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K. W. Electric, Inc. and International Brotherhood of Electrical Workers, Local 466, AFL-CIO. Case 9-CA-40422

September 24, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

On May 18, 2004, Administrative Law Judge Michael Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief to the Respondent's exceptions.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions as modified, and to adopt the recommended Order as modified and set out in full below.

1. Contrary to the judge, we find that the Respondent violated Section 8(a)(1) and (3) of the Act by discharging employee Michael McLean.

The complaint alleged that the Respondent unlawfully terminated McLean by laying him off on May 30, 2003, based on his union activity.² In determining whether an action against an employee was discriminatorily motivated, the Board applies the test articulated in *Wright Line*.³ Under that standard, the General Counsel must show that the employee was engaged in protected activity, that the employer knew of this activity, and that the employer's decision to discipline or discharge the employee was motivated by antiunion animus. When the General Counsel makes this showing, the burden shifts to the employer to demonstrate that it would have taken the action even in the absence of the protected activity.

The record shows that McLean engaged in protected union activity and that the Respondent was aware of his

activity. Within a few days of his May 5 recall from layoff, McLean informed Owner Michael Woodson that he intended to join the Union and leave when he could find a union job. The Respondent further demonstrated its knowledge of McLean's union activity by citing these intentions as the reason for choosing him to be laid off first on May 30.

Unlike the judge, we further find that the Respondent demonstrated antiunion animus. The judge construed the issue of animus too narrowly, focusing solely on animus in response to McLean's expressed intent to join the Union and seek a union job elsewhere, rather than on animus toward union activity more generally, which the Respondent amply demonstrated. On June 23, Marvin Alderman,⁴ an agent of the Respondent who served as a conduit of information from owner John Kuhn to the employees, told employee Joe Farley, "John [Kuhn] . . . would close the doors before joining the union." Moreover, on June 25, Kuhn told Farley that the Respondent "is a non-union company and will be a non-union company. If people wanted to be in the Union, they need to go to another company to work." Furthermore, Kuhn said that he already had a partner, that would be his only partner, and that would be the only contract he would ever sign. These statements conveyed an unmistakable message of the Respondent's antiunion animus. In addition, the judge found, and we agree, that Farley's termination on June 25, shortly after the Respondent became aware of his union activity, was discriminatorily motivated. Therefore, we find that the General Counsel has satisfied his initial burden under *Wright Line*.⁵

We further find that the Respondent has failed to meet its burden to show that it would have laid off McLean even in the absence of his union activities. In defending its layoff of McLean, the Respondent asserts that McLean was planning to leave for a union job anyway, and that McLean was the last employee hired.

We reject the assertion that the Respondent was justified in laying off McLean because of his intent to leave for another job. There was no indication in the record that McLean would leave anytime soon, and so the Re-

⁴ No exceptions were filed to the judge's finding that Alderman was not a supervisor within the meaning of Sec. 2(11) of the Act.

⁵ We find that these June statements are relevant to the issue of the Respondent's animus, even though they were uttered after McLean's layoff. The statements were made by Owner Kuhn or attributed to him by agent Alderman. Moreover, they expressed not only an intense dislike for unions, but also a categorical determination not to bargain with one, even if it meant the loss of employees or the closing of the business. The statements were made within a month after the Respondent laid off McLean, and there is no evidence that they were in response to any intervening event or involved only a particular project. Therefore, we find that the statements reveal a strong and generalized antiunion sentiment that predated the layoff of McLean.

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

² All dates are 2003 unless otherwise noted.

³ 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

spondent had no concrete basis for citing McLean's eventual departure as justification for his layoff. Also, because the project was winding down, it is likely that McLean would have remained available to work for the Respondent as long as his services were needed. Therefore, his plans to leave would have been of little consequence to the Respondent. In contrast, the Respondent's demonstrated animus toward union activity strongly suggests that the union-related aspect of McLean's plans would be highly significant to the Respondent.

