Big Sky Sheet Metal Company, Inc. *and* Local Union No. 242, affiliated with the Sheet Metal Workers International Association, AFL-CIO. Cases 19-CA-13068 and 19-RC-9807

January 17, 1983

DECISION, ORDER, AND DIRECTION

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On September 9, 1982, Administrative Law Judge Harold A. Kennedy issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief,[1] and Respondent filed cross-exceptions and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge, as modified herein.

We agree with the Administrative Law Judge that Respondent unlawfully discharged or permanently laid off employees Larry Mineer, Dan Martinez, Tony Gillen, and Eric Wilson on June 23, 1980,[3] because of their union activity in violation of Section 8(a)(3) and (1) of the Act. However, we disagree with the Administrative Law Judge's finding that Mineer's signing of a release on July 21, in which he acknowledged the termination of his employment with Respondent as of May 28, and his cashing of two pension or profit-sharing checks the next day absolved Respondent of its duty to reinstate Mineer and cut off its backpay liability to Mineer as of July 22.

Larry Mineer had worked for Respondent as an installer since 1976. On April 24 he signed a union authorization card, and on May 1 he attended a union meeting. Along with Martinez, Gillen, and Wilson, he was present at the representation hearing on June 5, and, while he did not testify, he did answer questions the union representatives had about Respondent's president, Charette's, testimony. Although before May 1 Mineer had been working 25 to 40 hours a week, after that he worked a total of approximately 10 hours until his discharge on June 23. Mineer was questioned by Charette about the Union prior to the election.

On the day of the election, July 21, after casting his ballot, Mineer approached Charette and Respondent's secretary-treasurer, Ellie Jausoro, and requested his portion of the Company's profit-sharing fund. Mineer stated at the hearing that he had not been working for some time, had neither an income nor an expectation of being recalled to work, and wanted the money to which he felt he was entitled. Following the request, Respondent's accountant composed a letter which Mineer signed, stating that Mineer had terminated his employment with Respondent on May 28,[4] and was requesting payment of his vested interest in the profit-sharing plan. Mineer cashed two pension checks the following day.

The Administrative Law Judge found that by signing the release and negotiating the checks Mineer had severed his relationship with Respondent and was no longer entitled to reinstatement or to backpay beyond the date he signed the release. We disagree, and find that Respondent's unlawful discharge of Mineer was responsible for putting him in the economic condition which necessitated his request for the pension money and coerced him into signing the release.

In *Atlantic Marine, Inc., and Atlantic Drydock Corporation*, 211 NLRB 230 (1974), two discriminatorily discharged employees signed documents in which they waived all claims against their employer in exchange for money to get home. The men had flown to Florida from their homes in Oregon to accept their former employer's offer of reinstatement. Soon after their arrival, it became clear that they would not be reinstated. The two men then agreed to waive their claims to reinstatement and backpay in return for money to get back to their families in Oregon, and the employer argued that those waivers released it from any duty it might owe the two former employees. The Board found that the men had been placed in an impossible position by the respondent, who could not be allowed to benefit from its unlawful conduct, and that the men were entitled to reinstatement and backpay.

Similarly, in the instant case, Respondent's actions toward Mineer can only be seen as coercive. Respondent unlawfully discharged him, left him without income, and then drafted a self-serving

[1] The General Counsel filed a motion to strike Respondent's exceptions as untimely on October 19, 1982. Respondent filed a motion in opposition. The General Counsel subsequently withdrew his motion when the Board accepted Respondent's exceptions and brief in support thereof as cross-exceptions.

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

[3] All dates are in 1980 unless otherwise indicated.

[4] Mineer stated at the hearing that he did work for Respondent after May 28, but he could not recall whether or not he turned in a timecard after that date.

document in which Mineer waived all rights against Respondent in order to get the only funds available to him. As the Board found in *Atlantic Marine*, Respondent cannot be allowed to profit from its unlawful conduct. We shall therefore order Respondent to offer Mineer reinstatement and to make him whole for any loss of earnings he may have suffered as a result of his unlawful discharge.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Big Sky Sheet Metal Company, Inc., Kennewick, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in Local Union No. 242, affiliated with the Sheet Metal Workers International Association, AFL-CIO, or any other labor organization, by discriminatorily discharging, permanently laying off, or otherwise discriminating against employees in any manner with regard to their hire or tenure of employment or any other term or condition of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

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

(a) Offer Dan Martinez, Tony Gillen, Eric Wilson, and Larry Mineer immediate and full reinstatement to their former positions or, if their positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make Dan Martinez, Tony Gillen, Eric Wilson, and Larry Mineer whole for any loss of earnings they may have suffered by reason of their unlawful discharge or permanent layoff in the manner provided in the remedy section of the Administrative Law Judge's Decision, as modified herein.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Kennewick, Washington, place of business copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

DIRECTION

It is hereby directed that the Regional Director for Region 19 shall, pursuant to the Board's Rules and Regulations, Series 8, as amended, within 10 days from the date of this Decision, Order, and Direction, open and count the ballots of Larry Mineer and Eric Wilson and thereafter prepare and cause to be served on the parties a revised tally of ballots, including therein the count of said ballots. Thereafter, the Regional Director shall issue the appropriate certification.

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT discourage membership in Local Union No. 242, affiliated with the Sheet Metal Workers International Association, AFL-CIO, or any other labor organization, by discriminatorily discharging, permanently laying off, or otherwise discriminating against our employees in any manner with regard to their hire or tenure of employment or any other term or condition of employment.

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

WE WILL offer Dan Martinez, Tony Gillen, Eric Wilson, and Larry Mineer immediate and full reinstatement to their former positions or,

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

WE WILL make Dan Martinez, Tony Gillen, Eric Wilson, and Larry Mineer whole for any loss of earnings they may have suffered by reason of their unlawful discharge or permanent layoff, together with interest.

BIG SKY SHEET METAL COMPANY, INC.

DECISION

HAROLD A. KENNEDY, Adminstrative Law Judge: These matters were heard by me on October 8 and 9 and November 10, 1981, in Richland, Washington. They are before me as a result of an order of the Acting Regional Director for Region 19 of the National Labor Relations Board, dated February 13, 1981, directing that the unfair labor practice charges contained in Case 19-CA-13068 and certain challenges and objections filed in Case 19-RC-9807 be heard together and ruled upon by an administrative law judge. The issues for determination are somewhat confusing due in part to a partial review of the proceedings and the conditional waivers and withdrawals of the parties (during the hearing and afterward) on certain issues. Having considered the entire record, the demeanor of the witnesses, and the supporting briefs, I find the following:

1. Respondent unlawfully discharged or permanently laid off employees Larry Mineer, Don Martinez, Tony Gillen, and Eric Wilson on June 23, 1980.[1]

2. Mineer was eligible to vote in the Board election held on July 21. He had asked for his "pension money" previously, but there remained an expectancy that he could return to work following the unlawful termination. However, he severed his employment relation with Respondent thereafter on or about July 22, thereby limiting the backpay due him and waiving his right to reinstatement.

3. Earl Dunsmore at all times material herein has been a supervisor of Respondent. He was not eligible to vote in the election, and statements made by him to employees, including Gillen and Jeffrey Ross, were not hearsay and were attributable to Respondent.

4. Interrogation of employees by Respondent provided no basis for setting aside the election or finding a violation of Section 8(a)(1) of the Act.

5. Respondent Employer's Objection 1 (i.e., the "first component," which relates to the Union's alleged waiver of union dues) was withdrawn and was not sustained by the record.

6. Respondent Employer's Objection 3, relating to the alleged Union's promise to provide employees with jobs if they voted for the Union, was not sustained and is no longer a viable issue.

7. Mineer's ballot is to be opened and counted, along with Wilson's, whose eligibility to vote was previously established. The results will determine whether or not the Union is to be certified as the collective-bargaining representative.[2]

Big Sky Sheet Metal Company, Inc., is a Washington State corporation organized in 1976 or 1977 by Norman F. Charette (Charette), the corporation's manager and president, and a brother (Laurel). It maintains its office in Kennewick, Washington, and is engaged in the business of installing sheet metal for heating and air-conditioning units. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act. Respondent annually sells and ships goods or services valued in excess of $50,000 either directly to out-of-state customers or to customers that are engaged in commerce. Respondent annually purchases and receives goods valued in excess of $50,000 from sources out-of-state or from Washington suppliers that have received the goods from out-of-state. Respondent's gross

[1] All dates are in 1980, unless otherwise indicated.

[2] Respondent Employer in its brief seeks to revive its Objection 3 conditionally; i.e., "in the event Mineer's vote is counted and the objection to Dunsmore's vote is sustained." The Regional Director in a decision dated October 7 had sustained the challenge to Dunsmore's ballot on the basis he was a supervisor of Respondent. The Board, in a telegraphic order dated October 17, reversed the Regional Director and directed a hearing on the issue. The Regional Director's rulings on the election were not otherwise disturbed.

