

**Asphalt Paving Company and International Union
of Operating Engineers, Local No. 9, AFL-
CIO. Case 27-CA-11811**

April 15, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

On December 10, 1992, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief answering the Respondent's exceptions.

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, Asphalt Paving Company, Golden, Colorado, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge's findings, coupled with his citation of *Limestone Apparel Corp.*, 255 NLRB 722 (1981), indicate that he discredited the Respondent's account of its allegedly lawful motive for Marcum's discharge and found that the Respondent's sole motive was to rid itself of an employee it suspected of assisting the organizing effort. This satisfies the requirements of *Wright Line*, 251 NLRB 1083 (1980). *Cecil I. Walker Machinery Co.*, 305 NLRB 172 (1991). Even assuming this could be tenably classified as a dual motive case, we would still find a violation under *Wright Line*. First, the General Counsel has made a prima facie showing, in the light of the numerous 8(a)(1) violations and clear union animus, that Marcum was discharged because of his union support. Second, the Respondent has not met its burden of proving that the discharge would have taken place even in the absence of the employee's union activities.

T. Michael Patton, Esq., for the General Counsel.
Thomas A. Siratovich, Esq., Mountain States Employers
Council, of Denver, Colorado, for the Respondent.
J. William McCahill, Esq., of Denver, Colorado, for the
Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHIMDT, Administrative Law Judge. International Union of Operating Engineers, Local No. 9, AFL-CIO (Union) filed an unfair labor practice charge against Asphalt Paving Company (Respondent or Company) on July 22, 1991.¹

On September 10, the Acting Regional Director for Region 27 of the National Labor Relations Board (NLRB or Board) issued a complaint alleging Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (Act). The complaint was amended on February 13, 1992, and again at the hearing.

Respondent answered the complaint on September 17 denying that it engaged in the unfair labor practices alleged. The case was docketed for a hearing before an NLRB administrative law judge.

I heard this matter on February 27 and 28, 1992, at Denver, Colorado. After carefully considering the record, the demeanor of the witnesses, and the posthearing briefs filed on behalf of the General Counsel and Respondent, I conclude that Respondent engaged in certain unfair labor practices alleged, but not others, based on the following

FINDINGS OF FACT

I. ALLEGED UNFAIR LABOR PRACTICES

A. The Pleadings

The General Counsel alleges that Jeffery Keller, Respondent's vice president, violated Section 8(a)(1) by interrogating employees; soliciting employee reports of union activity; promising improved wages, benefits, and promotional opportunities to thwart employee union activity; suggesting that employees work elsewhere if they wanted union representation; and threatening to close Respondent's quarry if employees selected union representation.

Additionally, the General Counsel alleges that Harlan Begeman, Respondent's aggregate production manager, and Gerald Batt, Respondent's rock quarry superintendent, violated Section 8(a)(1). Specifically, the General Counsel charges that Begeman interrogated an employee, and that Batt gave instructions to avoid utilizing particular employees believed to favor the Union and interrogated an employee concerning other employees' union activities.

Finally, the General Counsel alleges that Respondent discharged Richard Marcum, one of its quarry employees, in violation of Section 8(a)(3). All the conduct alleged as unlawful occurred between July 3 and 15.

Respondent admits the preliminary complaint allegations, including the supervisory and agency status of Keller, Begeman, and Batt, but denies all substantive allegations of unlawful conduct.

¹ All dates refer to the 1991 calendar year unless otherwise indicated.

B. *The Evidence*

1. Background

Respondent, a corporation which maintains its office and primary facilities in Golden, Colorado, is engaged, *inter alia*, in the operation of a rock quarry involved in this proceeding.² The quarry, also known as the Ralston quarry, is located about 7 miles from Respondent's office in Golden.

Bill Keller holds the controlling ownership interest in the Company. His son, Jeffery Keller, is vice president of operations. About 17 employees work at the Ralston quarry, including Bill Keller's stepson, Richard Grasser. Following an unsuccessful economic strike in 1981, the quarry employees have been unrepresented.

Al Walker, who had served for about 10 years as the quarry superintendent, notified the Company in late May that he would retire effective July 1. His departure prompted the Company to create a new position of operations manager. Begeman, a supervisor at Respondent's separately located MAC plant, was selected to fill that position and he, in turn, participated in the selection of Batt, a MAC plant dozer operator, as Walker's successor. Batt took over as the Ralston quarry superintendent on July 1.

Marcum, the employee whose discharge is at issue here, began working at the Ralston quarry in 1979. He participated in the 1981 strike but later abandoned the strike and returned to work. No evidence indicates that Marcum maintained membership in the Union following the strike if, indeed, he had been a member prior thereto. Save for a 6-month period when Marcum worked at another company location, he was continuously employed at the quarry until his July 15 discharge.

In February 1990, Marcum was promoted to a quarry leadman position. No claim is made, however, that he possessed supervisory authority at relevant times. In early June, Marcum sought a pay raise through Walker who, in turn, recommended an increase approved by Jeff Keller.

Commencing in 1990, Marcum was absent for an extended medical leave. During this period, another employee, Charles Horcher, served as the leadman in Marcum's absence. For reasons never explained, Horcher and Marcum have apparently disliked one another for some time. Neither man was seriously considered as Walker's successor. Begeman claims that Walker thought both were unqualified; Keller implied to Marcum that a quarry outsider was chosen because he felt either Horcher or Marcum would promptly quit if the other became superintendent.

2. Union organizational activity

Marcum was deeply disappointed on learning that he had been passed over for the superintendent's job. Immediately thereafter, Marcum began investigating renewed representation by the Union.

Because the Union's office was generally closed during Marcum's off hours, Marcum's wife initiated contact with

the Union by telephone. Mrs. Marcum arranged to furnish Union Organizer Jim Venckus with a list of quarry employees and their home telephone numbers.³ She did not disclose either her or her husband's identity to Venckus.

