

**Amperage Electric, Inc. and Local Union No. 948,  
International Brotherhood of Electrical Workers,  
AFL-CIO. Cases 7-CA-29852, 7-CA-29932, and 7-CA-29989**

January 4, 1991

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On July 31, 1990, Administrative Law Judge Frank H. Itkin issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Amperage Electric, Inc., Owosso, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that employee Kary Cooper is not a supervisor under Sec. 2(11) of the Act, we find it unnecessary to rely on the contents of Cooper's personnel folder.

A. Bradley Howell, Esq., for the General Counsel.  
Andrew T. Baran, Esq., for the Respondent Employer.

DECISION

FRANK H. ITKIN, Administrative Law Judge. Unfair labor practice charges were filed in the above consolidated cases on October 30, November 16, and December 5, 1989. An amended consolidated complaint issued on January 4, 1990. General Counsel alleges that Respondent Employer, in opposing Charging Party Union's organizational drive, violated Section 8(a)(1) of the National Labor Relations Act by threatening employees with discharge if the employees selected the Union as their collective-bargaining representative; coercively interrogating an employee about his union sympathies; threatening employees that it would close its facility if they selected the Union as their collective-bargaining representative; telling employees that it would be futile for them to select the Union as their collective-bargaining representative because the Employer would not sign a union contract; threatening employees with discharge if they engaged in strikes on behalf of the Union; and attempting to promote employees Dennis Morrice and Kary Cooper out of the unit because of the Union's organizational campaign. General

Counsel further alleges that Respondent Employer violated Section 8(a)(1) and (3) of the Act by ceasing to permit employee Morrice to have certain Saturdays off; implementing new rules which no longer permitted employees to park the Employer's vehicles at their homes overnight and to obtain their paychecks prior to 5 p.m. on Fridays; ceasing its practice of paying for the repair and replacement of employees' tools; laying off unit employees following the Board-conducted representation election; and discharging employees Dennis Morrice and Gary Presley, all because of the employees' activities on behalf of and in support of the Union. General Counsel further alleges that Respondent Employer also violated Section 8(a)(1) and (3) of the Act by permanently replacing unfair labor practice striker Kary Cooper. Respondent Employer denies violating the Act as alleged. Respondent Employer alleges, inter alia, that Morrice and Cooper are supervisors beyond the protection of the Act and that employee Presley quit his job.

A hearing was held on the issues raised on March 7 and 8, 1990, in Owosso, Michigan. On the entire record, including my observation of the demeanor of the witnesses, I make the following.

FINDINGS OF FACT

Respondent Employer is engaged in the business of electrical repair and installation in Owosso, Michigan, and is admittedly an employer engaged in commerce as alleged. Charging Party Union is admittedly a labor organization as alleged. On July 7, 1989, the Union filed a petition with the Board's Regional Director seeking to represent a unit consisting of the Employer's full-time and regular part-time employees. A Board-conducted representation election was held on September 8, 1989; there were approximately 11 eligible voters; 9 votes were cast for the Union and 2 were cast against it; and there were also 2 challenged ballots. On September 18, 1989, the Regional Director certified the Union as exclusive bargaining agent of the unit employees. The evidence pertaining to the Employer's conduct during the Union's organizational effort and the related contentions of the parties is summarized below.

Dennis Morrice, an alleged discriminatee whose supervisory status has been placed in issue, testified that he started working for Respondent Employer as an apprentice electrician in June 1985; he became a journeyman electrician in 1987 "working out in the field"; and he was discharged on October 19, 1989. Morrice recalled that the Union's organizational campaign started during the summer of 1989; he then attended about three or four union meetings; and he signed a union card about August 1989. Morrice further recalled that during late June 1989, Respondent's owner, Kent Telesz, had his first conversation with Morrice about the Union. According to Morrice,

He [Telesz] said that he heard that the Union was trying to come in, that if the Union did come in he would get rid of everybody that was going to vote for it, and if I wanted, if I went [for the Union], he would get rid of me also.

On this or possibly another later occasion, Telesz also questioned Morrice about "how" he "felt" and "stood on the Union." Morrice responded that he "didn't know"—he

would “have to look at both sides.” On another occasion, Telesz warned Morrice that he “would close up the shop and open up under another name . . . if the Union came in.” All of the above conversations with Telesz were in the Employer’s office and not witnessed by any other personnel. In addition, Morrice did not relate any of Telesz’ statements, as summarized above, to other personnel.

Morrice testified that previously, as a consequence of his divorce in 1988, he had been granted visitation rights for his children for Tuesday and Thursday evenings and every other weekend. Telesz had agreed that “we’ll make out an arrangement where you can see your kids every other Saturday, and Tuesday and Thursday evenings you can be out of work on time . . . five o’clock.” Telesz had explained that there might be a “possibility” Morrice would have to work on a Saturday or Tuesday and Thursday evening—Telesz “would try to accommodate” Morrice “if he could.” Later, however, during the summer of 1989, according to Morrice, Telesz

told me that he couldn’t treat me any different than any of the other guys because of the Union coming in, and after that I started working Saturday.

Morrice was nevertheless “still allowed to leave Tuesdays and Thursdays at five.”<sup>1</sup>

On September 8, 1989, the Amperage employees voted 9 to 2 for union representation. Morrice, as well as alleged discriminatee Kary Cooper, did not vote in the election.<sup>2</sup> Later that same day, Respondent Employer notified all employees in writing (G.C. Exh. 3):

. . . effective 9/8/89 Amperage Electric will be closing their doors for inventory & reevaluation of the business . . . all field staff excluding management will be given time off during this period beginning 9/8/89 at 5 p.m. . . . the length or time frame is indefinite . . . keys & Company tools must be turned in tonight before checks will be issued . . . personal items should be removed from premises . . . [and] by affixing his signature below [the employee] is stating that he has done the above and has no claim against Amperage.

Morrice and Cooper were not included in this layoff. Morrice testified that he was instructed to “go out and stand beside the vans to watch the guys get the tools off” their vans “so they could go home.” See also General Counsel Exhibit’s 19, where the Union charged that “the only 2 employees that were not discharged are the supervisors who are now doing work described in the bargaining unit.”

<sup>1</sup> Morrice also recalled that in the past the Employer had permitted employees to drive the Employer’s vans home and park them there overnight. In August the Employer changed this policy and required the vans to be parked at the shop. In addition, in the past the Employer had repaired or replaced employees’ tools which were damaged or broken at work. Morrice asserted that during the pertinent sequence he took his broken drill to the office to be fixed and it “just stayed there.”

<sup>2</sup> The Union and the Employer had stipulated in writing that both Morrice and Cooper “have the indicia of supervisors as defined in Section 2(11) of the Act” because they “each exercise the authority . . . to hire and discharge employees and/or effectively recommend such actions” and “to responsibly assign work and direct employees in the performance of their work by the exercising of independent judgment involving said responsibilities”; they “possess supervisory authority”; and therefore they are “not eligible to vote.” See G.C. Exh. 9.

Three days later, on September 11, Morrice met with laid-off employees at a donut shop. Telesz entered the shop. The laid-off workers left. The two then discussed work; Morrice apprised Telesz that “I can’t pick up the slack for the 11 guys you laid-off” or “work 24 hours a day”; Telesz agreed. Morrice added: “I wouldn’t cross a picket line if they [threw] a picket line up.” Telesz responded: “Well then you are for the Union.” Morrice replied: “Yeah I guess I am.”

Morrice last worked for the Employer on Thursday October 19, 1989. He was working with an apprentice at the Lansing Car Wash “doing the wiring to hook it up.” During that afternoon, Telesz telephoned Morrice at Lansing and instructed him to go “right away” to “Arby’s in Melvindale” where they “had an exhaust problem and couldn’t open up.” Morrice had previously worked on the Arby’s job and was familiar with it. Morrice complained to Telesz that he “couldn’t make it down there and back” by 5 p.m. and keep his visitation with his children. Telesz insisted that he “hurry and get going.” Morrice telephoned Telesz shortly thereafter and explained that he did not have an extension ladder necessary for the Arby’s job. Telesz instructed Morrice to buy one at a nearby hardware store. Morrice asked Telesz about other personnel who assertedly could take this emergency call, naming Kary Cooper and Kevin Newberry. Telesz replied, *inter alia*, that Newberry, an apprentice, was working in Owosso and Cooper was working in Sterling Heights and he could not “get a hold of him” and he does not “know the job.” Morrice then refused to go on the assignment, and was instructed by Telesz to speak with Telesz when he returned to the office. Later that day, shortly before 5 p.m., Telesz gave Morrice a notice that he had been fired for insubordination—not following directions. Morrice insisted that “all of us” have “turned down” jobs “at one time or another” and he was unaware of anyone being terminated for this reason.

