

Heritage Fire Protection, Inc. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 669, AFL-CIO. Cases 9-CA-27659, 9-CA-27707, and 9-RC-15699

June 8, 1992

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On December 26, 1991, Administrative Law Judge William F. Jacobs issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering 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 briefs and has decided to affirm the judge's rulings, findings,¹ 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, Heritage Fire Protection, Inc., Cannonsburg, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 9 shall, pursuant to the Board's Rules and Regulations, within 14 days from the date of this Decision, Order, and Direction, open and count the ballots cast by Michael Kincaid, Jeff White, Terry Osborne, and Mark Bussey, and cause to be served on the parties a revised tally of ballots. In the event that the Union received a majority of the votes cast according to the revised tally, the Regional Director shall issue a certification of representative. In the event that the Union did not receive a majority of the votes cast according to the revised tally, it is further directed that the elec-

¹ 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.

tion conducted on June 29, 1990, is set aside and that a new election be conducted in accordance with the following.

[Direction of Second Election omitted from publication.]

David L. Ness, Esq., for the General Counsel.

Fred F. Holroyd, Esq. (Holroyd & Yost), of Charleston, West Virginia, for the Respondent.

David L. Neigus (Beins, Axelrod, Osborne & Mooney), of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM F. JACOBS, Administrative Law Judge. These consolidated cases were tried before me December 3, 4, and 5, 1990,¹ in Ashland, Kentucky.

On May 8, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 669, AFL-CIO² filed the petition in Case 9-RC-15699. The National Labor Relations Board, pursuant to a stipulated Election Agreement, approved by the Regional Director, Region 9, on June 19, conducted an election on June 29, among certain employees³ of Heritage Fire Protection, Inc.⁴ The results of the election were two votes for the Union, four votes against the Union, and six ballots challenged, a number sufficient to affect the results of the election. Following the election, timely objections were filed by the Union.

On July 3, the same date it filed its objections, the Union filed the charge in Case 9-CA-27659. On July 23, it filed the charge in Case 9-CA-27707.

On August 10, the Regional Director issued a report on challenged ballots, objections to election, and recommendations to the Board in the representation case, and on August 20, he issued an order consolidating cases, consolidated complaint and notice of hearing consolidating for hearing the two unfair labor practice cases. On September 17, all three cases were consolidated for hearing.

Respondent filed a timely answer to the consolidated complaint in which it denied the commission of any unfair labor practices.

¹ Hereinafter all dates are in 1990 unless noted otherwise.

² Hereinafter called the Union.

³ The appropriate unit set forth in the agreement is:

All employees engaged in field installation of fire protection, plumbing, and piping systems, employed by the Employer at its Cannonsburg, Kentucky facility, including all laborers, helpers, installers, journeymen and apprentices, but excluding all full-time shop employees engaged in shop fabrication, office clerks, designers, estimators, janitorial employees, and all professional employees, guards and supervisors as defined in the Act.

⁴ Hereinafter called the Respondent, Employer, or Company.

The issues in these consolidated cases are as follows:

Case 9–RC–15699

The Challenges:

The eligibility of Stephen Conn, Michael Kincaid, Michael Wilks, Jeff White, Terry Osborne, and Mark Bussey.

The Objection:

The Regional Director, in his report of August 10, recommended that all the Union's objections be overruled except for Objection 6 which should be heard by the administrative law judge in the instant proceedings. In Objection 6, the Union alleges that the Employer terminated employee Mark Bussey because of his activities on behalf of the Union. The Employer denies that it engaged in any objectionable conduct and asserts that Bussey was discharged for cause. The alleged objectionable conduct described in Objection 6 is coextensive with the unfair labor practice alleged in paragraph 5(a) of the consolidated complaint and will therefore be considered below in the section of this decision dealing with the alleged unfair labor practices.

Cases 9–CA–27659 and 9–CA–27707

The substantive allegations contained in these consolidated complaints are:

- (a) On or about June 4, 1990, Respondent discharged its employee Mark Bussey.
- (b) On or about July 2, 1990, Respondent laid off its employee Duncan Smith.
- (c) On or about July 9, 1990 Respondent laid off its employee James Adams.

At the hearing, General Counsel moved to amend the complaint by adding two additional 8(a)(1) allegations. The motion to amend was granted.

The first amendment reads as follows:

Respondent, acting through Philip Hutchison, on or about May 11, 1990 at its Cannonsburg, Kentucky facility, forcibly interrogated an employee regarding his union membership, activities and sympathies.

The second amendment reads as follows:

Respondent, acting through Philip Hutchison, during early June, 1990, at its Cannonsburg, Kentucky facility, threatened employees with loss of employment if employees voted for the Union.

The above-described challenges and the cited objection and allegations together with Respondent's denials of the allegations frame the issues. Representatives of all parties were present and participated in the hearing and filed briefs.

Based on the entire record, including my observation of the demeanor of the witnesses and after giving due consideration to the briefs, I make the following

FINDINGS OF FACT⁵

Background

Respondent is a corporation engaged in the business of fabricating, repairing, installing, and inspecting sprinkler systems. Its principal officers, Claude Hutchison,⁶ Philip Hutchison,⁷ and Kevin Cleveland, had been employees of Patton Construction Company's sprinkler department, but in February 1989, left the employ of that company to found Heritage Fire Protection, Inc. Several of Patton's employees transferred over to Heritage at its inception and began working for Respondent, performing the same work that they had performed previously for Patton. Among those brought over from Patton were Mark Bussey whose installation ability is admittedly excellent, David Haymond, and Bruce Livesay. Philip, Respondent's vice president and treasurer, informed these three field employees that they would be bosses with the new company and that the foremanship would be rotated among them, as it had been with Patton. One day, on one job, one of them would be boss over the other two. On the next job, one of the others would be in charge. Philip added however, that if Jeff White were on the job, he would always be the boss because he had the most experience.

Initially, while the Company was still small, the jobs operated as Philip had said they would. Haymond and Bussey usually worked together and rotated the foremanship while Livesay and White worked together with White in charge. Later, when the Company expanded, Haymond and Bussey worked on separate jobs, each in charge of his own job and helper. If Haymond or Bussey were transferred to the other's job, whoever was there first remained in charge.

Though these foremen were in charge of their own jobs, each was expected to work with his tools. On a normal day they would work 10 or 12 hours wrenching and installing pipe and sprinkler heads. The foremen and their helpers, on most jobs, did an equal amount of manual labor. In most instances, the crews consisted of the foreman and helper. Sometimes, however, a foreman would have two or three in his crew.

As the Company obtained additional contracts, it expanded its work force by hiring new employees, some experienced, others with little or no experience. In April 1989 it hired Duncan Smith and put him to work in the shop in Cannonsburg, where new hires without experience were initially employed, in order to give them hands-on experience before they were sent out into the field. Smith worked in the shop for 3 or 4 weeks learning about the pipes, fittings, and types of hangers; threading and fabricating pipe, preparing it for the field. This type of work is not considered skilled. After completing this apprenticeship program, Smith was sent out with Bussey to work in the field.

In the summer of 1989, Respondent hired James Adams. Adams had been engaged in pipefitting work since 1969. He had installed sprinklers before coming to work for Heritage and had worked as a subcontractor for Heritage before going on its payroll. Philip was aware of Adams' experience and

⁵The complaint and answer, as amended at the hearing, alleges and admits that the Board has jurisdiction herein and that the Union is a labor organization within the meaning of the Act.

⁶Hereafter called Claude.

⁷Hereafter called Philip.

skill in installing sprinkler systems, so did not require him to work in the shop before sending him out in the field. Adams had an Ohio license to install and inspect sprinkler systems. This fact made him additionally valuable to Respondent. Respondent hired Greg Sigler in July 1989. He, like Duncan Smith, first worked a couple of weeks in the shop before being sent out to work at the Ashland Mall project, one of Respondent's biggest jobs. Similarly, Respondent subsequently placed newly hired employees Warren St. Clair, Eric Miller, Frank White, and Tice Shelton in the shop for training before they were sent out on field projects.