After receiving the employee list, Venckus telephoned company employees to discuss the Union and assess the level of employee interest. Between June 24 and the second week of July, Venckus said that he spoke with about 15 quarry employees.

Marcum said that Venckus telephoned him on July 1. In the next few days, Marcum spoke to four or five other employees, including Grasser, about the call from Venckus. Jeffery Keller acknowledged that he talked to Grasser about the Union's telephone calls but no specific information was adduced as to when this occurred or what they discussed.

3. Company knowledge and reaction

Marcum spoke to Begeman privately at the quarry on July 3 in an effort to learn why he had not been promoted to the superintendent's job. In the course of their conversation, the subject of the Union's telephone calls was broached. Marcum claims that Begeman asked how many employees had been contacted by the Union. Begeman claims that Marcum initiated the subject by telling of his telephone call from the Union.⁴

Following his conversation with Marcum, Begeman told Jeffery Keller, who was also at the quarry that day, of the Union's contacts. Shortly thereafter, Begeman asked Marcum to join Keller and himself in Keller's vehicle. After driving to a quieter quarry location, Keller, by Marcum's account, said, "I hear that you got contacted by the union." Marcum acknowledged the Union's contact. Marcum claims that Keller then proceeded to ask him who made the contact, what was discussed, and how the other employees felt about a union.

Marcum testified that Keller also told him that the company wages were comparable to the Union's wage scales and that the Company was planning a 20-cent-per-hour wage increase. According to Marcum, Keller added that the Company had been nonunion for 10 years, that he planned to continue nonunion, that if employees wanted union representation they could go elsewhere, and that he would "close the doors" before he let a union on the property. Further, Keller told Marcum about an attempt in 1990 by the Teamsters to organize the Company's trip travelers which was "thrown out" after the Company had talked to enough employees.

When Marcum asked Keller about being bypassed for the superintendent's position, Keller assured Marcum he would have other opportunities with the Company because he was a valued employee. Keller concluded the conversation by asking Marcum to find out how the other employees felt about the Union and to let him know if the Union attempted to set up an employee meeting so he could meet with them first.

² Respondent's direct inflow and indirect outflow each annually exceed the dollar volume established by the Board for exercising its statutory jurisdiction over nonretail enterprises. Respondent admits that it is engaged in commerce and in a business affecting commerce within the meaning of Sec. 2(6) and (7) of the Act. Jurisdiction over this labor dispute lies with the Board.

³ Marcum readily acknowledged that he prepared the employee list submitted to the Union, in part, from a roster in Walker's desk. Marcum had regular access to Walker's desk. Marcum resorted to this source because other employees, including Grasser, had unlisted telephone numbers.

⁴ The General Counsel does not allege any unlawful conduct occurred in this exchange between Marcum and Begeman.

Both Keller and Begeman agree that a private conversation with Marcum took place in Keller's vehicle on the morning of July 3. The exchange, Keller said, began in front of the quarry office after Begeman and Marcum approached him and Begeman reported that Marcum had been talking about a matter which would be of interest to Keller.

At first, Keller said, Marcum wanted to know who was giving out his unlisted phone number and Keller asked him to explain what he was talking about. Marcum then reported in a loud voice that he had received a telephone call at home the previous evening from a union agent. At that point, Keller invited Begeman and Marcum to join him in his vehicle because other employees were in the vicinity.

Once at a more private location, Keller said that he told Marcum that he was sure no one at the Company had given out his phone number but agreed to check into it. Keller asserted that Marcum expressed offense about the phone call because he did not want to discuss work with others while at home. Keller asserted that after "we kind of calmed down about the union and his phone calls and who was giving his unlisted number out, and we had talked about some of those issues for about five minutes" he asked Marcum if he had anything else to discuss and the conversation shifted to the reasons Marcum had not been promoted to the quarry superintendent's position.

Keller provided no specifics about the exchange between Marcum and himself during the 5-minute period that he alluded to. However, Keller implicitly denied that he questioned Marcum about the Union; instead, he recalled that Marcum stated that he had been "with the Union" before and that he "didn't want anything to do with them again." Purportedly, Marcum also told Keller that other employees had been contacted by the Union and that they were "anxious" about it. Keller denied that he threatened to "close the doors."

Begeman likewise was not asked to provide specifics about the exchange between Keller and Marcum. Apart from saying, without specificity, that the two men discussed the Union's telephone call to Marcum's unlisted number, the superintendent's job, production, and Marcum's future promotion potential, Begeman merely denied that Keller threatened to close the quarry, or promised any pay raises.

According to Marcum, Keller approached him again at the quarry on July 8 and asked if the Union had gotten in touch with him again or if he had heard anyone talking about the Union. Marcum told Keller that he had not "heard a word." Keller provided no testimony about this exchange.

James Hayes, a current employee of Respondent, said that Keller approached him at the quarry on July 8 or 9 and "asked . . . what was going on with the Union deal." Hayes told Keller that he had been contacted by Venckus. Keller then went on to inquire of Hayes about the level of interest in organizing. Hayes expressed some ambivalence by saying that there were "pros and cons" about the Union. Although Hayes said that he could not state how others felt, he told Keller that his own wages were the same as 10 years ago. Hayes recalled that Keller said wages would be evaluated when Batt "got his feet on the ground." Keller also told Hayes that some employees had received calls from the union agent at their unlisted phone numbers which suggested to Keller that there was a "nigger in the woodpile."

Supposedly, Keller also briefly reminisced with Hayes about the 1981 quarry strike. He recalled that Hayes had participated in the strike and told Hayes that he wanted the Company to remain an "open shop." Keller told Hayes about the recent Teamsters organizing effort, including his belief that some employees lost their jobs because they "got so preoccupied with this organization that they had accidents."