The Charging Party's counsel participated only in the first day of the hearing. Respondent's counsel stated at the conclusion of the General Counsel's case-in-chief that it was withdrawing its objection pertaining to the waiver of union initiation fees, whereupon the Charging Party's counsel stated he was withdrawing from further participation of the hearing. Counsel for the Charging Party explained that he was present at the hearing "simply to respond to any evidence that the Employer would present with respect to that objection." He went on to state:

> The Union, of course, challenged the ballot of Earl Dunsmore on the ground that he was a supervisor and it's our position to this day that he is and was a supervisor. Now, during the course of investigating the Employer's and the Union's objection to the election, certain objectionable conduct was—or potentially or possibly objectionable conduct—was uncovered by the Regional Director to the effect that the Employer threatened to close the shop if unionized.
>
> It's the Union's position that if the Union prevails in this matter on the question of the supervisory status of Mr. Dunsmore, that it does not wish to pursue anything having to do with the objectionable conduct uncovered by the Regional Director in the course of his investigation.
>
> In other words, if Earl Dunsmore's ballot is not counted on the grounds that he is a supervisor, the Union has no objection to the election.

The General Counsel at this point disclaimed proceeding against any threats as an unfair labor practice:

> They were time-barred under (10)(b), so they're not part of that however anything that may have been said by Mr. Ross was just uncovered *and we haven't alleged that, specifically, although I don't believe these statements are in 10(b).* [Emphasis supplied.]

The General Counsel's attorney has made certain arguments in her post-trial brief which she later deletes in the "General Counsel's Response to Employer's Motion to Strike Portions of General Counsel's Brief." The arguments deleted relate to the challenge of Dunsmore's ballot, the challenge to Mineer's ballot, and the setting aside of the election based on objectionable conduct. Respondent's motion to strike, based on the claim that the General Counsel "departed from a tradition of remaining neutral in representation cases and has become an advocate," is made essentially moot because of the response of the General Counsel and is, therefore, denied. The General Counsel's response does not withdraw the request that I find an 8(a)(1) violation based on a statement made by Charette to Ross, but I find such issue was not fairly tried in view of the General Counsel's statement quoted above.

sales for the fiscal year ending February 1980 exceeded $500,000.

Local Union No. 242, affiliated with the Sheet Metal Workers International Association, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

In 1976 or 1977 Charette, apparently the primary stockholder of Respondent, organized Eagle Metal Products of Montana to produce sheet metal ventilation for the heating and air-conditioning of houses. Around 1979 Charette organized Big Sky Sheet Metal of Montana and Quality Heating and Air Conditioning to install and service, respectively, heating and air-conditioning units.

During the years 1978 and 1979, according to Respondent's records (Resp. Exhs. 1, 2(a), and 2(b)), sales increased in the spring and summer months. In 1980 and 1981 there was a general downturn, but new job starts flattened out and were more constant. Respondent's figures show it grossed nearly $3 million in 1978, and nearly $2 million in 1979. Respondent's profits dropped from over $400,000 in 1978 to $37,459 in 1979. In 1980 its gross sales and profits dropped markedly (to just over $1 million in sales and $833.38 in profits). Both gross sales and profits increased during the first 8 months, however. Respondent employed between 10 and 14 installers during 1978. In 1979 the number of installers declined more or less steadily from 14 in January to 5 at the end of the year. In 1980 the number of installers varied between four and five in number except for May when there were three. During the first 8 months of 1981 Respondent employed four installers.

On April 24, Tony Gillen and Larry Mineer signed union authorization cards. On May 1 Don Martinez signed a card, and on May 27 Eric Wilson signed a card. The Union filed a representation petition on May 8, and on June 5 a hearing was held before a Board hearing officer. The four alleged discriminatees, who had signed union authorization cards in April and May, attended the hearing and assisted the Union. On June 23 all four alleged discriminatees were laid off. In the following month Respondent "recalled" two employees, Jeffrey Ross and Rich Nelson, and hired a new employee, Larry Shelton.

A Board-supervised election was held on July 21. There were two votes for the Union, two against, and three challenged ballots. Earl Dunsmore's ballot was challenged by the Union on the ground he was a supervisor. The Respondent Employer challenged two ballots—Mineer's, on the basis he had been permanently laid off prior to the election with no reasonable expectancy of a recall, and Wilson's on the ground he was a serviceman, not a sheet metal worker, and should be excluded from the unit. Both the Union and Respondent Employer filed objections to the election. In a decision dated October 7 the Regional Director found no merit to any of the objections filed by either party except the "first component" of the Employer's Objection 1 which he described as follows:

> 1. The Union told employees there would be no initiation fee for joining the Union . . . .

The Regional Director directed a hearing on the challenged ballot of Mineer, the first component of Employer's Objection 1 and "additional alleged threats uncovered during the course of the investigation of the (Union) Petitioner's Objections." The additional alleged threats, which were said to have occurred between the filing of the petition and the date of the election, were described by the Regional Director as follows:

> More specifically, this conduct involves alleged threats made by Charette to employees that he would "lock all the doors" before he'd let the Union in and "There's no damned way I'm going to let the Union come in here. I've worked too damned hard and long to get where I am now just to give it all away. I'll lock the doors before I let the Union in this place. You guys will be out of a job before I let the Union in."

Respondent Employer requested review of the Regional Director's October 7 decision, challenging the rulings made with respect to Dunsmore (that he was a supervisor and therefore ineligible to vote), Wilson (eligible to vote), and the denial of the "second portion" of the Employer's Objection 1. The Board on November 17 denied the Employer's request for review except in one respect as indicated in the following quotation from its telegraphic order of November 17:

> Employer's request for review . . . raises a substantial issue regarding the challenged ballot of Earl Dunsmore. Accordingly, review is granted as to him, and that supervisory issue is remanded for hearing, along with other issues scheduled for hearing by the Regional Director.

Respondent asserts in its brief that Region 19 erred in rejecting its claim that the Union had interfered with the election promising employees work at the Hanford Nuclear Site. This was the subject of Respondent's Objection 3 which the Regional Director found to be without merit. There is no evidence in the record about this issue, and, in any event, it is foreclosed by failure of Respondent to appeal the Regional Director's ruling on it.

The Acting Regional Director's complaint, issued on February 13, 1981, arises out of a charge filed by Local Union No. 242 on December 18. The complaint alleges Respondent violated Section 8(a)(3) and (1) as follows:

> On June 23, 1980, Respondent through its agent Dunsmore, discharged or permanently laid off employees Larry Mineer, Dan Martinez, Tony Gillen and Eric Wilson and thereafter has failed and refused to reinstate Mineer, Martinez, Gillen and Wilson to their former or substantially similar positions.
>
> (b) Respondent engaged in the conduct described above in subparagraph 5(a) because the employees named therein joined, supported, or assisted the Union and/or engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other

concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Respondent admitted in its answer that Norman Charette is its president as well as a supervisor and an agent for the Company. In addition to conceding jurisdiction, Respondent admitted that the Union is a labor organization as that term is used in the Act. Respondent denied that Dunsmore is a supervisor or an agent of the Company. Respondent also denied engaging in the discrimination alleged in the complaint. As affirmative defenses, Respondent asserted that "all terminations or layoffs were for cause or other business reasons," a "very low" volume of business and improper denial of the objections it filed to the election.

The General Counsel called the Union's business agent, Stewart Thompson, the four alleged discriminatees, a current employee of Respondent, Jeffrey Ross, and a friend of one of the discriminatees, Dee Ann Long. Respondent called as defense witnesses Charette, Dunsmore, and Eleanor Jausoro, who works as a secretary-office manager for Respondent and is also a shareholder and secretary-treasurer of the corporate Respondent.

Stewart Thompson, who has been a business agent for Local 242 for over 3 years, testified that Mineer and Gillen came to his office in the union hall on April 24 to inquire about having the Union represent them as employees of Respondent. Thompson said he explained a union authorization card to the two men, and both employees signed cards that day. Shortly thereafter, on May 1, Thompson met with Mineer, Gillen, and another employee, Martinez, at Gillen's home in Pasco, Washington. On that occasion Thompson showed the employees copies of contracts that he had negotiated with other employers and also obtained Martinez' signature on an authorization card. Thereafter, Thompson filed a petition for a Board election. On June 5, a representation "R" hearing was held concerning the petition. Four employees of Respondent—the alleged discriminatees Mineer, Martinez, Wilson, and Gillen—attended the hearing and provided assistance to union officials present—Thompson; Vern Demand, the union business manager; and Bill Westergard, the Union's International organizer—during the hearing as follows:

> They sat directly behind us and any questions that we had concerning the past employees and the status of the people in the shop and their functions and they advised us at the time what—answered our questions as to what they were.

None of these employees testified at the "R" hearing.