Morrice was questioned at length about his alleged supervisory status. He generally denied exercising any of the indicia of supervision as recited in Section 2(11) of the Act. He insisted that for the most part he served as a journeyman electrician; punched a timeclock; got paid for overtime; would work with a crew of one or two apprentices and tell them “what job to do” because of his experience and his status as a licensed electrician; and would answer “questions” for other journeymen but did not have “to explain to them how to run the pipe” or “circuits.” He claimed that in July 1989 Telesz said that he “could give [Morrice] a raise if I put you on supervision” and Morrice agreed and received a raise. He claimed that his duties remained the same and he was never instructed what his new duties would be. He was also told about this same time that Kary Cooper “was classified as a supervisor.” Elsewhere, he acknowledged that he had been hired as an apprentice in 1985 at an hourly rate of \$8 which was considerably more than the usual apprentice rate; Telesz told him 6 months later that “I’m his right hand man”; he was raised from \$9 to \$10 an hour in November 1987 when he became licensed; he was later raised to \$12.25 an hour; he was asked to be a “supervisor” and run the office when Telesz went on vacation or when he, Morrice, was working in the office for a number of weeks following an injury; new apprentices would be assigned to work with him and he would tell Telesz “if they

were worthwhile"; he was "often" placed in charge of multiple crews, consisting of journeymen and apprentices, at those sites where more than one crew was working; he made written evaluations of employees; his personnel file has listed him as a supervisor since 1987 when he received his license; and in 1987:

I was told to be a supervisor . . . I was told . . . I was his [Telesz'] right hand man [Tr. p. 100].

Morrice acknowledged signing Respondent's Exhibit 1, an "employee warning report," in early 1988 as a "supervisor." The report recites, inter alia:

Since [the named employee] has worked for Amperage he has consistently shown no initiative and lack of production. He has worked with 3 different crew leaders thus far. We will work [him] with another crew leader . . . for a period of 5 working days, if there is not substantial improvement we will terminate his employment.

Morrice also acknowledged repeatedly signing detailed trainee evaluations as a "supervisor" in late 1987. See Respondent's Exhibits 2, 3, and 4. In addition, Morrice acknowledged that, with respect to layoffs during the summer of 1989, "I may have suggested . . . if things were slow and people weren't working out that they [the Employer] thin out." And, Morrice acknowledged that he was present when Telesz "told employees" that "I was his right hand man, his number one man."

Kary Cooper, another alleged discriminatee whose supervisory status has been placed in issue, testified that he worked for the Employer for about 5 months in 1984 and then quit; he was hired again in November 1986 and worked until his discharge on November 1, 1989; he held a master electrician's license; and he was paid \$12.25 an hour, punched a timeclock, had medical insurance coverage, was given 1 week's paid vacation with paid holidays and 3 personal days off. Cooper contacted the Union in June 1989 to enlist its support in organizing the Employer's shop. He assembled the names and addresses of the employees for the Union, attended union meetings and signed a union membership card.

Cooper recalled that shortly after the first union meeting in June, Owner Kent Telesz addressed "all the field workers" and "electricians," as follows:

Kent told us that he knew we were trying to get the Union in and we were making a mistake. Kent said that he didn't think the Union was a good idea and he wouldn't sign a contract. And he thought that if we did vote the Union in he'd probably have to close the doors and go out of business.

Cooper recalled that about 3 weeks before the September 8 election, Telesz again spoke to the employees at a meeting, as follows:

Kent told us that he was losing business because of the Union drive. He wouldn't sign the contract . . . he thought that we were making a mistake . . . he had to close the doors if we voted the Union in and go out of business. He also said that there was a lot that we

didn't understand about the unions . . . he couldn't tell us but if we wanted to go to him on a personal basis, one to one, he could tell us. It was also the first time I [Cooper] was informed by Kent that I was considered a supervisor . . . and I wouldn't vote.

Cooper explained that earlier that month Telesz had discussed with him "the possibility" of making him a supervisor and asked if he was "interested." Cooper then responded: "I really didn't know what I wanted because of what was going on with the Union drive and everything and I'd let him know." Later, at the above meeting, Telesz suddenly apprised Cooper that he was "considered a supervisor" and consequently would not vote in the election.

Cooper recalled that about a week before the election Telesz made the following statements to him in the plant parking lot:

[Telesz] told me he couldn't understand why everyone was trying to get the Union in . . . he thought we were kicking him while he was down because his business had slowed down a bit during the summer and we were just working 40 hours. And he said to me that he could fire Dennis Morrice and myself because we were supervisors but he couldn't fire anyone else at the time.<sup>3</sup>

Cooper, as noted, was not permitted to vote in the election. Following the election on September 8, Telesz stated to him:

[Telesz] told me he was taken [by] surprise by the election results and he was going to reevaluate what he was going to do with his Company. He said the next week everyone would not be working except for Kent, Jon Harris [the Employer's estimator], Morrice and [Cooper].

Thereafter, On October 19, Cooper was working with an assistant at the Sterling Heights Car Wash. About 2:30 p.m. that day Cooper telephoned Telesz at the office. Telesz then apprised Cooper that "he'd been trying to get ahold of [Cooper] since noon because he wanted [Cooper] to run a service call at the Arby's in Melvindale"; Telesz "said he couldn't get ahold of Dennis [Morrice] to run the call because Dennis had custody of his boys that evening and so he asked me if I'd run down and do it." Cooper agreed. Cooper was actually closer to the Arby's job than Morrice. The Arby's job took only about 15 minutes and Cooper returned to the shop about 5:30 p.m. that evening. Cooper noted that in the past he had been asked to take a call and had declined. Cooper explained:

Well, every once in awhile Kent Telesz . . . would ask at the end of the day perhaps when we just got in if we'd like to go out [on] a call . . . and if you'd say I can't tonight then generally he'd say all right and have someone else call it . . . it generally wasn't a problem . . . it didn't happen very often.

<sup>3</sup>Cooper also recalled that during the Union's campaign the Employer changed its policy of allowing employees to drive their vans home during the evening and to pick up their paychecks before 5 p.m. on Fridays.

Morrice, as noted, was fired on October 19. Employee Gary Presley, discussed below, was allegedly terminated shortly thereafter. And, on October 27, the Union notified the Employer that the unit employees would be “on an unfair labor practice strike . . . effective October 30.” Later, on October 31, the Union notified the Employer that the employees “will unconditionally return to work effective November 1.” (See G.C. Exhs. 7 and 8.)<sup>4</sup> Cooper joined this strike and on November 1 was notified by the Employer (G.C. Exh. 6):

On Monday October 30 . . . you left your job without prior notice [and] joined employees on strike, as a result we have hired a supervisor to replace you.

Cooper was questioned at length about his alleged supervisory status. Cooper testified that his duties did not change after he was informed by Telesz during August that he was “considered” a supervisor; he was not then told that he had any new authority; and he denied exercising any of the indicia of supervision as set forth in Section 2(11) of the Act. Cooper explained his duties, as follows:

I was told in the morning what the job was to go to. And either I would be informed by Kent in the morning or Jon Harris, the estimator, what the job consisted of, what needed to be done, or I’d meet on the job site with the construction supervisor or home owner, or if they had a blueprint there [I] would go over the blueprint, or if there was an occasion where we’d done a job before and were familiar with it . . . go over the layout of the job, find out what had to be done and instruct the apprentice or whoever was working with me at the time what his duties were.

Cooper noted that if his apprentice on such a job did not perform the work to his satisfaction, “I’d ask him to change it”; however, Cooper was never told he had the authority to discipline and never disciplined an apprentice. Cooper added that he was never told that he had the authority to hire or recommend anyone for hiring; the authority to lay off or recommend anyone for layoff; the authority to fire or recommend anyone for firing; the authority to discipline or recommend anyone for discipline; the authority to grant a wage increase; the authority to select the jobsite an apprentice went to; and the authority to grant time off, permit personnel to come in late or leave early.