Keller claimed that the Union came up only tangentially in his discussion with Hayes on this occasion. By Keller's account, he approached Hayes at that time to discuss a job transfer because Hayes was a capable loader operator. Keller implied that Hayes expressed conditional interest; he told Keller he would consider the move provided a wage increase came with it. Keller told Hayes that the Company was in the middle of a wage review but he could not promise anything.

Keller denied that he initiated the subject of the Union with Hayes. Instead, Hayes purportedly told Keller that he was "nervous" about the "phone calls to employees and stuff." Keller said that he cautioned Hayes against getting preoccupied with it and that if Hayes or anyone had any questions, the company agents would be happy to answer them or try to find out answers to their questions.

Keller acknowledged that he had made the "nigger in the woodpile" statement but never specified to whom or in what context. His use of that phrase, Keller explained, followed a rash of problems the Company experienced immediately after Walker's departure which caused him to suspect that Walker was responsible for the recent problems "at that time."⁵

Marcum claimed that Begeman asked if he (Marcum) had heard anything more about the Union on July 9. Purportedly, Marcum responded that he had not. Although Begeman said that he could not recall Marcum ever saying anything further to him about the Union after July 3, he did not specifically deny making the July 9 inquiry which Marcum attributed to him.

On Thursday, July 11, several conversations involving Marcum, Begeman, and Batt occurred in connection with the anticipated repair of a shaker device on one of the quarry's rock crushers. In the course of one exchange, Marcum claims that either Begeman or Batt told him that he could use anyone on the work other than Hayes or Kelly Higgins, employees Marcum had indicated he planned to utilize to assist him on that project. The reason for this directive, Marcum said, was not explained at that time.

Later in the day, however, Marcum asked Batt in Horcher's presence why he could not use Hayes or Higgins. Batt replied that there was "a nigger in the woodpile" and said nothing further. Marcum later confronted Batt again about the instruction at quitting time. At this time, Batt told Marcum that Higgins might be discharged for damaging one of the Company's dozers, and that Hayes was active in the Union and "we [want him] to stay home . . . and think about it."

⁵Specifically, Keller claimed the Company had to hire a house cleaner on July 1 because Walker had vacated the quarry residence without cleaning it as promised. The following day a mine inspector appeared at the quarry unannounced inquiring about old citations long since abated. And the next day Keller learned of the Union's calls.

Neither Batt nor Horcher testified about any of the July 11 conversations described by Marcum.⁶ Begeman said, in effect, that he overruled Marcum's plan to use Hayes and Higgins as helpers on the shaker repair job. Begeman explained that he vetoed Marcum's selections because Hayes and Higgins were essentially equipment operators and the Company had experienced mechanics available for repair work.

4. Marcum's discharge

Marcum was discharged on Monday, July 15. Respondent claims that Marcum's discharge resulted from Marcum's "fouled-up" repair of the shaker on July 13. General Counsel claims Respondent's defense to Marcum's discharge is a pretext designed to mask Marcum's discharge over the Union's renewed interest in the quarry employees.

As for the discharge itself, Batt said that he entered the room where Marcum was changing his shoes in preparation for starting work on the morning of July 15 accompanied by Begeman. Batt said that he handed Marcum an "Employment Separation Notice" and told him that he was being discharged for dishonesty.⁷

Batt explained that he told Marcum that the action was being taken because of Marcum's untruthful July 13 representations that the new shaker bearings were covered as Batt had instructed and that the shaker would be ready for operation within a couple of hours on Monday morning. According to Batt, when he checked on the shaker repair job after work hours that Saturday, he found that Marcum had not covered the bearings as instructed, that dust had already blown into the bearings, and that the shaker could not be operational as claimed by Marcum.

Marcum, on the other hand, said that after Batt and Begeman entered the room, Batt charged that Marcum had lied to him. When Marcum asked Batt to explain, Batt accused Marcum of bending the shafts to the shaker machine while installing them and claimed that it would take much longer than Marcum's Saturday estimate of 3 hours to have the machine operational. Marcum said that Batt told him that he was being fired for dishonesty. Marcum claims that Batt said nothing about dust in the shaker bearings and provided no evidence that the Union was discussed at that time.

Asked twice on direct examination to describe what occurred at the time of Marcum's discharge, Begeman first said only that Batt "explained why he was discharging [Marcum] and that he couldn't work that way anymore." Asked to be more specific, Begeman testified "[t]here wasn't a lot of sense being made in the conversation and then [Batt] asked him to sign [the termination notice] and that's why he was discharging him and [Marcum] did not sign it and left the room."

Enroute to his vehicle following his discharge, Marcum stopped to speak with Hayes. Marcum told Hayes that he had been let go and warned Hayes to "watch [his] back because they thought [he] was pro-union . . . and that was the reason [he] hadn't worked the Friday before [on the shaker job]."

⁶Batt was called as a General Counsel witness before Marcum testified. He was not recalled by Respondent during its case. Horcher, called as a witness by Respondent, was not questioned about this exchange between Batt and Marcum.

⁷Marcum's separation notice reflects that he was terminated for dishonesty or misconduct.

Marcum then drove to the company office at Golden to speak with Jeff Keller. Keller provided Marcum with no explanation for his summary dismissal apart from telling him that the Company had spent a lot of money on the shaker repair.

In the meantime, Hayes went directly to the quarry office and confronted Batt and Begeman as to whether he had not been given work because of "this union deal." They assured Hayes the Union was not the reason he was not assigned to the shaker repair; they asserted to Hayes that the Company's best mechanics were assigned to the job. Hayes responded that he had already lost a couple of jobs through union strikes, that he was "tired of this shit," and that he wanted to get it on the table. Batt assured Hayes that he understood Hayes' feeling as he, too, had been in the Union. Hayes said that ended the matter.