On December 11, Respondent obtained a contract to install sprinkler systems in the J.C. Penney, Elder Beerman, and Sears stores and the Hoyts Cinema in the Morgantown, West Virginia Mall as well as in parts of the mall itself. This contract represented the largest contract, to date, that Respondent had ever obtained. Bussey was unanimously chosen by Philip, Claude, and Cleveland to be the foreman over the entire project.

Philip advised Bussey, in January, that he had been chosen to run the Morgantown job, and that it had been between Haymond and him. Bussey told Philip that he appreciated and accepted the opportunity, that he had never run a project that size, with that many men to boss before, and this was true.

The Question of Bussey's Supervisory Status

Bussey credibly testified that his duties at Morgantown primarily involved the manual installation of sprinkler systems. Virtually his entire workday, he worked with his tools along with the other installers and helpers. However, Philip had advised him that he was also to check with the men, from time to time to see if they were having any problems with their installation work which they could not solve themselves; such mechanical problems as ductwork or steel beams interfering with the proper installation of the piping in accordance with the blueprints. This he did. If there were problems which were minor in nature, the workmen would usually make the changes and tell Bussey about it later. Occasionally, a workman with a problem would bring it to Bussey's attention, in which case, he would tell him what to do. If the problems were major, Bussey would contact the office and describe the problem before proceeding. A major rerouting of piping would have to be cleared through higher management.

Another one of Bussey's duties was to attend the regular Tuesday meetings called by the general contractor's superintendent wherein the latter would discuss with the foremen of the various subcontractors, including Bussey, rules, regulations or problems, in connection with the project. The object of these meetings was to coordinate the efforts of the different contractors and crafts, and to schedule their work so as to progress in the most efficient manner toward the completion of the project.

Sometimes these Tuesday meetings would result in the superintendent advising Bussey of changes in the scheduling. He might request Respondent to start work early at a new location, Sears or Elder Beerman; to bring more men on the job in order to expedite construction; to change the installation schedule; or to reroute sprinkler lines to accommodate the installation problems of other subcontractors. These re-

quests, unless of a minor character, would be forwarded by Bussey to Philip for decision.

Claude testified that, in its early stages, the Morgantown project went well and he felt justified in his faith in Bussey's ability to run the job. Bussey, before the project began, and during its first few months, showed a good deal of interest in the plans and in how the job progressed. There were no problems. What few there were, Bussey solved himself, or in consultation with Claude, at the end of the workweek, when he returned to the shop from the project. At these weekend meetings, Bussey would show Claude, on the blueprints, what progress had been made on the job and advise him what materials would be needed for the job, the following week.

The project, under the contract, required that Respondent have both an offsite and an onsite representative. Philip was the offsite representative and was responsible for the design and engineering work on the job, for invoicing and for the general progress of the job. Rentenbach, the general contractor, would contact Philip if any problems arose in these areas.

Bussey was Respondent's onsite representative and was present at the jobsite every workday. He was in charge of the entire project and of coordinating the work of the other foremen on the job. He was to instruct and assign work to employees on the job, to solve any problems which arose and which were brought to his attention by the general contractor, and to report on such problems to Philip. Bussey served as the main conduit between the employees and the general contractor on one hand and Respondent's upper management on the other. Although the contract gave authority to both the onsite and the offsite representatives to establish pricing for extra work, in practice, only Philip, not Bussey, did this.

Philip, Cleveland, and other subcontractor and tenant representatives visited the jobsite for 2 days early each month to discuss with the general contractor the progress of the job and to work on pricing so that invoices could be sent out. Meetings with the representative of the general contractor would take place in each of the areas where Respondent had a job in progress. Each meeting would last an hour or so and the entire first day would thus be spent until 5 p.m. On the evening of the first day and after additional meetings with the general contractor on the second day, Philip would visit with Bussey and Respondent's other employees for 2 or 3 hours and look over the work in progress. Bussey would point out problems and Philip or Cleveland would, perhaps, make suggestions. Bussey was not invited to attend the meetings held earlier in the day with the general contractor's representative.

On his visits to the site, Philip inspected the work in progress but testified that he did not concern himself with the particulars of the job. He took no measurements but depended on Bussey and his expertise to get the system in place without his intervention. Bussey was responsible for the proper installation of not only the job that he was personally working on, but all of Respondent's jobs at Morgantown. He was also the person who had to report to Philip any problems which might come to his attention at Morgantown.

In addition to the monthly and Tuesday meetings described above, Bussey would meet with Philip, Claude, and

Jeff White each Friday to discuss the various jobs and the progress made that week on each. Bussey would report what piping had been installed, what changes had been required by the superintendent and what piping still needed to be installed. Based on Bussey's Friday report and those of leadmen on other jobs, Philip and the other above-named members of management would hold regular Monday morning meetings with the employees at which Philip would make assignments of personnel to particular jobs. All field workers and shop workers attended these meetings and it was then that they learned where they would be working the forthcoming week. If any employee expected to be absent for any reason during the week, he was expected to advise Philip at this time.

Although Bussey testified that he considered himself a boss on the Morgantown jobsite and although he was referred to by management and other employees as supervisor or even as superintendent, this, of course, does not conclusively determine his supervisory status under the Act.⁸ On an average workday, Bussey would be busy, personally installing sprinkler piping. At different times during the day, however, he would go to where the other men were working to see if they had any problems installing the piping. If he discovered that there were such problems as pipes or hangers missing, or the wrong size, he would so advise Philip or Claude by telephone. This type of problem and problems brought to his attention by the general contractor would necessitate his calling the office, sometimes once or twice per day, sometimes only twice in a week, where higher management would decide what to do and issue instructions to Bussey.

As to Bussey's actual authority over other employees on the job, Bussey testified that he had never hired nor fired⁹ employees while at Morgantown, nor interviewed prospective employees. He did sit in on one occasion when Philip interviewed an applicant and asked a few questions himself. However, Philip made the decision on whether to hire the applicant.

Similarly, Bussey credibly testified that he could not transfer employees from one jobsite to another, for example from Morgantown to Lancaster. He could, however, reassign employees from one area to another, at the same jobsite, if additional help were needed or if, for one reason or another, they could not continue working where they were. Sometimes, under these circumstances, Bussey would first contact Philip before making the reassignment. At other times, in the case of smaller jobs, he would not bother to do so. These reassignments did not result in any change in the type of work being performed or in the employee's wage rate.

Bussey credibly testified that he did not schedule employees' vacations, that Philip did this. Similarly, he testified that, at times, employees would ask him for time off. On these occasions, Bussey would ask Philip if it was all right or would tell the employee making the request to talk to Philip. Bussey stated that he had no authority to independently grant time off to employees. On one occasion, an em-

ployee got sick on the job. He simply left the job without seeking the permission of Bussey or anyone else.

Philip determined the number of hours the employees were to work each day on the Morgantown job. Usually, he demanded that the employees work a 12-hour day or as long a day as they could. Bussey had no authority to change these requirements, but circumstances sometimes required variances. All the crew members worked the same number of hours per day and days per week including Bussey. All, including Bussey, received overtime for hours worked over 12 plus traveltime. Bussey was paid an hourly rate of \$8.50 and he and the other employees kept their own timecards. Employee Jim Adams who worked on the Morgantown job installing sprinklers, at the same time as Bussey, received \$8.75 per hour.

At some point the employees determined that they would prefer to work a 4-day week with additional hours per day. Although Bussey had heard of their preference, the employees did not address their request to him. Rather, they went directly to Philip who granted their request and advised Bussey later, without consultation with him beforehand.

According to the testimony of other employees working at Morgantown, Bussey would tell them in what areas they were to work. If they, through inexperience, were unable to perform an assigned task, they would ask one of the more experienced personnel, chiefly Bussey, to help with their problems. When installer helper Warren St. Clair was assigned by Philip to work at Morgantown, Philip told him to do whatever Bussey told him to do.

Philip emphasized, in his testimony, that there was a difference between jobs where there was a single foreman and the Morgantown site, the largest in terms of employees, where there were several jobs. In most jobs there was just the leadman and his helper whereas at Morgantown, Bussey was over several leadmen and their helpers. In the former type of situation, according to Philip, the leadman works with his tools most of the time whereas in the latter situation, it was Bussey's primary function to oversee the job, and solve problems for the foremen and their helpers.