Cooper explained that a crew would “generally” consist of two persons, himself and an apprentice. There were “occasions” when there would be multiple crews at a job and on such occasions he, as a crew chief, “would be telling a number of people what to do, not just [his] apprentice.” Cooper noted, however, that he had served on several multiple crew jobs when another licensed electrician, other than Morrice or himself, were the crew chiefs. Thus, for example, John Vyskocil was a crew chief on a particular job, “in charge of the job”; and Vyskocil “let [Cooper] know what to do and what had to be done.” Moreover, according to

<sup>4</sup>Richard Beamish, the Union’s assistant business manager, testified that the “purpose of the strike” “was over the dismissal of Dennis Morrice” and picket signs said that the employees were “on strike because of unfair labor practice [sic].” Beamish had notified the unit employees that “we were going to have an unfair labor practice strike starting . . . on October 30.”

Cooper, as a crew chief, he still “would call the office” to “get permission” if a customer wanted “a change” in the job and “if they wanted a price”; he was never told that he had the authority to quote a price for changed or additional work; he would also notify the office when the customer “wanted people to work over” and “get permission.”<sup>5</sup> Finally, Cooper explained why the Union and the Employer had stipulated to his alleged “supervisory” status—it was more or less a compromise that Dennis [Morrice] and [Cooper] were not to be included in the election so that we could get the election on a little earlier . . . [and] didn’t have to have any more delays.”<sup>6</sup>

Gary Presley, also an alleged discriminatee, testified that he was employed by the Company as a master electrician from November 1987 until October 23, 1989, when he was allegedly fired. Presley first became aware of the Union’s organizational effort in June 1989; he attended union meetings and signed a union card. Presley recalled Telesz repeatedly telling the employees during the organizational drive:

he [Telesz] understood we had been to a Union meeting . . . he couldn’t afford to go Union . . . if we voted in a Union he would have to close the doors . . . he couldn’t afford a Union . . . we would be out of a job . . . he would close.

On September 8 Presley and his coworkers voted in the Board-conducted representation election. He and his coworkers were suddenly laid off later that day and required to sign copies of General Counsel’s Exhibit 3, supra. He was recalled on September 11 and resumed work on the following day, September 12.<sup>7</sup>

Presley testified that shortly before quitting time on Thursday October 19, Morrice apprised Presley that he, Morrice, had been fired. Presley was admittedly angered and upset. He then went to punch out and broke the timeclock because he apparently hit it “too hard.” Telesz came out of the office. Presley told Telesz, inter alia, “you just fired Dennis for no reason”; Telesz explained why he had fired Morrice; Presley responded: “that’s a bunch of shit . . . you’re just looking for an excuse to fire Dennis because of our Union activities”; “I was tired of the bullshit”; “I was tired of this fuckin place”; and

<sup>5</sup>Cooper, in his prehearing affidavit, assertedly had said that “on a couple of occasions [he] had recommended that Kent Telesz hire friends . . . and [Telesz] had interviewed them but they had turned down the job.” Cooper explained that “I didn’t come to Telesz and recommend someone”; Cooper would tell a friend that “we’re looking for electricians . . . why don’t you go to the office and see if you can get an application”; Telesz later interviewed one such friend and hired him but the friend declined the job.

<sup>6</sup>John Bond, the Union’s business manager, explained that at the time he signed the “stipulation,” G.C. Exh. 9, “there was a question on who could vote and who could not vote”; “we had the support we needed to win the election”; and “so we just went ahead and signed the stipulation just to move things along and keep the September 8 [election] date at that particular time.” Bond added: “I didn’t believe that they were supervisors”—“I felt that it wasn’t going to hurt our interest at that particular time to exclude 2 people from the voting procedure.”

<sup>7</sup>In addition, Presley testified that the Employer, during the Union’s organizational campaign, also changed its policy with respect to allowing employees to pick up their paychecks before 5 p.m. on Fridays and with respect to replacing or repairing broken, stolen, or worn-out tools. Presley acknowledged, however, that the Employer in fact repaired a broken tool of his months later after he had complained.

I ought to just go out to the truck, get my time card and turn the damn thing in.

Telesz replied: "do what you got to do." Presley later told Morrice, who was in the parking lot cleaning his tools, "Kent's probably going to fire me or after what I said . . . he might even think I quit." Presley and Morrice then "walked away." Presley, however, did not turn in his timecard.

Presley next testified that he met with his coworkers later that day; "talked about . . . Dennis . . . being fired"; and decided "not going to work the next day and protesting what happened." Presley did not work on Friday, October 20. Instead, he assertedly had telephoned the office about 6 a.m. earlier that day and "told the answering service that [he] was going to take a personal day." Thereafter, on Monday, October 23, Presley attempted to report for work and had the following exchange with Telesz:

I [Presley] was there to work . . . he [Telesz] wanted to know why . . . because I had said on Thursday that I was going to quit . . . he said I used some terrible language on Thursday . . . and I said yes I was very upset with you and probably did . . . [and I] meant every word.

Telesz maintained that Presley had quit; Presley maintained that he "didn't quit"; and Telesz said he would discuss the matter with his attorney. Telesz thereafter continued to refuse to permit Presley to resume working there.

John Vyskocil testified that he has worked for Respondent Employer for over 2 years; he is a journeyman electrician earning \$13 an hour; he voted in the election; he was laid off that day and was later recalled; and he too witnessed the Telesz-Presley confrontation on October 19. Morrice had just been fired "and nobody was really too happy about it"; and

then the thing with Gary got started. Well all I [Vyskocil] heard was what Gary said. I heard him say if that's the way it's gonna be I might as well turn in my card too.

Vyskocil could not remember whether Presley used the word "quit" and did not see him turn in his timecard.<sup>8</sup>

<sup>8</sup>In addition to the above testimony, Bernie Andres testified that he worked for Respondent Employer from July 1986 until November 13, 1989, when he quit; he attended union meetings; he witnessed Telesz telling the employees before the election "if we were to go Union he wouldn't be able to afford the fees and otherwise he'd have to close the doors"; he was laid off after the election; and he witnessed the Telesz-Presley confrontation on October 19. Andres recalled:

As I entered the warehouse . . . Kent Telesz and Dennis Morrice [were] exiting Kent's office. And at this time Kent asked for Dennis' time card and Dennis said fine. And then Gary Presley spoke up and said this was a bunch of bullshit and Kent asked what. And Gary told him the firing of Dennis . . . and we would have to work Saturday and that's what Gary got all upset about. And at this time Gary broke the timeclock . . . by punching it too hard. I believe Kent stated to write Gary up . . . and Gary said fine, you might as well write me up too.

Presley left the garage. Andres never heard Presley say that he "quit" during the above exchange.

William Burman also testified that he has been employed as an electrician by Respondent Employer for over 2 years; he voted in the election; he was later laid off and then recalled; and he too witnessed the Telesz-Presley confrontation. Presley was upset and broke the timeclock when he punched out on October 19. Presley then said to Telesz "I ought to turn my card in too"

Kent Telesz, an owner of Respondent Employer, generally denied the alleged acts of interference, restraint, coercion, and discrimination attributed to him by the above witnesses. He acknowledged meeting with his employees during the campaign and telling them that he "didn't want a Union"; he could not at one point "recall" asking "why they needed a Union"; he also could not "recall" stating that he "couldn't afford to pay Union wages"; he spoke with Morrice about the available "possibilities" if the employees voted for the Union which included "anything from signing the contract [to] closing the doors"; and he testified:

Q. Did you specifically mention closing the doors as a possibility that you were considering?

A. I told them I didn't know what I was going to do.

Elsewhere, he denied telling his "people [that he] could not afford to pay the wage rates" under the union contract because he "didn't know exactly what the wage rates were."<sup>9</sup>

Telesz admittedly changed the Employer's policy during the Union's campaign with respect to allowing employees to park the Employer's vans at their homes overnight. He claimed that he made this change because he had received a "preliminary report" from his accountant showing that "we were losing money." This "preliminary report," according to Telesz, has since been "destroyed" and is therefore no longer available. Instead, Telesz proffered reports of his accountant received by him after the events in question. (See R. Exhs. 23 and 24).<sup>10</sup> In addition, Telesz insisted that there "wasn't really any change regarding" the Employer's policy of distributing paychecks to the employees during the Union's campaign. Elsewhere, he acknowledged posting a notice on July 18, during the campaign, stating that "effective immediately no paychecks will be given out before 5 p.m. or to anyone except said employee without one days notice in writing," and requiring all personnel to initial this no-

and Telesz responded: "do what you think you got to do." Burman did not hear Presley say that he "quit."

Jeff Bower also testified that he was employed by Respondent Employer as an apprentice during the pertinent time period; he voted in the election, was laid off and then recalled; and he too witnessed the Telesz-Presley confrontation. Bower recalled that at closing time on Thursday, October 19 Presley broke the timeclock, told Telesz that "he was tired of all this bullshit . . . the things about Dennis Morrice" and his termination, and said: "you might as well terminate me too." Bower subsequently witnessed Presley ask Telesz on Monday, October 23, "if there was any work for him" and Telesz replied: "you quit." Presley insisted that he did not "quit" and again asked for work and was refused.