In addition to the shaker repair job, Batt said his conclusion to discharge Marcum was based on two other incidents where Marcum had countermanded orders he had given to machine operators. Batt acknowledged that he had never spoken with Marcum about either of these incidents and Marcum denied that they ever occurred.

After reaching his decision to terminate Marcum, Batt prepared a memorandum to Marcum's file listing several derelictions in Marcum's performance. Entirely apart from the disputes about the veracity of several items listed in that document, Batt acknowledged that he had never spoken to Marcum about any of those matters either and, apart from the two countermanded orders, he did not rely on those matters in reaching his decision to discharge Marcum. On the contrary, when Marcum asked Batt on July 12 how Batt thought he was doing, Batt told Marcum that he was pleased with his work.

5. The shaker repair project

The shaker device evidently had been a source of difficulty at the quarry. During the first week of July, Richard Walker, one of the quarry's maintenance employees, had performed some unspecified repairs but by the following week a decision was made to perform further repairs on this device.

According to Marcum, the shafts on the shaker would occasionally snap from the excessive torque which would occur when the machine was shut off and it would stop suddenly. The repairs scheduled for the second week in July were designed to get the shaker in running order and to install an electrical device which would cause the shaker to slow down gradually when it was shut off.

Marcum testified that Begeman and Batt informed him on Thursday, July 11, that they had received authorization from Keller to shut the main quarry down for maintenance on the following Monday and Tuesday and he was assigned to do the repairs on the shaker. Horcher was assigned to order the electrical device which, it was hoped, would arrive and be installed so the shaker could be in operation by the following Wednesday. Marcum ordered the shaker parts on Thursday but they did not arrive until Saturday.

After the new shaker parts arrived at about 10 a.m. on July 13, the shaker repair work commenced. Although he had designated Richard Ferguson and Horcher as helpers, Horcher soon went about other work because there was not enough

room in the confined area where the work was being performed for three workers.

Somewhere between 2 and 2:30 p.m., Batt visited the repair project and spoke briefly with Marcum. Marcum told Batt that about 2 or 3 hours of work would remain on the device by the end of the workday. Batt cautioned Marcum to cover the new bearings so they would be protected from the dust and other elements over the weekend.

By the end of the day, Marcum had removed and replaced the four bearings on the two shafts. He said that Ferguson and Horcher assisted in replacing the gear end of the shaker with its regular cover. Because the other cover was being used as a receptacle for the remaining loose parts and as the shiv end was about 30 feet in the air because the device had been tilted on edge, the other end was covered with rags to protect those bearings from the elements. Marcum claims that both Horcher and Ferguson helped put the rags over the uncovered bearings.

At the end of the July 13 workday, Marcum waited for Batt by the quarry shop before leaving the quarry. When Batt arrived, Marcum reported that he still had to install the timing gears, time the device, install the covers, add oil, and install the shiv (the pulley device for the belt-driven shaker). Marcum estimated that the shaker would be "ready and running" with about 3 additional hours of work.

Batt said that he visited the repair project yet later on July 13, accompanied by Horcher. At this time, Batt claims that he found the bearings uncovered and already covered with dust. In addition, he said that both of the eccentric shafts (which cause the device to shake while in operation) were frozen, i.e., would not turn on the newly installed bearings as he claimed they should. Batt said that he also observed that some of the bearings, oil slingers (seals), and bearing housing holes had been damaged. In sum, Batt sought to portray a badly botched repair job.

Batt testified that he decided to discharge Marcum after he got home that evening, and, sometime over the weekend, Batt said he notified Begeman by telephone of the action he planned to take Monday morning.

Horcher provided an account of his afterhours visit to the shaker repair job with Batt. He remembered that the gear side bearings were covered with the oil pan which normally encloses them but the drive-side bearings were uncovered and exposed to the atmosphere. Horcher provided this general summary of the situation at that time:

Q. On Saturday, July 13, what was your evaluation of how long it would take to fix this job, if you made an evaluation at that time?

A. Jerry Batt explained to me that he was told by Rick Marcum that he had approximately two hours and all he had left to do was to put on the side covers on and put oil in it and it would be up and running in about two hours.

Q. And what was your evaluation of that information?

A. I observed that with bolts missing from the housing, the one shaft, the driven shaft, bound tight, and the timing gears not being in place, I told him that there was no way the thing could be up and running in two hours or even close to that.

Horcher made no reference to having observed damaged parts when he examined the shaker on July 13. No inquiry was made of Horcher concerning Marcum's claim that Horcher had assisted in covering the shiv-side bearings near the end of the workday.

Keller said that he learned from Batt following the disassembly of the shaker on July 15 that some of "the brand new parts had been ruined" so he instructed Batt to save them for training purposes.

Respondent attempted to establish that Marcum damaged some of the new shaker parts while installing them on July 13. Horcher identified four bearing components at the bearing which, purportedly, were removed from the drive side of the shaker on July 15 by himself and Richard Walker in the course of redoing Marcum's July 13 repair job. With respect to those particular parts, Horcher testified: (1) that the bearing housing showed signs of an impact with a hammer, including severe damage to one retaining bolt hole; (2) that a retaining ring which fits on the bearing housing showed signs of having been hit with a hammer and cracked; (3) that a two-piece labyrinth seal (slinger) reflected wear and breakage; and (4) that the spherical roller bearing itself had chips on the outer race suggesting that it had been struck with a metallic object. These four components, Horcher claimed, were shown to Begeman on their removal from the shaker.⁸

Begeman claims to have received a telephone call from Batt during the afternoon of July 13 in which Batt reported that the bearings were being driven onto the shaft with "steel drift pins." Begeman said that Batt asked if he "should go to the shop and get the right tools." Begeman told Batt, "[N]o, we'll get it." No evidence indicates that either Batt or Begeman furnished any tools to Marcum on July 13 or admonished him in anyway about the manner in which he was repairing the shaker. Likewise, Begeman was never asked about Horcher's claim that the damaged parts were shown to him after they were removed on July 15.

