

Topside Construction, Inc. and Operating Engineers Local 3, International Union of Operating Engineers, AFL-CIO. Cases 20-CA-27725, 20-CA-27777, 20-CA-27839, and 20-RC-17245

October 22, 1999

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN TRUESDALE AND MEMBERS FOX
AND LIEBMAN

On March 10, 1998, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in opposition to the Respondent's exceptions, and the Charging Party joined this brief and filed a brief in support of the judge's report on challenges and objections.

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 conclusions² and to adopt the recommended Order as modified and set forth in full below.³

ORDER

The National Labor Relations Board orders that the Respondent, Topside Construction, Inc., Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities.

(b) Threatening employees with unspecified reprisals for exercising their protected right to file unfair labor practice charges.

(c) Threatening employees with more rigid treatment, discharge, and future job loss because of their union activities.

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.

² In the absence of exceptions, we adopt, *pro forma*, the judge's recommendations that the Employer's Objections 3, 4, 6, and 7 be overruled, and the judge's conclusion that the absence of union objections is no bar to setting aside the election in the event the revised tally of ballots shows that the Union did not receive a majority of the valid ballots cast.

³ The judge inadvertently omitted from his recommended Order and notice his finding that the Respondent threatened employees with more rigid treatment. We shall modify the judge's recommended Order and notice to reflect this correction.

We shall also modify the judge's recommended Order to conform to *Indian Hills Care Center*, 321 NLRB 144 (1996).

(d) Threatening employees with closure of the Respondent's operations if the employees selected a union to represent them.

(e) Failing to recall the following employees because they were engaged in union activities:

Mike Buttacavoli

Chris McBride

Mike Munoz

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

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

(a) Within 14 days from the date of this Order, offer Mike Buttacavoli, Chris McBride, and Mike Munoz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make each of them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner provided in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful failure to recall these employees, and within 3 days thereafter notify these employees, in writing, that this has been done and that this conduct will not be used against them in any way.

(d) Within 14 days after service by the Region, post at its Carmichael, California facility, and all jobsites where employees in the bargaining unit involved herein are employed, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 20, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent's authorized representative, shall be posted 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 the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since March 14, 1997.

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back-pay due under the terms of this Order.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

DIRECTION

IT IS DIRECTED that, within 14 days from the date of this Decision, Order, and Direction, the challenged ballots of Steve Peterson, Matt Haser, Doug Young, Don Young, Mike Buttacavoli, Michael Drury, Stan Thrall, Michael Munoz, and Chris McBride be opened and counted by the Regional Director and that a revised tally of ballots be issued.

IT IS FURTHER DIRECTED that if the revised tally of ballots reveals that Operating Engineers Local 3, International Union of Operating Engineers, AFL-CIO (the Petitioner) has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If, however, the revised tally shows that the Petitioner has not received a majority of the valid ballots cast, the Regional Director shall set aside the election and conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.

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 interrogate our employees about their union activities and sentiments.

WE WILL NOT threaten employees with more rigid treatment, discharge, loss of future job opportunities, and the closure of our operation because they support the Union or engage in union activities.

WE WILL NOT threaten employees with adverse consequences if they assert their right or intention to file charges against us with the National Labor Relations Board.

WE WILL NOT fail to recall our employees because they engage in union activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Mike Buttacavoli, Chris McBride, and Mike Munoz full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make the above-listed employees whole, with interest, for any loss of earnings and other benefits suffered as a result of our discrimination against them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful failure to recall the above-listed employees, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that this conduct will not be used against them in any way.

TOPSIDE CONSTRUCTION, INC.

William A. Baudler & Patrick Kavanagh, Esqs., for the General Counsel.

Dennis B. Cook & Jessavel Y. Delumen, Esqs. (Cook, Brown, Rediger & Prager), of Sacramento, California, for the Respondent/Employer.

Timothy Sears, Esq., of Alameda, California, for the Charging Party/Petitioner.

DECISION AND REPORT ON CHALLENGES AND OBJECTIONS

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard the above-captioned cases in trial in Sacramento, California, on August 20–22, 1997. The matter arose as follows.

I. THE UNFAIR LABOR PRACTICE CASES

On March 21, 1997, the Operating Engineers Local 3, International Union of Operating Engineers, AFL-CIO (the Charging Party, the Petitioner, or the Union) filed a charge, docketed as Case 20-CA-27725, with Region 20 of the National Labor Relations Board against Topside Construction, Inc. (the Respondent or the Employer) amending that charge on June 27, 1997. The Charging Party filed a second charge against the Respondent, docketed as Case 20-CA-27777, on April 23, 1997, and a third charge against the Respondent, docketed as Case 20-CA-27839, on June 2, 1997, amending the latter charge on July 2, 1997.

The Regional Director for Region 20 issued an order consolidating cases, consolidated complaint and notice of hearing involving the first two charges on June 27, 1997, and an order consolidating cases, amended consolidated complaint and notice of hearing on July 2, 1997, consolidating all three of the

above-captioned unfair labor practice cases. An order consolidating cases, second amended consolidated complaint and notice of hearing respecting the three cases issued on July 11, 1997. The Respondent filed timely answers to the complaints.

The complaint alleges and the answer denies that the Respondent's agents made various threats to employees in the months of March and April 1997 in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). The complaint further alleges and the answer denies that the Respondent failed to recall employees Chris McBride, Mike Munoz, Mike Buttacavoli, and Troy Pair, on or about March 26, 1997, because of their actual or suspected union activities in violation of Section 8(a)(3) and (1) of the Act.

II. THE REPRESENTATION CASE

On March 14, 1997, the Union filed a petition, docketed as Case 20-RC-17245, seeking to represent the Employer's heavy equipment operators. Pursuant to a Stipulated Election Agreement approved by the Regional Director on April 4, 1997, an election was conducted on April 25, 1997. The tally of ballots shows that 6 votes were cast for the Union, 1 vote cast against the Union and 13 ballots were challenged. The challenged ballots were sufficient in number to affect the results of the election. On May 2, 1997, the Employer filed timely objections to the election and on May 5, 1997, an amendment to the objections each of which were served on the Petitioner.

On July 11, 1997, the Regional Director issued a report on objection and challenged ballots, order consolidating cases and notice of hearing. The report held that the objections and challenges raised substantial and material issues of fact which could best be resolved by a hearing. The report further held that the allegations of the complaint should be considered with the objections to the extent they bear on the validity of the election. The report ordered that the challenges and objections be consolidated with the complaint for a common hearing and determination and requested that the designated judge prepare and serve on the parties a report containing resolutions of credibility, findings of fact, and recommendations to the Board respecting the challenged ballots and the disposition of the objections and other conduct bearing on the validity of the election.

On the entire record, including oral argument by the Respondent and helpful briefs from each of the parties, I make the following

FINDINGS OF FACT¹

I. JURISDICTION

At all times material the Respondent has been a corporation with a place of business in Carmichael, California, where it has been engaged in the construction industry providing site preparation services. During the year ending April 4, 1997, the Respondent during its business activities provided services valued in excess of \$50,000 to other business entities each meets one or more of the Board's standards for assertion of jurisdiction on a direct basis.

Based on the above, the complaint alleges, the answer admits, and I find the Respondent at all relevant times has been an

¹ As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings here are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent is a construction site preparation contractor in the Greater Sacramento, California area. Its president is Larry Nizzoli and its superintendent is Frank Haser. The Respondent has employed approximately a dozen or more² employees as heavy equipment operators and in related functions. At relevant times it operated two crews, one under the direction of Michael Drury and the other under the direction of Stan Thrall. Within the Greater Sacramento area, the Respondent was a relatively small, unorganized construction site preparation contractor with two much larger competitors in the area who were signatory to contracts with the Union.

On the morning of March 14, 1997, the Union hand delivered to the Respondent's president, Nizzoli, a letter on the Union's letterhead asserting, in part:

This is to inform you that a majority of your production and maintenance employees in your Sacramento area operation have designated Operating Engineers Local Union No. 3 of the International Union of Operating Engineers, AFL-CIO, as their exclusive bargaining representative. Therefore we hereby request recognition as the exclusive bargaining agent for the employees described above.

We tender immediate proof of our majority status through a card check conducted by any impartial, mutually agreed upon their party, such as the State Conciliation Service.

B. The Complaint Allegations

1. Conduct alleged to violate Section 8(a)(1) of the Act

a. Complaint paragraph 6(a): The Respondent's agent, Larry Nizzoli, about April 2, 1997, threatened employees with unspecified reprisals for exercise of the Section 7 right to file charges with the Board

Former employee Troy Pair testified that, becoming frustrated with the fact that he had not been recalled to work, he went to the Prairie Oaks jobsite on April 1, 1997, to determine which of the Respondent's employees were at work. He walked the jobsite taking notes on the individuals at work. Pair testified that during this process he was summoned by horn and hail to Haser's truck in which Superintendent Haser and President Nizzoli were sitting. He approached the truck and was asked by Haser what he was doing on the job. Pair testified:

I said I was taking notes on who was working. I asked him if he thought it was fair for some of these people who were out there to work before I was. I used the names Craig Scott, Kevin Weatherington and John Cooke. And he said yes, he thought that was fair.

Q. Did you say anything in response?

² The construction industry and the site preparation aspect of the construction trade are both seasonal and site preparation is especially subject to interruption and delay because of adverse weather conditions.

A. I just let him know I didn't think that was fair and that I was going to file an unfair labor practice.

Q. What, if anything, did Haser say in response to that?

A. Do what you got to do?

Q. Was anything else said at that time?

A. No.

Later that day, Pair received a telephone call from Haser asking him to return to work the following day, April 2, 1997. He did so. Working that first morning, Pair testified that Nizzoli approached him on the job appearing upset, shaking and gritting his teeth and, as Pair recalled, "told me that I needed to keep my mouth shut and to control my temper until this was all over." Pair testified: "I asked what was all over, and he says this union thing." At lunch that day Pair made a written note of the event. He wrote: "Larry approached me. You have to control your temper and shut your mouth. Trembling and shaking." His note contained no reference to statements by Nizzoli about the Union or "until this was all over."

Frank Haser recalled meeting Pair at the jobsite on April 1, 1997. He testified that he and Nizzoli were approached by Pair in an agitated state and that Pair wanted to know why he was not working. When Haser told him that he had not been needed up to that point, Pair "said he was going to file an unfair labor practice report and stomped off."

Nizzoli testified:

Q. And on this same day, April 1st, at the Prairie Oaks jobsite, did you see Troy Pair at the jobsite?

A. Yes. Frank [Haser] and I were standing there talking. He was in his truck and I was standing alongside and we saw Troy walking on the job and making a loop around the circle. And I said, "I wonder what Troys doing." And he said, "I don't know." And I think we waved him over as he was within 100 yards of us, as he was making his circle.