Although, as noted above, Philip testified that the Morgantown job differed from other jobs because it was larger, he also testified that initially only J.C. Penney's was being worked on, the other jobs not yet ready. Therefore, only Bussey and two or three other employees were required. Thus, during the early period, the Morgantown job was no different than any other job and Bussey's duties were similar to that of other foremen who were expected to work with their tools.

By the time the mall itself was ready to be worked on, Penney's was 75 percent roughed in, and it was a simple matter to transfer some of Respondent's employees there from Penney's. Bussey and his helper moved into the mall at this point leaving the others to finish Penney's. Nevertheless, the time came that Bussey felt more men were needed and asked for them at the regular Monday morning meetings. The general contractor's representative also suggested additional men. Philip initially ignored these requests in order to save out-of-town expenses since he was obtaining good reports on progress at the jobsite from the general contractor. Most of the time four employees including Bussey were sufficient to get the job done, although occasionally there were as many as six during the initial stages. Philip hoped to get

⁸ *Capital Transit Co.*, 114 NLRB 617, 618-619 (1955).

⁹ Bussey testified that on one occasion he asked Philip to fire two employees who were not doing their jobs right. They had been working in the shop. Philip refused to follow Bussey's suggestion, stating that he did not think Bussey's reasons for firing them were good enough.

more production out of the men already there rather than hire additional employees.

The pipe used at the Morgantown jobsite was cut and threaded at the Cannonsburg shop. Occasionally, there were mistakes made and pipe, too short for its purpose, was sent out. This, according to Philip, was not unusual. It would happen, from time to time, on many jobs and no one was disciplined for these occasional mistakes. Responsible employees were, however, reprimanded and corrected.

Philip testified that Bussey, as superintendent on the job, had the additional duties of completing daily reports and turning them over to the general contractor's representative. He also attended weekly safety meetings and was responsible for cleanup. Bussey also had to police the job to make certain that the employees all wore hard hats and followed OSHA regulations. He recorded the time the men worked and the lines put in. He listed material needed for the job to progress. All of these duties were listed in a memo addressed to Bussey and signed by Hutchison at the beginning of the project.

Philip testified that in his opinion, as the job progressed, Bussey was spending too much time working with his tools, hanging pipe and not devoting enough time to supervision. Although this allegedly was Philip's opinion, he never spoke to Bussey about it. He explained that it was Bussey's choice to make, as to how he would spend his workday.

Before being assigned to run the Morgantown job, Bussey was usually in charge of jobs where he had one or two helpers where the three, as a crew, would install a sprinkler system. Both Bussey and the helpers would work with hand tools, all doing the same thing, for the same amount of time.

Although Bussey was at Morgantown performing the tasks described above for most of the first 6 months of 1990, Respondent, on two occasions during this period, transferred him to a jobsite in New Philadelphia. While working at New Philadelphia, Bussey worked as a rank-and-file installer. Dave Haymond was in charge at New Philadelphia and bore responsibilities for that job similar to those borne by Bussey when he was employed at Morgantown. Bussey's wage rate was not affected by his transfers between Morgantown and New Philadelphia.

From the above description of Bussey's duties and authority, I conclude that he was both a leadman or working foreman and a conduit between Respondent's management and the general contractor. He was not, however, a supervisor within the meaning of the Act. Bussey should not be denied his right to representation or the protection of the Act based on the minimal authority which he possessed to routinely assign tasks to fellow employees who, on the next job, might very well have the same minimal authority over him.¹⁰

Union Activity at Morgantown

In mid-April, at the Morgantown jobsite, according to Bussey, three employees, Tice Shelton,¹¹ Warren St. Clair, and Greg Sigler began to discuss the possibility of obtaining

¹⁰ *John Cuneo of Oklahoma*, 238 NLRB 1438, 1439 (1978), enf'd. 106 LRRM 3077 (10th Cir. 1980).

¹¹ Shelton denied that he was initially involved in organizing and testified that Bussey was responsible for contacting the Union. It is clear from Shelton's testimony that he was not in favor of union representation.

union representation. They expressed the hope of obtaining better pay for fewer hours through the Union. When they discussed these matters before Bussey, he told them that all they had to do to get union representation was to vote.

On Friday, April 20, when Bussey returned to the shop in Cannonsburg, he told Duncan Smith that the men were interested in talking to Union Representative Singleton about representation. Smith declared that he too would be interested in talking to Singleton.

On Monday, April 23, Bussey contacted Singleton and a meeting was scheduled for April 24. Bussey advised Terry Osborne, James Adams, and other employees about the meeting. Four employees attended the meeting including Bussey and Adams, both of whom signed union cards. The record does not indicate whether the other employees present at this meeting signed cards but at some time or other Shelton also signed a card. Smith later contacted Singleton himself, met with him, and signed a union card on April 28.

Between the signing of the cards in late April and the filing of the petition on May 8, the employees at Morgantown discussed and debated the merits, or lack thereof, of unionization. Bussey and Adams would argue in favor of unionization while Shelton would argue against it. Shelton advised them that he could understand their position and wanted them to understand his. He argued that he had only been working for the Company 4 months, that when he got the job, he and Philip had sat down and discussed how much he would be making. He said that Philip had not done him any wrong and he did not want to stab him in the back. Shelton testified that although he had attended union meetings and had signed a card, he had done so just to "go along with the guys," that he was worried about his job because he had a family to support. He stated that he was caught in a situation where he really did not know what to do.

On May 8, the Union filed a petition to represent Respondent's field employees. Respondent received a copy of the petition on May 9, the following day. This was the first inking that Respondent had that its employees had been engaged in union activity.

On the evening of May 9, Philip was introduced to a labor attorney who represents employers. The labor attorney gave Philip a quick education as to precisely what could and could not be done by an employer during a union organizing campaign. He learned that evening, he testified, that he, Claude and Kevin Cleveland were "to keep their mouths shut; were not to say anything about union, nonunion or anything at that point to the employees who they had working." Respondent retained this counsel throughout the instant proceedings and attempted to follow his directions meticulously. Doing so, however, made it extremely difficult for management to determine which employees were responsible for the union organizational activity.

On Thursday, May 10, Philip called Bussey, apparently for the purpose of determining who was involved in the union organizing campaign. The content of the discussion between Philip and Bussey is not all that well covered by record testimony but as a result thereof, Bussey told the Morgantown employees, "When you all go in, you got to meet with Phil. He's mad. He's going to tear you all's ass."

That evening was, of course, the end of the 4-day workweek and the day after Respondent received notice that a petition had been filed. It was also the day after management

had been warned about mentioning the Union to the employees.

When the employees arrived at the shop, Philip said that he wanted to speak to them individually. The employees, however, insisted on sticking together, and all entered Philip's office together. Present facing Philip were Bussey, Adams, St. Clair, Shelton, and Sigler. St. Clair testified that Philip acted very upset with him, Sigler, and Shelton. When St. Clair asked Philip what the problem was, Philip would not immediately reply. But then Philip stated that Bussey had informed him that Sigler, Shelton, and St. Clair had been sitting up there, at the Morgantown project, arguing about a raise. Philip, following advice of counsel, did not mention the Union, but it was perfectly clear to everyone that Philip was talking about the employees' union activity. St. Clair denied the accusation and, in turn, accused Bussey of lying. He stated that Bussey had a problem, that he had something against the three named employees. St. Clair, in his testimony, freely described Bussey's alleged problem. He stated that Bussey was trying to get him fired because he, St. Clair, was against the Union and, he, Bussey had, in fact, told him so. St. Clair, however, specifically denied that he told Philip, that evening, during the meeting, about Bussey trying to get him fired because he was not in favor of the Union.

Shelton's testimony was similar to that of St. Clair. According to Shelton, sometime after he and Bussey had their disagreement over the Union, Bussey tried to get him, St. Clair and Sigler fired. He testified that Bussey called Philip and told him that these three employees were sitting up at the jobsite hollering for a raise when, in fact, this was not so. Bussey insinuated, according to Shelton, that it was Shelton and St. Clair that had gotten him to go to the Union when, in fact, it was Bussey's own idea to contact the Union. Despite his belief that Bussey was trying to get him and St. Clair fired, Shelton denied that he reported any of the employees' union activities to Philip.