Richard Walker, a former maintenance employee with the Company who was called as a General Counsel witness, testified that he was assigned along with Horcher to repair the shaker anew on July 15. According to Walker, he was instructed to take the entire mechanism apart because one of the shafts would not turn "to make sure everything was all right, which it was and [then] put it all back together."

Walker's testimony is at complete odds with Horcher's. At the outset, Walker claimed that Horcher only assisted for about 2 hours over the course of the 3 days that he worked on the shaker. In addition, both Marcum and Walker testified that Marcum had installed a new shaft, four new bearings, four new slingers, and three new bearing housings. These parts, Walker claimed, were in good condition when he removed them on July 15 and *all* were reinstalled on the shaker when he put it back together. Walker said that the fourth bearing housing and two bearing retainer rings were replaced when he put the shaker back together but, in Walker's judgment, even the bearing housing and retainer rings were still

⁸Horcher estimated the cost of the housing and the bearing itself at about \$800 each. He said that the parts were essentially unusable junk.

usable.⁹ Walker said that Batt and Begeman made the judgment to replace the fourth housing.

Marcum denied that he ever hit any of the new bearings with a steel drift pin as claimed. Moreover, Marcum said that it is normal for the shaft to be frozen until it is pulled properly into position during the timing process. Walker said that the frozen shaft problem occurred again as he was putting the shaker back together. According to Walker, when the second bearing is installed on a shaft, the shaft itself is "pinched" against the other bearing and will not rotate until the timing gear is installed and tightened down.

No parts invoices or shipping documents related to the disputed shaker project which would serve to identify the dates of purchase or delivery of parts for this job were introduced in evidence, nor were their unavailability explained.

C. Further Findings and Conclusions

1. Credibility resolutions

Several critical questions here rest on the ultimate determination of which witnesses merit belief. However, those few issues not disputed between the witness called by the General Counsel and Respondent serve as an aid in making other credibility resolutions.

Marcum made two significant assertions which were never contradicted by the company officials who testified. The first was his assertion that Keller, during their initial conversation about the Union on July 3, solicited his cooperation in surveying employees about their union sympathies and advising him of any union attempts to meet with employees. The second was his claim that Batt, on July 11, explained Begeman's prohibition against using Hayes on the shaker repair job by initially alluding to the oft-used "nigger in the woodpile" phrase and then stating outright that "we" wanted Hayes to think about being "active in the union."

Read together, these uncontradicted disclosures reflect a scenario more consistent with the entirety of the events as described by both Marcum and Hayes rather than as described by Keller. As is evident, Keller emphasized Marcum's purported concern about how the Union obtained his unlisted phone number and only vaguely alluded to discussing the "some of those issues" for about 5 minutes. Keller was equally vague in describing the discussion which occurred after Hayes purportedly raised the union subject in their conversation.

By contrast, the more detailed portrait depicted by Marcum and Hayes concerning the nature of Keller's interest and reaction to the Union is somewhat similar even though they testified about different conversations with Keller. This similarity takes on even greater significance because of Hayes' obvious reluctance while testifying, a fact likely explained by his continued employment with the Company.

Resolution of the conflicts in the testimony of Horcher and Walker is also critical. In a nutshell, Horcher, Respondent's key witness concerning the quality of Marcum's July 13 shaker repairs, claimed that several parts installed by

Marcum had been damaged. Walker on the other hand asserted that he reinstalled all the parts which he removed from the shaker on July 15 with the exception of a bearing housing and two retainer rings. I have concluded that significant reasons exist to credit Walker's version of the events.

First, Walker was no longer employed by Respondent at the time of the hearing and no showing was made that Walker harbored any significant affinity for either Marcum or the Union. On the contrary, Respondent sought to demonstrate that Walker was one of the few employees who had not been contacted by the Union and, Walker's denial notwithstanding, that he once started to walk off the job in a dispute with Marcum shortly before Marcum's discharge. Second, Walker's assertion that Begeman ordered the replacement of only one bearing housing was never disputed by Begeman. Third, no attempt was made to refresh Walker's recollection or to suggest that he may have been mistaken about his claim that *all* the bearings removed on July 15 were reinstalled on the shaker. Fourth, no documentation such as purchase orders or shipping invoices were ever proffered to undermine Walker's claims about what parts were removed and reinstalled. Fifth, Walker's uncontradicted assertion that the frozen shaft problem was replicated and overcome in the course of his July 15-17 work is consistent with the implication of his testimony that this temporary condition was not caused by any damaged parts. And sixth, nothing in Walker's stoic demeanor while testifying caused me to question his veracity.

By contrast, Horcher openly acknowledged that he did not get along with Marcum. Second, Horcher was still employed at the quarry when he testified. Third, although Horcher repeatedly used the plural pronoun "we" in discussing the work done on the shaker between July 15 and 17, he never directly contradicted Walker's claim that he spent very little time on the project in that period. And fourth, neither the part number nor the manufacturer's stamp on the damaged bearing Horcher identified at the hearing conformed to the part Marcum claimed, without contradiction, that he ordered for the shaker repair project.

For the foregoing reasons, I credit the testimony of both Marcum and Hayes to the extent that it conflicts with Keller on the important questions pertaining to the Company's reaction to the news that the Union had begun efforts to interest employees in representation. Furthermore, I have concluded that Walker's testimony concerning the condition of the shaker on July 15 is reliable. Accordingly, for the following findings and conclusions I have relied primarily on the testimony of these three witnesses.