Q. So on that day was he scheduled to work at Prairie Oaks?

A. No, we had decided that we were going to call him that day to come to work the next day.

Q. So you called Troy Pair over and then what happened?

A. Troy came over and I—I don't remember—Frank might have said, "How are you doing," or something, or, "What are you doing," or something, in a friendly manner. And Troy was quite upset and quite angry and loud, and he proceeded to yell at us that this was all a bunch of baloney, this was not right, that he should be out here working before Craig Scott or before Kevin Weatherington, and this was not—you know, acceptable, and he was going to file a ULP, and I was in total shock.

Nizzoli also recalled his comments to Pair the following day.

The next morning, I was on the jobsite before we started and I—I guess I shouldn't have, but, again it was such a shocking thing to me, that what he did—you know, how someone could yell at their boss and certainly the owner of the company like that—so I went down to Troy with the idea of fatherly advice. And I said, "Troy"—I said, "You know that—you know, we were just getting ready—we were going to call you to come to work the next day, and when we waved you over, we were going to

save the phone call and just tell you." "But, I said, "you just totally shocked us, the way you acted." And I said, "Your hot temper is going to get you in trouble some day. And you've got to learn to control it."

Nizzoli specifically denied telling Pair the "problem" was with the Union or that Pair had better keep his temper in check "until this thing is over." He further denied even knowing until after these conversations what a "ULP" or unfair labor practice was.

There is essentially no dispute respecting what was said on April 1 save that Pair recalled threatening to file an "unfair labor practice," Haser recalled Pair's reference was to an "unfair labor practice report," and Nizzoli recalled it simply as a "ULP." I credit Haser and Pair that Pair used the term "unfair labor practice" rather than simply the initials "ULP." It is unlikely that Pair was a cognoscente of Agency nomenclature at that time and Haser corroborates his recollection.

As to the April 2 Nizzoli-Pair conversation, I credit Nizzoli's version of events over Pair primarily because Pair's notes recording the conversation shortly after its occurrence failed to attribute to Nizzoli the references to the Union or "till this thing is over" which Nizzoli denied making. Had Nizzoli made a remark about the Union, it is very likely that Pair would have recalled it the short time later when he made his note and, recalling such a reference, would have been likely to have recorded it. His failure to do so undermines his version of events. I do not believe that Pair was dishonest in his testimony. Rather, I believe that he connected Nizzoli's remarks to this threat to file a charge with the Board the previous day and this colored his recollection.

Even given this credibility resolution, I find that Nizzoli's statement to Pair violates Section 8(a)(1) of the Act. Pair had angrily threatened to file an unfair labor practice charge and Nizzoli's warning the next day to Pair that his conduct was going to get him "in trouble some day," I find, would reasonably have chilled an employee's contemplation of filing charges with the Board, an activity protected by the Act. From the Respondent's perspective, at the very least, Nizzoli should have realized³ that Pair's threat to file unfair labor practice charges involved Pair considering taking the matter to the Board. Telling Pair that his conduct on that day, i.e., his threat to go to the NLRB, was likely to get him in trouble could not help—as Nizzoli either realized or reasonably should have realized—but convey the message to Pair that making such threats about going to the Labor Board was going to cause him trouble in his employment with the Respondent. The word "trouble" as used in this context clearly is a threat—however nonspecific—to adversely effect Pair in his employment. I therefore sustain this allegation of the complaint.

³ Nizzoli denied understanding Pair's threat to file a "ULP." Were it necessary to do so, I would discredit his assertion. Both a representation petition and an unfair labor practice charge against the Respondent had been filed by the Union and served on Nizzoli well before April when the events in controversy occurred. While Nizzoli may not have had an attorney's understanding of the nuances of the term, I specifically find he was aware that Pair in the April 1 conversation was threatening to complain to the National Labor Relations Board that he had not yet been recalled to work.

b. Complaint paragraph 6(b): The Respondent's agent, Larry Nizzoli, about April 22, 1997, threatened not to bid on new projects and to close its operations because of employees' support for the Union

Former employee Stan Thrall testified that he had a personal conversation with Larry Nizzoli at the Prairie Oaks job on April 21, 1997, regarding the Union and related matters. Thrall expressed his unhappiness respecting Superintendent Haser who, he felt, was "pushing his responsibilities" on Thrall. Thrall told Nizzoli "that I was probably going to go union, and that I was unhappy; and that many of the other crew members felt the same way." Thrall testified that Nizzoli responded that the Respondent would be unable to compete with its larger more integrated competitors as a union company and would have to "close their doors." Nizzoli also said, in Thrall's recollection, that he had been anticipating making an aggressive bid—he had "sharpened his pencil so to speak"—that week on a significant new job, but that as a result of Thrall's remarks, Nizzoli was not going to submit the bid. Thrall recalled that about an hour or two after the conversation, Nizzoli telephoned him:

He told me not to say anything to anyone about the conversation that we had because even in the context of a personal conversation, if I said anything to anyone I could be subpoenaed to testify on that information.

Nizzoli testified to two separate events. He recalled having had a conversation with Haser which could have been overheard by Thrall who was nearby in which Nizzoli lamented that a main client of the Respondent had entered into a joint venture with another developer combining what might have been ideal separate work for the Respondent into a larger job which, in Nizzoli's expressed estimation, would make the Respondent's possible bid on the joint project noncompetitive. Nizzoli testified he told Haser that this was unfortunate and that even though the client had solicited a bid from the Respondent on the work, Nizzoli did not intend to bid since he was convinced any bid would be unsuccessful.

Nizzoli also recalled a "personal" conversation with Thrall in late April.⁴ The conversation dealt primarily with Thrall's personal difficulties and his desire to be just a grade setter who did not have to deal with the problems that a foreman has to deal with. Nizzoli testified that Thrall asserted:

he realized that as long as he stayed at Topside he'd always be considered by the crew as the foreman. So he decided that his only choice of action is to make a clean break, go some place else to work, and just be a grade setter.

And so he said, "If I'm going to do that, I'm also going to go back to the union."

Finally Nizzoli recalled that in this conversation Thrall asked:

[H]e asked me, he says, "What's going to happen to Topside, you know, with this?" And I said, "Stan, I don't know." But I said, "I do know that if—you know, if we are forced to be-

⁴ Nizzoli testified:

I said, "You know, as much as we've been through together and as long as we've been together"—because Stan [Thrall] was our first employee after Frank [Haser]—I said, "This is really awful that you—we can't talk." And Stan says, "Yes, we can."

And I said, "Privately, just between us?" And he says, "Yes, privately just between us. It won't ever go any further."

come union, that we will obviously—our labor costs will increase because of the union benefits, and we'll be less competitive. And so what will happen, I don't know."

Nizzoli testified he later called Thrall and reminded him the conversation should remain confidential.

I found Thrall to be an honest witness with a convincing demeanor who was testifying from his recollection of events without a filtering agenda. Nizzoli on the other hand convinced me that he was tempering his recollections with a strong desire to avoid testifying to any matter or personal remark which he felt might undermine the Respondent's defense to the unfair labor practice allegations. Indeed his overt attempt to have Thrall keep the conversation in confidence supports my belief that Nizzoli was aware his conduct should not be made known to others. Accordingly, based on all the above, I credit Thrall's account of events over Nizzoli's where the two differed.

Given this factual resolution, I find the Respondent through Nizzoli violated Section 8(a)(1) of the Act: (1) by threatening to close the Respondent's operations if the Union came to represent its employees and, (2) by telling Thrall that he had abandoned a bid for work because of the employees' actions in seeking union representation. The General Counsel's cited cases are on point. *Thermal Master, Inc.*, 318 NLRB 43, 45 (1995), and *MBC Headwear, Inc.*, 315 NLRB 424, 428 (1994). I therefore sustain this allegation of the complaint.

c. Complaint paragraph 7(a): The Respondent's agent, Frank Haser, about March 14, 1997, at the Respondent's Laguna, California jobsite, interrogated employees about their union activities

There is no dispute that having learned on the morning of March 14, 1997, that the Union had demanded recognition of the Respondent, Frank Haser went to the jobsite and met with Drury and his crew members. Haser testified: "I asked [the assembled employees] if the union had approached them and they said, no, they had approached the union." Following this initial exchange Haser recalled the employees asked him his view of "the pros and cons of the union" and he made further remarks.

The General Counsel argues on brief at 2:

Haser's questioning of employees with previously undisclosed union sympathies who had been summoned to a hastily called hostile meeting with their superintendent [footnote omitted], with no legitimate reason offered, and without assurances against retaliation, violated Section 8(a)(1) of the Act. See *NLRB v. Loredo Cocoa-Cola Bottling Co.*, 613 F.2d 1338, cert. denied 449 U.S. 889 (1980); *Kona 60 Minute Photo*, 277 NLRB 867, 867 (1985).

The General Counsel's cited cases are persuasive and on point. I agree Haser's conduct as described above violated Section 8(a)(1) of the Act as alleged in the complaint.

d. Complaint paragraph 7(b): The Respondent's agent, Frank Haser, about March 17, 1997, during a telephone conversation, threatened employees with discharge and future job loss because of their union activities

Stan Thrall testified that on March 17, 1997, he called Frank Haser to inquire about returning to work. Thrall testified:

I asked [Haser] what was going to happen with the union. He said that he didn't know. I volunteered that I had signed a union card. He asked me why I had done it. I told

him that I kind of saw a ship sailing away and I jumped on it. That I wasn't sure why I had done it. He asked me how I would vote. I said that if the vote were that day, I would more than likely vote no.

Then, he asked me if I didn't realize that if we did go union, that there was nothing in the union contract that would state that he had to take any of us to the next project. That once that project was over, he would send us back to the union hall.

He then told me that if we so much as went to a break truck, that he would fire our butts on the spot. He told me at that time that Topside would not be union and that he would be in contact with me the rest of the week.

Q. Was there any discussion about crew members during this conversation?

A. Yes.

Q. Can you tell me what that was?

A. He stated that he felt the unionization efforts had come from the other crew. He named Mike Drury and Chris McBride. And that he could see that Chris McBride was stacking the deck against them in bringing Mike Buttacavoli over because he had worked with Chris McBride on another job for a different company.

Haser recalled speaking on the telephone with Thrall on March 17:

And we had a lengthy conversation about the situation.

Q. What do you mean by "the situation?"

A. About them choosing to go union and the way it was done and what I thought. Again, it was all based on a personal friendship-type thing.

I told Stan [Thrall] at that time that the biggest thing that bothered me about the whole thing was that none of them bothered to talk to me before they did it, or involve me in it.

Q. Do you recall what else was said during the conversation?

A. No, not enough to give testimony on, no.

Q. Do you recall whether Buttacavoli's name came up during the conversation?

A. It may have, yeah. It very well may have.

Q. Do you recall what context it may have come up?

A. There was some question that Stan had that he expressed that I had drawn some conclusions on Buttacavoli and I told him that I hadn't, because I had no idea what the man was doing or where he stood on anything, having not talked to him.