I do not credit St. Clair's and Shelton's denial that they reported the employees' union activity to Philip. Rather, I believe that when Philip called Bussey, during working hours on Thursday, May 10, he told Bussey that a petition had been filed and probably asked him what he knew about it. Bussey most likely replied that Shelton, St. Clair, and Sigler had been sitting up at the jobsite hollering for a raise, thus intimating that they had been responsible for contacting the Union. Philip then summoned the three to the meeting not, of course, to reprimand them for talking about a raise, but to find out who was involved in the activity that gave rise to the filing of the petition.

After hearing, at the meeting, that Bussey was blaming them for initiating the union activity and believing that he was trying to get them fired, one or both of them must have informed Philip that it was Bussey, not they, who had initiated the union organizing effort. I am equally certain that they also identified to Philip which of Respondent's employees were prounion and which were antiunion. The events which followed during the next few days and weeks would support this conclusion because Respondent took specific action against each of the cardsigners.

The meeting of Thursday evening, May 10, was not limited to the oblique references to the union activity of the employees at Morgantown. In addition, Philip leveled his first criticism toward Bussey and the other Morgantown employ-

ees. He told those present that they had not been producing and that Bussey had not been doing his job as a supervisor. He stated that he was not satisfied with the employees' production on the Elder Beerman job or in the mall. Bussey defended himself and the other employees by pointing out that Philip had been at the jobsite the week before and was aware that the problems involved were not the fault of his employees, but were the direct result of problems created by other subcontractors. Though Philip admitted knowing this to be the case, he still was not satisfied and announced that henceforth, the men would have to file daily reports indicating what they had done, where they had worked and how many hours they had spent on each job. He ordered Bussey to call in every evening with this information. Subsequently, Bussey and the other employees complied with Philip's order, beginning May 14, the next workday. Each employee filled out his own report and continued to do so through May 17 when the procedure was abandoned.

I conclude that the sudden requirement that employees file daily reports was in direct response to and in retaliation for their union activity.¹² This conclusion is based on the fact that the requirement was instituted the day after Respondent received notification of its employees' union activity through receipt of the petition and the fact that Respondent had previously given no indication that it was dissatisfied with the work of the Morgantown employees though Philip had been visiting the site continuously since January. I find that the purpose of the requirement was both to harass the employees suspected of having engaged in union activity and to establish a record, perhaps on which to take later action against them.

On Friday, May 11, Frank White called Respondent's office and spoke with Philip. White had previously filed a job application and had called several times seeking employment. Philip exclaimed "Good timing. Can you come in today?" White replied that he could, and did, in fact, report to Philip's office.

During his job interview, Philip asked White how he felt about the Union.¹³ White replied that he did not know because he did not know anything about unions. Philip then commented, "As far as I'm concerned, this company will not be union." Philip advised White that he would be hired and should report to work the following day. He told White that he would work in the shop until he, Philip, felt he was qualified to move to the field. White reported the following day as instructed and worked in the shop.

In the context of the circumstances of this case, and in light of Philip's comment, "This company will not be union," I find that Philip's interrogation of White was in violation of the Act.¹⁴

Like all other inexperienced new hires before him, Frank White was initially put to work in the shop where he worked for 2 weeks cutting and threading pipe and gaining experience under the guidance of Jeff White. Frank was thereafter transferred to the field where he continued to work until Oc-

¹² The complaint contains no allegation of violation in connection with this matter. I therefore find none.

¹³ Philip denied that he asked this question. This denial is not credited.

¹⁴ *Gilberton Coal Co.*, 291 NLRB 344 (1988), *enfd.* 888 F.2d 1381 (3d Cir. 1989).

tober when he was laid off. He was on the payroll and in the unit on the date of the election.

Considering the timing of his hire, immediately after the petition was filed, his interrogation by Philip with the accompanying comment, it is quite possible to make the case that Frank White was hired to pad the unit. The complaint contains no such allegation, however, and I find no violation.

In 1989, Respondent had employed an employee named Jeff White. White had an on-the-job accident that year and was receiving workmen's compensation from June until December. In December, Philip offered White the opportunity to return to work in the office performing light duty. White's doctor approved his return to work on that basis and he performed light duty in the shop beginning in January. Eventually, he was put in charge of fabrication in the shop.

On May 17 Philip sent or handed White a letter stating that, effective 7 a.m., May 21, he was instructed to return to his position in the field at Morgantown.¹⁵ Since the unit description contained in the petition included "all employees engaged in field installation" and excluded "all full-time shop employees," White's transfer from the shop to the field was a transfer into the unit from outside.

While Jeff White was employed in the shops on light duty, he did very little manual labor. Rather, he spent most of the time handing down orders, taking measurements from blueprints and placing them on fab sheets. As of the date of the election he was working in Morgantown, on light duty. According to Philip, he was "just kind of helping out" whoever needed it, trimming valves, testing systems "this type of thing." Eventually, White recovered and since then has been performing full-time work in the field.

It is clear that Jeff White was never involved in any union activity. On the contrary, he had very special reasons to be loyal to management. When healthy, before his accident, he was placed in charge of any job on which he was foreman, and that meant over any other foreman, including Bussey and Haymond. When he was injured, he was befriended by Philip by letting him work on light duty in the shop. Since White was unable to perform the duties demanded of a full-time installer, at the time of his transfer back into the field at Morgantown, on May 21, it is clear that he was not sent there to increase production. I conclude that White was transferred to Morgantown to pad the vote in Respondent's favor. However, since the complaint does not contain any allegation concerning White's transfer, I find no violation. The discussion herein concerning my findings as to Respondent's motives in transferring White is to indicate the extent to which Respondent was willing to go to keep the Union out and to support motivational findings with regard to other allegations which are, in fact, included in the complaint.

On May 17, Philip also sent a letter to Jim Adams assigning him to the fabrication shop as a "permanent shop employee" effective 7 a.m., Monday, May 21. This transfer was the only instance of its kind in the history of the company wherein a field installation employee was transferred to the shop as a permanent shop employee. The transfer resulted in the removal from the unit of a cardsigning union activist.

¹⁵ Though other employees had been transferred in the past from the shop to the field, no such documentation ever before accompanied the transfer.

Adams received the transfer letter along with his check on May 17. He had received no advance warning of the forthcoming transfer and no explanation as to the reason for the transfer. When Adams asked Philip why he was being transferred, Philip replied that he had his reasons. Tice Shelton, who was present during this conversation, asked Philip why he, Shelton, was not being transferred to the shop since he wanted to be in the shop. Philip repeated that he had his reasons. I conclude that Shelton was kept in the field rather than Adams because Philip was aware that he was not in favor of the Union.

Warren St. Clair credibly testified that when he first began working for Respondent in January, he was put in the shop. Philip explained to him, at the time, that he was being put in the shop to train him for the field. In the shop he would gain experience cutting and threading pipe before being sent into the field. After 5 weeks of such training, St. Clair was sent to Morgantown.

In light of Respondent's history of training new and inexperienced employees in the shop and sending them later into the field, and never having sent an experienced field employee to work permanently in the shop, I conclude that the aberrant transfer of Adams from the field to the shop was a transparent attempt, on the part of Respondent, to undermine the Union's strength within the unit. This conclusion, of course, presupposes company knowledge of Adams' union activity. There being no allegation in the complaint concerning this matter, I find no violation but include discussion of it to indicate the existence of an antiunion pattern of conduct.

On Friday, May 18, Philip informed Bussey that Claude and Jeff White were going to come onto the Morgantown job to work. Bussey greeted this news with enthusiasm and suggested that Claude or White be made boss over the job because of their experience. Philip, however, rejected this idea stating that he wanted "Things to stay the same," that he wanted Bussey "to be the boss."