Anthony Gillen worked as an installer for Respondent from March 1978 until June 23, when he was laid off. He was paid initially at the rate of $4 per hour for about 6 months when the Company switched to a "piecework type basis."[3]

Gillen identified the card he signed at the union hall on April 24 when he and Mineer met with Business Agent Thompson. Gillen said he told fellow employees Martinez and Wilson of the visit to the union hall and later had a union meeting in his home around May 1.[4]

Gillen stated that he, Martinez, Mineer, and Wilson attended the June 5 "R" hearing and furnished guidance to Business Agent Thompson and the Union's attorney. Gillen testified:

> We had participated in it as far as talking to our union representatives and discussing points that were brought out in testimony that we thought were false and we could show them that they were false and we talked to them before the hearing started and during the meeting and after the meeting.

A few days following the "R" hearing, Charette "brisked" Gillen away from a group, which included Dunsmore, Darrell McGrath, "another superintendent in charge of a sister company of Big Sky (Quality) which is located right next door," and possibly another installer or more, to his office and talked with him privately. He testified as follows on direct examination concerning such conversation:

> He approached me by saying—starting out that he don't begrudge us any for starting this—for what we're trying to do, but he's just a little bit mad about how we're using him for a stepping-stone to get ahead and that he told me how much his lawyer had cost for fighting this thing and he told me that "no matter how much money it's going to take, we'll get out of it, but there's no way in hell the Union's going to come in here to represent us" and that "you have"—"I've told you this before and Larry knows where I stand on it, if you didn't like it here, you can leave any time, but there's"—he repeated it to us that there's no way in hell the union was going to come in there to represent us.

The meeting was, according to Gillen, "heated and one-sided, and there was no response to make "because it was more of a lecture type thing." Charette also told Gillen at that time that "he would lock the doors" before the Union could come in "and that we'd be out looking for another job."

Gillen was assigned no work that day. After his meeting with Charette, Gillen said he asked "the supervisor, Earl Dunsmore, if there was any work that day and he just ignored me and just shook his head and I just—I left at that time."

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[3] Gillen explained that there was "an hourly basis wage" under the company piecework pay plan, and employees continued to sign timecards indicating an amount of time worked. He testified:

> A job or a house was set up on a basis of an hourly base wage, what they were going to give us. They decided, "Well, that house will take you 12 hours to do so we're going to pay you for 12 hours for the job."

Employees would put down on timecards the time it took to do a job—"we'd put it down for the days, we'd put down 12 hours—6 hours a day—and we'd write the job classification."

[4] Gillen said employees were concerned about being laid off or fired if they signed union authorization cards. Business Agent Thompson stated at the meeting at his home that the National Labor Relations Board would protect them; also the Union would stand behind the employees. Thompson indicated that they could probably get work at Hanford.

Before the "R" hearing, according to Gillen, the practice was for employees to call in around 7 a.m. to learn whether there was work to do that day. The practice "changed dramatically after the hearing," he said, explaining:

> . . . I would call in and there would be times where I'd call in at 7:00 and there would be no answer and I'd call in at ten after, the same day, and the supervisor [Dunsmore] would say, "Well, it's too late now, we had a job for you at 7:00, but you didn't call in. . . ."
>
> [T]here were other days when I did call in and he'd give me the same thing, "Well, we had a job for you, but you're supposed to drive on in from now on and check in. You drive on in, you don't call anymore."[5]

Then on June 23 the "four of us . . . Larry Mineer, Dan Martinez, Eric Wilson and myself" were laid off. "We all drove together" that morning, he said, "and went into the office where Dunsmore was." Gillen continued:

> . . . Earl Dunsmore . . . stood up as soon as we came in and looked around to us to—"might as well pack our tools up and clean out our vans and sign up for unemployment because we don't have any more work for you and we don't know when there will be any."

Gillen remembered that Jack Ballard, who he said "was bitterly opposed" to the Union, was at work that day. Gillen said he was never contacted by Respondent again, and he considered himself "fired."

Gillen stated that when employees had been laid off previously their tools, which were owned by them, would be locked up in the van, and the employees would file for unemployment. The employees would keep the keys to the van (owned by Respondent). Later on "we'd just come back to work and everything would be ready for us to go again," he said.

Between January 1 and May 1 Gillen thought he worked about 30 hours a week. In May and in June of that year he thought he worked 2 or "maybe an average of 3" days a week.

Gillen considered Dunsmore to be a supervisor. Employees reported to Dunsmore, he would assign the work, and "brief us on the job." Dunsmore checked the timecards and gave time off "right then and there" without checking with anyone. Gillen thought Dunsmore hired Hector Hernandez in 1978 and had fired his [Dunsmore's] son and Jeff Ross in 1979. Gillen recalled observing an argument between Dunsmore and Ross at the time Ross left the Company in late 1979 and that Dunsmore had commented:

> . . . I had to fire the sniveling fool. He's just been whining too much and he wants all the best jobs that there are up there. He thinks he should have special consideration, so good riddance to him.

Gillen testified that Dunsmore has also stated with respect to Rich Nelson's leaving about the same time:

> . . . we're going to get rid of Rich Nelson. He's getting too sloppy with his work and he's getting too fat and he can't move around, he's taking too long with the jobs and so we're going to let him go, get rid of him.

According to Gillen, it was Dunsmore who ran the business much of the time because Charette was frequently away. "There's periods I wouldn't see [Charette] for 2 months," Gillen said.

Larry Mineer worked as an installer for Respondent from 1976 until June 23. His testimony was similar to that given by Gillen on a number of points: he signed a union card on April 24; he attended the union meeting at Gillen's home around May 1; he appeared at the "R" hearing on June 5 and informed union representatives about things that Charette "said wrong on the stand"; he was questioned by Charette about the Union before the election; and he, along with three other employees, was let go on June 23. Mineer gave his version of what happened on the morning of June 23 as follows:

> Well, I had showed up for work but when we got in there, Dan Martinez and Tony Gillen and Eric Wilson and myself showed up approximately the same time and all walked in together and as we walked in, Earl Dunsmore, our supervisor, informed us that there wasn't enough work to go around and that we weren't need [sic] anymore and that we should pick up our tools and turn our keys in and go sign up for unemployment because there was only enough work for himself and another employee, Jack Ballard.

Like Gillen before him, Mineer explained that previously he had kept his personal tools in the Company's van assigned to him. He said he had been furnished with keys to the van, the shop, and the office.[6]

Mineer thought he worked only about 10 hours after May 1 "because I was not getting along with my supervisor." Earlier in the year, between January 1 and May

[5] Dunsmore later testified on defense that Respondent allowed employees to call in for a short time when work was slow so they would not have to come in when there was no work. But Gillen testified persuasively on rebuttal that it was union activity that caused a change in the practice of reporting in. Gillen said:

> It was always standard practice for us to call in. Up until the point of time that [Charette] found out who was involved in the union activities . . . . Two and one-half years it was perfectly acceptable to call in.

[6] Mineer agreed on cross-examination that Dunsmore did state on June 23 that Charette had directed the layoff of the four installers on the basis that there was only enough work for himself (Dunsmore) and Jack Ballard. Mineer added that he "figured . . . that it seemed pretty much permanent layoff because we'd never been told before to remove our personal belongings from the shop—or, the vans."

Charette later testified that it was Respondent's practice to collect keys from employees when they were fired. Asked when Mineer turned in his keys, Charette stated:

> Well, Larry didn't have a rig driving back and forth, so he didn't turn the keys in. As far as him having a shop key, personally, I don't remember me asking him for it or whether he turned it in.

1, he said he worked more or less at his own pace, somewhere between 25 and 40 hours a week. Mineer indicated he had been friendly with Dunsmore before the union activity had begun. Mineer said:

> . . . I got along real well with my supervisor, Earl Dunsmore, and I've lived in his house for a little bit and taken care of it and we just got along real good normally most of the time and it seemed as though, when this union activity started, that I was getting the cold shoulder and kind of shrugged off and I didn't get along with him well and then prior to the day of showing up, we weren't getting along at all and I wasn't being issued any work or given the opportunity to do any work so it was like I was still employed but no one talking to us.

Mineer, like Gillen, regarded Dunsmore as his supervisor. Mineer said Dunsmore would "lay out the house and check the equipment size, schedule who would do the work, check the job out after we were through with it and then okay it on our timecards . . . ." Mineer also explained that Respondent had paid actual hours worked before going "to the job rate" or piecework basis sometime in 1979.

Mineer recalled that Jeff Ross and Rich Nelson were friends and that both had worked together in 1979 for Respondent before they were laid off, quit, or "whatever." According to Mineer, Dunsmore had criticized both; i.e., Ross' "work performance wasn't that great," and he was "pretty cocky"; and Nelson was "sloppy" and "slow."

Mineer identified an undated document (G.C. Exh. 4) which he said he signed on the day of the election, July 21. It reads:

> To: Trustee and Administrator of Big Sky Sheet Metal Profit Sharing Plan and Trust
>
> Gentlemen:
>
> As I have terminated my employment with Big Sky Sheet Metal, Inc. as of May 28, 1980, I hereby request payment of my vested interest in the Big Sky Sheet Metal Profit Sharing Plan and Trust. I am aware that there is the option to wait until [sic] after the close of the current plan year, but I prefer to receive payment of vested interest at this time.[7]

Mineer said he did not read the document carefully but signed it in order to get some money. He said he worked after May 28 (on June 7, he thought), although he may not have turned in a timecard after the specified date. The document was drawn up by Respondent and given to him to sign. After signing it, Mineer was given a check (actually two checks, Resp. Exhs. 5(a) and 5(b)). He said he owed Respondent some money—on a running account and for damage to a company van—so his check, he thought, amounted to approximately $300.