Q. What did Stan say?

A. Stan told me that they all had signed, and that was it.

Q. Did you respond to his statement?

A. That it surprised me. I told him that much.

Haser's recollection of the conversation is not as detailed as Thrall's and is not entirely inconsistent. More importantly Haser's demeanor during this testimony was simply unpersuasive. I formed the belief that Haser was willing to deny or fail to recall actions and statements attributed to him based on the Respondent's general denials of wrongdoing rather than consulting his recollection and basing his answers thereon. Thrall, however, seemingly testified from a memory of events without elaboration. Based on the relative demeanor of the two wit-

nesses and on the basis of the record as a whole, I credit Thrall over Haser where the two differ.

Given the factual resolution, I further find that the statements violate Section 8(a)(1) of the Act. As correctly argued by the General Counsel on brief, the threat to tighten working conditions, treat the employees more rigidly and generally less well if the Union represents employees, violates the Act. *Lafayette Radio Electronics Corp.*, 216 NLRB 1135, 1140-1141 (1975); *Penn Color, Inc.*, 261 NLRB 395, 396, 403 (1982).

e. Complaint paragraph 7(c): The Respondent's agent Frank Haser, about April 1997, on two different dates, at the Respondent's jobsite, threatened employees with closure of its operations if the employees voted for union representation

Thrall testified that he had two conversations with Haser in late March and early April. In the first conversation, at the Prairie Oaks project, Thrall told Haser of his dissatisfaction with the Respondent and his desire to look into unionization. The conversation included a discussion of a union pension plan which Thrall found enticing. Thrall recalled Haser told him that a part owner of the Respondent, Joe Lucidge, "would not allow Topside to be union." In a second conversation about a week later on the same job, Thrall testified that Haser told him: "Larry [Nizzoli] could not afford to go union and that Larry was looking into some sort of pension plan." Haser generally denied threatening employees in violation of the Act.

As noted, *supra*, I found Thrall to be a persuasive and believable witness concerning other matters in dispute. I found him equally so with respect to this testimony. Haser's testimony was far less convincing and caused me to believe he was testifying with an aim to avoid recollecting events which he imagined would embarrass his employer. Based on these strong impressions I credit Thrall over Haser where the two differed.

As discussed, *supra*, both threats of adverse consequences for those who support the Union and more threats to close operations are a violation of Section 8(a)(1) of the Act. I find therefore that the Respondent, through Haser, violated Section 8(a)(1) as alleged in the complaint by threatening an employee with closure of operations. I therefore sustain this allegation of the complaint.

2. Conduct alleged to violate Section 8(a)(3) of the Act, complaint paragraph 8: beginning on or about March 26, 1997, the Respondent failed to recall employees Chris McBride, Mike Munoz, Mike Buttacavoli, and Troy Pair

a. The Respondent's actions at relevant times

On March 14, Drury's crew of employees: Chris McBride, Mike Munoz, Steve Hulse, and Troy Pair told Haser, who was inquiring about the basis of the Union's demand for recognition earlier that day, that they had on their own initiative contacted the Union. At the end of the day, as had been expected because of the progress of work, Drury and his crew were laid off. Drury and his crew members expected to be recalled to work in the near future.

Mike Buttacavoli had begun work for the Respondent on Thrall's crew earlier that week on the recommendation of McBride. On March 14, Thrall and his crew were also laid off because of unsuitable ground conditions. Thrall and his crew also expected to return to work in a few days when it was determined which job could proceed.

No employees worked between March 14 and 26. On Wednesday, March 26, the Respondent began to recall employ-

ees to its Prairie Oaks job which was in its initial stage of preparation. Haser testified that he intended Thrall to be the foreman on this job. Thrall and returning former employee John Cooke were the first employees on the job on March 26. They were joined by Thrall's crew member Harryman the next day, and laid-off employees Young and Peterson the day following.

On March 27 the Respondent began 2 days' work at its Sun City project which was now in its undergrounding phase utilizing Drury and Thrall's crew member, Moises Vasquez. The following workday Drury worked at a small job, Crocker, with a day laborer for part of the day and with several employees for at least a day the following week. He filled out timesheets for these short jobs as the foreman. Drury was primarily involved at Prairie Oaks that week and thereafter working under Haser and Thrall.

As the needs of the Prairie Oaks job increased, Haser sought additional staff. He testified he started trying to contact laid-off employee Munoz on March 28 and after several attempts spoke to him on April 1. In that conversation Haser asked what Munoz was doing and Munoz said he was working for a different employer—Mallory. Haser did not mention recall, nor did Munoz, and the conversation soon ended without reference to Munoz' employment or return to work with the Respondent. The Respondent's agents and Munoz did not communicate further respecting his return to work and Munoz had not returned as of the hearing.

Haser testified he also attempted to reach McBride. He attempted to do so by telephone on March 28, but got no answer. He called again on March 31: "A young lady answered the phone and I left a message to have Chris call me." No return call was forthcoming. Haser testified he tried to call McBride again on April 1 and again got no answer. Having heard thereafter that McBride was working for another contractor, Haser testified, he ceased trying to reach him. McBride testified he never received a message that Haser had called or to call Haser from anyone in his household. He also testified his household telephone is connected to a working answering machine which he checks for messages and at no relevant time had a caller left a message that he was to call Haser. McBride never was personally contacted to return to work and never did so to the time of the hearing.

As described supra, Pair spoke to Haser and Nizzoli on Tuesday, April 1, on the Prairie Oaks jobsite and was telephonically offered recall by Haser that evening to begin work the following day, which offer he accepted. Both Pair and Steve Hulse started at the Prairie Oaks job April 2.

Mike Buttacavoli was never recalled. He regularly contacted Thrall seeking information on recall dates until early April when Thrall reported to Buttacavoli on Haser's instruction that he had been earlier hired on a trial basis and that he had not worked out.

b. The argument of the parties

The General Counsel and the Union argue that the Respondent—primarily Superintendent Haser—believed that Thrall's crew was behind the Union's demand for recognition and the Union's filing of the representation petition and harbored resentment against them for that reason. This is evident, argues the General Counsel, from the improper interrogation of the crew by Haser on March 14, from Haser's statement to Thrall on March 17, i.e., that he believed that Drury's crew members

were responsible for the "unionization efforts," specifically naming Drury⁵ and McBride as prounion, and suggesting that McBride was "stacking the deck against them in bringing Mike Buttacavoli over because he had worked with Chris McBride on another job for a different company," and from the other improper statements of the Respondent's agents, Haser and Nizzoli alleged in the complaint.

The General Counsel and the Union argue that the actual circumstances of the recall process further establish the violation. Thus, they argue that the Respondent maintained a consistent pattern of recalling skilled grade setters and finish blade operators before other less skilled employees until March 1997 and the failure to recall Thrall's crew members before the other less skilled employees was a breach of that long-standing tradition. Second, they argue that, beyond simple delay, the complete failure to recall Buttacavoli, McBride, or Munoz further support their claim.

The Respondent denies union animus was a factor in the March–April 1997 recalls and argues that the initial startup days at the Prairie Oaks job were too few and circumstances too unusual to support a claim that the recall was inconsistent with an established pattern. Thus the Respondent noted the job was to be Thrall's as foreman, that it involved rough or rocky ground and rented equipment requiring, because of the owner's restrictions, particular operators, and that the return of former employee Cooke was an intervening factor in the recall. Further the Respondent argues that Haser attempted to recall both McBride and Munoz and was dissuaded only on learning that each had obtained employment elsewhere which was evidence that they had quit.

c. Analysis and conclusions—the standard to be applied

The Board in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), established a test for approaching discrimination allegations which was recently restated in *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996):

Under [the *Wright Line*] test, the Board has always first required the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity. *Office of Workers Compensation Programs v. Greenwich Collieries* [512 U.S. 267, 278 (1994)].

Under this test it is first appropriate to determine if the General Counsel has met his burden of proof that antiunion sentiment was a substantial or motivating factor in the Respondent's timing of the recall of Pair, the initial attempt and subsequent abandonment of attempts to recall employees Chris McBride and Mike Munoz, and its decision not to recall Mike Buttacavoli. Should the General Counsel meet that burden as to some or all of these allegations, the analysis will then turn to the question of whether or not the Respondent with respect to such allegations has met its burden of persuasion to prove its affirmative defense that it would have taken the same action or inaction even if the employees had not engaged in protected activity.

⁵ The complaint does not allege that the failure to recall Drury violated the Act. Drury at relevant times was on salary and was paid irrespective of his actual working hours.

The General Counsel has established direct knowledge by the Respondent Superintendent Haser that Drury's crew had gone to the Union. Based on the findings earlier made, it is clear the Haser was hostile to Drury's crew members for that reason. Further, although Buttacavoli was not on Drury's crew, I specifically find, as detailed supra, that Haser also expressed hostility respecting Buttacavoli who he believed to be a union shill or salt brought into the Respondent's employ for the purpose of bringing the Union in. This is important evidence of the Respondent's knowledge of its employees' union activities and animus respecting those activities. Further, in the context of an organizing drive and during the pendency of a Board representation election, employees who are active in support of the Union are also likely favorable votes for the Union if they are eligible to vote.

Turning initially to the timing of the Respondent's recall efforts, there is no dispute that Pair was offered recall the evening of April 1. Haser testified he first tried, albeit unsuccessfully, to reach McBride and Munoz on Friday, March 28. The General Counsel argues that the out of order recall of the employees—before Drury's former crew members named in the complaint were contacted—was punishment for their actual or suspected union activities. I reject the argument as insufficiently established by the facts.

Quite simply, the distinctions the General Counsel wishes to draw in the timing of the recalls are simply based on too short a period of time to sustain the allegation. Thus, for example, I am unable to conclude that Munoz and McBride should have been contacted a day or two earlier than March 28 when the job was in the very threshold stage of development. As discussed in greater detail infra, there is insufficient evidence to challenge the Respondent's rehiring of Cooke who was brought to work on Wednesday, March 26. Perhaps Munoz and McBride should have been brought on the job on March 27, but they were not on Thrall's crew and it was Thrall who was to run the job. It is clear that Pair was exercised at not having been recalled by Tuesday, April 1. Again given the slowly developing job and the fact that Pair was not, like McBride and Munoz, one of the most skilled operators, there is insufficient evidence to meet the government's burden of proof. Accordingly, I do not find the timing of the Respondent's initial recall efforts improper.

McBride, Munoz, and Buttacavoli were not recalled at all. There is no contention that the work quality or performance of these individuals was lacking or that there was no work for them. Each individual, however, presents a somewhat different set of circumstances which merit separate discussion below.