David Boyd also testified that he too was employed by Respondent Employer during the pertinent time period and later quit by turning in his "beeper" and signing an "affidavit . . . saying that I resigned." Boyd witnessed [Presley] say to Telesz on October 19, "he [Telesz] might as well give me [Presley] my walking papers." Boyd could not "remember" Presley saying that he "quit" or Telesz saying that he was "fired."

<sup>9</sup>Kevin Newberry, employed by Respondent, testified on behalf of the Employer. Newberry generally denied ever hearing Telesz say that "he would close the Company if the employees voted for the Union" or "he would never sign a Union contract." Newberry assertedly asked Telesz "what he would do if the employees voted for a Union" and Telesz responded that "his lawyers wouldn't allow him to talk about it."

<sup>10</sup>Telesz, when questioned further about destroying the accountant's "preliminary report," asserted:

Well it wasn't a hundred percent accurate, this [the later report] is a hundred percent accurate, so you know we wouldn't keep something later on that might be misinterpreted or used. The accountant did not testify in this proceeding.

tice. (See R. Exh. 25.) He claimed that the “major reason” for this “change” was “poor” “cash flow” and an incident involving an employee’s girlfriend picking up a paycheck assertedly without authority.<sup>11</sup>

Telesz admittedly shut down his facility and laid off his employees after the election results were made known on Friday, September 8. Employees were summarily notified that the Employer “will be closing their doors” “for inventory and reevaluation”; required to “turn in” tools and company property “before checks will be issued”; and advised that “all personal items should be removed from the premises.” (See G.C. Exh. 3.) Telesz claimed that he laid off the employees in this manner “because [he] had to meet with [his] attorney on Monday.” Telesz was asked “why didn’t you work on Saturday if you had to meet with your attorney on Monday?” Telesz responded:

Well, most of the employees told me they didn’t want to . . . and under the circumstances with all the emotional things that went on we decided that we weren’t going to force anybody to work on Saturday.

Elsewhere, Telesz testified: “I think maybe someone did work on that Saturday but I didn’t force anybody to.” Elsewhere, Telesz acknowledged that employees had been required to remove their tools from their vans which is not “normal” if they are only being sent home for the day; the layoff could have been “forever”; he “did it [lay off the employees] because [his] attorney told [him] to”; the attorney “told us to prepare a notice, leave it vague, . . . we weren’t really laying them off because we really wanted to just figure out where we were going to go from there . . . [the attorney] basically told us what to say in the notice”; the attorney later told him on Monday “to recall the employees” which he did; and the employees were admittedly paid for all time lost as a consequence of the September 8 layoff after unfair labor practice charges were filed in this proceeding.<sup>12</sup>

Telesz next testified with respect to the subsequent firing of Morrice on Thursday October 19. Telesz acknowledged that Morrice previously had asked for every other Saturday off from work in order to visit his children and Telesz had agreed that he “would do [his] best.” Telesz claimed that he never changed this policy during the union campaign. Telesz asserted that he did not “know” that Morrice also “wanted to get off” on Tuesday and Thursday evenings in order “to visit his kids.” Telesz elsewhere testified:

<sup>11</sup> Telesz also insisted that the Employer’s policy was to replace or repair employee tools which were not “mishandled” and this policy has not been “changed.” He cited bills for such repairs or replacements which the Employer has since paid. See R. Exhs. 26–29. With respect to R. Exh. 29, Telesz acknowledged:

That’s Gary Presley’s clamp-on-meter. Actually the Union brought it to my attention and I went ahead and asked Gary for it, Gary gave it to me and I replaced it even though it was a mishandled tool, it wasn’t worn out.

The invoice date for R. Exh. 29 is after Presley’s termination of employment.

See also the testimony of Linda Telesz, part-owner and wife of Kent Telesz, pertaining to the Employer’s policy of paying employees before 5 p.m. on Fridays and compensating them for unused personal days when they are terminated or quit (Tr. 425 to 428 and G.C. Exh. 5).

<sup>12</sup> The attorney for Telesz involved in the above sequence did not testify or appear at these hearings.

Q. He [Morrice] never told you that? Is that your testimony?

A. Not to my knowledge.

Q. He did tell you [that] during that phone conversation [on the day of his termination], did he not?

A. I don’t believe he did.

Telesz elsewhere insisted that Morrice told him during one of their telephone conversations on the afternoon of October 19 that “he just wasn’t going to go” on the Arby’s call; Telesz asked “why”; and Morrice said that he “had to leave at 5” and “did not” state “why he had to leave.” Morrice was fired later that day assertedly for refusing to take the Arby’s call.

Telesz next testified with respect to the alleged “quitting” by employee Presley shortly following the Morrice termination. Telesz walked into the garage following his termination of Morrice and discovered that the timeclock had been broken by Presley. Presley, in a loud voice, acknowledged that he had “hit it too hard because [he] was mad”; he “was tired of my bullshit”; he “was tired of working for an asshole like me . . . the long hours . . . working every Saturday”; and “he ought to just quit.” Telesz testified that he then apprised Presley that he “had nothing against him”; “we had no problems”; and he “should go home . . . cool off.” According to Telesz, Presley responded that he “didn’t need time to think about it”—“he quit.” Presley did not report for work on Friday or Saturday—“everybody was going to work on Saturday.” Presley reported on Monday, October 23 and, as Telesz recalled, “walked in and asked if I had any work for him.” Presley also stated: “I meant everything I said on Thursday.” Telesz then apprised Presley that he had “quit on Thursday.” Presley replied that he had said that “he ought to quit.” Telesz insisted that “it was real clear that you said you had quit” and, assertedly, Presley acknowledged “I guess I did.”

Telesz elsewhere testified that Presley, during their confrontation on Thursday, October 19, did not refer at all to Morrice being fired. Telesz also testified that Presley had not filled out a “quit slip” for the Employer at the time and Telesz was uncertain whether Presley had turned in his tools. Telesz further testified:

Q. But notwithstanding that he [Presley] had broke the time clock and notwithstanding that he said this was bullshit, you told him you had no problem with that . . . you told him to reconsider, is that right?

A. Yes.

Q. As of that point if he had reconsidered you would have taken him back?

A. Yes I would have.

Q. Notwithstanding him swearing at you or breaking the time clock?

A. I am not a hard man to get along with and I would have taken him back, yes.

Q. I take it at the time you were thinking he was just blowing off steam, don’t do something rash?

A. Yes.

Q. Isn’t it true sir when he came in the following Monday he said I did not quit?

A. He told me that before we even started our conversation, that he meant everything he had said on Thursday.

Q. When he went into your office . . . are you saying he never said he didn't quit?

A. He told me that he meant everything he said on Thursday, but he said he should quit.

Q. He ought to quit?

A. Yeah. . . .

Q. So the only thing that went on—because he didn't apologize you wouldn't take him back?

A. Well you got to remember he was the one screaming, hollering and swearing at me. If he would have come in and apologized for all of that, yes, I probably would have at the time.

Q. Did you say I got to talk to my lawyer . . . .?

A. He told me that he didn't think he had quit . . . and I said I would talk to my . . . lawyer.<sup>13</sup>

Telesz next testified about the October 30 and 31 strike and his firing or replacement of Cooper. Telesz assertedly needed a "supervisor" during this strike and, as he recalled, "at the time I knew my brother-in-law had been dissolved in his business and I asked him to come aboard as a supervisor." Telesz assertedly hired his brother-in-law on October 31 to start on November 1. When Cooper returned to work on November 1, Telesz "told him that I had to have a supervisor and he wasn't available so I had to replace him." Telesz notified Cooper (G.C. Exh. 6):

On Monday October 30 . . . you left your job without prior notice [and] joined employees on strike, as a result we have hired a supervisor to replace you.