Although Claude testified that he and White had been sent to Morgantown to determine the reasons why the J.C. Penney job was behind, I conclude that they were sent there to familiarize themselves with the job before removing Bussey because of his involvement with the Union. Indeed, if Claude were interested in why the job was behind, he would have told Bussey so and would have asked him reasons for the delay. He did neither. Instead, he permitted Bussey to continue operating just as he had, without interference. Moreover, the J.C. Penny job, though 2 weeks late, was virtually completed, and all the others were on time. When White arrived on the Morgantown job on Sunday, May 20, he noted to Bussey his concern about coming on the job, in the middle of it, taking over without knowing what was going on. Bussey had not been told in advance that White was going to take over the Morgantown job. On the contrary, as noted, Philip had told him the previous Friday that he wanted Bussey to continue to be the boss. White, apparently had unintentionally flashed Respondent's hand.

Despite contradictory reports from Philip and Jeff White, Bussey remained in charge of the project through Wednesday, May 23. That very day White reiterated to Bussey that Bussey would continue to be the boss and that White was only there to offer advice. At 5 p.m. that evening, however, Claude informed Bussey that Philip wanted him to come into the office the following morning, that he had another job in

Lancaster that he wanted to assign to him. No other explanation for the transfer was offered.

On Thursday, May 24, Bussey reported to the shop as ordered. Philip explained to him that he had a job in Lancaster and a couple of others that he wanted him to take care of. Once again, he said nothing to disparage Bussey's work at Morgantown. Bussey loaded the truck and went to the Lancaster job where he worked with one employee or another installing sprinkler piping.

I find that Respondent removed Bussey from the Morgantown job to separate him from the other union activists and in preparation for his ultimate termination. I find that this was part of an overall general plan to undermine the Union's strength in preparation for the forthcoming election.

Meanwhile, Adams reported to work at the shop on May 21 as instructed. This was the first time he had worked in the shop. Unlike most newly hired employees who initially worked in the shop to obtain experience before being sent out into the field, Adams was sent directly into the field when he was first hired because of his experience. Adams continued to work in the shop after May 21 with less experienced employees for the rest of his tenure with Respondent. Newly hired employees, with very little experience, such as Frank White were sent out to work in the field, White to Morgantown where he worked for 3 months, while Adams remained in the shop. No explanation was given to Adams as to why he was subjected to this treatment.¹⁶ The immediate effect, however, was to remove one union adherent from the unit.

As of May 29 Bussey was still employed at Lancaster. As of June 1 he was employed at a smaller mall along with Frank White. At this time, according to Philip, it was planned that he, Claude and Kevin Cleveland would meet on the weekend to determine what was going to be done with Bussey. They did so and, according to Philip, after evaluating the circumstances, decided to confront Bussey and ask him about the "problems" on the Morgantown job.

According to Philip, about June 1, he decided that Respondent could use some more help at Morgantown. Not experienced installers, but someone to carry a ladder or go for parts. He asked employee Todd Kincaid if he knew of anyone who might be interested in a job. That day and the next, at Philip's behest, Kincaid called Andy Conn¹⁷ and Mike Wilks. He first called Conn and told him that Respondent needed some people to help out during the summer and that if he and Wilks wanted jobs, they could have them. Conn then contacted Wilks who expressed interest. Kincaid called

Wilks, himself, Saturday morning, June 2, and invited him to meet with Philip for an interview.

Later that day, Conn and Wilks drove to the Cannonsburg shop and spoke with Philip about the job. Philip told them what they would be doing and how much they would be paid. Both filled out applications for employment.¹⁸ During the interview, Philip advised the two applicants that a union representation election was coming up in about 30 days, that they would be voting in it and that it would be to their advantage to vote no. He explained that if the Union was voted in, Conn and Wilks would be replaced by better qualified people that were out of work but already in a union.¹⁹ Philip was aware when he made this statement that neither Conn nor Wilks had ever had experience in the fire protection industry. Therefore, his threat to replace them was clearly violative of Section 8(a)(1) of the Act. He hired both applicants that day. Both Conn and Wilks were paid for the hour spent being interviewed and filling out the applications.

Philip testified that he hired Wilks and Conn to work anywhere they were needed, not just at Morgantown, although consideration was given to them working there. He admitted, however, that he hired them on June 2 and paid them for that date because June 3 was the eligibility cutoff date and he wanted them to be able to vote in the union election.

As of June 2, Philip intended to send Wilks and Conn to work at Morgantown the following Monday, June 4. He later changed his plan, however, and had Wilks drive a truck to Morgantown and to New Philadelphia. They did no installation work that day. Wilks likewise drove on June 5 and 6.

Later, during the week of June 4, however, both Conn and Wilks were assigned as helpers on the Morgantown job. They carried ladders and helped the installers lift pipe. They threaded pipe and cut hangers; the kind of work previously done by new employees in the shop. They worked on the lift, holding, twisting, and putting couplings on pipes. They did not, however, install sprinkler systems on their own. About August, Wilks was transferred to the shop.

During the week of June 4, along with Wilks and Conn, employees Smith, Shelton, St. Clair, Kincaid, Frank White, Jeff White, and Sigler were working at Morgantown. This was the largest complement of employees ever assigned to that jobsite; more than had worked there when Bussey had been in charge. In fact, the complement doubled.

About 7:30 a.m. June 4, Philip, Claude, and Cleveland called Bussey into the office in Cannonsburg.²⁰ Claude told Mark that he was going to have to let him go. There had been no warning prior to that time that discharge was being contemplated. Bussey asked why he was being fired. Claude said that on the Morgantown job the piping was all wrong in J.C. Penney's, the goosenecks were turned the wrong way in Elder Beerman's and production was low. Claude said that Bussey should have been supervising the men more to see that they were putting the pipe in right.

Bussey defended himself. He said that there were 12 studmen, carpenters hanging the studs, working very fast

¹⁶ Philip testified that Adams was transferred to the shop at this time because he wanted to work a 4-day week rather than a 5-day week at Morgantown. However, several employees working at Morgantown, at this time, were working a 4-day week, including Tice Shelton who credibly testified that he did so with Philip's blessing. I therefore reject Philip's explanation as to why he transferred Adams as patently incredible. Similarly rejected is Philip's explanation that Adams was transferred to the shop to replace an employee who had just quit. Historically, new employees were trained in the shop and sent out to the field after gaining experience. In Adams' case, Respondent transferred the more experienced Adams to the shop, then shortly afterwards replaced him in the field with newly hired employees with no experience—clearly an aberration.

¹⁷ Also known as Stephen Conn.

¹⁸ Wilks completed a second section of his application on June 4 when he actually reported for work.

¹⁹ Philip's version of this conversation was entirely different from that of Wilks. Where the two versions differ, I credit that of Wilks.

²⁰ The record contains contradictory testimony concerning what was said at this meeting. Where Philip's and Claude's testimony conflicts with Bussey's, that of the latter is credited.

while he was working alone trying to keep pace. Claude said that Bussey should have checked each and every line against the blueprint. Bussey repeated that he did not have time. When Claude said that Bussey should have asked for more men, Bussey truthfully stated that he had asked Philip for additional help at their Monday meetings. When Philip acknowledged this as fact, Claude then stated that Bussey should have requested additional supervisory help, either from himself or from Jeff White. He said that it was Bussey's responsibility to see that the job went in right. Bussey, thus put on the defensive, said that he had told Philip back in January that he had never worked a job that big, with that many men, and Philip had assured him that he could do the job. Claude acknowledged, in agreement, that he thought that Bussey was capable of doing the job.

Bussey suggested that he be put on a smaller job since he had always done very well on such jobs and Respondent had never had any problems with him. Although both Philip and Claude agreed that they had had no problems with Bussey, Claude rejected Bussey's suggestion stating, "No, I've got my mind made up."

Bussey then suggested that they give him 2 more weeks to prove himself. Claude again refused, repeating, "No, I have my mind made up." Bussey then asked the three bosses to talk it over again among themselves, give him another chance and "maybe put him on smaller jobs." This they agreed to do, then retired into another office to discuss the matter further.