Mineer testified that he wanted his money out of the Company's profit-sharing program and had discussed it with Union Business Agent Thompson "prior to talking to Norm and Ellie." "I asked Stew," he said, "if it would be all right if I talked to Norm if it wouldn't nullify my vote or anything that I go up and close that and get the money that was owed to me by company or profit-sharing program." Mineer said he later saw Charette and Jausoro and requested payment as follows:

> . . . it was after the election was over—or, I was through voting and I seen Norm and Ellie were just standing around and I wanted to bring that up to them and get . . . the money that was vested to me and I didn't want them to have it anymore. I wanted it in my own personal account and I felt as though it was time that I had that because it was time—I wasn't employed by them and I didn't have any income at all and I wanted my money and I had found out prior to talking to them, their winning ballots to the election or negotiations, if I did just go ahead and get that check, but also, I believe I could have just as easily left it up there in that profit-sharing program. It could probably still be there, I imagine, I don't know, but I needed the money and I wanted it, it was mine and I just wanted the money.[8]

Eric Wilson said he had worked for Charette's Quality Heat & Air Conditioning and Big Sky Sheet Metal of Montana before being employed as an installer by Respondent beginning in February 1980. (See Resp. Exh. 4.) He was paid hourly at first and later on a piecework basis. He thought he averaged 35 to 40 hours of work during the period February-June 1980.

Wilson considered Dunsmore his supervisor. Quoting Wilson's direct examination: "[Dunsmore] mainly gave out the work and that sort of thing. I'm sure he hired and fired . . . . He hired me, for one . . . ."

According to Wilson, Dunsmore granted time off and ran the business when Charette was not there. Wilson said he would see Charette "maybe once or twice a week, passing by."

Wilson went to the union office on May 27 and signed a union card "to show my commitment to them." He said he went to the "R" hearing on June 5, sat behind the Union's representatives "and listened." On June 23, he, Mineer, Martinez, and Gillen were laid off. Quoting from his direct examination:

> Q. Can you again state what Mr. Dunsmore told you?
>
> A. He said that there wasn't enough work at that time to keep us going and that we were all four laid off and to get all our tools out of the vans and return the keys.
>
> Q. Were any employees still working at that time?
>
> A. The only one I saw was Jack Ballard.

[7] Eleanor Jausoro, Respondent's secretary-treasurer and office manager, later testified that the document was composed by the Company's accountant and that she had typed it up.

[8] Mineer conceded on cross-examination that he had erroneously told a Board agent that he worked as a foreman for Respondent. He said he believed at the time that he had "foreman responsibilities."

Q. If you know, what was Jack Ballard's union activity?

A. None at all.[9]

Wilson said he saw Norman Charette and Ellie Jausoro on July 21 as he was leaving the site of the election and engaged Charette in a conversation:

> I basically just asked for my vacation pay and Norm said it wasn't—he didn't have it coming to me. He said something to the effect that he runs a non-union shop and he can do what he wants, something to that effect.

In the following month the service manager of Quality Heating, Darrell McGrath, contacted him about returning to work. Wilson testified:

> [McGrath] said he was quite busy and that he needed some help. I told him I was willing to go to work, but I would like my vacation pay that was owed to me and he said he'd have to check with Norm and get back with me and I never heard anything more.

Dan Martinez went to work for Respondent in May 1978. In early 1980, when he was paid on a piecework basis,[10] he thought he worked "at least around 30 to 40 hours a week," more than the other installers. On May 1 he signed a union card at a meeting held at Gillen's house. He said his hours were reduced "drastically" in mid-May. He thought he averaged 20 hours a week after that until he was laid off in the following month. On June 5 he attended the "R" hearing and sat with the three other alleged discriminatees behind the union representatives. On June 23 he, Mineer, Wilson, and Gillen showed up for work but were told that they were being laid off for "lack of work." Martinez testified:

> [Dunsmore] informed us that . . . it was going to be a great time before there was going to be any work around, so we were told to pack up our tools and clean out the vans and gather our tools, turn in what tools we had of the company's in to them and to just go ahead and leave the premises.
>
> Q. What, if any, response was made by you or the employee?
>
> A. Well, myself, I was kind of curious as to why we had to turn in our tools because during any other time we had a slow-down period, we were never informed to turn in our tools or the keys to the vans and then this manner was kind of strange so I asked Earl if he had our checks ready for us and of course he informed me that I was not laid off and if we were being fired, they would have our checks ready for us, so just to come back on Friday, just on any other normal payday to pick up our checks.[11]

While cleaning out his van, Martinez took note that "one employee took off to do a job and it was Jack Ballard," who, he said, was "totally against" the Union.

Martinez testified that the practice of calling in before reporting to work evolved, but this changed around mid-May 1980. Dunsmore told the installers at that time that they should not call in anymore; "if we wanted work, we had to be there at 7."

Martinez "always" considered Dunsmore to be a supervisor of Respondent. Martinez said: "He just assigned the jobs and went out to different contractors and laid out houses and tried to bid jobs out." Dunsmore was the person to contact about taking time off, he hired and fired a friend of Martinez (Hector Hernandez in 1979) and had bragged about having a set salary. Dunsmore ran the business in the absence of Charette, who, Wilson thought, was away about 40 percent of the time.

After being laid off, Martinez said he had observed Jeff Ross and Jack Ballard doing work for Respondent. He also saw Rich Nelson in a company van. Martinez knew Ross and Nelson as they had prevously worked for Respondent in 1979. Martinez recalled that Dunsmore had made critical comments about both. Dunsmore commented on the day Ross "cried and sniveled about the jobs . . . had too much problems and he just didn't think he would ever hire Jeff Ross back again." Dunsmore had told Martinez that he "didn't like the fact that Rich was too slow and he was a little overweight which made him a little sluggish on the job. . . ."

Jeffrey Ross, testifying on the General Counsel's case-in-chief, said he first worked for Respondent in September 1977.[12] In late 1979 Dunsmore suggested that he draw unemployment, and he was "voluntarily" laid off, along with Rich Nelson. Ross went to work for Vitro Engineering in January 1980 but returned to work for Respondent in July 1980 after the four alleged discriminatees were laid off. He voted in the Board election held on Tuesday, July 21, although he worked for Respondent only 1 day prior to that date in 1980 (except for 9 hours in January, Resp. Exh. 3(a))—Saturday, July 18. He continued to work for Vitro Engineering through July 24. He then left Respondent's employment again in September 1981.

Ross explained his return to work for Respondent in July 1980 as follows:

> Well, I had gone over and talked to [Dunsmore] about it and he mentioned that things—that there was work to—you know, that was coming up and

[9] Prior to June 23 Wilson said "not even once" was he asked to turn in his keys.

[10] Martinez explained his understanding the firm's piecework method of payment as follows: "It's hourly type of contract work where you get so many set hours per job and if you finish the job up quicker, you gain the extra hours that was given to you or if you were slower, you lost on it."

[11] Martinez stated on cross-examination that the "regular practice" in the case of a slowdown was for an installer to "keep the keys in your pocket and your tools in the van." Martinez had been laid off once before and he had expected to come back. In June 1980, according to Martinez, Dunsmore indicated it was hard to say how long the layoff would be and Martinez "had the assumption that we would probably never work there again . . . ."

Martinez agreed on cross-examination that Charette had never discussed the Union with him.

[12] Ross was later recalled by the General Counsel to rebut certain defense evidence (summarized, *infra*).

that some of the guys had been discharged or that—I don't recall exactly what he had said as to how they had been discharged, but he said that, you know, there was work available and asked if I'd like to and I said yes.

Ross recalled discussing with Dunsmore and Ballard on election day, July 21, the eligibility of Ross and Nelson to vote and what would happen if the employees voted to bring in the Union. (Nelson had also returned to work for the Company in the summer of 1980. He "was also going to appear and vote in the election" as Ross planned to do, but Nelson's whereabouts at the time were not known.) Ross recalled at that time that "Earl had said something to the effect that . . . they had no intention of going union."

Ross remembered that through the years Charette's position was that "the union was not a very good way to go." On one occasion Charette had said "he had no intention of going union, that he'd just close it down before he would go union."

Jack Ballard was working for Respondent when Ross returned to work as an installer in the summer of 1980. Shortly thereafter, in August Ross thought, Dunsmore hired Larry Shelton to work as a "trainee and installer."

Ross testified that his father, John Ross, had been superintendent for Respondent before leaving in 1979. At that time Dunsmore moved from foreman position to be superintendent and continued in that job, as he understood it. Dunsmore might do some installation work on the weekend, when Ballard usually worked, but not during the week. According to Ross, Dunsmore "laid out houses, told us what jobs that we would be doing during the day and talked to the builders about jobs and bidding on the jobs that we were to do." Dunsmore "was always the one to okay our timecards." He granted time off and, as Ross understood it, was the only one "on salary." When Charette was not around, which was much of the time in July 1980, Dunsmore ran the business.