Finally, Telesz testified with respect to the alleged supervisory status of Morrice and Cooper. Respondent's field personnel "normally" worked in crews consisting of a journeyman and apprentice electrician. There were occasions when "multiple crews" were used on certain jobsites, however, the "majority" of the work was "single crew" work. Morrice and Cooper assertedly were placed in charge of "multiple crews" and would, on such occasions, direct the personnel involved. In addition, Morrice had been classified as a "supervisor" in late 1987 when he became a licensed electrician and his personnel file or folder listed him as a "supervisor." Moreover, Morrice trained new personnel and recommended "whether to keep them"; personnel were told in late 1987 that Morrice was a "supervisor"; and Morrice and Telesz would participate together in employee disciplinary meetings. Further, Morrice was entrusted with the key to the shop and was to be contacted in case of emergency (see R. Exh. 20); would disburse employees on job assignments when Telesz was not present; and could change work schedules without consulting with Telesz. Morrice could also make changes in a job and bid for extra work, however, these were apparently "minor changes" in previously approved bids. Morrice had recommended laying off employees when business was slow in the summer of 1989; the Employer paid for Morrice's disability insurance policy; and personnel were apprised that Morrice was Telesz' "right hand man."

<sup>13</sup> There is no claim made here that Presley was discharged because of his language or conduct during the above confrontation. Counsel for Respondent solely argued that Presley quit. See Tr. 287.

Telesz further claimed that both Morrice and Cooper would review previously prepared work schedules "and figure out how we were going to juggle [the] people around to take care of [the] customers"; both could "order parts"; both were the highest paid field personnel; and both had the authority to have crews work beyond their scheduled quitting time when requested by a customer on "multiple crew" jobs. In addition, Telesz claimed that Cooper would make changes in contracts if it was necessary on "multiple crew" jobs; would make "suggestion[s] . . . if somebody wasn't pulling their own weight"; and could "direct" employees. Cooper assertedly was told when he was hired that Telesz "needed another supervisor."<sup>14</sup> However, it is undisputed that Cooper's personnel file or folder only lists him as "master electrician" and not as a "supervisor."<sup>15</sup>

Harold Zimmerman, father-in-law of Kent Telesz, testified that he is "often" on Respondent's premises; he witnessed the Telesz-Presley confrontation on Thursday, October 19; and Presley then stated:

God dammit Kent, I am sick and tired of taking your bullshit . . . I've worked all this overtime all these Saturdays and I am sick and tired of working it . . . I'm not married to you or my job . . . I have a wife that I'm married to and I'm going to satisfy her. . . . As far as overtime and my job I'm not worried about it because I just quit.

Zimmerman witnessed nothing else of this exchange.

Jon Harris, an estimator for Respondent Employer, also testified about the Telesz-Presley confrontation on Thursday, October 19. Harris recalled:

. . . [Presley] said I'm not going to pull this shit, walked around the corner and the next thing I know he came back . . . back around the corner and he says well I quit too and that was it.

<sup>14</sup> Cooper, as noted, was hired initially in 1984 and rehired in 1986.

<sup>15</sup> Jeffrey Martineau, associated with Action Auto Stores, a customer of Respondent, generally testified that on "multiple crew" jobs involving Action Auto he would "deal" only with Telesz, Harris, Morrice, or Cooper pertaining to job changes and employees working late; and one of these four would be present for contractor meetings at the site or for inspections of completed work. Martineau generally asserted that Cooper ran the gas installation crew at such sites and "trained other guys." Elsewhere, Martineau acknowledged that he last observed "multiple crews" of Amperage at Action Auto "about a year ago"; he "generally" "left it to someone else to take care of the project"; "he wouldn't spend much time at any one job location"; and he had "no idea" who Morrice or Cooper "would check with" at Amperage about his requested changes or overtime—"they must have called somebody."

Kurt Curtis, also associated with Action, generally claimed that he too would "deal" with Telesz, Morrice, or Cooper at "multiple crew" sites concerning "what portion of the project to work on that day"; "any changes that might occur"; "how much of a crew we're going to need for the next day"; "or whatever." Curtis asserted that Morrice and Cooper would attend onsite contractor meetings as "supervisors," however, he acknowledged that he "assumed they were supervisors" from what Telesz had told him. Curtis too was unaware of whether or not Morrice or Cooper "spoke to anybody back at Amperage with respect to any of [his onsite job] requests."

George Brown, city building director during the pertinent time period, testified that in addition to dealing with Telesz he would also deal with Morrice concerning inspections and permits; Telesz once told him "that Dennis would be in charge of field operations and so on for the Company" during Telesz' absence for "several days up to a week"; and Telesz referred to Morrice as "supervisor," "foreman," or "superintendent." However, Brown was uncertain of Telesz' "exact words" and could not "recall [the] title" used by Telesz.

Harris was then questioned about Presley's attempt to return to work the following Monday. Harris recalled:

Gary . . . said [to Telesz and Harris] I want you to understand one thing . . . everything I said I meant and I don't take anything back . . . and then he said . . . that he . . . [had said on Thursday] that he ought to quit, not that he quit . . . and I looked right at him and said Gary you quit . . . and he says the guys told me I said a lot of things I don't remember . . . and Kent says as far as we're concerned that's it . . . and he says fine then I quit then.

On cross-examination Harris acknowledged that "nobody else [had] quit [on Thursday], Dennis was fired. Harris then attempted to change his testimony claiming that Presley "didn't say I quit too." Later, Harris again claimed that Presley had stated on Thursday "I quit too." Harris acknowledged that Presley's alleged statement on Thursday was directed to Morrice at the time—Presley "wasn't coming up to [him] as a management official . . . turning in his papers or anything like that." Harris also acknowledged that Presley had insisted on the following Monday that he had said "I ought to quit."<sup>16</sup>

I credit the testimony of Dennis Morrice, Kary Cooper, Gary Presley, Richard Beamish, John Bond, John Vyskocil, Bernie Andres, William Burman, Jeff Bower, and David Boyd, as detailed supra. Their testimony pertaining to this entire sequence of events is in large part mutually corroborative and is also substantiated in significant part by admissions of Respondent's witnesses and undisputed documentary evidence of record. They also impressed me as trustworthy and reliable witnesses. On the other hand, I find the testimony of Kent Telesz, Kevin Newberry, Linda Telesz, Harold Zimmerman, and Jon Harris to be vague, incomplete, contradictory, evasive, and unclear. I do not on this record find Kent Telesz, Kevin Newberry, Linda Telesz, Harold Zimmerman, and Jon Harris to be trustworthy and reliable witnesses.

Thus, for example, I find incredible here Kent Telesz' assertions that he suddenly changed the Employer's existing policy with respect to allowing employees to take their vans home during evenings because "we were losing money" and

<sup>16</sup>Harris was also questioned about the alleged supervisory status of Morrice and Cooper. Harris claimed that "when the started out with the Company . . . as an apprentice . . . Dennis [Morrice] was [his] supervisor"; later, after he became an estimator, "when Kent [Telesz] went on vacation . . . a couple of times Dennis would be in the office and handle all the crews"; he also observed both Morrice and Cooper in charge of "multiple crews"; and

Dennis was Kent's number one man . . . if Dennis was on a job and Kary [Cooper] was on a job Dennis would be in charge . . . if Kary was on a job and Dennis wasn't on a job Kary was in charge if there was multiple crews.

Harris also recalled:

one day I was in . . . personnel manager . . . Bob's office and he had a conversation with Dennis and Kary as to whether or not we should keep this guy and they both indicated that they didn't think it was worth while . . . and he [this guy] was subsequently let go.

Elsewhere, Harris testified:

Q. Isn't it also true that on the Auto Action jobs on occasion . . . somebody else besides Gary or Dennis would be out on a job alone with apprentices, some other journeyman?

A. Yes.

Q. David Boyd . . . and John Vyskocil?

A. Yes.

Later, Harris claimed that to his "knowledge" Boyd and Vyskocil did not "run any multiple crews."

that he in like vein suddenly announced a policy change with respect to employees' picking up their paychecks early because of "poor" "cash flow" or an unsubstantiated incident involving an employee's girlfriend picking up a paycheck assertedly without authority. I am persuaded instead that these and other related acts of Telesz were part and parcel of his strong opposition to the Union's attempt to represent his employees. I find equally incredible Telesz' shifting and unsubstantiated reasons for suddenly laying off his employees as soon as it became apparent that the Union had decisively won the Board-conducted representation election. This record makes it clear, as discussed below, that Telesz was retaliating against his employees for choosing union representation. He was admittedly "emotionally broken up" by the employees' selection of union representation earlier that day. Indeed, Telesz, after charges were filed here, made his employees whole for any losses sustained from this sudden and unprecedented layoff.