After 30 to 45 minutes the three again met with Bussey. Claude reiterated, "Mark, I still have my mind made up." He then added, "But if there's some reason—if you could explain what was wrong, what the problem. . . ." In my opinion, Claude was clearly probing for certain information without being direct with his questions; he and the others wanted to know about Bussey's involvement with the Union. They wanted an admission and an apology but were afraid to use the dreaded "U____ word."²¹ The Union was never mentioned, as such.

This approach went over Bussey's head. He did not understand what Claude was driving at. He again explained that he was trying to get water on the J.C. Penney job and why he had to leave piping off on the Elder Beerman job.

Bussey's explanation did not, of course, answer the question that management was posing. Claude tried again. He repeated that the bosses had their minds made up, that they were going to have to let him go. But then he added that if Bussey could explain to them why the men's attitude had changed in the last two weeks . . . they could maybe make a change in their decision. Claude was, of course, referring to the union activity which had occurred over the previous several weeks and the dichotomy which had arisen and divided the employees into pro and antiunion factions.

It is not certain from the record whether Bussey still did not know what Claude was asking about, as he testified, or whether he was just being coy. In any event, he did not mention the Union or the attitude of the employees. He once again described the mechanical problems on the job and the reasons for them. He also pointed out, with regard to the

²¹ As noted supra, Philip testified that he had been told by his attorney on May 9, that he should not say anything to his employees about the Union.

charge of low production, that whenever Philip or Kevin Cleveland came on the job, around the first of each month, they were always satisfied with production and said that Bussey and the men were doing well. Philip agreed, but Claude noted that they never noticed that the pipe had been installed wrong because they never checked the installation against the blueprints.

The meeting ended about 10 a.m. with Bussey discharged, the only employee ever discharged by Respondent, with management inviting Bussey to come back, in a week or two, to "explain the problem." Philip and Claude assured Bussey that if he wanted to think about it at home and come back and explain the situation, whatever it may be, that they would listen, and that his explanation would be the basis for whether he would be allowed to work and for whether they would reconsider their decision.

On June 6, 2 days after his discharge, Bussey visited Philip and Kevin Cleveland in Philip's office. They again discussed the J.C. Penney and Elder Beerman jobs. Bussey then asked Philip if the Union had anything to do with his discharge but Philip denied that this was the case. When Bussey asked for his job back, Philip said that he would first have to talk to Claude, then would get back to Bussey. Bussey was not contacted thereafter.

It was also on June 6 or earlier that the parties had agreed on a Stipulated Election Agreement which the Union executed on that date. It provided for a unit consisting of all field installation employees employed during the payroll period ending June 3. If Bussey were reemployed, he would have been eligible to vote. He was not reemployed.

Philip was examined, during the hearing, as to why Respondent did not keep Bussey on as a rank-and-file employee since he was admittedly an excellent mechanic, and the only thing that was allegedly wrong with his work was his failure to adequately provide assistance to the other workmen on the job. Philip replied that it simply would not work out to have Bussey work for someone who used to work for him.

I reject Philip's explanation as patently absurd because historically Respondent, since its inception, had followed just such a practice. Haymond, Bussey, and the other foremen worked for each other and changed roles with one another everytime they transferred.

I find that Mark Bussey was the leading union activist among Respondent's employees, that Respondent learned about his union activities and fired him because of them and for no other reason. Respondent thus violated Section 8(a)(3) and (1) of the Act.²²

At the regular Monday morning meeting on June 11, Duncan Smith, a union cardsigner was advised that he was being transferred from the Morgantown job to the shop, effective immediately. Philip testified that the reason Smith was transferred was that he had knocked an 18-inch hole in a wall on the Morgantown job to put a 4-inch pipe through. According to Philip, on discovery, he immediately told Claude about it because he was disturbed. He did not, however, discuss the matter with Smith at the time.

At the June 11 meeting, Philip made the statement that he did not want employees knocking big holes through the walls, directing his remark to Smith. Claude joined in by telling Smith that he had a bad attitude, that when he would

²² *Darbar Indian Restaurant*, 288 NLRB 545 (1988).

direct Smith to work in a certain area, Smith wanted to work in another. He stated that he did not want Smith working on any jobs that he was running. This was the first indication that Smith had received of Claude's displeasure with his work. Smith, apparently angry, challenged Philip and Claude to fire him.

After the meeting, according to Philip, he, Claude, and Cleveland discussed the matter and since they needed help in the shop, decided to transfer Smith to the shop. Of course, the immediate effect of Smith's transfer was to remove another cardsigner from the unit. I find that this was the intent of management.

Smith worked in the shop for the next 3 weeks along with Adams and Gary Hensley, the welder. Smith and Adams, during this period, threaded pipe, pulled fittings on, cut hangers, and loaded trucks. Smith credibly testified that these were the same duties he had performed when he first was hired, before he was sent out to the field.

Meanwhile, before the election, while Smith was working in the shop, Frank White was working at Morgantown with Claude. White credibly testified that on one occasion he heard Claude laugh and state that Duncan Smith "had a bad attitude and was letting this union ordeal go to his head." I find the statement further evidence that wherever Respondent's management used the term "attitude" or "bad attitude" they clearly meant that any employee so described, had been engaged in union activity.

During the week prior to the union representation election scheduled for June 29, the Union and the Respondent both held meetings. At one meeting on June 26, Haymond brought up the subject of Bussey's firing. Philip, however, directed his employees to get off this subject because that was not what the meeting was about.

The following evening, June 27, Haymond had a conversation with Claude about Bussey's firing and the fact that nobody from management would talk about it. He asked Claude why Bussey had been fired. Claude said that firing Bussey was one of the hardest things he had ever done. He said that he thought highly of Bussey and of his ability as a sprinkler installer and had felt that Bussey had a future with Respondent.

Haymond had just come from a union meeting and was carrying some union documents in his hand. Claude apparently noticed these and commented on some past incidents which had occurred when Respondent had been union. He described past difficulties with Jerry Singleton and accused him of being vindictive. He said that Singleton would try anything and say anything to get the Union in.

Haymond brought the conversation back to Bussey's firing and the reasons for it. Claude then talked about keeping graphs on the Morgantown job, the low production, his personally going to the jobsite and his sending Adams back to the shop. Haymond, confused, asked Claude what this had to do with Mark. Claude then stated that Mark's attitude had changed, that he could not understand what had gotten into him. Haymond, still confused, asked for more specifics. Claude then described two very minor incidents, which he also later described in his testimony, during which Bussey replied to two of Claude's comments or questions in a snappy or curt manner. Haymond, in disbelief, remarked, "That was the only reason [for the firing]?" Claude rejoined, "Well, when he came back on Monday, we talked to him

and we gave him an opportunity to explain and he couldn't explain it." Then Claude added that the one thing that really hurt him, and he just didn't expect it, was that he never once heard anything about union activity until the day he got the letter from the Labor Board.

Haymond testified that he understood Claude to be expressing his disappointment in the employees at Morgantown, that none of them reported the union activity to him. I agree with Haymond, and inasmuch as Claude's expression of disappointment appeared in the general context of a discussion concerning the reasons for Bussey's firing, I find that Claude was expressing disappointment in Bussey in particular. Although, Haymond did not, apparently, receive the same impression, I find that Claude was indirectly telegraphing his reason for firing Bussey. For Haymond testified that after a full hour of conversation with Claude, he still did not understand why Bussey had been fired. However, though Haymond was not specifically told why Bussey had been fired, he certainly came to the proper conclusion through implication, for he testified:

I knew exactly what he [Claude] was talking about . . . Well, when he talks about attitude change and his talking about the last couple of weeks . . . prior to him coming up there and all the union activities that was going on behind his back and then he found out about it. I mean, it don't take no Einstein to figure out where he's coming from when he was upset and he didn't know anything about it.

The complaint alleges Bussey's discharge to be discriminatorily motivated. Respondent argues that it was for cause. I find this conversation, between Claude and Haymond, supportive of my earlier finding that Bussey was fired in violation of the Act.

As noted, the union representation election was conducted June 29. Smith acted as the Union's observer but did not cast a ballot since he was ineligible because he was still employed in the shop at the time. Jeff White was the observer for the Respondent. Several ballots were challenged. These will be discussed infra. Adams, on vacation in Mexico, the day of the election did not show up to vote. He testified that he might have flown back but did not do so because he was not on the voter's list and might be challenged because he was employed in the shop, outside the unit.