There is little dispute respecting the events as to Munoz. Haser and Munoz spoke on April 1. Haser testified: "The extent of the conversation was pretty much that he was working for Mallory. He was doing fine and that was it. There was no other exchange of conversation." Based on this exchange, and without offering or discussing his recall, Haser testified he concluded Munoz had quit and did not deal further with him. Munoz testified that Haser asked him what he was "up to" and he said he was working for another contractor. The conversation then ended without Haser mentioning a recall and Munoz was not contacted by the Respondent again.

There was substantial, essentially unchallenged testimony that the Respondent's employees regularly sought and obtained other work during periods of layoff and that the Respondent well knew this. Indeed, further unchallenged testimony indicated that Haser would directly contact or pass the word along

to such laid-off employees who were working for other contractors that they were being recalled to the Respondent's employ and that the employees in such circumstances in fact did so. Given this evidence, I find it incredible that Haser could so blithely conclude that Munoz—a valued employee—had quit his employment based on the scant information he received in his telephone call with Munoz and that he then could end the call without telling Munoz there was work and inquiring if Munoz would accept recall.

This being so, and given the credited evidence of Haser's knowledge of and animus concerning the union activities of Drury's March 14 crew members including Munoz, I find that the General Counsel has met his burden of persuasion that the Respondent failed to recall Munoz because of his protected union activities or because the Respondent believed Munoz was engaging in such activities. Turning then to the Respondent's affirmative defense, again I do not credit Haser's testimony that he concluded Munoz had quit. Further, as noted supra, I have discredited Haser where his testimony was inconsistent with the testimony of employees and have little confidence in his testimony here. Rather based upon the noted evidence and the record as a whole, I find and conclude that Haser omitted to recall Munoz because of this union activities and would have recalled him had there been no union activities underway.

Haser testified he tried on at least three occasions to contact McBride by telephone, twice obtaining no answer and once leaving a message with an individual he concluded was a young person. On learning indirectly that McBride was employed by another contractor, Haser testified he simply abandoned further attempts to contact McBride in order to offer him recall. The General Counsel and the Union challenged Haser's version of events and McBride testified he had an answering machine which should have answered the phone and record any messages left but which did not have messages from Haser at relevant times. I find it unnecessary to address this challenge to Haser's testimony respecting the mechanics of his attempting to contact McBride. I reach this conclusion because I find, as with Munoz above, that Haser could not have fairly concluded from what took place that McBride had abandoned work for the Respondent. McBride was a highly skilled employee who would not have been lightly abandoned by the Respondent. Rather, consistent with Haser's specific statements of hostility respecting McBride and union activities, I easily find the General Counsel has met his burden of persuasion to show that McBride was not recalled because of Haser's hostility to him based on his union activities and possible favorable vote for the Union. Turning to the Respondent's affirmative defense I find it fails for want of credible evidence. I am unable to conclude on this record that, had there been no union activities afoot, the Respondent through Haser would have abandoned further attempts to inform McBride there was again work at the Respondent.

Buttacavoli presents a slightly different picture because he was a new employee and because John Cooke returned to the Respondent's employ.⁶ While Buttacavoli was not a member of Drury's crew, the General Counsel relies on the credited assertion of Thrall that Haser believed Buttacavoli had been brought

⁶ The General Counsel and the Union challenged the Respondent's evidence that Cooke communicated a desire to return to the Respondent's employ and that the Respondent was glad to have him back. There is no substantial contrary evidence save general suspicion offered in opposition. Therefore, I credit the Respondent's version of events as to Cooke.

to the Respondent by McBride to aid in the union organizing to show that Haser especially resented Buttacavoli because of his suspected union activities. This view is further supported and augmented by Haser's instruction to Thrall that Buttacavoli was simply to be told, falsely, that he had not worked out. This evidence in the context of the larger picture of the Respondent's unfair labor practices, including the failure to recall McBride and Munoz as described above, sustain the General Counsel's burden of persuasion.

The Respondent argues that Buttacavoli was simply replaced by Cooke, a former employee with a long track record with the Respondent who had asked to return to work. I have found, *supra*, that the evidence as to Cooke's return has not been effectively challenged. The issue then is, as the parties argued in the alternative, whether or not, Cooke having been properly rehired and no union activity having occurred or been suspected of having occurred, Buttacavoli would have been retained as an additional skilled employee or let go as replaced by Cooke.

The General Counsel presented unchallenged evidence that workers with the degree of skill and experience to be "finish blade operators" were a rare and prized commodity to be cultivated and retained whenever possible by an excavation contractor. Thus, the General Counsel argues, even if Cooke were properly returned to employment, Buttacavoli would also have been recalled and kept working on the job as a highly skilled all purpose employee. The Respondent did not rebut this evidence nor suggest persuasively that the jobs in prospect in April 1997 could not use the skills of Buttacavoli. This being so, I find the Respondent has not sustained its affirmative defense that Buttacavoli would not have been recalled even had the Respondent not known or suspected him of union activities and a future vote for the Union.

In summary respecting this portion of the complaint, I find that the General Counsel has not sustained his allegation that the Respondent wrongfully delayed the recall of employees Chris McBride, Mike Munoz, Mike Buttacavoli, and Troy Pair. This element of the complaint allegation shall be dismissed. The General Counsel has prevailed, however, in the allegation that the Respondent failed to recall employees Chris McBride, Mike Munoz, and Mike Buttacavoli because of their actual or suspected union activities in violation of Section 8(a)(3) and (1) of the Act.

IV. THE REPRESENTATION CASE

A. *The Challenged Ballots*

1. Narrowing of issues respecting challenged ballots

The Petitioner challenged the ballots of Steve Peterson, Matt Haser, Doug Young, and Don Young. The Employer challenged the ballots of Michael Drury, Stan Thrall, Michael Munoz, and Chris McBride. The Board agent challenged the ballots of Mike Buttacavoli, Rodney Mosier, George Kellison, Jess Saylor, and Kevin Uffelman.

At trial the parties stipulated that four of the five voters challenged by the Board agent—Rodney Mosier, George Kellison, Jess Saylor, and Kevin Uffelman were not eligible to vote. Based on the stipulation of the parties, I sustain the challenges to the ballots of each of these individuals. The Union, at trial, withdrew its challenges to the ballots of Steve Peterson, Doug Young, and Don Young without opposition by the Employer. On brief it withdrew its challenge to the ballot of Matt Haser. I

accept the withdrawal of the challenges to the ballots of these individuals and find each of them eligible voters.

The challenges remaining for resolution concern Mike Buttacavoli, Michael Drury, Stan Thrall, Michael Munoz, and Chris McBride. The Employer contends that Drury and Thrall were supervisors at relevant times and thus ineligible to vote. The Petitioner contends that Buttacavoli, Munoz, and McBride were employees who were wrongfully not recalled by the Respondent as alleged by the General Counsel in its complaint at paragraph 8 and in consequence eligible to vote.

2. The Employer's challenges to the ballots of Drury and Thrall—alleged supervisory status

As discussed, *supra*, the Respondent's president is Larry Nizzoli and its superintendent is Frank Haser. Frank Haser, as superintendent, is in charge of all field operations. Depending on business circumstances, the Respondent would undertake multiple jobs at different sites. The crews at those sites would be visited each day by Haser, but would have either a foreman or leadman on each job. At relevant times the Respondent had generally worked two crews, each headed by a foreman: Mike Drury and Stan Thrall.⁷ The parties disputed the supervisory status of these two individuals in two contexts: first, the parties argued respecting their general duties and responsibilities upon assuming the positions of foremen and, second, the dispute focused on the narrow period between the filing of the petition and the election.

Both Drury and Thrall had been paid hourly wages when working as grade checkers and skilled equipment operators prior to their promotion to foremen. On assuming the position of foreman they were each given a salary and thereafter at all times was salaried and each received his salary irrespective of hours worked or not worked, including periods of layoff. Other employees at relevant times were hourly paid for time actually worked. Each foreman received certain employer paid fringe benefits not employer paid for other employees. Each had a company truck, telephone, and pager. The two men conducted regular jobsite safety meetings and filled out and submitted time sheets on crew employees.

Michael Drury testified that on a jobsite he functioned both as a leadman or working foreman and as a grade checker directing grading operations. Thus, he gave his crew directions respecting what work needed to be done based on his technical knowledge as a grade setter and skilled machine operator and from his reading of the grading plans and instructions from Haser. The crew was experienced in the normal day-to-day tasks of grading and site preparation and did not need more than general direction and grade specification respecting how to accomplish the work. He also was the primary source of information and contact person for employees respecting recall while on layoff, and made on-site job assignments between machines depending on the needs of the job. Drury testified that he had no power to grant wage increases or to hire, fire, layoff, recall, or discipline employees. He testified that he reported regularly to Haser respecting work matters and then did as Haser instructed.

Haser agreed that he generally retained the authority to take such personnel actions as hire, fire, discipline, or layoff, but testified that Drury regularly made recommendations to him respecting the layoff and recall of crew members as well as the

⁷ Thrall's title was clearly foreman at least the events in controversy as discussed *infra*.

hire and discharge of employees, which recommendations he would generally accept. Haser named several employees he had either hired or fired based on Drury's recommendation. Haser also testified that Drury was authorized to and in fact gave employees time off on his own and reprimanded employees both with Haser's authorization and on his own.

Drury testified that at least until the March 14, 1997 layoff he made recommendations respecting the layoff or recall of crew employees to Haser and further testified that Haser at least sometimes followed his recommendation.⁸ He testified that he had recommended a wage increase for employee Munoz to Haser, but that he did not know if an increase had been ever in fact been granted Munoz. Haser testified that Munoz received a wage increase based on Drury's recommendation.

Thrall testified that at least until January 1997, he would discuss the layoff and recall of his crew members with Haser and the two would come to an agreement on which employees would be retained or laid off or, if the job was resuming, who would be recalled.⁹ During this period he also was the employees' primary contact respecting grievances and would deal directly with the employees by first attempting to resolve the grievances and, failing that, contacting Haser on the matter.

Section 2(11) of the Act defines the term supervisor:

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

Longstanding Board law, with court approval, makes it clear that any one of the indicia of supervisory authority set forth in the definition is sufficient to make an employee with such authority a supervisor.

The two contested foremen did not have direct, independent authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, or reward employees. There are evidentiary conflicts respecting their ability to effectively recommend such action or to independently discipline employees or adjust their grievances. The two clearly directed employees, but the General Counsel and the Charging Party contend that such direction was merely of a routine nature and did not require the use of independent judgment.

The General Counsel and the Union argue that the duties and responsibilities of the foremen in giving their crews direction in their grading work devolved primarily from their technical qualifications as grade setters and experienced equipment operators. Counsel for the General Counsel argue at page 7 of their brief:

their authority in coordinating the assignments of their crews flowed from their technical knowledge of the jobs' needs and their assessment of the crew members' qualifications, based on their own training and experience, not independent judgment.