Eleanor Jausoro was called by Respondent and testified that she owns approximately 28 percent of Respondent's stock and is the corporation's secretary-treasurer. Jausoro said she had authority to hire, fire, lay off, grant time off, and schedule work (in the office and outside).[13] She said she also works as the firm's secretary-office manager, doing "all of any clerical type of work"—the mail, the payroll, accounts payable, filing, etc. In 1979 she said three persons worked in the office. Since that time, she has worked alone except for some temporary help.

Jausoro identified and gave explanatory testimony concerning the following documents that she had prepared for the hearing:

A. RX 1—Record of New Job Starts 1978 through August 1981.

B. RXs 2(a) and 2(b)—Record of Gross Sales, Net Profits (Loss) and Number of Installers, 1978 through August 1981.[14]

C. RXs 3(a) and 3(b)—Record of "actual number of hours worked" by Respondent's employees in 1980 and the first 9 months of 1981.[15]

D. RX 4—a list of employees with "the date of their first employment with various organizations in our company structures."

Jausoro said she was familiar with "the books of the corporation" and offered on direct examination this summary of the financial condition of Respondent from late 1979 onward and the effect on employment:

> Well, the problems were that the work availability in this area is down because of housing problems and that is our main source of income and so there just simply was not enough volume. We began to get in dire straits because we have debt service to take care of that sort of thing and the corporation was hanging on by the skin of its teeth and everything had to be done to pare down to the bare bone in order to survive.
>
> Q. Are you aware of any discussions that occurred between you and Norm or Norm and anyone else regarding the necessity of laying off people?
>
> A. Yes.
>
> Q. Tell us about those.
>
> A. Well, Mr. Charette and I had many conversations of what we could do to keep the company going and what was needed with what workload we had and with what looked like we might have coming up and so we talked about many things in these areas and one of them was it looked like it would be necessary to lay people off, Mr. Charette

[13] She said she also owns 10 percent of the stock of Big Sky Sheet Metal of Montana, Inc., which had become "defunct," and 20 percent of the stock of Quality Heating and Air Conditioning, Inc., which "is still in existence" but "not doing very much." She said she also owns stock in the Eagle firm, the fourth sister corporation that Charette controls.

[14] Jausoro explained with respect to Resp. Exh. 2 that: "Installers, January through June 1980 does not include Dunsmore. July 1980 through present includes Dunsmore. January 1980 profit does not reflect $81,941 loss assumed from Billings, Montana operation."

Charette did some installation work, she said, but stated he was not counted as an installer. She identified the following as installers for the company in June and July 1980:

> Okay, in June, we have four. That would be Jack Ballard, Tony Gillen, Dan Martinez and Richard Nelson, one, two, three, four. In July, we have Jack Ballard, Richard Nelson, Jeff Ross, one, two, three, Earl Dunsmore would be four and Larry Shelton who is a helper/installer—a trainee/installer.

Payroll records of employees working in 1980 were stipulated into the record (G.C. Exhs. 7(A)–(K))—Ballard, Ceynar, Charette, Gillen, Martinez, Mineer, Nelson, Ross, Shelton, and Wilson. Jausoro said the profit-and-loss information for March and April 1980 should be considered together; also, that the profit-and-loss information for November and December 1980 should be considered together. She said April losses had been improperly recorded for March, and December expenses had been erroneously included in November.

[15] Jausoro stated that while employees worked on piecework basis it was necessary to maintain hourly records for insurance purposes and to comply with state and Federal laws. Charette testified that the piecework pay plan was put into effect because of its "incentive basis." He said it had been used by a union employer for whom he had worked at an earlier time.

go back into installing and to no longer have a foreman and have him be installer.[16]

Q. Do you recall when those conversations took place?

A. Those were in the last part of 1979 and into the first part of 1980. They were ongoing conversations and we began to make various decisions in these areas and in May, we decided that it looked like it was necessary to implement what we had feared would happen.

A. Did the assumption of the debt from Big Sky in Montana worsen the financial picture of Big Sky of Washington?

A. Of course. In a tight money situation, anyway, assuming another $80,000 worth of loss, naturally would hurt our operation here.

Q. When you assumed the debts of Big Sky of Montana, was there any money or cash that came in from that company?

A. There was very little accounts receivable.

Jausoro identified two checks (Resp. Exhs. 5(a) and (b)) which she said represented the vested interest of Mineer in the Company's profit-sharing plan and trust. Jausoro testified that Mineer had asked for the money "a week or two before they were issued" by her on July 18. Jausoro said: "When Mr. Mineer was terminated, he approached the trustees of the profit-sharing plan saying that he wanted his vested interest." She said this was the first withdrawal, and she had to make inquiry how it could be done. She said her understanding was that an employee, even on layoff, could not withdraw such funds and that she explained to Mineer on the day he picked up his checks, election day (July 21), that "you must terminate" in order to get "your funds." She said she drafted the language of the release (G.C. Exh. 4) "on the instructions of my accountant" and "just handed him the document." Jausoro said Charette was also present when Mineer took delivery of the checks and signed the release. Charette said nothing at the time but "met with Larry after that."

Jausoro also recalled that on the day of the Board's election that Wilson approached Charette about vacation pay. She said he did not say, "I won't pay you because I run a nonunion shop and can do what I want." Her recollection of the meeting was:

> Eric asked Mr. Charette, "What about my vacation" more or less those words. I can't remember his exact words. Mr. Charette told Eric, "Come and talk to me later about it."

Jausoro was asked on direct about the occasion when the four alleged discriminatees returned on the Friday (June 27) following their layoff to get their final paychecks. She testified:

> They came in to pick up their checks and went back into the back where they're usually kept and picked them up. I said to them, "I have provided you with an insurance information where you have the opportunity to continue to carry the group plan if you want to while you're on temporary layoff, but you would have to pay the premium until you come back to work." They laughed and said, "We don't need insurance; we're getting insurance through the Union" and crumpled up the paper and threw it in the wastepaper basket.

Q. Did they make any other comments or statements to you, then?

A. Yes, they did. They said, "This will be the last time a non-union man walks in this shop."

Q. Was anything else said?

A. Eric approached me about his vacation and I said, "As you know, you have to talk to Norm about that."

Jausoro identified Respondent's Exhibit 6, a letter addressed to Wilson. It is dated May 7, 1981, and signed "Norman F. Charette." It reads:

> Dear Eric:
>
> At this time we have work for a service man. If you are interested, please contact us by May 14, 1981.
>
> Thank you.

Jausoro said she prepared the letter, sent it certified, and received a signed receipt.

Jausoro identified another letter addressed to Dan Martinez, also dated May 7, 1981. She said it was sent by certified mail to Martinez' address as indicated in Respondent's records. Admittedly the letter was returned undelivered. The letter reads:

> Dear Dan:
>
> We have work available in our sheet metal installation department. You had previously turned us down in July of 1980 when we offered work because you stated you were union dispatched. If things have changed and you are interested in this job, please contact me by May 14, 1981 so that I can fill this position.[17]

Finally, Jausoro indicated that toward the end of Mineer's employment that he was often unavailable and "would more or less come in at his convenience."

Earl Dunsmore testified he had been doing sheet metal work since 1965. He said he had worked in a union environment under Charette and had been a member of Local 99, Sheet Metal Workers, "out of Seattle," up until about 4 years previously.

Dunsmore said he had worked for Respondent for about 4 years, always on salary except for the first 3 or 4 months. He acknowledged taking over the job as super-

[16] I am persuaded by the more credible testimony of the alleged discriminatees that Dunsmore never ceased performing supervisory functions. Dunsmore certainly exercised more authority over Respondent's installers—laying out the work to be done, assigning particular installers to perform it, checking their timecards, granting time off, etc.—than Jausoro did.

[17] Jausoro had stated earlier that Charette brought Wilson back to Kennewick when the Montana operation closed down "to help him out" and because it was hoped that there would be need for him.

intendent when John Ross left Respondent's employment "a couple of years ago," but Dunsmore claimed that he held the job only "for maybe three or four months." While working as superintendent he said he—"Laid out jobs, scheduled the men out in the morning and went out and checked the jobs and I'd help them a little bit, then, you know." Dunsmore claimed since early 1980 he had been "installing most of the time." He described his position with Respondent as a "working foreman."[18]

Dunsmore agreed that he had given time off to employees, indicating he did so because he had no choice in the matter—"no sense arguing with him about it." He said he had changed one or two timecards and had initialed them when he did so.