With respect to the assertion that McLean was the last employee hired, the record shows that employee Smith was hired the same day as McLean. Smith was laid off after McLean. Thus, the evidence fails to establish that McLean was the last employee hired. Nor does it show a reason, apart from McLean's union activity, for selecting him to be laid off before Smith.

As the record does not support the Respondent's asserted basis for selecting McLean for layoff, the Respondent has failed to show that it would have laid him off even in the absence of his union activity. Therefore, we find that the Respondent terminated McLean on the basis of his union affiliation.

In *Buckeye Electric Co.*, 339 NLRB No. 42 (2003), an employee announced he had joined the union and would leave for a union job when he could find one. The employer subsequently discharged him. In finding that the discharge was unlawful, the Board stated that the employer had no obligation to retain an at-will employee after his announcement of his intention to leave for a union job, but could not base its decision on the employee's union activity. As we have found that the Respondent laid McLean off on the basis of his union activity, we conclude that his termination violated Section 8(a)(1) and (3).⁶

2. We also find, contrary to the judge, that the Respondent violated Section 8(a)(1) when Owner Woodson told McLean that he was selected for layoff because he planned to seek union employment. Citing the prospect of McLean's quitting to accept a union job as the basis for his selection for layoff was merely an oblique way of informing him that the action was being taken because of his union membership. An employer violates Section 8(a)(1) by linking an employee's discharge to his pro-

⁶ In finding that the Respondent unlawfully terminated McLean, we do not rely on the Respondent's failure to put McLean on low earnings status or to transfer him to another jobsite. Although McLean was put on low earnings in 2001, the Respondent's employment records show that no employees laid off in 2003 were put on low earnings status. In addition, no evidence demonstrates that it was the Respondent's normal practice to transfer employees from one jobsite to another when work at one was finished, although Woodson testified that the Respondent occasionally did so.

ected activity. *Benesight, Inc.*, 337 NLRB 282, 283 (2001); see also *Valley Material Co.*, 316 NLRB 704, 708 (1995). A reasonable employee would understand from Woodson's statement that he was being singled out for layoff from the other recently hired employees on the basis of his union activity.

ORDER

The National Labor Relations Board orders that the Respondent, K. W. Electric, Inc., Fayetteville, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with closure of the business in order to avoid unionization.

(b) Making statements that convey to employees that their union activities are futile.

(c) Terminating or otherwise discriminating against employees for supporting International Brotherhood of Electrical Workers, Local 466, AFL-CIO or any other union.

(d) Informing employees that they are being discharged because of their membership in the Union.

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

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

(a) Within 14 days from the date of this Order, offer Michael McLean and Joe Farley 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 McLean and Farley whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

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

(d) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Fayetteville, West Virginia, copies of the

attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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 employees and former employees employed by the Respondent at any time since May 30, 2003.

(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.

Dated, Washington, D.C. September 24, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

1. Contrary to my colleagues, I would adopt the judge's findings that the Respondent did not violate Section 8(a)(1) and (3) of the Act by terminating employee Michael McLean. It is undisputed that the Tamarack job was coming to a close and that the Respondent was laying off employees as the remaining job requirements decreased. McLean and employee Smith were the last to be hired. Faced with the need to lay off an employee, the Respondent selected McLean as the first to be laid off. He and Smith were the most junior employees, and he (unlike Smith) had said that he intended to quit as soon as a union job could be found. Smith was laid off a few days later.

I assume *arguendo* that the General Counsel has made an initial showing that a reason for selecting McLean for

layoff was his union activity. However, in my view, the Respondent established that McLean would have been selected for layoff even if he had not engaged in union activity. There is no dispute about the fact that someone had to be laid off. The choice came down to the two most junior employees—McLean and Smith. Of the two, McLean had indicated an intention to leave as soon as a union job came along. Smith had not so indicated. Thus, the Respondent chose for layoff someone who could not be relied upon to stay as long as needed.