⁸ Drury testified: "Sometimes; sometimes not. It really depended."

⁹ Thrall testified: "It would be a mutual agreement in that we would discuss those things as to maybe we should bring back this guy. He hasn't worked in a little while. So and so has been calling me a lot, maybe we should put him. It was more of a discussion."

Supporting their argument, the counsel for General Counsel cites the recent Board case of *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996). In that case, overturning the findings of a hearing officer, the Board found a challenged voter, Decamp, was an employee and not a supervisor. Similar to the instant case, the employee in contention in *S.D.I.* was the primary on site representative of his employer and provided direction and guidance to other employees based on his experience and skill and the demonstrated skills of the employees. He also consulted with his employer's supervisors to determine the staffing needs of particular projects. The Board found such duties and responsibilities were not necessarily supervisory and did not demonstrate the exercise of independent judgment. The Board found that such actions involved the routine decisions typical of leadman positions not found to be supervisory by the Board. The Board further asserted, 321 NLRB at 112 fn. 2:

We find it unnecessary to consider the secondary indicia relied on by the hearing officer, such as Decamp's pay differential, his not being required to punch a time clock, his status as the most senior employee at the project site, and the lack of an on-site statutory supervisor, if Decamp were not found to be one. In the absence of primary indicia as enumerated in Section 2(11) of the Act, these secondary indicia are insufficient to establish supervisory status. [Citations omitted.]

S.D.I. is a recent, on-point case which I find is determinative on these issues. The directions of the foremen here, given to their experienced colleagues in the specifications and elevations of grading, the equipment to be used by individual operators and related job assignments devolved from Thrall and Drury's experience as graders and grade checkers and not from any supervisory role or authority. Thus, I reject the Respondent's argument that the direction of the site crews herein conferred supervisory status on either of the two foremen.

The Respondent also claims that the two individuals had the power to independently discipline or adjust the grievances of crew members or at least effectively recommend the hire, fire, layoff, and recall of crew employees. Haser testified credibly that, at least in earlier periods, while he had the final authority in questions of hire, layoff, pay, and discipline, he discussed these matters regularly with his foremen and took their advice regarding the needs of the job and the skills of the employee members of the crews. More importantly he testified he relied on the recommendation of his foremen respecting layoff and recall of specific individuals. Indeed Drury and Thrall—at least for Thrall until January 1997 and Drury till March 14, 1997, testified that they had a recommendatory role in the recall and layoff process and that Haser, at least some of the time, took their advice. Such a consultative process—which results in agreements between the foreman and the superintendent respecting the recall and/or layoff of employees or which results in the hire or fire of an employee—is more than simply a report on the needed skills of the job. I find these consultations rise to the level of effective recommendations concerning recall and layoff of employees within the meaning of Section 2(11) of the Act. Thus, on this basis I find that the two men were statutory supervisors during the periods that they made such effective recommendations.

Having found both Thrall and Drury to have been supervisors of the Respondent, a further question remains: Were they supervisors during the critical period March 14 through April 25, 1997? Stanley Thrall testified that he met with Haser and

Nizzoli in January 1997 and told them: “I was unhappy with that position, that I did not want to be a foreman. I wanted to check grade and run equipment. That’s what I was happiest at doing.” He testified that his superiors agreed to lighten his load:

[Larry Nizzoli] told me that Frank Haser would start doing the time sheets. He would take that responsibility back and he would start being on the project more; that he would deal with the employees directly; that I would no longer be responsible for changing diapers, dealing directly with the employees on complaints and grievances that they had.

Haser testified that at the January meeting with Thrall:

[H]e wanted to give up his foreman’s position at that time. It was pointed out to him that is almost an impossibility just on the way he does his work. I and Larry [Nizzoli] agreed that we would take some of the burden off of him for various tasks to make the job easier for him and less involved.

Nizzoli also recalled that Thrall wanted to give up his foreman position at this meeting and that in an attempt to satisfy Thrall it was decided to reassign to Haser Thrall’s time recordation duties and his obligation to make calls to the employees on his crew.

Thrall testified that after the January 1997 meeting, he did not maintain employee time records and generally deferred to Haser who now spent substantially more time on the jobsite. Thrall testified that by March and April 1997, he no longer had any role—even one limited to making recommendations to Haser—respecting the hire or fire, layoff or recall of employees. Thrall testified that during the March and April period until the election he worked at the Respondent’s Prairie Oaks Phase 2 job.

Thrall described Haser’s role in the Prairie Oaks jobsite in March and April 1997 after the March 14, 1997 layoff as that of both superintendent and forman “calling all the shots.” Thrall testified that his own job position at that time had been reduced to that of leadman working under Superintendent/Forman Haser. He testified he had no role in selecting the employees recalled to that job and was in fact surprised at the identity of the specific employees recalled and not recalled. While Thrall continued to deal with employee arguments respecting operating particular equipment on that job, he testified that he dealt with these problems by relaying the employee’s questions and arguments to Haser without making recommendations respecting them. He specifically testified that he held the view during this time that he no longer had the authority to “order a worker to perform a different assignment.” At all relevant times, Thrall retained his job title, salary, and other perquisites however.¹⁰

The Respondent’s agents did not concede that Thrall’s supervisory duties had been eliminated in January so much as temporarily reduced. Thus Haser testified that he telephoned Thrall after the March 14 layoff in contemplation of starting the Project Oaks job and asked Thrall if he wanted to bring back John Cook or Mike Buttacavoli. Thrall however testified that he was never asked about Cooke, but rather was simply told by Haser that Cooke would be hired for the job. As to Buttacavoli,

Thrall testified that in the week of March 10, 1997,—Buttacavoli’s first week with the Respondent—he told Haser that Buttacavoli was doing a great job. Later in March Thrall questioned Haser as to why Buttacavoli was not being recalled. Thrall testified that Haser told him that Buttacavoli was not needed and that he should tell Buttacavoli that he had not worked out. Nizzoli testified to a conversation with Thrall just before the election in which Thrall told him: “He had to quit, because he just didn’t want to be foreman any more.”

After the layoff of March 14, Drury testified had essentially no role in recalling or laying off crew members. Thus, he testified that while he regularly talked to Haser about such matters until March 14, he was not consulted at all thereafter. Drury suggested, in effect, that once Haser learned of his own and his crew’s role in contacting the Union and precipitating the organizing campaign and representation petition, Haser simply ceased consulting with Drury respecting any aspect of work supervision and treated him as an employee thereafter. Thus, for example, he was not asked about staffing of jobs after the March 14 layoff, his recommendations were ignored, he was not told who was to be hired or recalled until after the event, and he was not the individual who contacted employees for recall to the Prairie Oaks job. Thrall testified that Haser was the superintendent/foreman on the Prairie Oaks job, with Thrall the leadman and Drury simply a grade checker.

Haser testified that Drury’s job duties and responsibilities were unchanged through March and April 1997. More particularly, Haser testified he consulted with Drury respecting which employees should be utilized at the Respondent’s Crocker worksite which work commenced on April 4, 1997, and was Drury’s first job—i.e., a “job that was his”—after the March 14 layoff.¹¹ Nizzoli however described that job as simply a “housepad” job for a friend of Nizzoli that was of no consequence. Drury in turn testified that even as that job started, Haser overruled his suggestion respecting bringing in a particular employee to help him. The record timesheets suggest that the job was a minor one and the Prairie Oaks involved the greater payroll.

Given the record as a whole, and having found that Thrall was a supervisor within the meaning of the Act up to January 1997, I further find that he did not have sufficient authority after that time, and in particular during the pendency of the representation petition to the election, to qualify as a statutory supervisor. Thus, I find that Thrall ceased to be a supervisor well before the petition herein was filed and thereafter became and remained a statutory employee at all times relevant to resolving his ballot eligibility.

I make this finding because, as discussed above, the critical element of Thrall’s foreman duties and responsibilities rendering him a supervisor in and before January 1997 was the reliance Haser placed on his recommendations respecting hiring, layoff, and recall of employees in his crew. There is a testamentary conflict between Haser, Nizzoli, and Thrall respecting the continuation of Thrall’s supervisory activities after January 1997, I credit Thrall over Haser and Nizzoli where the testimony is in conflict. As discussed supra, Thrall seemed to me to answer the questions presented him directly and forthrightly,

¹⁰ Thrall testified to a conversation with Nizzoli after the representation petition had been filed in which, after Thrall asked if he was still being paid his salary, Nizzoli replied that he would have to consult his attorney. It is also clear however, that Thrall’s salary was in fact unchanged through the events in question.

¹¹ Thrall testified that he had asked Haser why Drury was not recalled to the Prairie Oaks job consistent with his experience that the two foremen were first to return to work. Haser told him that Drury was not needed.

with a clear recollection of what duties and actions he took during the period. I had far less confidence in Haser's recollection of events and actions taken in this period. I believe that Haser testified more from a desire to sustain his employer's position on matters in dispute, including the issue of the supervisory status of the Respondent's foremen, than from a simple memory of events. My analysis is essentially similar as to Nizzoli as discussed supra. Thus, for example I credit Thrall over Haser that Thrall did not recommend that former employee Cooke be favored over Buttacavoli for recall to the Prairie Oaks job and find that Haser told Thrall that Cook would be used and that Buttacavoli would not be recalled. I further find that Thrall made no recommendations and was not consulted by Haser respecting staffing the Prairie Oaks job. I also credit Thrall over Haser, and Nizzoli to the extent his testimony addresses this issue, that Haser was the active director on the Project Oaks job and that Thrall has dropped back to a nonsupervisory leadman role at the site.

Michael Drury like Thrall was found to be supervisor for the Respondent prior to March 15, based on his effective recommendations to Haser respecting hire, layoff, and recall of his crew members. Unlike Thrall, Drury never communicated a desire to the Respondent to relinquish his supervisory authority nor did either Haser or Nizzoli, as in Thrall's case, affirmatively inform him his duties and responsibilities would be reduced. Nonetheless, on this record, I find that at all times after March 14, 1997, Drury as the Respondent's employee was not a statutory supervisor. I do so for the following reasons.

Employees who make recommendations respecting hire and fire, layoff, and recall of other employees to the Respondent's agents are supervisors under Section 2(11) of the Act only if they are effective in doing so. It is not the making of the recommendations, but the reliance on them by the agents who have the authority to take the action involved that renders the individual a supervisor. Thus, under this portion of the statutory definition, it is not the authority specifically given the recommending employee nor the belief of the recommending employee respecting his authority which establishes the effectiveness of the recommendation and the actual finding of supervisory status. The actions of the superior upon the recommendations determine the outcome. Thus, it was not Drury's recommendations to Haser respecting his crew which made him a supervisor, but rather Haser's effective reliance on those recommendations. I found Drury made such effective recommendations as a foreman which were relied on by Haser and therefore found Drury a supervisor at least until the events in controversy.