On Monday, July 2, Smith reported for work at the shop. He was told by Kevin Cleveland, on arrival that he was laid off, that there was not enough work to do in the shop and that he should go on down to the unemployment office and take a little vacation. Cleveland told him that he would get in touch with him when he needed him. Gary Hensley, the welder, was laid off at the same time.

Smith had been employed by Respondent since April 1989 and had never before been laid off. He had received no warning before July 2 that a layoff was contemplated. For the 6 or 8 months prior to his transfer to the shop, Smith had been working on a number of jobs where he was in charge of the job with one helper assigned to him. Both he and his helper were employed installing sprinkler systems during this period. Respondent clearly had been satisfied with Smith's work, otherwise he would not have been placed in charge and given a helper. Additionally, Smith received a

wage increase of 50 cents per hour about 3 months prior to his layoff, bringing him up to \$7.50 per hour. He worked at Morgantown for Bussey and remained there for a short period after Bussey left. He also worked for David Haymond at New Philadelphia. Smith described Bussey's job at Morgantown and Haymond's job at New Philadelphia as essentially the same.

The complaint alleges Smith's layoff to be discriminatorily motivated. Respondent argues that Smith was laid off because of a lack of work in the shop. In light of my earlier findings that Smith was a known union activist, that the Respondent demonstrated its antiunion animus in numerous ways, including discriminatorily transferring Smith from the field to the shop in order to prevent him from casting a vote for the Union, that Respondent continued to employ relatively inexperienced personnel while laying off Smith, I find Smith's layoff to be discriminatorily motivated and a violation of Section 8(a)(1) and (3) of the Act.²³

On July 3, the Union filed objections to the conduct of the election and a charge based on Bussey's termination.

On Monday July 9, Smith visited the shop to determine his situation. Philip told him that he was still laid off. The same day, Adams returned from vacation. Upon reporting to the shop, he was told by Philip that he was laid off, that Respondent might be able to use him once in a while, but not regularly. At the hearing, Philip was asked why he did not, at this time, use the experienced Adams in the field. His explanation was that he did not have a place to put him in the field.

I reject Respondent's explanation as to why Adams was not returned to the field. Philip had instructed his employees not to take their vacations in late July or August because they would be needed at Morgantown during this period. Indeed, Adams had rescheduled his vacation in accordance with Philip's directions because Philip had explained that during this period the Morgantown Mall would be nearing completion, retail stores would be starting, there would be a lot of rework to be done and he did not want anybody scheduled for vacation at this time. Moreover, on July 9, when Respondent needed all the experienced men it could get at the Morgantown site, Philip chose to lay off Adams and keep inexperienced employees such as Conn and Wilks, whom he had just recently hired. I find Respondent's action with regard to the layoff of Adams incongruous and Philip's explanation incredible. In light of the surrounding circumstances, it is clear that Adams was laid off because of his support for the Union, in violation of Section 8(a)(3) and (1) of the Act.²⁴

A couple of days after his layoff, Adams contacted Philip to find out whether he was going to be working anymore or should draw unemployment compensation. Philip replied that Adams should apply for unemployment compensation because there was no work "with this union thing." He added that possibly it would be 10 weeks before Respondent "would be back on track." Philip did not expand on what he meant by this statement but did explain that because of the uncertainty of the outcome of the union election, he had not bid on work.

²³ *Darbar Indian Restaurant*, supra.

²⁴ *Ibid.*

On July 19, Philip called Adams to offer him some work available in the shop but he was not home. The following day, July 20, Cleveland called Adams, but again he was not home. Cleveland left a message with Adams' wife to have him return the call. The call was not returned. The following Monday, July 23, the same thing occurred.

On the morning of July 23, the Union filed its charge against Respondent in Case 9-CA-27707 alleging that it violated Section 8(a)(3) and (1) by, inter alia, transferring Duncan Smith from the field to the shop, laying off Duncan Smith, transferring Adams from the field to the shop and laying off Adams, all in retaliation for their union activities. This charge was served on Respondent the following day, July 24.

On Friday, July 26, between 9 and 10 p.m. Cleveland succeeded in contacting Adams. He asked him if he was available for work. Adams replied that he had "kind of committed" himself to working at a plant that was being shut down in his area. He then asked Cleveland how much work he had. Cleveland replied that he did not know exactly, then suggested that it might be for a few days, a week, or longer. He added that he had some stuff that needed to be done immediately. Adams then declined Cleveland's offer, citing his commitment to the job at which he was currently employed. No further contact occurred thereafter between Respondent and Adams.

In addition to contacting Adams, Respondent, in late July, also called back other employees who had been on layoff, including Smith whom Philip placed in the field. Two and a half days after Smith returned to work, however, he injured his shoulder while on the job, and went on workmen's compensation for about 3 months. This was toward the end of July. Philip testified that even if Smith had not been injured, he would probably have been laid off eventually as were several other employees.

As completion of the Morgantown job approached, in September, Respondent transferred Wilks and probably Conn back to the shop because there was, again, some work to be done there. They worked there until October when, once again, the shop ran out of work. The record contains no explanation as to why Respondent chose to transfer Wilks and Conn to the shop, at this time, rather than recall the more experienced Smith and Adams except that Philip testified that, if he brought Smith back, or presumably Adams, he would have had to lay off somebody else, and this was not company policy.

The Bussey Discharge—Respondent's Defense

Respondent takes the position that Bussey was discharged because of his failure to properly supervise the employees²⁵

²⁵ Respondent produced two witnesses, Tice Shelton and Warren St. Clair, who testified in support of its position that Bussey did not adequately supervise them. Both witnesses testified that Bussey had tried to get them fired and that they were afraid of losing their jobs. I found neither of these witnesses credible. Both were more interested in getting even with Bussey and in currying favor with Respondent than in telling the truth. Greg Sigler, on the other hand, was called as a rebuttal witness on behalf of General Counsel. He testified credibly in support of Bussey and his leadership qualities, effectively contradicting Claude's testimony on the subject. At the time of the hearing, Sigler was no longer employed by Respondent.

which resulted in mistakes in the installation of the sprinkler systems and in a failure to meet construction time targets.

I do not find Respondent's defense worthy of credit. Since the Morgantown job was begun, Philip and Cleveland made frequent periodic visits to the site and thoroughly inspected the work as it progressed. At no time prior to Respondent's receipt of the petition did Philip or Cleveland criticize any of the work being done under Bussey's guidance. Though it was clear to everyone that the J.C. Penney job had fallen behind, everyone knew that it was because more men were needed on the job and Philip was reluctant to provide them.

Respondent's attempt to blame Bussey's discharge on nonexistent or inconsequential errors in the installation work is clearly a transparent, pretextual attempt to divert attention from the real reason for his termination, namely his engaging in protected concerted activities on behalf of the Union.

The Challenged Ballots and the Objection

The Petitioner challenged the ballots of Stephen Conn, Michael Wilks, and Michael Kincaid on the ground that they were temporary employees, and the ballot of Jeff White on the basis that he is a supervisor within the meaning of Section 2(11) of the Act. The board agent conducting the election challenged the ballots of Terry Osborne and Mark Bussey on the ground that their names did not appear on the list of eligible voters.

Stephen Conn and Michael Wilks: The Stipulated Election Agreement provided a payroll period ending date of June 3, 1990. The record indicates that Conn and Wilks were interviewed and hired on June 2 for the purpose of padding the eligibility list in favor of the Employer. Though they were paid for the time they spent filling out the application forms and being interviewed, they did not actually begin doing unit work until June 4. In order to be eligible to vote, an individual must be employed and working on the established eligibility date.²⁶ Accordingly, I recommended that the challenges to Conn's and Wilk's ballots be sustained.

Michael Kincaid: Michael Kincaid has been employed by the Company since its inception in February 1989. As a student he works 10–20 hours per week, regular part-time but works full-time during the summer. He is employed 52 weeks a year. Kincaid's work schedule is sometimes tailored to fit the requirements of his school schedule, especially around examination time. He works both in the shop and in the field, as needed. At the time of the election he was working at Morgantown installing pipe in J.C. Penney's. I find Kincaid to be a regular part-time employee, not a temporary employee. He should therefore be included in the unit. I recommend that the challenge to his ballot be overruled.

