" (Tr. 39). Ellena was also the "spokesperson" for the Union (Tr. 190-191).

"A strike which is caused in whole or in part by an employer's unfair labor practices is an unfair labor practice strike." *Northern Wire Corp. v. N.L.R.B.*, 887 F.2d 1313, 1319 (7th Cir. 1989). "A strike remains an unfair labor practice strike even though the strikers may be motivated in part by economic or other objectives, if the employer's unfair labor practices are a contributing cause of the strike." *Lapham-Hickey Steel Corp. v. N.L.R.B.*, 904 F.2d 1180, 1187 (7th Cir. 1990) (citing *Northern Wire Corp.*, supra at 9–11). Unfair labor practice strikers cannot be permanently replaced and are entitled to immediate reinstatement upon tendering their unconditional offer to return to work. *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 278, 76 S.Ct. 349, 355 (1958). An employer violates Sections 8(a)(1) and (3) of the Act when an employer refuses to reinstate unfair labor practice strikers upon tendering their unconditional offer to return to work violates § 8(a)(1) and (3) of the Act. *Lapham-Hickey Steel Corp.*, 904

F.2d at 1187. Here, Riverstone violated the Act when it did not reinstate Ellena and required him to sign a preferential hiring list.

On May 20, 2019, Ellena went out on strike against Riverstone for unfair labor practices (Tr. 166 and 168 and G.C. Ex. 4). Skerston was aware Ellena exercised his legal right to strike Riverstone for unfair labor practices (Tr. 39). In a letter dated July 10, 2019, Ellena tendered his unconditional offer to return to work to Riverstone (Tr. 41 and 166 and G.C. Ex. 5). Skerston responded to Ellena's offer on July 12, 2019 advising Ellena that there were no job openings for him and that he was required to sign a preferential hiring list (Tr. 41 and 167 and G.C. Ex. 6(a) and (b)). This made Ellena think he no longer was an employee (Tr. 167). Ellena did not sign the preferential hiring list because he is still an employee (Tr. 167). Ellena testified that he "didn't feel [he] should have to sign a list to get hired back when [he is] still employed." (Tr. 167). No one from Riverstone told him he was not required to sign the list (Tr. 167-168). Respondent argues that it offered but did not require Ellena to sign the preferential hiring list. However, Ellena was the only employee who offered to return to work but who was not returned to work (Tr. 237). Skerston's admission that Riverstone instituted and implemented the preferential hiring list in response to Ellena's July 12, 2019 unconditional offer to return to work (Tr. 44) is proof that it was a requirement and is unlawful. Further, Ellena has not been in contact with Riverstone since July 12, 2019 and to date has not been asked to return to work (Tr. 45).

Furthermore, Skerston testified that the preferential hiring list began the day he responded to Ellena's unconditional offer to return to work (Tr. 41 and 167 and G.C. Ex. 6(a) and (b)). The suspicious timing of creating a preferential hiring list and making it a requirement for Ellena to sign two days after the date of Ellena's tendered his unconditional offer to return to work letter makes it difficult for Riverstone to overcome the presumption that signing the

preferential hiring list was optional or that it had other legitimate reasons for implementing such a policy.