I find equally incredible on this record the assertions by Telesz that Morrice never told him that Morrice wanted to get off at quitting time on Tuesdays and Thursdays so that he could visit his children or that on Thursday, October 19, Morrice did not say "why" he had to leave on quitting time that particular evening. Cooper credibly testified that Telesz had acknowledged to him on October 19 that Telesz was aware that Morrice "had custody of his boys that evening." Moreover, I similarly reject as incredible the assertions by Telesz that Presley did not refer at all to the firing of Morrice later on Thursday, October 19, and Presley then stated to management that "he quit." I find instead, as discussed below, that Presley emotionally apprised Telesz on Thursday, October 19, that he "ought to quit"; no steps were taken by the Employer or employee to end this employment relationship; Telesz concededly did not terminate the employee because of this brief emotional confrontation; and Telesz later insisted that Presley had "quit" as part of his attempt to retaliate against the employees for supporting and selecting union representation.

Likewise, I reject as incredible Telesz' asserted justification for the subsequent firing of Cooper. Cooper joined the employees in their brief strike on October 30 and 31. On October 31 the Union notified the Employer that the striking employees "will unconditionally return to work effective November 1." I do not credit Telesz' assertions to the effect that he needed a "supervisor" during this strike; "knew this brother-in-law had been dissolved in his business"; and hired his brother-in-law on October 31 as a replacement to start on November 1. I am persuaded on this record, as discussed below, that Telesz hired no permanent replacement for Cooper but instead retaliated against this employee because he had joined the strike. In addition, I do not credit the assertion by Telesz' father-in-law, Zimmerman that Presley had conveniently stated in his presence on October 19 "I just quit." Zimmerman's testimony about this incident is vague and incomplete. Equally incredible is the contradictory and confusing assertion by Harris that Presley had said "I quit too." No one else had assertedly quit that day—Morrice had been "fired." And, Newberry's elicited denials of coercive statements by Telesz during the Union's campaign were incomplete, vague, and unreliable.

It is true, as counsel for Respondent argues, the testimony of General Counsel's witnesses was at times not the best. Thus, for example, Morrice initially attempted to minimize

and deny his authority with the Employer. Nevertheless, a fair review of Morrice's entire testimony as well as the testimony of the other witnesses called by General Counsel not only discloses a complete and trustworthy picture of Respondent's unlawful threats, coercion, restraint, and discrimination during this pertinent period, it also discloses a complete and trustworthy picture of the authority exercised by Morrice and Cooper. On balance, the cited weaknesses of General Counsel's witnesses in this and related respects must be assessed in the context of the testimony of Respondent's witnesses, whose testimony, as stated above, I find on this full record to be unreliable and untrustworthy.<sup>17</sup>

#### Discussion

Section 7 of the National Labor Relations Act guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as "the right to refrain from any or all such activities." Section 8(a)(1) of the Act makes it an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." Section 8(a)(3) forbids "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Counsel for Respondent initially argues that both Morrice and Cooper are "supervisors" and consequently beyond these protections of the Act. A "supervisor" is defined in Section 2(11) of the Act as

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Actual existence of true supervisory power is to be distinguished from abstract, theoretical, or rule book authority. It is well established that a rank-and-file employee cannot be transformed into a supervisor merely by investing him or her with a "title and theoretical power to perform one or more of the enumerated functions." *NLRB v. Southern Bleachery & Print Works*, 257 F.2d 235, 239 (4th Cir. 1958), cert. denied 359 U.S. 911 (1959). That is relevant is the actual authority possessed and not the conclusory assertions of witnesses. And while the enumerated powers listed in Section 2(11) of the Act are to be read in the disjunctive, Section 2(11) also "states the requirement of independence of judgment in the conjunctive with what goes before." *Poultry Enterprises v. NLRB*, 216 F.2d 798, 802 (5th Cir. 1954). Thus, the individual must consistently display true independent judgment in performing one or more of the enumerated functions in Section 2(11) of the Act. The performance of some

supervisory tasks in a merely "routine," "clerical," "perfunctory" or "sporadic" manner does not elevate a rank-and-file employee into the supervisory ranks. *NLRB v. Security Guard Service*, 384 F.2d 143, 146-149 (5th Cir. 1967). Nor will the existence of independent judgment alone suffice; for "the decisive question is whether [the individual involved] has been found to possess authority to use [his or her] independent judgment with respect to the exercise [by him or her] of some one or more of the specific authorities listed in Section 2(11) of the Act." See *NLRB v. Brown & Sharpe Mfg. Co.*, 169 F.2d 331, 334 (1st Cir. 1948). In short, "some kinship to management, some empathetic relationship between employer and employee, must exist before the latter becomes a supervisor of the former." *NLRB v. Security Guard Service*, supra.

Applying these principles of law to the credited evidence of record, I find and conclude that Morrice was a "supervisor" and thus beyond the protection of the Act. Morrice, as he acknowledged, was listed as a "supervisor" in his personnel jacket since 1987, long before the Union's organizational effort. Morrice was then told "to be a supervisor" and he was Owner Telesz' "right hand man" and "number one man." The unit employees were similarly apprised by Telesz of Morrice's "right hand man" and "number one man" status. Morrice would run the office when Telesz was absent. New apprentices would be assigned to work with Morrice and Morrice would tell Telesz "if they were worthwhile." Morrice was "often" placed in charge of "multiple crews" consisting of both journeymen and apprentice electricians. Morrice made "written evaluations" of employees; he signed an "employee warning report" as a "supervisor" which concludes: "if there is not substantial improvement we will terminate" the criticized employee; he repeatedly signed detailed trainee evaluations as a "supervisor"; and he "suggested" to Telesz that he "thin out" or lay off employees "if things were slow and people weren't working out." Further, it is undisputed that Morrice would participate with Telesz in employee disciplinary meetings; Morrice was entrusted with the key to the shop and was to be contacted in case of an emergency; and the Employer paid for Morrice's disability insurance policy which was not the case for other field personnel. In sum, I find and conclude here that Morrice had the authority to effectively recommend layoff, discharge, and discipline of employees; he could responsibly direct other employees; and the exercise of such authority by him was not merely of a clerical, sporadic, or routine nature but required the use of his independent judgment.<sup>18</sup>

On the other hand, I do not find and conclude on this record that Cooper was a "supervisor." As counsel for Respondent acknowledges in his posthearing brief (p. 38), "Amperage readily concedes that Cooper's authority and re-

<sup>17</sup>To the extent that the testimony of Martineau, Curtis, and Brown contradicts materially the testimony of General Counsel's witnesses, as summarized above, I find the testimony of the former to be general, vague, and incomplete.

<sup>18</sup>Since I have found Morrice to be a "supervisor" beyond the protection of Sec. 8(a)(1) and (3) of the Act, it is unnecessary for me to discuss further whether the Employer engaged in the alleged unlawful conduct pertaining solely to him. I note, however, for the benefit of reviewing authority, that in the event Morrice were regarded as a protected employee I would find on the credited evidence detailed supra that management engaged in the alleged coercive and discriminatory conduct pertaining solely to him. In particular, I am persuaded here that Telesz fired Morrice on the day in question because he previously had discovered that Morrice supported the Union; Telesz thereafter seized upon Morrice's refusal to take a job assignment which would interfere with his evening visitation rights of his children as a pretext to get rid of Morrice; and Telesz would not otherwise have discharged Morrice under the circumstances.

sponsibilities were not as broad as Morrice's." Thus, Cooper credibly testified that he worked for the Employer for about 5 months in 1984 and then quit; he was hired again in November 1986 and worked until his discharge on November 1, 1989; he held a master electrician's license; and he was paid \$12.25 an hour, punched a timeclock, had medical insurance coverage, was given 1 week's paid vacation with paid holidays and 3 personal days off. Cooper contacted the Union in June 1989 to enlist its support in organizing the Employer's shop. He assembled the names and addresses of the employees for the Union, attended union meetings, and signed a union membership card.

Cooper credibly recalled that at an employee meeting about 3 weeks before the September 8 representation election, Telesz first apprised Cooper that he "was considered a supervisor . . . and wouldn't vote." Cooper explained that earlier that month Telesz had discussed with him "the possibility" of making him a supervisor and asked if he was "interested." Cooper then responded: "I really didn't know what I wanted because of what was going on with the Union drive and everything and I'd let him know." Later, at the above meeting some 3 weeks before the election, Telesz suddenly apprised Cooper that he was "considered a supervisor" and would not vote in the election.

Cooper credibly testified that his duties did not change after he was suddenly informed by Telesz during August that he was "considered" a supervisor; he was not then told that he had any new authority; and he denied exercising any of the indicia of supervision as set forth in Section 2(11) of the Act. Cooper explained his duties, as follows:

I was told in the morning what the job was to go to. . . . And either I would be informed by Kent in the morning or Jon Harris, the estimator, what the job consisted of, what needed to be done, or I'd meet on the job site with the construction supervisor or home owner, or if they had a blueprint there [I] would go over the blueprint, or if there was an occasion where we'd done a job before and were familiar with it . . . go over the layout of the job, find out what had to be done and instruct the apprentice or whoever was working with me at the time what his duties were.