Jeff White: Jeff White, prior to his on-the-job injury in 1989, was a highly regarded skilled mechanic who was employed as a leadman on field projects. As such, he was put in charge of whatever project on which he worked. If other leadmen were also working on the job, White would still be in charge, even over Bussey or Haymond. Nevertheless, his actual duties were not dissimilar from those performed by Bussey.

Though I have found that White's transfer to Morgantown, at the time it took place, was for the purpose of padding the

eligibility list in favor of the Respondent, his transfer to the field was permanent. Though, at the time of his transfer to Morgantown, White was initially put on light duty, he was taken off light duty before the day of the election and was performing rank-and-file unit work on June 29. Consequently, I recommend that the challenge to his ballot be overruled.

Terry Osborne: Osborne was hired in September 1989 to do inspections and perform maintenance work for Respondent's customers. He was not immediately given any title, but when the Company subsequently ordered calling cards, he was given the title of service manager but no managerial responsibilities. Thus, Osborne would be sent out to look over an existing fire protection system and talk with a potential customer concerning a contract for periodic inspections but was not permitted to offer a price or an estimate. Rather, he would have to return first to the shop and tell Philip what was involved, after which Philip would decide on the price. The purpose of the title was purely to impress potential customers.

Osborne did not schedule his own visits to potential inspection customers nor independently obtain assistance from other employees on these trips. These matters were cleared through management. Whether he could schedule an inspection trip or obtain assistance depended on whether there was installation work to be performed elsewhere. The latter had priority.

During the initial period of his employment, between September and December 1989 Osborne had a desk in the same office as Philip, Claude, Cleveland, and the secretary. He spent, on the average, 10 hours per week at this desk though there was no phone on it. When Osborne was not at his desk or traveling to inspection sites, he was expected to drift from one installation job to another, filling in where there was a shortage of personnel. He spent about 50 percent of his time installing sprinkler systems, sometimes by himself, sometimes with other employees, always using the tools of the trade.

During the winter of 1989–1990, the amount of installation work increased to the point that the service contracts could not be fulfilled. Osborne was needed more and more for sprinkler system installation so that in January 1990 the character of his work changed. He spent 2 months at the New Philadelphia jobsite, working for Haymond who was the crew chief on that job at the time.

Between March and October, months would go by without Osborne using his desk. It was eventually taken away and given to a newly hired secretary. During this period, he did between 5 and 10 inspections which took about a half hour each or about 1 week's work altogether including traveltime. Meanwhile, he was sent to Morgantown about June 20 where he worked on the J.C. Penney and Sears jobs and, for a time, was made leadman on the Elder Beerman job. He was doing installation work at Morgantown throughout June and July rather than inspections, the same work performed by the other rank-and-file employees in the unit, side by side with them.

From the above, I conclude that as of the eligibility date, Osborne was employed as a rank-and-file unit employee. Accordingly, I shall recommend that the challenge to his ballot be overruled.

²⁶ *B.L.K. Steel*, 245 NLRB 1347, 1353 (1979); *Ra-Rich Mfg. Corp.*, 120 NLRB 1444, 1447 (1958).

Mark Bussey: I have found that Bussey was not a supervisor but a rank-and-file unit employee who was discharged in violation of Section 8(a)(1) and (3) of the Act. Accordingly, I also find that the objection to the election based on this unfair labor practice is meritorious and recommend that the challenge to Bussey's ballot be overruled.

Challenges

Having found that Michael Kincaid, Jeff White, Terry Osborne, and Mark Bussey are eligible to vote, inasmuch as their votes are sufficient in number to affect the results of the election, I recommend that their votes be counted.

The Objection

Having found that the objection is coextensive with the unfair labor practice alleged concerning the discharge of Mark Bussey, and having found the objection and unfair labor practice meritorious, I shall make recommendations, *infra*, in accordance with these findings.

The Unfair Labor Practices

Having found that allegations 5(a), (b), and (c) of the complaint and the 8(a)(1) amendments thereto are meritorious, I shall make recommendations, *infra*, in accordance therewith.

CONCLUSIONS OF LAW

1. The Respondent, Heritage Fire Protection, Inc., is an employer engaged in commerce within the meaning of Section 2(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. By forcibly interrogating an employee regarding his union sympathies and by threatening employees with loss of employment if they voted for the Union, Respondent violated Section 8(a)(1) of the Act.

4. By discharging employee Mark Bussey and laying off employees Duncan Smith and James Adams because they engaged in union activities, Respondent violated Section 8(a)(3) and (1) of the Act.

5. The unfair labor practices enumerated above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Union's Objection 6, which is coextensive with the unfair labor practice alleged in paragraph 5(a) of the complaint, is meritorious and must be sustained.

7. The challenges to the ballots of Michael Kincaid, Jeff White, Terry Osborne, and Mark Bussey are invalid and must be overruled.

8. The challenges to the ballots of Stephen Conn and Michael Wilks are valid and must be sustained.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take appropriate and affirmative action designed to effectuate the policies of the Act. In particular, as I have found that employee Bussey was discharged and employees Smith and Adams were laid off because they en-

gaged in union activities, in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that Respondent be ordered to offer these employees immediate and full reinstatement to their former jobs, displacing, if necessary, any replacement, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay suffered as a result of the discrimination against them with backpay computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See also *Isis Plumbing Co.*, 138 NLRB 716 (1962). I shall also recommend that Respondent be required to post an appropriate notice.

It shall be further ordered that the Respondent be ordered to remove from its records any references to the discharge of Mark Bussey and to provide him with written notice of such removal and of the fact that his discharge will not be used as a basis for further personnel actions against him.²⁷

Having found the challenges to the ballots of Stephen Conn and Michael Wilks valid, it is recommended that the challenges be sustained and their ballots not be counted. Having found the challenges to the ballots of Michael Kincaid, Jeff White, Terry Osborne, and Mark Bussey invalid, it is recommended that the challenges be overruled and that their ballots be counted. It is further recommended that should the counting of the valid challenged ballots result in a majority of valid ballots cast being cast against representation, since I have found merit to the Union's objection 6, it is recommended that the election in Case 9-RC-15699 be set aside and a new election directed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁸

ORDER

The Respondent, Heritage Fire Protection, Inc., Cannonsburg, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from discouraging membership in, activities on behalf of, or sympathies towards United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 669, AFL-CIO or any other labor organization by:

(a) Forcibly interrogating employees regarding their union sympathies.

(b) Threatening employees with loss of employment if they vote for the Union.

(c) Discharging or laying off employees because they engaged in union activities.

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

²⁷ See *Sterling Sugars*, 261 NLRB 472 (1982).

²⁸ 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.

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

(a) Make Mark Bussey, Duncan Smith, and James Adams whole for any loss of pay suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Offer to Mark Bussey, Duncan Smith, and James Adams immediate and full reinstatement to their former jobs, displacing, if necessary, any replacement, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(c) Remove from its records any reference to the discharge of Mark Bussey and provide him with written notice of such removal and of the fact that his discharge will not be used as a basis for further personnel actions against him.

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

(e) Post at its plant at Cannonsburg, Kentucky, copies of the attached notice marked "Appendix."²⁹ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the 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.

²⁹If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

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

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

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT forcibly interrogate employees regarding their union sympathies.

WE WILL NOT threaten employees with loss of employment if they vote for the Union.

WE WILL NOT discharge or lay off employees because they engage in union activities.

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

WE WILL make Mark Bussey, Duncan Smith, and James Adams whole for any loss of pay suffered as a result of our discrimination against them.

WE WILL offer to Mark Bussey, Duncan Smith, and James Adams immediate and full reinstatement to their former jobs, displacing, if necessary, any replacement, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

WE WILL remove from our records any reference to the discharge of Mark Bussey and provide him with written notice of such removal and of the fact that his discharge will not be used as a basis for further personnel actions against him.

HERITAGE FIRE PROTECTION, INC.