Dunsmore said he never hired or discharged anyone. He specifically denied either hiring or firing Hector Hernandez. He thought John Ross had hired Hernandez and presumed "that John was probably still there" when Hernandez left the Company. Dunsmore stated that Jeff Ross had quit two different times and was never fired. Rich Nelson, according to Dunsmore, was not fired; he "quit one time and was laid off one time." Dunsmore said he did not talk to Gillen about Jeff Ross "to my knowledge." Nor did Dunsmore tell Gillen, according to Dunsmore, that he had to get rid of Nelson. Dunsmore said Charette had hired and laid off his (Dunsmore's) son.[19]

Dunsmore indicated in his testimony that he was merely a conduit of information emanating from Charette. Dunsmore said he would call a person to come to work because Charette told him to do so. As for scheduling of work, Dunsmore indicated that Charette would go over with him the work to be done, usually during the evening before. Also, Dunsmore claimed work would be laid out before Charette went out of town, and "he'd call most every day."

Employees normally reported to work at 7 a.m., Charette said. It was only "for maybe a month or 6 weeks" that the practice changed, according to Dunsmore, and that was when the work "got real, real slow." Charette changed the procedure "for a short period of time . . . to save them driving up, you know, if there was no work."[20]

Mineer was not a reliable employee between January and May 1980, according to Dunsmore. Dunsmore said: ". . . you wouldn't see him for a week and finally Norm was going to discharge him. I believe he did."

Dunsmore was asked on cross-examination about Jeff Ross' return to work in July 1980. His response was: ". . . if I remember right, we had a roller skating rink to do and Norm hired him because we had that job coming up to do." Dunsmore agreed that he had discussed the possibility of such work earlier saying, "Jeff's a very good installer." But Dunsmore said he did not recall telling Ross that Charette was unhappy about his quitting a couple of times previously.

Dunsmore said he remembered sitting with Ross and Ballard under a tree on election day but stated that he did not recall a discussion at the time about the Union. Dunsmore was asked on cross-examination if he had once stated that Charette had told him he had worked hard to build up his Company and that employees should leave if they wanted to go union. He could "not recall exactly," he said, "whether I said it in that words or not."[21]

Norman Charette described himself as "part owner and manager of Big Sky Sheet Metal." He gave a history of his work in the sheet metal business. His testimony was lengthy and somewhat rambling. He served a 4-year apprenticeship in Seattle "in Local 99" and continued to work there as an installer for 11 years. He later organized Respondent with his brother, who later moved to Montana and developed M.S. Charette said that John Ross and Jausoro later "bought in" and became shareholders of Respondent. Charette was also instrumental in setting up another Big Sky Corporation in Montana, also Eagle Metal Products, a fabricator of sheet metal ventilation for heating and air-conditioning systems (around 1976 and 1977), and Quality Heating and Air Conditioning, a "service company" (in 1979). Charette said that Respondent "Big Sky has really been the father of the whole works."

Charette testified that he started "to lose money fast" in 1980 and has continued to do so. He said Big Sky of Montana was closed down in February 1980. "Quality we've had to close down; Eagle Metal Products we're having to close down." (A housing division of Eagle, which built 27 houses in 1980 and 33 in 1981 for Indians under HUD auspices, would be closing down in December after the hearing, he said.) Respondent "Big Sky of Washington is stalemated." "In '80 and '81 we are on a week basis, especially now," he said. Charette indicated he owed a lot of money and others owed him. "I will lose everything I have," he said, if he should have to close down.[22] Charette stated that Respondent had recently taken on new types of projects in order to remain in business:

> . . . everything up until June of '80, we were doing almost 100% housing, maybe 2% commercial work . . . .
>
> . . . we started hut [sic] mop roofing and I bid on the roller-skating rink in Spokane undercut the people in Spokane to get a job. I did the sheet metal

[18] Dunsmore testified that Charette also did installation work in 1980 and had been doing "more and more" since. Dunsmore seemed anxious to support Respondent's cause whenever possible. While most of the employee witnesses (i.e., the alleged discriminatees) were not themselves free of bias, I find their testimony more credible than Dunsmore's. I believe Dunsmore's authority to act for Respondent as a supervisor never diminished once he became superintendent for Respondent in late 1979.

[19] But Dunsmore said at one point, "I hired" Larry Shelton to do roofing work.

[20] I am persuaded, however, that such change was in reprisal for union activity rather than an act of thoughtfulness.

[21] As indicated, *infra*, Dunsmore was recalled later by Respondent and asked about a conversation that Jeff Ross had referred to during his rebuttal testimony. The conversation reportedly took place at Dunsmore's house shortly before Ross' return to work. Charette had indicated during such conversation, according to Ross, that Respondent would be closed down if the Union came in. Dunsmore said he could not "specifically remember any conversation to that effect."

[22] Charette said he owed Areifco $450,000 and is further obligated to Sea First Bank, Carrier, and SBA.

installation and Earl [Dunsmore] did the hut [sic] mop roofing.

Charette indicated he had a very close relation with Earl Dunsmore. Charette said he "put him on salary basis" in 1979 when he "started helping me run the place when John went to Billings." Charette suggested that Charette's authority later diminished, but he said he "left him on a salary basis so he had a steady income." Charette indicated that he (Charette) actually hired all of Respondent's workers, but he conceded that he had testified at the "R" hearing in June 1980 that: "[Dunsmore] can fire and hire, he scheduled jobs and men and layouts and jobs out." Charette agreed that Dunsmore might still lay out jobs, but he denied that Dunsmore could hire or fire.

Charette denied ever telling Jeff Ross, whom he regarded as a family friend, that he would shut down to avoid the Union, although he conceded that he might offer a comment something like, "Hey, Jeff, you know, this is why I didn't go in the union." Charette also remembered "saying to him that 'I might not have to worry, anyway, whether the union came in or not because I'm going to go busted' and I was . . . ."

Charette said he had asked Gillen what he thought of the benefits that the employess were getting and received a response to the effect that "We earned it . . . ."

Charette indicated tht he was careful about talking to employees after getting "a thing" from the NLRB that said he "couldn't discuss anything" with the men. He said he knew employees were involved with the Union as early as February 1980. He "surmised" Gillen was involved but "was floored" to learn at the "R" hearing that Martinez and Wilson were. Charette explained on direct why the four alleged discriminatees were let go in June 1980 as follows:

> A. Well, when it came to the time of layoff, I had to—first of all, the four people weren't chosen. The four people—Larry Mineer, in my eyes, was already fired prior to that.
>
> Q. You had talked to him before that time?
>
> A. Right, right. But, he was already fired as far as I was concerned. That's why even at the hearing I made that statement to let him know. He was not going to be there anymore so there was no choosing with Larry. He was already as far as I was concerned gone.[23]
>
> Q. How about the other three?
>
> A. Eric Wilson was not an installer. Eric Wilson was just—and I had no use for him an a serviceman. I had no use. I had three servicemen, already had let two go. So, he was not really—he was just in the flow of the whole thing. In fact, the only reason I felt that he was even there when he surprised me is that he was wanting to get into the union because it was a good way to step right in and get a good paying job. That's the only thing and that. He was not qualified.
>
> So, that left me down to two people so when I laid off the two people and that was Tony Gillen—that's the way I felt—and Dan Martinez. I had already had—Jeff Ross had come back and talked to me and on the day before the election, Jeff came back and worked for me and that and I brought him back.
>
> Rich Nelson had been on a layoff to draw unemployment temporary. I had—he had left in March. He wasn't off very long and I brought him back. These people were also people that have worked longer than any of the people I laid off, have been with me longer than any people and like I stated earlier, I'm more loyal to the people that have worked for me for the longest.
>
> Q. Is that the reason that Martinez and Gillen were laid off?
>
> A. They—I had no work. . . .

Charette claimed that the Union was in no way involved in his decision to lay off the four employees in June 1980. His attitude toward the Union was not always consistent, however. Quoting from Charette's testimony (in sequence):

> I was union 13 and half years. I also believe in free enterprise.
>
> * * * * *
>
> We'd made good profits; we'd shared it. We gave turkeys every year on Thanksgiving; we gave turkeys on Christmas; we had a Christmas party and we gave bonuses from 50 to 200 dollars for a Christmas present. We started a health program for everybody; we created a profit-sharing for everybody. I don't know how much more than that an individual would have to do to make it right with everybody. If they needed an advance, we gave them advances. . . . Okay, the union I had heard about already in February.[24] I don't care whether the men go union or not. It doesn't bother me what they want to do. It bothers me what I want to do,

[23] Charette testified later on cross-examination:

> I terminated Larry basically in June, when I—and his last day of—I can't remember his last day, but I would . . . guess the second of June.

Charette stated that Mineer had requested his "pension" money in June about a week after the "R" hearing and well before the election. Charette said Mineer asked for the check the day after the election and "he knew basically through the grapevine that I was firing him." Charette later agreed that he had given a statement to a Board agent stating that he had spoken with Mineer on July 22 and that he "did not personally tell Mineer he was laid off permanently until he came in" to pick up his retirement check.