Addressing the critical later period, I specifically find on this record that at all times after March 14, 1997, Drury was either not consulted respecting issues of hire, fire, recall, or layoff, or his recommendations respecting such actions to Haser were not effective. Rather I find, as discussed, supra, under the unfair labor practice portion of this decision, that Haser believed that Drury and his crew were behind the Union's organizing drive and, in consequence, lost confidence in Drury and ceased to have the earlier faith in Drury's judgment or reliance on his opinions which made Drury's recommendation effective. Simply put, I find that Haser after March 14 did not consult with and did not accept or rely on Drury's recommendations to the

extent he made them.¹² To the extent Haser and Nizzoli's testimony is inconstant with these findings, I discredit each on the same basis as discussed supra respecting their testimony regarding Thrall's duties and responsibilities after January 1997, and credit Drury, importantly corroborated by the previously credited testimony of Thrall respecting the post-March 14, 1997 events.

Given all the above, I find that neither Thrall nor Drury were supervisors of the Respondent during relevant times and therefore the challenges to their ballots based on their supervisory status should be overruled.

3. Challenges to the ballots of Buttacavoli, Munoz, and McBride—complaint paragraph 8

Having found that the Respondent's failure to recall employees Buttacavoli, Munoz, and McBride violated Section 8(a)(3) and (1) of the Act, supra, it follows that they should properly be regarded as employees at all relevant times. Accordingly, I find they were each¹³ eligible to vote in the election, the challenges to their ballots should be overruled, and their ballots should be opened and counted. I shall so recommend.

4. Summary and conclusions respecting challenged ballots

a. Agreed-on resolutions

Consistent with the agreement of the parties, I sustain the challenges to the ballots of Rodney Mosier, George Kellison, Jess Saylor, and Kevin Uffelman. Based on the Petitioner's unopposed withdrawal of the challenges to their votes, I grant the motion to withdraw the challenges. Based on that withdrawal I find the following voters properly cast their ballots in the election and those ballots should be opened and counted: Matt Haser, Steve Peterson, Doug Young, and Don Young.

b. Disputed resolutions

Respecting the challenges which remained in contest after submission of briefs, I have found the challenges to the votes of the following employees to be without merit and will recommend their being overruled: Stan Thrall, Michael Drury, Mike Buttacavoli, Michael Munoz, and Chris McBride

B. The Objections and Other Conduct Bearing on the Validity of the Election

1. The objections

The Employer's amended objections assert:

1. Operating Engineers Local No. 3 violated the laboratory conditions of the election by promising selected employee-voters jobs with other companies at higher wages and fringe benefits; guaranteeing the waiver of initiation fees for selected employee-voters; and bypassing the Union's

¹² On the same basis, crediting Drury and Thrall over Haser and Nizzoli, I find that Drury had no role as a foreman or supervisory authority on the Prairie Oaks job after March 14 and that his work on the other much less significant jobs during that period, if it could be argued to be the work of a foreman, did not involve any of the indicia of supervisory status set forth in Sec. 2(11) of the Act.

¹³ McBride and Munoz, long time employees, easily meet the formula for voter eligibility set forth in *Daniel Construction*, 133 NLRB 264 (1961), restored to application in the construction industry in *Steiny & Co.*, 308 NLRB 1323 (1992), and applicable here. Buttacavoli, constructively employed at all relevant times also meets the standard formula for voter eligibility incorporated in *Daniel* and *Steiny*.

standard job referral practices, providing preferred registration in the Union's Job Placement Center, dispatching only selected employee-voters to higher paying jobs as a condition of and to induce and encourage their support for the Union.

2. Michael Drury, Steve Peterson, and Troy Pair were allowed to vote before the polls were scheduled to open, in contravention of the parties' Stipulation to the Election and the Board's [R]ules and [R]egulations governing the conduct of elections.
3. Several Union representatives engaged in electioneering and other union activity including the use of cellular telephones within 5 to 10 feet from the entrance to the polling place after the voting began and within minutes after three employees voted in the election.
4. Union representatives violated the parties' preelection conference agreement which clearly designated no-electioneering areas during the election.
5. The Employer objects to the Union's use of Michael Drury, a supervisory employee, as the Union's election observer.
6. Voters Stan Thrall, Michael Drury, Troy Pair, Kevin Weatherington, Scott Cook, and Craig Scott had already accepted offers of employment from the Union before they voted in the election and were, therefore, no longer employees of the employer at the time of the election.
7. Voters Stan Thrall, Michael Drury, Troy Pair, Kevin Weatherington, Scott Cook, and Craig Scott had already accepted offers of employment from the Union before they voted in the election and had, therefore, quit their employment with the Employer before they voted in the election.

The Regional Director's report in charging the judge with the duty to consider and make recommendations respecting the disposition of the objections asserted in part at page 4:

In addition the allegations of the complaint shall also be considered to the extent they bear on the validity of the election. *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988).

These objections are best grouped and discussed as follows.

2. Objection 1

The Operating Engineers Local No. 3 violated the laboratory conditions of the election by promising selected employee-voters jobs with other companies at higher wages and fringe benefits; guaranteeing the waiver of initiation fees for selected employee-voters; and bypassing the Union's standard job referral practices, providing preferred registration in the Union's Job Placement Center, dispatching only selected employee-voters to higher paying jobs as a condition of and to induce and encourage their support for the Union.¹⁴

While the Employer's objection has multiple parts, for the reasons set forth below, find that with respect to each part of objection 1 the Employer has failed to meet its burden of proof that the conduct alleged occurred.

The Employer conducted extensive examination of numerous witnesses concerning the representations of the Union's agents to employees about the availability of other work. It is clear that the union representatives were very cautious in their representations. The Union informed employees, as the Em-

¹⁴ The discussion of Objections 6 and 7, *infra*, are related to the instant objection.

ployer advances on brief at 3-4, that, if the Employer "fold[ed]," refused to sign a union contract or discharged the employees, there was work for experienced employees in the industry. There is no evidence that the Union made promises to obtain for the employees work or priority in employment which they were not otherwise entitled to receive from the Union simply as employment applicants to the hiring hall.

It is clear that at least some of the Employer's employees in the preelection period were anticipating superior employment working under a "union contract" which would have been economically superior to that then on offer from the Respondent. The Employer points to statements of certain employees among themselves in the preelection period that the employees were, in essence, assured of union wages and benefits. Many of the employees, however, made it clear in their testimony that, in the employees' view at that time, working under a union contract was a state of affairs which could have occurred under several alternative scenarios, one of which was being employed by the Employer after it had recognized the Union, before or after the election, and negotiated and signed a union contract.¹⁵ The alternative mechanism to come to work under a union contract in the employees view at that time, were the Employer to close in the face of union organization—as had been threatened, were the Employer to terminate the employees—as had been threatened, or were the Employer to raise other problems, was for the employees to then seek "union" employment elsewhere in the favorable conditions then pertaining in the local area economy and the trade. I simply do not find this evidence sufficient to support the Employer's claim that the employees preelection aspirations and musings were evidence of improper union promises.

There was no evidence offered sufficient to support a finding that the Union guaranteed to waive initiation fees for selected employee-voters. Nor was there evidence that the Union promised or actually acted to skip or bypass union referral practices in order to benefit any or all employees of the Employer. The Employer introduced evidence that various of its former employees received referrals through the union hiring hall and came to acquire journeyman positions when the referred employees had neither completed apprenticeship programs or had sufficient experience with qualifying employers to receive such status. This evidence was not entirely unchallenged by the Union,¹⁶ but the Petitioner argued primarily on brief at 2 that the Respondent's evidence did not connect the Union with any irregular conduct and "offered only speculation and innuendo, but no evidence, that the Union gave anyone any special treatment with respect to hiring hall referrals." I have considered the record evidence of the Union's treatment of the Respondent's employees in light of the Employer's arguments regarding special treatment. I do not find the evidence respecting how the employees were treated after having received referrals from the Union to persuasively suggest the Union acted improperly. I do not find the evidence offered by the Employer as suggesting the Union favored these individuals over others of like standing

¹⁵ Drury testified he did not decide to end his employment with the Respondent until he learned after the election and ballot count that the Employer would not recognize the Union, but would rather "fight it."

¹⁶ The Union adduced evidence that the employees who received referrals in short order did so because they accepted employment referrals to work that did not pay the full journeyman rate and which, in consequence, were not sought after by other hiring hall registrants. The Employer did not successfully challenge this evidence.

under the hiring hall practices supports the claim asserted. I find there is simply insufficient evidence to support a finding of union improprieties in the operation of its hiring hall referral process with respect to any employee of the Respondent. Absent such a finding there may be no finding that the Union improperly favored these individuals.

Given all the above, I find each of the subparts of the Employer's Objection 1 lacks a factual foundation and therefore the objection lacks merit. That being so, and on the basis of the record as a whole and the credibility resolutions made above, I shall recommend the objection be overruled in its entirety.

3. Objection 2

Michael Drury, Steve Peterson, and Troy Pair were allowed to vote before the polls were scheduled to open, in contravention of the parties' Stipulation to the Election and the Board's [R]ules and [R]egulations governing the conduct of elections

There is no dispute that, on request and with the approval of the Board agent conducting the election, the two election observers cast their ballots under the challenged ballot procedure and a third employee cast his ballots out of sight of all other employees a few minutes before the scheduled polling period commenced.¹⁷ Early voting is not permitted by the Board's guiding rules and regulations or procedures.¹⁸ It was not permitted under the terms of the parties' election agreement. No discussion of the "early vote" procedure occurred at the pre-election conference or any other time nor was permission of the parties solicited nor given at any time. In giving the two observers and the third employee permission to vote early, the Board agent acted inconsistent with the Board's procedural requirements—he clearly goofed. Three voters cast ballots—two challenged on other grounds and a third voting without challenge.¹⁹ The Respondent argues this conduct is objectionable and requires the election results be set aside and a new election conducted.

The Petitioner emphasizes: (1) that the early ballots would have been cast by the three voters in all events, i.e., had permission to vote early been denied them and, (2) that no other voters during the polling period were ever aware of, and hence could not have been affected by, the early voting. The Petitioner also cites *Rosewood Care Center*, 315 NLRB 746 (1994). In that

¹⁷ Perhaps 5 minutes before the polls opened the Union's observer, Michael Drury, asked the Board agent if he could vote. The Board agent gave his approval and Drury cast a challenged ballot. The Employer's observer, Steve Peterson, made a like request and received like permission, thereafter casting a challenged ballot. A minute or two later, but still before the polls opened, Drury asked the Board agent if employee Troy Pair, who was present, see further discussion, *infra*, could also vote with the same permission given and vote cast—on this occasion an unchallenged ballot.