2. The 8(a)(1) allegations

Employer interference, restraint, or coercion of employees exercising the statutory right, *inter alia*, to "form, join, or assist labor organizations" is an unfair labor practice under Section 8(a)(1) of the Act. However, Section 8(c) provides that the expression of "any views, argument, or opinion . . . shall not constitute or be evidence of an unfair labor practice . . . if such expression contains no threat of reprisal or force or promise of benefit."

The test under Section 8(a)(1) does not "turn on the employer's motive or whether the coercion succeeded or failed [but instead on] whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the

⁹Walker claimed that he had caused the impact marks on that particular housing and one of the retainer rings during the course of an earlier repair he performed in the first week of July. No evidence indicates that Marcum was involved in this earlier repair. Horcher was on vacation at that time.

free exercise of employee rights under the Act.”¹⁰ In addition to the variety of direct threats and promises of benefit excluded as protected speech under Section 8(c),¹¹ less explicit threats or promises are also prohibited by Section 8(a)(1).¹²

Concluding as I have that Marcum provided the more reliable version of the exchange which took place between Keller and himself on July 3 in Keller’s vehicle, I find that Keller primarily sought to convey the message that he intended to oppose unionization by a variety of actions in order to assure the Company’s quarry operations remained unorganized. Consistent with this overall objective, Keller uttered a collection of statements and posed a series of questions which, when considered in their entirety, were clearly coercive. Specifically, Keller: (1) interrogated Marcum in detail to learn the nature and extent of the initial union activities; (2) threatened to close the quarry should the employees chose to be represented; (3) suggested that employees desirous of union representation were unwelcome; (4) suggested that a general wage increase was planned by the Company in the context of comparing union wage scales with the Company’s pay rates; and (5) solicited Marcum to report to him about employees’ sympathies for the Union and further union activities. Because of the general coercive character of this conversation, I find that each of the enumerated statements violated Section 8(a)(1) as alleged.

The inquiries made of Marcum by both Keller and Begeman on July 8 and 9, respectively, represent only a continuation of the unlawful interference began on July 3. Hence, I find that both Keller and Begeman violated Section 8(a)(1) by unlawfully interrogating Marcum on those two occasions.

I further find that Keller, in the course of his July 8 or 9 conversation with Hayes, unlawfully interrogated Hayes about employee sympathies for the Union and made a vague, but unlawful, suggestion the a potential wage increase could be expected after learning that Hayes was dissatisfied with his own level of pay. I also find that Keller’s “nigger in the woodpile” remark at the conclusion of their conversation violated Section 8(a)(1) of the Act. In the context used, that pejorative phrase could reasonably convey the notion that Keller was seeking to identify and punish the individual who provided the Union with the information (unlisted telephone numbers) necessary to initiate contact the quarry employees.

In addition, I find that Batt’s July 11 repetition of the “nigger in the woodpile” phrase and his later statement that Marcum could not use Hayes to assist in the shaker repair

because he was suspected of supporting the Union both violate Section 8(a)(1) as alleged. Batt’s two statements were made on separate occasions that day to essentially the same question posed by Marcum, i.e., why had Begeman instructed him not to use Hayes and Higgins on the shaker repair? Linked as they are by Marcum’s common question, I find the former is unlawful because the latter—clearly an unlawful statement—explains in clear terms the meaning of Batt’s earlier “nigger in the woodpile” response.

The General Counsel’s complaint alleges, in essence, that Marcum was also promised a promotion in his July 3 conversation with Keller and that Batt unlawfully interrogated Marcum on July 11. No evidence at all exists to support the latter allegation. Accordingly, the recommended Order provides for the dismissal of that allegation.

Although a discussion of a promotion arose in the Keller-Marcum conversation on July 3, I am not satisfied that subject was adequately linked to the recent emergence of the union activity. Rather, Marcum’s potential for promotion arose in the course of their discussion about the Company’s failure to promote Marcum to the quarry superintendent’s position and appears to have been made by Keller as a form of reassurance to Marcum that he would be legitimately considered for future promotional opportunities. For this reason, that allegation will also be dismissed.

3. The 8(a)(3) allegation

An employer violates Section 8(a)(3) by discharging an employee for engaging in statutorily protected union activities.¹³ Here, the General Counsel claims that Respondent’s July 15 discharge of Marcum was unlawfully motivated by that employee’s union activity.

Respondent argues that Marcum only engaged in minimal union activity, that Respondent never became aware of any union activity by Marcum, and that Marcum was discharged for cause, i.e., “a fouled-up maintenance job.” Although Respondent does not dispute that it knew about the union activity in general, it vigorously argues that the evidence is insufficient to establish that it was aware of Marcum’s involvement with the Union prior to his termination.

The General Counsel concedes, in essence, the lack of direct evidence that the Company knew about Marcum’s union activity but argues that the plethora of circumstantial evidence compels the inference that Respondent became aware of Marcum’s union sympathies and discharged him for that reason.

No formalistic *Wright Line*¹⁴ analysis is necessary as, for reasons outlined below, I have concluded Respondent’s defense to this allegation is a pretext.¹⁵ Nevertheless, the General Counsel always bears the burden of proving in 8(a)(3) cases “with acceptable substantial evidence” that a discharge “comes from the forbidden motive of interference in

¹⁰ *American Freightways Co.*, 124 NLRB 146, 147 (1959). (Emphasis added in the quoted text.)

¹¹ *Atlas Microfilming*, 267 NLRB 682 fn. 2 (1983)—threat to close business operations; *M.K. Morse Co.*, 302 NLRB 924 (1991)—promise of potential pay increase in Henceroth-Smyth conversation.