[24] On cross-examination, Charette stated that in February or March "the rumor just came through the door." I reject Charette's assertion that there was any indication of union activity prior to April 24. Gillen testified credibly on rebuttal that there had been no discussion of a union among employees prior to that time. Gillen said that he and Mineer approached Charette on that date after making a trip into Oregon to work on a job. Gillen and Mineer were concerned about the extra costs involved and spoke to Charette about getting some relief. Charette "wasn't open to talk about anything," so Gillen and Mineer went to the union hall that day. Respondent's counsel moved to strike Gillen's rebuttal testimony on the basis it was given in violation of the sequestration rule that had been invoked. I find the rule was not violated, and the motion to strike is denied. See *General Processing Corporation*, 263 NLRB 86 (1982).

and that's why I—like I told Tony [Gillen], I met Tony in the office and this was after the hearing or whatever and I told him, I says, "Tony, I do not begrudge you for your want to go in the union. I don't begrudge you to go work for anybody else. I don't begrudge you to go work and dig a ditch. If you feel that you're better in yourself or you feel in your mind, each individual handles himself like a business", I says, "All I've heard so far is that everybody is wanting to work and go out to work at Hanford" and I says, "I begrudge you to use me as a stepping-stone because I've trained you, I've got you to this point. You knew nothing. I put the money into you, but you're not sitting here wanting to work for me, you're wanting to work for somebody else." That's the begrudge that I had and that's the feeling that I didn't like.

In the process of that, I had taken—they had gotten into the process of the union, the hearing and everything. I was driving to Montana. . . . I made the decision, I called Ellie and I told Ellie to fire—lay off the people, lay them off, take and I wanted the vans pulled in. When they pulled the vans in, I says "I want them cleaned out and I want the people to take their tools." I didn't want to be responsible for any man's tools; they're not mine, they're theirs.

I also in that right after that hired a man when I came back. I hired a man to take and start cleaning the trucks up. He—I hired him and this is Shelton and I hired him first of all as a mechanic.

* * * * *

If I was going to keep this thing going, I had to get into a field that I didn't want to get in, and that's what we did, so I started in the frying pan, I got this triplex theatre. I had signed up right in June or July before they even let me knew I had it was the roller-skating rink. I mean, we ran up right up to that point. I had laid them people off. I had already brought back Eric —not Eric, Rich Nelson. He had been laid off, he—in fact, he said he wasn't working enough hours. I laid him off and he took and drawed unemployment. With him and that, he was out for awhile. He kept calling me and that and he was saying that, you know, he was starving to death so I brought him back. He was also a longer working employee; I'm more loyal, in my company of running my business, loyal to the people that's worked for me for the longest and the longest people that have worked for me was Rich Nelson, Jeff Ross, Jack Ballard, Earl Dunsmore and Larry Mineer.

Larry Mineer and that, I was pretty well fed up with. . . . We would hire him at the time back only for the fact is that there is no manpower around here. There's nobody wants to work. We've already trained him, so we just absorbed him right back in, but when it got into tough times and he started doing it and he wouldn't show up, then it made an entirely different outlook on it, so then I laid him off and that. I've terminated him and when I went to the hearing, they brought it up at the hearing that I had these men and that. I says,—at the start of the hearing—I says, "I want one thing said: I have one man I am firing." I didn't say who it was.

* * * * *

. . . he approached me after the election and, yes, it was ready, it was up at the shop, and he did—and he came up and got it and it was already made out before that and it was already made out to his agreement that he was going to take and that and go back to February, so he had agreed on it before the election and, in turn, I made out two checks and that because he did owe me some money.

* * * * *

My biggest reason for laying the men off was the fact is that we were going down the tube. The second biggest reason is, is after the men had went and talked to the union and got into the union and that, their workmanship went to hell. I mean, it was to the point that we'd send them out on a job—especially we sent them up here on an old folks' home—they'd work two hours, they'd turn in a full day's pay, they would be sitting at home. They got to be belligerent. I don't care if they—if they would have stayed working for me, they could have stayed if I had the work. I did not have the work. I had carried them already through the spring, knowing that they were going union, I had already carried them, on a losing basis. . . . They have to live their own life. They could have worked right straight on through, if I had the work because as far as I was concerned, I am opposed to the union and being opposed to the union and I think everybody is aware that I am since Day 1, otherwise I wouldn't be sitting here. . . .

Testifying on cross-examination, Charette agreed that he had told a Board agent that he was fed up with unions and "could have" referred to "the union dictatorship." And he conceded that he "would be upset" to learn that his employees were joining the union, although he maintained that he had not "pushed" his personal feelings on anyone.

Charette said he had tried to recall certain employees. He said he called Wilson in late July or August 1981 to do the work of a "serviceman." Charette said he made contact with Martinez about "a month to a month and a week after the layoff" but was told by Martinez to "call the union if you want me out there."[25] Charette said he "didn't try to get a hold" of Gillen as he understood that he "was already working."

Charette agreed that Wilson spoke to him about vacation pay on election day, but Charette said he only told

[25] I credit Martinez' rebuttal testimony that he never talked with Charette after being laid off on June 23.

Wilson that he "would see him up at the shop." Charette indicated he had to be careful what he said at the time because of the election; "we were governed by what we had to say."

Dee Long, a friend of Dan Martinez, testified on rebuttal for the General Counsel, that she had spoken with Charette over the telephone sometime in the summer of 1980 after Martinez had been laid off. Charette called Martinez, in his absence, she said, and asked certain questions of her about Martinez, including whether he would return to work for Respondent. She said her response was, in part:

> . . . I told him I had no idea. That I, you know, could not say and could not talk for Dan. But I did tell him that he was on union referral through the unemployment office and that, you know, I believed that as far as my knowledge was concerned that he would probably have to go through the union hall to talk to Dan.

Long said she told Martinez a couple of days later about the call, but she was not aware whether Martinez or Charette ever telephoned the other after that.

Jeffrey Ross, testifying on rebuttal, indicated that he worked out the "terms of going back to work" for Respondent in July 1980 with Dunsmore. He said when he left Respondent's employ again in 1981 he gave notice to Dunsmore because Charette was in Montana at the time.

Ross stated that he had talked with Charette in Dunsmore's home a week or two before returning to work for Respondent in July 1980 and that Ross' earlier testimony—to the effect "that Norm said he would close his doors before joining the union"—was discussed.[26]

According to Ross, Dunsmore continued to schedule and assign the installation work on a daily basis during the period of July 1980 through January 1981. On occasion a job would be called in, and Dunsmore would assign an installer to do the work at the time. Ross stated that Dunsmore and Charette continued to do installation work on weekends, but Ross could not recall that Charette did very much, if any, installing during the week. Ross was under the impression that Jausoro performed only a bookkeeping function for Respondent, and he did not recall that she ever scheduled any of his work. While acknowledging that Larry Shelton "did some light mechanical work" after he went to work for Respondent (in July 1980), Ross considered Shelton to be one of the regular installers. Ross indicated that Shelton learned the trade and "worked with the principal installers—Jack Ballard and Rich Nelson."

Ross was asked on cross-examination if he had not been guessing at "people's" functions within the Company, and he replied:

> I would not say so. I would say that the time spent receiving our jobs in the morning would be sufficient to understand as far as the workings of Earl Dunsmore and his duties and also the fact that you have to remember that I had a personal relationship with Earl and Norm and had conversed with Earl on many occasions of different things concerning the business. Also, my father, when I first came there, was also in a management position. I was aware of certain, you know, things about the business. At the time I had a desire to possibly even work my way up into management. Later down the road I could see that, as far as my position goes, for whatever reason, I didn't see where I was going to ever be able to fulfill that goal.[27]

Respondent's part owner and general manager, Norman Charette, painted a gloomy picture of Respondent's financial health in June 1980 when the four alleged discriminatees, Larry Mineer, Dan Martinez, Tony Gillen, and Eric Wilson, were laid off. But Respondent's financial condition, however desperate it may have been, would be no defense if Respondent discharged them or laid them off because they joined, supported, or assisted the Union. I am convinced that such was the case here. The credible evidence of record persuades me to conclude that there was one critical event that triggered the layoff of the four employees—their union activity. I find, therefore, that the layoffs were in violation of Section 8(a)(3) and (1) as alleged.[28]

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[26] Dunsmore and Charette were recalled by Respondent on surrebuttal to contradict Ross' testimony that Charette had stated in July 1980 that he would close down before going union. Their testimony was of little help to Respondent's cause. Dunsmore claimed he could not remember such a conversation. Charette denied ever threatening to close the business down because of the union. He recalled a conversation at "a casual get together" at Dunsmore's home, but he thought it occurred later after after Ross had returned to work. The gist of it according to Charette:

> What the conversation brought into it that if we went union, then we would probably have to close the shop down.
>
> Now I've said this before already and here is just that generality is because of bidding. You are higher-priced. This is just common sense. But, no, I did not say that direct.

Charette's denial was unpersuasive. I believe he made a "direct" threat as Ross testified. I am declining to make a finding or order on the issue, however, as the General Counsel disclaimed any intention of proceeding on this charge at the outset of the hearing.