Riverstone's failure to reinstate Ellena, regardless of the status of the strike—economic or for unfair labor practices—is in and of itself an unfair labor practice. Assuming, *arguendo*, that the strike was economic, Ellena remained an employee, and if an opening occurred after Ellena gave his unconditional offer to return to work, then Riverstone was required to reinstate him rather than hire a replacement. However, Riverstone continued to hire additional replacement workers after Ellena gave his unconditional offer to return to work. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) (Company violated 8(a)(1) and 8 (a)(3) by delaying reinstatement of the most active union supporters); *Laidlaw Corp.*, 171 NLRB 1366, 1369-70, enforced 414 F.2d 99 (7th Cir, 1969) cert. denied 397 U.S. 920 (1970) (“economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees and (2) are entitled to full reinstatement upon the departure of replacements . . .”). See *Sacramental Theatrical Lighting*, 333 NLRB 326 (2001); *Peerless Pump Co.*, 345 NLRB 371 (2005); *Pirelli Cable Corp.*, 331 NLRB 1538 (2000); *Champ Corp.*, 291 NLRB 803 (1988), enforced, 933 F.2d 688 (9th Cir. 1990), cert. denied, 502 U.S. 957 (1991) (violation of the Act where employer required strikers wanting to return to work to complete new job applications because it gave the strikers the impression that they had been discharged). Riverstone cannot meet its burden that it had a legitimate reason for requiring Ellena to sign a preferential hiring list particularly since no other employee was required to sign one. The suspicious timing of this adverse action and the pretextual nature of Riverstone's proffered justification is sufficient evidence of Riverstone's unlawful motivation to adversely act

against Ellena after he lawfully exercised his right to strike against Riverstone for unfair labor practices.

**G. Respondent's seventh and eighth issues – Whether an employer may unilaterally change a punch-in policy for permanent replacements workers; and whether prohibiting employees from punching in earlier than the start time is a unilateral change or a lawful response to a unilateral change by the employees – was correctly decided by the ALJ**

It is well-settled that an employer may not make unilateral changes in mandatory subjects of bargaining without first bargaining to a valid impasse. *NLRB v. Katz*, 369 U.S. 736 (1962). Indeed, with regard to such unilateral changes, motive is not relevant. A unilateral change in a mandatory subject is a per se breach of the Section 8(a)(5) duty to bargain, without regard to the employer's subjective bad faith. *Katz, supra* at 743 (“though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end . . . an employe’s unilateral change in conditions of employment under negotiation is [] a violation of § 8(a)(5)”). “For it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.” *Id.* at 743. “Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy.” *Id.* at 747. “The vice involved in [a unilateral change] is that the employer has changed the existing conditions of employment. It is this change which is prohibited and which forms the basis of the unfair labor practice charge.” *Daily News of Los Angeles*, 315 NLRB 1236, 1237 (1994) (bracketing added) (quoting *NLRB v. Dothan Eagle, Inc.*, 434 F.2d 93, 98 (5th Cir. 1970) (court's emphasis)), enf’d. 73 F.3d 406 (D.C. 1996), cert. denied, 519 U.S. 1090 (1997).

Here, Riverstone unilaterally changed the punch in/punch out policy for all employees whether a replacement worker or otherwise<sup>38</sup> without bargaining or giving the Union notice or an opportunity to bargain. The employees at Troy Grove and Vermillion work from 6:00 a.m. to 4:00 p.m. Monday through Thursday (Tr. 136, 144, 153, 161, 184, and 229). At no time prior to January 2019 did Riverstone implement a policy or bargain with Local 150 over a policy prohibiting punching in or receiving overtime pay prior to the employees' start time (Tr. 139). Prior to the unilateral change, the employees regularly punched in at Troy Grove and Vermillion upon their arrival at each quarry (Tr. 146, 155, 163). Employees are paid beginning at the time they punch in (Tr. 137-141, 145-146, and 155). Sometimes the employees arrived at Troy Grove or Vermillion thirty minutes prior to their start time and would punch in upon their arrival and receive overtime pay (*id.*). With no notice to the employees or the Union, in mid-January 2019, Riverstone posted a notice above the time clock in the break room that employees could not punch in more than five minutes prior to the employees' start time (Tr. 134, 139, 140, 147-148, 156, 164, and 185, and G.C. Ex. 27).