Cooper noted that if his apprentice on such a job did not perform the work to his satisfaction, "I'd ask him to change it"; however, Cooper was never told he had the authority to discipline and never disciplined an apprentice. Cooper added that he was never told that he had the authority to hire or recommend anyone for hiring; the authority to lay off or recommend anyone for layoff; the authority to fire or recommend anyone for firing; the authority to discipline or recommend anyone for discipline; the authority to grant a wage increase; the authority to select the jobsite an apprentice went to; and the authority to grant time off, permit personnel to come in late or leave early.

Cooper credibly explained that a crew would "generally" consist of two persons, himself and an apprentice. There were "occasions" when there would be multiple crews at a job and on such occasions he, as a crew chief, "would be telling a number of people what to do, not just [his] apprentice." Cooper noted, however, that he had served on several multiple crew jobs when another licensed electrician, other

than Morrice or himself, were the crew chiefs. Thus, for example, John Vyskocil was a crew chief on a particular job, "in charge of the job"; and Vyskocil "let [Cooper] know what to do and what had to be done." Moreover, according to Cooper, as a crew chief, he still "would call the office" to "get permission" if a customer wanted "a change" in the job and "if they wanted a price"; he was never told that he had the authority to quote a price for changed or additional work; he would also notify the office when the customer "wanted people to work over" and "get permission."

And, Cooper credibly explained why the Union and the Employer had stipulated to his alleged "supervisory" status—"it was more or less a compromise that Dennis [Morrice] and [Cooper] were not to be included in the election so that we could get the election on a little earlier . . . [and] didn't have to have any more delays." This accommodation among the parties would not make Cooper a "supervisor" within the meaning of Section 2(11) of the Act. Cf. *Servomation*, 235 NLRB 975, 976 fn. 3 (1978). Moreover, it is conceded that Cooper's personnel file or folder only lists him as "master electrician" and not as a "supervisor."

In sum, I find and conclude here that Cooper did not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, and the alleged exercise of such authority by him was at best of a clerical, sporadic, or routine nature and did not require the exercise of independent judgment. Cooper is not a "supervisor" and is therefore entitled to the protection of the Act.

Counsel for Respondent next argues that Telesz did not engage in the alleged acts of interference, restraint, coercion, and discrimination attributed to him. The credited testimony of record summarized above is to the contrary. Thus, employee Presley credibly testified that Telesz repeatedly told the employees during the Union's organizational campaign that "if we voted in a Union he would have to close the doors"; "he couldn't afford a Union"; "we would be out of a job." Employee Andres credibly recalled Telesz telling employees that "if we were to go Union he wouldn't be able to afford the fees . . . he'd have to close the doors." And, employee Cooper credibly recalled Telesz telling the employees that "he wouldn't sign a contract"; "he'd probably have to close his doors and go out of business." Telesz admittedly "didn't know what the [Union's] wage rates were." Telesz, at the same time, suddenly announced to Cooper at an employee meeting that Cooper "was considered a supervisor . . . and wouldn't vote." Telesz later admonished Cooper that he could "fire" Cooper because he was a "supervisor" "but he couldn't fire anyone else at the time."

Telesz, by the above statements and conduct, unlawfully threatened employees with discharge and closedown if they chose union representation. Telesz' coercive statements cannot reasonably be regarded on this record as privileged speech under Section 8(c) of the Act or "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969); *Overnite Transportation Co.*, 296 NLRB 669 (1989). Telesz, at the same time, unlawfully admonished employees that it would be futile for them to choose union representation because he would not sign a collective-bargaining

agreement with the Union. See *Overnite Transportation*, supra. In addition, Telesz, as part of this effort to defeat the Union's organizational drive, unlawfully attempted to promote employee Cooper out of the bargaining unit. See *Golden State Bottling*, 414 U.S. 168, 188 (1973); and *NLRB v. Bell Aircraft Corp.*, 206 F.2d 235 (2d Cir. 1953). Thus, as noted, Cooper was suddenly apprised at an employee meeting that he was "considered" a "supervisor" and would not vote. Cooper was later admonished that he could now be "fired" as a "supervisor." Telesz made good on this threat when he subsequently fired Cooper because Cooper had joined the employees' strike. Such statements and conduct plainly tended to impinge upon employee Section 7 rights in violation of Section 8(a)(1) of the Act.

Telesz similarly resorted to proscribed acts of discrimination in violation of Section 8(a)(3) and (1) of the Act. Telesz, during the campaign, unlawfully implemented new work rules which no longer permitted his employees to park the Employer's vehicles at their homes overnight and to receive their paychecks prior to quitting time on Fridays. He also unlawfully ceased his practice of readily paying for the repair or replacement of employees' tools. There is no credible explanation for the sudden implementation of these changes during the Union's organizational campaign. These changes in terms and conditions of employment were part of Telesz' effort to defeat the Union's campaign. And, later, when the employees decisively voted for union representation in the Board-conducted representation election, Telesz unlawfully shut down his facility in retaliation. Telesz was angered and felt betrayed because his employees had exercised their statutory right to have union representation. Such conduct, discriminatorily motivated here, runs afoul of the proscriptions of Section 8(a)(3) and (1) of the Act. See *St. Agnes Medical Center*, 287 NLRB 242 (1987), enfd. in part and remanded, 871 F.2d 137 (DC Cir. 1988).

Telesz also violated Section 8(a)(3) and (1) of the Act by discriminatorily firing employees Presley and Cooper. Presley credibly testified that shortly before quitting time on Thursday, October 19, Morrice apprised Presley that he, Morrice, had been fired. Presley was admittedly angered and upset. He then went to punch out and broke the timeclock because he apparently hit it "too hard." Telesz came out of the office. Presley told Telesz, inter alia, "you just fired Dennis for no reason"; Telesz explained why he assertedly had fired Morrice; Presley responded: "that's a bunch of shit . . . you're just looking for an excuse to fire Dennis because of our Union activities"; "I was tired of the bullshit"; "I was tired of this fuckin place"; and "I ought to just go out to the truck, get my time card and turn the damn thing in." Telesz replied: "do what you got to do." Presley later told Morrice, who was in the parking lot cleaning his tools, "Kent's probably going to fire me or after what I said . . . he might even think I quit." Presley and Morrice then "walked away." Presley, however, did not turn in his timecard.

Presley credibly testified that he met with his coworkers later that day; "talked about . . . Dennis . . . being fired"; and decided "not going to work the next day and protesting what happened." Presley did not work on Friday, October 20. Instead, he had telephoned the office about 6 a.m. earlier that day and "told the answering service that [he] was going to take a personal day." Thereafter, on Monday, October 23,

Presley attempted to report for work and had the following exchange with Telesz:

I [Presley] was there to work . . . he [Telesz] wanted to know why . . . because I had said on Thursday that I was going to quit . . . he said I used some terrible language on Thursday . . . and I said yes I was very upset with you and probably did . . . [and I] meant every word.

Telesz maintained that Presley had quit; Presley maintained that he "didn't quit"; and Telesz said he would discuss the matter with his attorney. Telesz thereafter continued to refuse to permit Presley to resume working there.

As noted above, there is no claim made here that Presley was discharged because of his language or conduct during the above confrontation. Counsel for Respondent solely argued that Presley had quit. (See Tr. 287.) Telesz also acknowledged in his testimony that during this confrontation on Thursday, October 19, he did not refer at all to Morrice being "fired"; Presley had not filled out a "quit slip" for the Employer; and Telesz was uncertain whether Presley had turned in his tools. Telesz further testified:

Q. But notwithstanding that he [Presley] had broke the time clock and notwithstanding that he said this was bullshit, you told him you had no problem with that . . . you told him to reconsider, is that right?

A. Yes

Q. As of that point if he had reconsidered you would have taken him back?

A. Yes I would have.

Q. Notwithstanding him swearing at you or breaking the time clock?

A. I am not a hard man to get along with and I would have taken him back, yes.

Q. I take it at the time you were thinking he was just blowing off steam, don't do something rash?

A. Yes.

I find and conclude on this record that Presley had not quit on Thursday, October 19; he had not been fired; he instead had emotionally apprised Telesz that he "ought to quit"; no steps were taken by the Employer or employee to end this 2-year employment relationship; Telesz concededly did not terminate the employee because of this brief emotional confrontation; and Telesz later, on Monday, October 23, unlawfully insisted that Presley had "quit" as part of his attempt to retaliate against the employees for supporting and selecting union representation.