¹² See, e.g., *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985), where the Board reiterated its case by case in determining whether, under all the circumstances, employee interrogation contains elements of coercion. And see *Dependable Lists*, 237 NLRB 1304, 1305 (1979)—coercive interrogation of employee Gross unlawful; *C. J. Rogers Transfer*, 300 NLRB 1095, 1101 (1990)—soliciting employee to ascertain and report other employees’ union sympathies unlawful; *Rolligon Corp.*, 254 NLRB 22 (1981)—inviting union supporters to seek employment elsewhere unlawful. See also *McLane/Western, Inc. v. NLRB*, 723 F.2d 1454 (10th Cir. 1983), and the cases cited therein at 1456.

¹³ *McLane/Western, Inc. v. NLRB*, supra at 1458 fn. 12.

¹⁴ 251 NLRB 1083 (1980). In *Wright Line*, the Board held that once the General Counsel makes a prima facie showing that protected conduct was a motivating factor in an employer’s action against an employee, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct.

¹⁵ See *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

the employee's statutory rights."¹⁶ However, direct evidence that an employer knew of the discharged employee's union activity is not essential; circumstantial evidence of employer knowledge and unlawful motive is sufficient.¹⁷

The General Counsel filled this record with indicators that Marcum was a valued, long-term employee. Apart from the actual length of his service, those indicators include his leadman status, his recent pay increase, and Respondent's expenditures for his outside schooling related to the equipment he was assigned to repair on July 13. Although disappointed that he was not selected for promotion to the quarry superintendent's job, he was reassured of his future promotion potential by Keller as recent as 2 weeks before his summary discharge. Furthermore, Batt never admonished Marcum for any alleged deficiencies; instead, he assured Marcum as recently as July 12 that his work was quite satisfactory.

No serious dispute exists about the fact that Marcum was responsible for contacting the Union and supplying it with the names and phone numbers of the quarry employees. Apparently, Marcum was also the first to call management's attention to the early union contacts with the quarry workers. In the period preceding Marcum's discharge, no other employee had provided the Union with any other known form of assistance apart from, perhaps, encouraging the Union's organizer in the course of a private telephone contact.

The General Counsel also established a strong case reflecting Respondent's union animus and potentially unlawful motive through the series of events which transpired over the 2-week period preceding Marcum's discharge. Those events included independent violations of Section 8(a)(1) as found in the previous subsection, including particularly that evidence showing that Respondent was interested in the identity of the person or persons who might be furnishing the Union with information necessary to mount an organizing campaign among its relatively isolated quarry employees.

A summary of the more salient aspects the General Counsel's evidence concerning both knowledge and motive shows that Respondent was: (1) aware of the Union's initial efforts at organizing the quarry employees as evidenced by Marcum's July 3 disclosures to Begeman and Keller; (2) strongly opposed to union representation as evidenced by Keller's July 3 remarks to Marcum, including particularly the threat to close the quarry; (3) employing unlawful means to thwart employee representation including the aforementioned threat and vague references to increasing wages; (4) searching for, or at a minimum curious about, the identity of anyone aiding the Union's early efforts—the "nigger in the woodpile"—by means of coercive employee interrogation; (5) engaging in speculation about potential union supporters as evidenced by Batt's July 11 remarks to Marcum concerning Hayes; (6) apparently privy to employee scuttlebutt through Grasser, the Keller relative employed among the rank-and-file employees at the quarry and an individual with whom Marcum had discussed the Union's calls; and (7) at least obliquely rebuffed on July 8 and 9 by Marcum's failure to provide any further information concerning employee union sympathies or activities as Keller had requested.

Full responsibility for the decision to discharge Marcum was attributed solely to Batt. Although Batt asserted that he observed damaged parts installed by Marcum during his last inspection of the project on July 13, his account of the discharge conversation reflects no discussion about damaged parts; instead, he accused his leadman only of providing a dishonest account about the repair project's status at the end of the July 13 workday. This unusual circumstance coupled with Batt's lengthy postdischarge file memo about Marcum's numerous purported deficiencies—none of which Batt ever called to Marcum's attention and some of which appear far more serious than the so-called dishonesty that supposedly lead to Marcum's discharge—suggests either that the asserted reason for Marcum's discharge is a pretext or that Quarry Superintendent Batt, as portrayed by witness Batt, is a supervisor who lets substandard performances accumulate without correction before discharging valued, long-term employees without warning. The inherent improbabilities in Batt's account leaves me with considerable suspicion concerning his veracity.

In my judgment, the evidence at the conclusion of the the General Counsel's case established a strong basis for inferring that Marcum's termination resulted from Respondent's knowledge or suspicion of his union sympathies. This inference became even more compelling after Respondent's witnesses failed to provide a convincing explanation for Marcum's termination. On the contrary, the thrust of the defense was so shrouded with fatal inconsistencies, improbabilities, and the lack of significant corroboration as to lead me to the conclusion that Marcum's discharge was unlawfully motivated.

Of greatest significance to my conclusion about Respondent's defense, of course, is the prior finding that Walker's account of the postdischarge repairs is credible. That being so, Respondent's protracted effort to ascribe Marcum's discharge to a bungled repair job characterized by the destruction of expensive shaker parts is rejected. But Walker's account aside, that claim is also rejected because even Batt, the supervisor who purportedly made the decision to discharge Marcum, failed to make a straightforward assertion that he fired Marcum because he damaged the new parts in the course of installing them.

Furthermore, Begeman became inexplicably vague in attempting to describe the discharge conference and, in the end, was entirely unhelpful in resolving which of the two remarkably divergent versions of this event, that of Batt or Marcum, provided the more accurate account. Likewise, Marcum's extremely significant assertion—at least from viewpoint of the claims made by Batt—that both Horcher and Ferguson assisted in covering the exposed bearings at the end of the July 13 workday was never contradicted by Respondent's witness Horcher and Ferguson was never called as a witness at all, nor was his absence explained.