Section "8(d) [of the Act] explicitly defined the duty of both sides to bargain as the obligation to 'meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . .'" 29 U.S.C. § 158(d). *Ford Motor Co. v. N.L.R.B.*, 441 U.S. 488, 495, 99 S. Ct. 1842, 1848 (1979). Punch in/punch out policies that directly affect employees' wages, hours, and other terms and conditions of employment are certainly mandatory subjects of bargaining. Policies regarding workers punching in and punching

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<sup>38</sup> Respondent argues that "unilateral changes for permanent replacements do not violate the Act." (R. Br. p. 34-35). Assuming the replacements are permanent, the change applied to all employees not just the replacement workers and therefore the unilateral change violates the Act.

out is “indeed, a mandatory subject of bargaining.” 45 U.S.C. § 152; *Miller v. Sw. Airlines Co.*, 926 F.3d 898, 903 (7th Cir. 2019).

Contrary to Respondent’s assertion the change was not material, substantial or significant (R. Br. 34), it was because it cost employees significant overtime pay. When Riverstone implemented their new punch in/punch out policy without prior notice and bargaining with the Union, it violated Sections 8(a)(1) and 8(a)(5) of the Act for failing to negotiate in good faith with the Union. The ALJ correctly concluded that the parties are not at impasse (ALJ Dec. p. 12) and that the policy resulted in lost pay (ALJ Dec. pp. 12-13). Finally, Respondent argues that it may change the policy for replacement workers. However, assuming that argument is correct, the change applied to all workers including, for example, Lower, who was not a replacement worker and whose early punch ins triggered the unilateral policy change. Therefore, the ALJ was correct that Riverstone violated Sections 8(a)(1) and 8(a)(5) of the Act when it unilaterally made changes to the employees’ punch in/punch out policy without bargaining or giving the Union notice or an opportunity to bargain.

#### **IV. CONCLUSION**

The foregoing establishes that Riverstone violated the Act when it unilaterally changed the punch in/punch out policy without bargaining or giving the Union an opportunity to bargain; interfered with the employee Section 7 rights when it stole a Union picket sign; refused to reinstate a returning striking employee and required him to sign a preferential hiring list; and disciplined and terminated a Union supporter because of his Union activity and support and denied that employee his right to have a *Weingarten* representative during a disciplinary/investigatory meeting.

WHEREFORE, IUOE, Local 150 respectfully requests the Board find that:

1. The Respondent, Riverstone, is an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act;
2. The International Union of Operating Engineers, Local 150, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act;
3. Respondent, Riverstone, violated Section 8(a)(1) and (5) of the Act when it changed the punch-in/punch out policy without prior notice to the Union and without affording the Union an opportunity to bargain;
4. Respondent, Riverstone, violated Section 8(a)(1) when it stole a Union picket sign from public property;
5. Respondent, Riverstone, violated Section 8(a)(1) and (3) of the Act by requiring employee Joe Ellena to sign a preferential hire list located at Respondent's Vermillion facility.
6. Respondent, Riverstone, violated Section 8(a)(1) and (3) of the Act by disciplining and discharging employee Matthew Kelly; and
7. Respondent, Riverstone, violated Section 8(a)(1) of the Act by denying the request of employee Matthew Kelly to be represented by the Union during an investigatory/disciplinary interview.

Further, IUOE, Local 150 respectfully requests that the Board order Respondent to post the appropriate notices at the appropriate locations; rescind the punch in/punch out policy; make employees whole for lost pay and benefits; reinstate Joe Ellena and make him whole for all lost pay and benefits including compensation for the adverse tax consequences; reinstate Matt Kelly and make him whole for all lost pay and benefits, including compensation for the adverse tax consequences; remove all discipline and discharge notices from Matt Kelly's files; return the Union's picket sign; and order all other relief deemed just and equitable.

Dated: February 22, 2021

Respectfully submitted,

IUOE, LOCAL 150, AFL-CIO  
LEGAL DEPARTMENT

s/ Steven A. Davidson

One of the Attorneys for Local 150

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**CERTIFICATE OF SERVICE**

The undersigned certifies that on February 22, 2021, he caused a copy of the foregoing *Answering Brief of Local 150* to be filed via the National Labor Relations Board website and served upon the following individuals via electronic mail:

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