In like vein, Telesz unlawfully fired Cooper on November 1. Telesz previously had attempted to promote Cooper out of the unit and thus deprive the employee of the protection of the Act. Telesz had threatened Cooper that he could by this maneuver fire Cooper without penalty. Later, on October 30 and 31, Cooper joined the employees' brief strike. Cooper, at strike's end on November 1, attempted to return to work and was informed that he had "joined employees on strike" and "we have hired a supervisor to replace you." As recited above, I do not credit Telesz' assertions to the effect that he needed a "supervisor" during this strike; "knew [his] brother-in-law had been dissolved in his business"; and hired his brother-in-law on October 31 as a replacement to start on

November 1. I find and conclude on this record that Telesz had hired no permanent replacement for Cooper but instead retaliated against this employee because he had joined this protected economic strike. See *NLRB v. Mars Sales & Equipment*, 626 F.2d 567, 573 (7th Cir. 1980).<sup>19</sup>

I therefore find and conclude that Respondent Employer violated Section 8(a)(1) of the Act by threatening employees with discharge and closedown of its facility if they selected the Union as their collective-bargaining representative; telling employees that it would be futile for them to select the Union as their collective-bargaining representative because the Employer would not sign a union contract; and attempting to promote an employee out of the unit because of the Union's organizational campaign. I find and conclude that Respondent Employer violated Section 8(a)(3) and (1) of the Act by implementing new rules which no longer permitted employees to park the Employer's vehicles at their homes overnight and to obtain their paychecks prior to 5 p.m. on Fridays; ceasing its practice of readily paying for the repair and replacement of employees' tools; laying off unit employees following the Board-conducted representation election; and discharging employees Presley and Cooper because of the employees' activities on behalf of and in support of the Union. The remaining allegations of the amended consolidated complaint are dismissed.

#### CONCLUSIONS OF LAW

1. Respondent Employer is an employer engaged in commerce and Charging Party Union is a labor organization as alleged.

2. Respondent Employer violated Section 8(a)(1) of the Act by threatening employees with discharge and closedown of its facility if they selected the Union as their collective-bargaining representative; telling employees that it would be futile for them to select the Union as their collective-bargaining representative because the Employer would not sign a union contract; and attempting to promote an employee out of the unit because of the Union's organizational campaign.

3. Respondent Employer violated Section 8(a)(3) and (1) of the Act by implementing new rules which no longer permitted employees to park the Employer's vehicles at their homes overnight and to obtain their paychecks prior to 5 p.m. on Fridays; ceasing its practice of readily paying for the repair and replacement of employees' tools; laying off unit employees following the Board-conducted representation election; and discharging employees Presley and Cooper because of the employees' activities on behalf of and in support of the Union.

4. The remaining alleged unfair labor practices either pertain solely to Morrice, found to be a supervisor beyond the protection of the Act, or were not sufficiently proven and are therefore dismissed.

5. The unfair labor practices found above affect commerce as alleged.

#### REMEDY

To remedy the unfair labor practices found above, Respondent Employer will be directed to cease and desist from engaging in such conduct and like or related conduct and to

<sup>19</sup> Under the circumstances, it is unnecessary for me to decide whether the strike was an unfair labor practice strike as alleged in the amended complaint.

post the attached notice. Respondent Employer has been found to have violated Section 8(a)(3) of the Act by discriminatorily discharging employees Presley and Cooper. Respondent Employer will therefore be directed to offer employees Presley and Cooper immediate and full reinstatement to their former jobs or in the event their former jobs no longer exist to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of their unlawful firings by making payment to them of a sum of money equal to that which they normally would have earned from the date of Respondent's discrimination to the date of its offer of reinstatement, less net earnings during such period, with backpay to be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 651 (1950), and interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Further, Respondent Employer will be directed to preserve and make available to the Board or its agents upon request all payroll records and reports and all other records necessary to determine backpay under the terms of this Decision and Order. And, Respondent Employer will also be directed to expunge from its files any reference to the disciplinary action and firings of Presley and Cooper found unlawful here, in accordance with *Sterling Sugars*, 261 NLRB 472 (1982).

Respondent Employer has been found to have discriminatorily laid off its employees and withdrawn certain privileges. Counsel for General Counsel disclaims any further need for a reinstatement or make-whole remedy with respect to the discriminatory layoff. With respect to Respondent's discriminatory withdrawal of employee privileges, counsel for General Counsel seeks an affirmative order directing reinstatement of the discriminatorily withdrawn privileges as found above. Respondent Employer will therefore be directed to reinstate its discriminatorily withdrawn employee privileges of permitting employees to park the Employer's vehicles at their homes overnight; obtaining their paychecks prior to 5 p.m. on Fridays; and paying for the repair and replacement of employees' tools.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>20</sup>

#### ORDER

The Respondent, Amperage Electric, Inc., Owosso, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge and closedown of its facility if they selected the Union, Local Union No. 948, International Brotherhood Of Electrical Workers, AFL-CIO, as their collective-bargaining representative; telling employees that it would be futile for them to select the Union as their collective-bargaining representative because the Employer would not sign a union contract; and attempting to promote employees out of the bargaining unit because of the Union's organizational campaign.

(b) Implementing new rules which no longer permitted employees to park the Employer's vehicles at their homes

<sup>20</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

overnight and to obtain their paychecks prior to 5 p.m. on Fridays; ceasing its practice of readily paying for the repair and replacement of employees' tools; laying off unit employees following the Board-conducted representation election; and discharging employees because of the employees' activities on behalf of and in support of the Union.

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

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

(a) Offer employees Presley and Cooper immediate and full reinstatement to their former jobs or in the event their former jobs no longer exist to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of their unlawful firings, with interest, as provided in this decision.

(b) Preserve and, on request, make available to the Board or its agents for examination or copying, all payroll records, social security payment records, timecards, personnel records and reports, as well as all other records necessary or useful in analyzing and computing the amount of backpay, as provided in this decision.

(c) Expunge from its files any reference to the disciplinary actions and firings of employees Presley and Cooper and notify them in writing that this has been done and that evidence of this unlawful disciplinary action will not be used as a basis for future personnel action against them.

(d) Reinstate its discriminatorily withdrawn employee privileges of permitting employees to park the Employer's vans at their homes overnight; obtaining their paychecks prior to 5 p.m. on Fridays; and paying for the repair and replacement of employees' tools.

(e) Post at its Owosso, Michigan facility copies of the attached notice marked "Appendix."<sup>21</sup> Copies of said notice, on forms provided by the Regional Director for Region 7, after being signed by Respondent's representative, shall be posted by Respondent immediately upon receipt in conspicuous places, including all places where notices to employees are customarily posted, and be maintained for a 60 consecutive days. Reasonable steps shall be taken to ensure that notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the remaining allegations of the amended consolidated complaint be dismissed.

## APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our employees with discharge and closedown of our facility if they select the Union, Local Union No. 948, International Brotherhood of Electrical Workers, AFL-CIO, as their collective-bargaining representative; tell our employees that it would be futile for them to select the Union as their collective-bargaining representative because we will not sign a union contract; and attempt to promote our employees out of the bargaining unit because of the Union's organizational campaign.

WE WILL NOT implement new rules which no longer permit our employees to park our vehicles at their homes overnight and to obtain their paychecks prior to 5 p.m. on Fridays; cease our practice of readily paying for the repair and replacement of our employees' tools; lay off unit employees following a Board-conducted representation election; and discharge employees all because of the employees' activities on behalf of and in support of the Union.

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

WE WILL offer employees Presley and Cooper immediate and full reinstatement to their former jobs or in the event their former jobs no longer exist to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of their unlawful firings, with interest, as provided in the Board's decision.

WE WILL preserve and, on request make available to the Board or its agents for examination or copying all payroll records, social security payment records, timecards, personnel records and reports, as well as all other records necessary or useful in analyzing and computing the amount of backpay, as provided in the Board's decision.

WE WILL expunge from our files any reference to the disciplinary actions and firings of employees Presley and Cooper and notify them in writing that this has been done and that evidence of this unlawful disciplinary action will not be used as a basis for future personnel action against them.

WE WILL reinstate our discriminatorily withdrawn employee privileges of permitting employees to park the Employer's vans at their homes overnight; obtaining their paychecks prior to 5 p.m. on Fridays; and paying for the repair and replacement of employees' tools.

AMPERAGE ELECTRIC, INC.

<sup>21</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."