¹⁸ The Board's Casehandling Manual (Part Two) Representation Proceedings, sec. 11318.5 states that early arriving voters should not be permitted to vote prior to the scheduled polling time. The section instructs the Board agent not to send the votes away but rather to ask them to line up and, if a voter states, he or she must leave, to inform the voter of the hours available for voting.

¹⁹ Peterson's ballot was challenged by the Charging Party, who withdrew that challenge without objection by the Employer at the hearing. In the section of this report and recommendation dealing with the challenged ballots, I recommend that his ballot be opened and counted. Drury's ballot was challenged by the Employer as the vote of a supervisor. In the section of this report and recommendation dealing with the challenged ballots, I find he was not a supervisor at relevant times and recommend that his ballot be opened and counted.

case the Board held that, if the parties agree to allow a voter to cast a ballot before the formal opening of the polls, that ballot is valid and a challenged ballot cast in such circumstances should be opened and counted.

The Respondent notes that the Board has announced a bright line rule terminating the balloting at the end of the voting period absent the agreement of the parties or extraordinary circumstances. Thus, the Board now holds that any challenged ballots cast after the close of the balloting, absent the agreement of the parties or extraordinary circumstances, will not be valid and the challenges will be sustained. *Monte Vista*, 307 NLRB 531 (1992). The Employer argues that the rationale for such a rule concerning the end of the balloting period applies with equal force to the start of the polling period and that, accordingly, the election herein should be held invalid.

There does not appear to be a Board case dealing with early voting which was not approved by the parties as *per se* objectionable conduct. The *Monte Vista* and *Rosewood* cases cited by the Petitioner and the Employer deal with the issue only in the context of the validity of the challenged ballots cast in such circumstances. Neither case addresses the question of whether or not the casting of unchallenged ballots in such circumstances taints the entire election process and is thus objectionable and requires a new election. The distinction between consideration of a given challenged ballot as valid or not and consideration of whether or not the conduct is objectionable and requires that the election be set aside is important and must be kept in mind in considering the Board's cases in this area.

In addressing objections to the conduct of an election, the Board finds irregularities in the enforcement of polling periods requires the election be set aside in several circumstances. First, as part of its long-established desire to avoid even the appearance of agency or Board agent partisanship, the Board tends to view any election irregularities, including irregularities in the controlling of the opening and closing of the polls, which might arguably suggest to the parties or the voters that the Board personnel or its rules and procedures had played an inequitable or partisan role in the election process as requiring a new election. In the instant case, although the Board's procedures were not complied with, it is clear that there is not even the arguable appearance of partisanship in the Board agent's approving the request that the two observers and a third voter cast ballots a few minutes early. Indeed the voting requests were initiated by both parties observers and objected to by neither. As in the *Cesarean Apotheqm*, the agent may be viewed in this instance as having acted above suspicion.

The Board has also been concerned with the precise timing of the ending the polling period because closing time disputes or difficulties frequently involve questions of whether or not a voter will be allowed to vote at all. Challenged ballots cast outside the polling period may be found valid or invalid and counted or not as appropriate. A late voter not allowed to cast a challenged ballot is a voter whose vote will never be cast. Errors that involve such thwarted ballots are not easily remedied. So, too, voters who cast unchallenged ballots in circumstances in which the propriety of their votes are in issue—because there is no ballot separate from the other cast ballots to be preserved for later consideration—present similar issues.

In these and similar situations where the difficulty is beyond remedy by use of the challenged voter procedures, the Board considers the arithmetic possibility of the unchallenged voters ballots, either cast or not cast, effecting the results of the elec-

tion. Thus, the Board, with court approval, found that although a Board agent may have wrongly denied four or five voters who arrived just after the end of the balloting period the right to vote, the action did not affect other voters and the 4 or 5 ballots involved could not have arithmetically effected the outcome of the election. *Bancroft Mfg. Co.*, 210 NLRB 1007, 1012 (1974), 516 F.2d 436, 445 (5th Cir. 1975). This is consistent with the Board's general standard of evaluating objections based on the integrity of the election process, i.e., is to assess whether or not if there is any reasonable possibility of the conduct affecting the outcome of the election. *Peoples Drug Stores*, 202 NLRB 1145 (1973).

Early balloting does not pose the same problems as late balloting because early voting—be it allowed or denied—will very rarely cause a voter to change whether or not he or she actually votes. Thus, those voters who were allowed to vote early, i.e., before the polls opened, would have voted later, i.e., when the polls formally opened, if not allowed to vote early in essentially all cases. While one might imagine a situation where, through some rigid scheduling or other restriction a voter must vote early or not at all, this is clearly not the case herein where the two observers were present through the entire balloting period and the third voter was also available throughout the period and thus would have been able to vote during the polling period.

Given all the above, in particular the cases cited and the record as a whole, I find the Respondent's objection lacks merit. I reach this result for the following reasons. First, the election irregularity—allowing three voters to vote 3–5 minutes early—was not of evident benefit to one party or the other nor could the Board agent's conduct be seen as having a partisan or unfair motivation. Thus, there is no need to set aside the election to avoid the suspicion that the Agency, the Board agent, or the process favored one side or another. Second, the irregularity did not effect the votes of either the three voters involved or any of the other voters. The voters not involved, i.e., all but the three, were at all times unaware of the event and thus were totally unaffected by the matter. The three voters would clearly have cast their ballots within the actual polling period had they not been allowed to vote early. Thus, the election outcome could not have been affected. In such situations, the Board does not overturn the results of an election.

Were the Board to disagree with my conclusion that the ballots of the three who voted early could not have been affected by the early vote, further analysis might be necessary. In order to avoid the need for a remand should reviewing authority differ, I make the following further conditional analysis and conclusions assuming my earlier conclusion was error and that the three early ballots must be viewed as potentially improper. Were this so, a finding I make only for the purpose of this conditional analysis, the Board test would be: could the three ballots—or whatever number were found improperly included in the election tally—affect the outcome of the election?

Initially, under such a conditional analysis, it must be noted that, if these three ballots are considered improper and their potential for effecting the outcome of the election is a relevant question, two of the three ballots are currently under challenge and have not at the time of the issuance of this report and recommendation been opened and counted. Although the challenges to the ballots of Drury and Peterson have been found insufficient and the opening and counting of these two ballots recommended, *supra*, those recommendations would not necessarily be appropriate, if the Board found that one or more of the

ballots was improperly cast. The status of two of the three ballots as challenged means that they may be withheld from the final tally if they are not considered properly included. In effect, the Board need not consider the potentially objectionable consequences to the validity of the election of these two ballots to the outcome of the election, where they have not yet been and need not, in such circumstances, be opened and counted as part of the final tally of ballots.

The third ballot arguably improperly cast in this conditional alternative analysis is therefore the only ballot unretrievably cast and the only one which should be considered in resolving the objection. The issue then resolves down to the question: Does this single, assumedly improperly cast, ballot have the potential to effect the outcome of the election? Since the challenges are currently determinative of the outcome of the election it is possible that the single ballot could affect the result.

This single ballot may ultimately—after all other valid ballots are opened and counted—be determinative of the election results. In terms of simple mathematical probability, it would likely not—i.e., when all the valid ballots are cast, the margin of victory or defeat of the Union will likely be sufficient that one more ballot either way will not change the result of the election. The result awaits the final tally of all valid ballots. If the Board holds that this is the proper test of the objection, then the proper procedure would seem to be to reserve the objection issue until the challenges are finally resolved and all valid ballots are opened and counted. If the results of the election turns on this single vote, the objection could be further addressed.

Summarizing this conditional alternative analysis, even if the Board were to find the early ballots invalid, they could be considered objectionable only if they were sufficient in number to effect the final outcome of the election. Since two of the three votes are still in segregated challenged envelopes, if they were improperly cast they should not be opened. If the third vote was improperly cast, the objection would depend on whether or not that single vote could effect the results of the election. The only way to resolve such an issue would be to reserve final ruling on the objection so that, in the event that after final resolution and tally of the valid challenged ballots the vote is determinative of the results of the election, the objection could be further considered.

4. Objections 3 and 4

Several union representatives engaged in electioneering and other union activity including the use of cellular telephones within 5 to 10 feet from the entrance to the polling place after the voting began and within minutes after three employees voted in the election. Union representatives violated the parties' preelection conference agreement which clearly designated no-electioneering areas during the election

Two situations are at issue under these objections. The first arose in the voting area a few minutes before the polling was to begin. Michael Drury was selected to be the Union's election observer, presumably at the preelection conference held about 1 hour preceding the 3 p.m. opening of the polls. This may have engendered controversy, see Objection 5 and the discussion thereof, *infra*. In all events, the Employer's objection to the use of Drury was "duly noted." Thereafter, the union officials apparently had second thoughts respecting their selection of Drury as observer. Tony Pair was asked by the union officials to substitute for Drury. He consented to do so and Pair went into the polling area. A few minutes later the three union offi-

cial followed into the polling a few minutes before the polls were to open and asked the Board agent's permission to effectuate the substitution of Pair for Drury as the union observer. The Board agent told the union officials they could make such a substitution only with the Employer's agreement. The union official using a cellular phone and without leaving the area telephoned the Respondent's superintendent and asked for permission to substitute Pair for Drury. Haser told him he could not and the call ended. The substitution of observers was not effected and the union officials left the area.

The timing of these events in relation to the 3 p.m. opening time for the poll and the early voting of Drury, Peterson, and Pair is not precise. Peterson recalled that the three had voted and Pair was leaving the area after casting his ballot when the union officials arrived. He recalled they arrived and spoke to the Board agent at about 2 minutes to 3 p.m.. By the time they had called Haser and left the area with Pair it was close to 3 p.m. Following these events Peterson recalled there was a period of "dead quiet" in the polling area. The next voters entered the area and voted about 15 minutes later.

The second circumstance raised by the Employer was described by the Employer's observer Peterson. Peterson and Haser testified that in the preelection conference it was agreed that agents of the parties would stay out of the building and building parking lot during the polling period and come no closer to the polling area than the sidewalk.

Peterson testified further that during the polling period he observed a union official come from the sidewalk on to the parking lot where he entered his car and obtained an item and then returned to the sidewalk. Haser observed two union officials sitting in their car in the parking lot using a cellular phone and writing in the final minutes of the polling period at a time when employees were still in the voting area and others were on the outside sidewalk area. The Employer argues that the no-electioneering rule was violated by the Union and a new election is necessary.

The Employer, citing *Milchem, Inc.*, 170 NLRB 362, 362-363 (1968), argues that this conduct rises to the level of last minute electioneering, is objectionable, and requires a new election. *Milchem* asserts at 170 NLRB 362:

Careful consideration of the problem now convinces us that the potential for distraction, last minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry into the nature of the conversations.