Equally inexplicable is Keller's failure to rebut Marcum's assertion that he received a curt brushoff in their postdischarge conference, a remarkable happenstance especially in view of Marcum's long tenure and Keller's recent assurances to Marcum about his future with the Company. Finally Keller's acknowledgment on cross-examination by the General Counsel that he had discussed the union matter with Grasser and the subsequent failure to elicit any explanation of the scope and nature of their discussion—or at the

¹⁶ *NLRB v. Wilhow Corp.*, 666 F.2d 1294, 1301 (10th Cir. 1981).

¹⁷ *Id.* at 1301, 1302, citing *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941).

very least a denial that this exchange did not include Marcum's discussions with Grasser about the Union's calls—provides some significant basis for inferring that Keller succeeded in locating the “nigger in the woodpile.”¹⁸

Having concluded that Respondent's witnesses failed to provide a truthful account establishing that Marcum was discharged for cause, I find, based on the extant circumstance of the Union's renewed interest in the quarry employees and Respondent's hostile and inquisitive reaction, that Marcum's discharge resulted from Respondent's knowledge or suspicion that he was sympathetic to union organization and assisting that cause. Accordingly, I conclude that Marcum's discharge violated Section 8(a)(3) as alleged.

II. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth above, occurring in connection with Respondent's business operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By coercively interrogating employees about their union activities and sympathies, threatening to close its quarry if employees chose to be represented by a union, making vague promises of future wage increases, soliciting employees to report employee union activity and sympathies, suggesting that employees who wanted union representation should seek employment elsewhere, implicitly suggesting to employees that it was attempting to identify the instigator of the union organizational activity, and advising an employee that another employee would not be permitted to work because of his suspected union activity or sympathy, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. By discharging Richard Marcum on July 15, Respondent engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (3) of the Act.
5. The unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, the recommended Order requires Respondent to cease and desist therefrom and to take the fol-

¹⁸The General Counsel's brief provides an interesting historical footnote about the origins of the well-known phrase “nigger in the woodpile.” Citing *Picturesque Expressions: Thematic Dictionary*, 2d ed. (Gale Research Co., 1985), the General Counsel points out that the phrase first appeared in print in 1852 and referred to the underground railroad practice of hiding runaway slaves in woodpiles. As used in this case, however, I have construed the phrase to mean an individual, without regard to race, engaged in an anonymous, unapproved activity.

lowing affirmative action designed to effectuate the policies of the Act.

To remedy Marcum's unlawful discharge, Respondent must immediately offer in writing to reinstate Marcum to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or other benefits. Respondent must also make Marcum whole for the loss of pay and benefits suffered by reason of the discrimination against him. Backpay, if any, shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Contributions due to any trust fund account on Marcum's behalf shall be determined in accord with *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Respondent must further expunge from any of its records any reference to Marcum's July 15 discharge and notify Marcum in writing that such action has been taken and that any evidence related to that discharge will not be considered in any future personnel action affecting him. *Sterling Sugars*, 261 NLRB 472 (1982).

Finally, Respondent must post the attached notice to inform employees of their rights and the outcome of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁹

ORDER

The Respondent, Asphalt Paving Company, Golden, Colorado, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Discharging employees in order to discourage membership in a labor organization.
 - (b) Coercively interrogating employees concerning their union activities and sympathies.
 - (c) Promising employees wage increases in order to discourage union activities.
 - (d) Threatening to close its quarry because of employee union activity.
 - (e) Informing any employee that another employee would not be permitted to work because of suspected activity or sympathy for the Union.
 - (f) Soliciting any employee to report the union activities or sympathies of any other employee.
 - (g) Suggesting to any employee that the identity of the employee responsible for instigating union activities among employees is being sought.
 - (h) Suggesting to employees that they should seek employment elsewhere if they desired union representation.
 - (i) In any like or related manner interfering with, restraining, coercing, or discriminating against employees because they exercise rights guaranteed by Section 7 of the Act.

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

¹⁹If 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. All pending motions inconsistent with this Order are denied.

(a) Immediately offer to reinstate Richard Marcum and make him whole for all losses incurred as a result of his July 15, 1991 discharge in the manner specified in the remedy section of the administrative law judge's decision in this matter.

(b) Expunge from its records any reference to Richard Marcum's July 15, 1991 discharge and notify Marcum in writing that such action has been taken and that this discharge will not be used in any future personnel action involving him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the propriety of any offers of reinstatement, backpay, and trust fund reimbursements required by the terms of this Order.

(d) Post at its Ralston quarry near Golden, Colorado, copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 27, 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.

(e) 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 all complaint allegations not sustained by the administrative law judge's decision in this case are dismissed.

²⁰If 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.

The National Labor Relations Act provides employees with the right to engage in union or other concerted activities for mutual aid and protection on the job, or to refrain from any such activities.

WE WILL NOT discharge or discriminate against employees in order to discourage membership in International Union of Operating Engineers, Local No. 9, AFL-CIO or any other labor organization.

WE WILL NOT coercively interrogate employees about their union activities and sympathies.

WE WILL NOT promise employees wage increases in order to discourage their union activities.

WE WILL NOT threaten to close our quarry because of your union activities.

WE WILL NOT inform any employee that another employee will not be permitted to work because of suspected activity or sympathy for the Union.

WE WILL NOT solicit any employee to report about the union activities or sympathies of any other employee.

WE WILL NOT suggest to any employee that the identity of the employee responsible for instigating union activities among employees is being sought.

WE WILL NOT suggest that employees should seek employment elsewhere if they desire union representation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees because they exercise their rights guaranteed by the National Labor Relations Act.

WE WILL immediately offer to reinstate Richard Marcum to his former position, and pay him for wages and benefits he lost as a result of his discharge on July 15, 1991, with interest as provided by law.

WE WILL notify Richard Marcum in writing that we have expunged any reference to his July 15, 1991 discharge from our records and that we will not rely on that discharge in any future personnel actions involving him.

ASPHALT PAVING COMPANY