[27] Ross impressed me as a knowledgeable and credible witness. Gillen, another credible witness, also testified that Dunsmore handed "these job assignments out ever since I was working there, and it hadn't changed" when he left on June 23. Dunsmore would "lay out houses and then he would say: 'Okay, you are going to be taking this one tomorrow.'" Charette, according to Gillen, "didn't know quite which jobs were ready and this sort of thing." Gillen, Wilson, Mineer, and Martinez, in testifying on rebuttal for the General Counsel, challenged a number of assertions made by Charette and other defense witnesses. They consistently testified that Dunsmore continued to schedule installation work up until the time they were laid off, that Jausoro did no scheduling of installation work, that they did not "hassle" her and the work they performed for Respondent was never criticized.

[28] Arguing that the Board's recent *Wright Line, a Division of Wright Line, Inc.*, decision, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), compels dismissal of the discrimination charges, Respondent contends that the General Counsel did not even present a *prima facie* case but that it, on the other hand, "conclusively . . . established that the layoffs were motivated by an economic necessity." I reject such contentions.

The General Counsel has "extrapolated" certain information from 1980 timecards submitted by employees (G.C. Exhs. 7(A)–(K)) and prepared a tabulation summary to show "an unequal distribution of hours" after May 1980. In any event, the summary graphically indicates, in accord with other evidence of record, that there was considerable work available after the layoffs—performed by Ballard and two "recalled" workers, Jeffrey Ross and Rich Nelson, and a new hire, Larry Shelton.

Charette's knowledge of the union activity of Mineer, Martinez, Gillen, and Wilson, the timing of their layoffs, and other conduct of Charette persuade me to find that it was their union activity, rather than economic necessity, which motivated Charette to order their layoffs in June 1980. The hiring of Larry Shelton and the rehiring of Jeffrey Ross and Rich Nelson approximately within a month of the four layoffs demonstrate that work was available for the alleged discriminatees to perform.

Charette learned for certain that Gillen, Martinez, Mineer, and Wilson were involved with the Union when he appeared at the June 5 "R" hearing and observed them offer assistance to the union representatives during that proceeding. He had surmised that Gillen had been involved with the Union but conceded that he was "floored" to learn that day that Martinez and Wilson were also involved. Mineer had been "already fired," Charette said, "in my eyes," but he, as well as the other three alleged discriminatees, were employees of Respondent on June 5 and remained so on June 23 when Dunsmore, pursuant to orders of Charette, laid them off.[29]

The Regional Director on June 18, 1980, directed an "immediate election" (G.C. Exh. 1(d), fn. 3) and Charette wasted no time in seeking the elimination of the four known union adherents by laying them off on June 23. This was consistent with his avowed opposition to the Union and the threats to close down the business to avoid it if necessary. Jack Ballard, who was known to be opposed to the Union, was kept on—and not, I am convinced, simply because of his seniority as Charette claimed.

Jeff Ross was brought back to work in July 1980 even though, as Charette acknowledged, that Ross had left Respondent's employment on two earlier occasions. Ross' appearance on the job on Saturday, July 18, before he left Vitro Engineering's employment on July 24, indicates (as does his testimony) he reported when he did in order that he could vote in the July 21 election.

Rich Nelson, who had also been laid off previously, was rehired and worked 16 hours during the last week of June 1980. Charette conceded that Nelson's considerable weight affected the speed of his work and his ability to perform it.

Charette's explanation for hiring Larry Shelton in July—that he was employed to perform mechanical work—was not persuasive. I credit the more impressive testimony of Jeffrey Ross, who said he knew Shelton to have worked regularly as "a sheet metal installer."

Much of Charette's testimony consisted, as the General Counsel's brief indicates, of "incredible ramblings." There were inconsistencies in it and significant admissions. At one point he indicated that Earl Dunsmore had been reduced to a mere installer while at another time he conceded that he continued to be his "right arm" in operating Respondent's business.

As has been indicated previously, I find that Earl Dunsmore is now, and at all times relevant, a supervisor of Respondent. Statements made by him to employees are attributable to Respondent, and he was not eligible to vote at the July 21, 1980, election.

Charette at one point suggested that he was indifferent to the Union, indicating that it played no role in his decision to lay off the four employees in June 1980, yet at another, he conceded that everyone presumably knew that he was opposed to the Union "since Day 1."

Charette claimed that workmanship of the four alleged discriminatees "went to hell" after they became involved with the Union. I reject such testimony. All four laid-off employees testified credibly that their work was never criticized.[30]

I agree with the General Counsel that the record does not establish that Respondent communicated a valid offer of reinstatement in the summer of 1980 to Martinez. See *Moro Motors Ltd.*, 216 NLRB 192 (1975); also *Polynesian Cultural Center, Inc.*, 222 NLRB 1192 (1976), modified 582 F.2d 467 (9th Cir. 1978). I also agree that the record indicates that Nelson, (Jeff) Ross, and Shelton were employed by Respondent prior to the time Charette made an effort to contact Martinez. Whether the May 7, 1981, letters to Martinez and Wilson (Resp. Exhs. 6 and 7) operated to toll backpay, that may be due them, can best be determined at the compliance stage.

With respect to Mineer, the credible evidence of record indicates that he was laid off on June 23, 1980, and not terminated or laid off at an earlier time as Charette testified at one point. Mineer last performed work for Respondent at an apartment complex in Oregon on June 7, 2 days after the "R" hearing, although he submitted no timecard for it. I find that he continued to come in, "ready for work," as he testified, "at least two to three times a week" up until June 23. On that date he reported with Wilson, Martinez, and Gillen and was told, as were the other three alleged discriminatees, to get the tools out of the vans and turn in the keys. Contrary to Charette's testimony, Mineer had a van assigned to him, and he had keys to it, the Company's office, and the shop until June 23.

Since Mineer was discriminatorily discharged, he retained his employee status and was entitled to vote in the Board election held on July 21, 1980. See *John A. Thomas Crane and Trucking Company, Inc.*, 224 NLRB 214 (1976); also *Gulf States Asphalt Company*, 106 NLRB 1212 (1953). I reject Respondent's contention that Mineer's employment relationship with Respondent had ended prior to the election. Thus, Respondent's challenge to Mineer's ballot will be overruled.

Whether Mineer is entitled to reinstatement, as Martinez, Gillen, and Wilson undoubtedly are, is a more difficult question. Respondent points out that Mineer signed a release form (G.C. Exh. 4), indicating that he had terminated his employment on May 28, 1980, and negotiated two "profit share" or "pension" checks (dated July 18, 1980) on July 22, 1980, the day after the Board election. It is true, as the General Counsel's attorney points out in her brief, that the release was drafted by Respondent and Mineer undoubtedly signed it as he indicated,

[29] Charette was particularly resentful that Wilson was supportive of the Union. Charette stated that he had given Wilson a job when there was no work for him to do. Charette's claim that Wilson did not work as an installer is rejected.

[30] I also credit their testimony that they did not hassle Jausoro as Charette had claimed.

without carefully reading it, in order to get money that was due him. Also, he had been laid off—unlawfully, to be sure—for approximately a month, and no doubt he needed the money. I am, nevertheless, persuaded that in the circumstances that Mineer must have known, or should have reasonably known, that by accepting and thereafter cashing the two pension checks on July 22, 1980, he was severing his employment relations with Respondent. See *Keeshin Charter Service, Inc.*, 250 NLRB 780 (1980). I find, therefore, that Mineer's right to backpay ended on that date, and Respondent is not bound to offer him reinstatement.

Based on the foregoing, I enter the following conclusions of law:

Conclusions of Law

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

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

3. On June 23, 1980, Respondent discharged or permanently laid off employees Larry Mineer, Dan Martinez, Tony Gillen, and Eric Wilson because of their activities on behalf of the Union and thereby engaged in unfair labor practices proscribed by Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

As for the Remedy, I shall recommend Respondent cease and desist from engaging in the unfair labor practices found. Affirmative action designed to effectuate the policies of the Act will also be recommended, including an order directing Respondent to offer Dan Martinez, Tony Gillen, and Eric Wilson immediate, full, and unconditional reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent ones, without prejudice to their seniority and other rights and privileges, as well as payment of backpay for earnings lost by them as a result of the discrimination against them. Backpay shall be computed with interest as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950); *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977). With respect to Mineer, my recommended Order will require Respondent to make him whole, with interest, for the period from June 23 until July 22, 1980.

With regard to Case 19-RC-9807, Respondent Employer's challenge to Mineer's ballot is denied as he was entitled to vote in the Board's election held on June 21, 1980. The Union's challenge to Earl Dunsmore's ballot is sustained as he was at all times material a supervisor of Respondent as such term is used in the Act. The first component of Respondent Employer's Objection 1, relating to the Union's alleged waiver of union dues, and Respondent Employer's Objection 3 are no longer viable and were not sustained. Accordingly, it is recommended that the ballot of Mineer be opened and counted by the Regional Director. A revised tally of votes is to be prepared and served upon the parties. If it indicates that the Union won a majority, the Union is to be certified as the exclusive collective-bargaining representative of the employees in the appropriate bargaining unit (see G.C. Exh. 1(d)).

[Recommended Order omitted from publication.]