The Union counters that the conduct at issue does not involve any conversations with voters during the polling period or while they were waiting to vote and emphasizes a different portion of *Milchem* at 170 NLRB 363:

We intend, of course, that our application of this rule will be informed by a sense of realism. The rule contemplates that conversations between a party and voters while the latter are in a polling area awaiting to vote will normally, upon the filing of proper objections, be deemed prejudicial without investigation into the content of the remarks. But this does not mean that any chance, isolated innocuous commend or inquiry by an employer or union official to a voter will necessarily void the election. We will be guided by the maxim that "the law does not concern itself with trifles."

I find that neither of the incidents relied on by the Employer supports a finding of improper union conduct under *Milchem* which requires the election be set aside. The prepolling contacts between union officials, the election observers, the Board agent, and employee Pair took place and was concluded with the union officials out of the area before the polling period began. As described above, the three "early bird" voters who were present during this event had voted before the union officials appeared in the polling area. No other voters arrived in the polling area until 15 minutes into the polling period. Thus, there is no evidence any voters were conversed with by union officials while awaiting an opportunity to vote or within the polling period in the polling area.

The second circumstance—the presence of the union officials in their car in the parking lot or going to and coming from the vehicle, is insufficient under Board cases to require a new election. There is no evidence that any employee was in contact with these officials during the period under question. The fact that the employees could see and presumably observed the union officials in such circumstances during the polling period is not enough without more to require a new election.²⁰

Given all the above and on the record as a whole, I am convinced that the evidence does not support a finding that the union behavior under challenge warrants the direction of a new election. I shall therefore recommend that the objections be overruled.

5. Objection 5

The Union's use of Michael Drury, an alleged supervisory employee, as the Union's election observer

Having found Drury at all relevant times not to be a supervisor, the Employer's objection lacks a factual foundation and I shall recommend that it be overruled.²¹

6. Objections 6 and 7

Various individuals cast ballots after accepting employment offers from other Employers

While contesting the underlying factual assumptions in the objection, see the discussion supra under Objection 1, the Union argues that these objections are simply postelection challenges in the guise of objections. Thus, argues the Petitioner, challenges must be made prior to the actual casting of ballots, and unchallenged ballots are given absolute finality citing *NLRB v. A. J. Tower*, 329 U.S. 324 (1946).

The Union also argues that even were the employees, or any of them, found to have quit their employ at the conclusion of work on the day of the election, they would still be eligible to vote in the election. The Board so holds with court approval. In *NLRB v. General Tube Co.*, 331 F.2d 751 (6th Cir. 1964), enfg. 141 NLRB 441 (1963), the challenged voter notified her em-

²⁰ Further, to the extent the Employer argues these events may well have suggested to employees that the agency was not neutral in the representation process, I find that the facts simply do not logically support the proposition asserted and therefore the argument fails for want of an evidentiary predicate.

²¹ This being so, it is unnecessary to reach the two remaining issues advanced by the parties respecting this objection: (1) whether or not, if Drury was a supervisor, the objection has merit in law and (2) whether or not the Employer is estopped from making this argument because the Union attempted to substitute a different individual as its observer before the polls opened, but the Employer opposed the Union's action.

ployer in the morning of the day of the election that that day would be her last day of employment and cast a ballot challenged by her employer later that day in the election. The Board found her an eligible voter. The Board's position that an employee's notification of an intention to quit is immaterial and the voter eligibility issue is entirely one of whether or not the voter worked on the day of the election was sustained by the court.

Accordingly, I find the objections lack merit and I shall recommend they be overruled.²²

7. Other conduct alleged in the complaint

a. *Threshold issue of judicial authority to act*

The Regional Director's report in charging the judge with the duty to consider and make recommendations respecting the disposition of the objections asserted in part at page 4:

In addition the allegations of the complaint shall also be considered to the extent they bear on the validity of the election. *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988).

The allegations of the complaint are directed solely against the Respondent/Employer; no allegations are directed against the Charging Party/Petitioner. The only objections filed, insofar as the record reflects, are those filed by the Employer seeking to set the election aside if resolution of the challenges results in a final tally of ballots in favor of the Union.²³ Misconduct of an employer is generally not a basis for setting aside an election victory for a labor organization. Presumably, then, the Director's report charges the judge to consider the allegations of the complaint in determining to set the election aside in the event the resolution of the challenges results in a union defeat in the election. It would be unusual to set aside a labor organization election defeat and direct a new election in the absence of union objections based solely on an employer's objections to a union election victory. This seems however to be the only possible reading of the Regional Director's instructions respecting the complaint allegations.

A Regional Director may appropriately under the Board's Rules and Regulations Section 101.9(b) refer to an administrative law judge in a consolidated matter such as the instant cases the consideration of any objections or other conduct relevant to the investigation of the circumstances of an election which could be appropriately considered by the Regional Director.²⁴ Therefore, if the Regional Director could properly set aside a

²² To the extent that this objection arguably raises issues respecting the challenged ballots of employees Thrall and Drury, the doctrine discussed here is also controlling and despositive as to their possible disenfranchisement as employees who had announced an intention to quit.

²³ When unresolved determinative challenges exist, it is impossible to know whether or not the union won or lost the election. Objections filed during such a period therefore have a conditional aspect. The objecting party seeks to have the election results set aside and a new election directed only if the objecting party loses the election. So, too, when the Board or the Regional Director finds merit in objections, during a time that determinative challenges have not been finally opened and counted, it directs a conditional election be held if and only if the objecting party loses the election under challenge.

²⁴ The proposition is limited to those matters placed before the judge by the Regional Director in his or her report. Thus a judge may not go beyond the issues raised by the Regional Director's report. *Precision Products Group*, 319 NLRB 640 (1995).

union defeat and direct a new election based on employer misconduct considered during the investigation of the employer's objections, so, too, it would be appropriate—given the necessary findings of fact and conclusions of law respecting the conduct—for me to make such a recommendation to the Board. The question remaining then is whether or not the Regional Director during the investigation of an employer's objections and in the absence of a union's objections may set aside an employer election victory based on employer misconduct.

As noted in the quoted portion of the Report, the Regional Director cites *White Plains Lincoln Mercury*, 288 NLRB 1133 (1988), as authority for the instruction in his Report that the complaint allegation conduct be considered. The *White Plains* decision revisits and harmonizes two seemingly conflicting lines of Board law: the first line of cases holding that a Board election may not be set aside under any circumstances without timely objections having been filed to it and the second line of cases holding that the Regional Director in investigating the circumstances of an election as part of an investigation of timely objections may, in the Regional Director's sole discretion, broaden the investigation into areas not mentioned in the objections.

The Regional Director implicitly assumes in his report that during the pendency of the investigation of the Employer's objections, not just conduct by the Union alleged in the objections or even any and all conduct by the Union which might form a basis for setting aside the election, but all conduct including the Employer's conduct may be properly considered in determining if the election outcome—be it union or employer victory—should be set aside and a new election conducted. *White Plains Lincoln Mercury*, supra at 1137, notes that the Act gives the Board the authority to ensure that the election process is protected from conduct by either party that may interfere with the employees exercise of free choice. The Board finds that this statutory authority and the elections procedures provided in its Rules and Regulations including the objections procedures provided therein gives the Regional Director sole discretion, once objections are filed and the integrity of the election is thus raised, to broaden his investigation to include areas not mentioned in the objections. The case does not limit the Regional Director's investigative discretion further. Given that this is so, the case seems to support the Regional Director's implicit assertion that in an investigation of an employer's objections, evidence of misconduct by the employer may be considered in making a determination respecting the validity of the election even though no union objections had ever been filed.²⁵

Given all the above, I find it is appropriate to consider the evidence offered in support of the allegations of the complaint in determining the validity of the election.

b. *The validity of the election in light of the complaint evidence*

I have found, supra, that the Respondent committed numerous violations of Section 8(a)(1) and (3) respecting a significant proportion of the bargaining unit involved in the election all of which occurred between the filing of the representation petition

²⁵ While *White Plains Lincoln Mercury*, and the cases cited therein make it clear that an election may not be set aside without objections having been filed, there seems to be no authority asserting that an election may only be set aside based on the objections of the losing party to the election. Thus the absence of union objections is no hindrance to setting aside an employer victory in the election given the pendency of the Employer's objections.

and the conduction of the election. Such illegal conduct, when as serious and extensive as that found herein, constitutes conduct which interferes with laboratory conditions and the exercise of free and untrammelled choice in the election. *Hopkins Nursing Care Center*, 309 NLRB 958 (1992). It follows therefore that, this conduct be found objectionable.

Accordingly, I shall recommend to the Board, if on resolution of the determinative challenges in this case the Union has lost the election,²⁶ a new election should be directed.

8. Summary of findings respecting the Employer's objections, other conduct, and the election's validity

I have found that each of the Employer's objections is without merit and should be overruled. Accordingly, I shall recommend to the Board that it overrule the Employer's objections in their entirety and, in the event final resolution of the challenges results in the Union receiving a majority of valid votes cast, that the Board certify the Union as the exclusive representative of the employees in the unit.

I have also considered the evidence of misconduct alleged in the complaint which the Regional Director's report directed me to consider and concluded based on that evidence that the Employer has engaged in conduct which is objectionable and requires a new election should the union lose the election. Accordingly, I shall recommend to the Board that in the event final resolution of the challenges results in the Union receiving less than majority of valid votes cast, that the Board set those election results aside and direct a new election at an appropriate time and place.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes and policies of the Act including the posting of remedial notices.

²⁶ The misconduct of the Employer is, of course, not a proper basis for setting aside the election in the event the Union, on resolution of the determinative challenges, prevails in the election.

In remedying the violations of Section 8(a)(3) and (1) found herein, the Respondent will be directed to offer its employees who were wrongfully denied offers of recall immediate reinstatement to their former positions discharging, if necessary, any replacements hired after the date their recalls should have been offered or, in the event those positions no longer exist, to substantially equivalent positions. Further, the Respondent shall make each employee wrongfully denied recall whole for any and all loss of earnings and benefits he may have suffered commencing at the time the employee would have returned to work if properly recalled, with interest. The make-whole and interest provisions shall be calculated in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987); see also *Isis Plumbing Co.*, 138 NLRB 716 (1962).

CONCLUSIONS OF LAW

1. The Respondent, Topside Construction, Inc., is and has been at all relevant times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. The Respondent violated Section 8(a)(1) of the Act by:

(a) Interrogating employees about their union activities.

(b) Threatening employees with unspecified reprisals for exercising their protected right to file unfair labor practice charges.

(c) Threatening employees with discharge and future job loss because of their union activities.

(d) Threatening employees with closure of the Respondent's operations if the employees selected a union to represent them.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by failing to recall the following employees because the employees were engaged in union activities.

Mike Buttacavoli

Chris McBride

Mike Munoz

5. The above-unfair labor practices constitute unfair labor practices effecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]