As the judge found, the Respondent selected for layoff an employee who expressed his intention to leave, over other employees with an interest in continued employment with the Respondent. Clearly, this does not constitute discrimination in violation of the Act. The fact that the employee's intention was to leave for a union job does not alter the fact that he intended to leave.

2. I agree with the judge that Respondent did not violate Section 8(a)(1) of the Act when Woodson told McLean that he was being laid off because he planned to quit to take a union job. Woodson's statement was simply an explanation of one of the reasons for McLean's selection for layoff, not an assertion that McLean's membership in the Union was incompatible with continued employment by the Respondent. The Respondent did not take any action against McLean when he first informed the Respondent (Woodson) of his intention to leave for a union job. In fact, Woodson told McLean that he did not have a problem with that and that he appreciated McLean's honesty and his efforts to better himself. In these circumstances, a reasonable employee would understand that he was being laid off because he was going to be leaving anyhow, not because of where he would be going, i.e., to a union job. In sum, I find nothing in the context of Woodson's explanation to McLean or otherwise to suggest that the statement would reasonably interfere with employee Section 7 rights.

Dated, Washington, D.C. September 24, 2004

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

⁷ 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."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT threaten you that we will close the business rather than go union.

WE WILL NOT make statements that convey to you that your union activities are futile.

WE WILL NOT terminate or otherwise discriminate against any of you for supporting International Brotherhood of Electrical Workers, Local 466, AFL–CIO or any other union.

WE WILL NOT inform you that you are being discharged because of your membership in the Union.

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 Michael McLean and Joe Farley 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.

WE WILL make Michael McLean and Joe Farley whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Michael McLean and Joe Farley, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharge will not be used against them in any way.

K. W. ELECTRIC, INC.

Jonathan D. Duffy, Esq., for the General Counsel.

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

Bert McDermott Jr., Organizer, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Oak Hill, West Virginia, on March 23, 2004.

International Brotherhood of Electrical Workers, Local 466, AFL–CIO (the Union), filed the charge on August 6, 2003,¹ and amended it on September 22 and October 28. On November 20, the complaint issued alleging that K.W. Electric Inc. (the Respondent), violated Section 8(a)(1) and (3) of the Act. Specifically, the complaint alleges that the Respondent, on June 25, through its owner and stockholder John Kuhn, made statements of futility and told an employee that if he wanted to be in the Union, he should work for another employer and that the Respondent would never sign a contract with the Union. The complaint further alleges that the Respondent, through alleged Supervisor Marvin Alderman, threatened an employee on June 23, by saying that the Respondent would close its doors before it would become union. The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the Act by terminating Michael McLean on May 30, and Joe Farley on June 25, because of their membership in and support for the Union. The General Counsel amended the complaint at the hearing to add an additional 8(a)(1) allegation, i.e., that owner/stockholder Michael Woodson informed an employee on May 30 that he was being terminated because he joined the Union.

On December 5, the Respondent filed its answer to the complaint, denying that Alderman was a supervisor and/or agent of the Respondent and denying that it committed the alleged unfair labor practices. The Respondent answered the General Counsel's amendment at the hearing by denying the new allegation.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Fayetteville, West Virginia, is an electrical contractor in the construction industry doing commercial and office construction. The Respondent annually purchases and receives at its Fayetteville facility goods valued in excess of \$50,000 from State Electric Supply, Inc., a West Virginia enterprise which purchases and receives these goods directly from outside the State of West Virginia. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent is a nonunion electrical contractor and, I have no doubt, would prefer to remain that way. The Union has apparently attempted, unsuccessfully, to convince the Respondent to enter into a voluntary agreement under Section 8(f) of the Act. In 2003, the Union employed a new strategy, "salt-ing," in an effort to obtain recognition as the representative of

¹ All dates are in 2003 unless otherwise indicated.

the Respondent's employees. The unfair labor practice charges at issue here arose, at least in part, out of that salting campaign.

John Kuhn and Michael Woodson are the sole shareholders of the Respondent corporation and have owned it since 1996. The Respondent admits that Kuhn and Woodson are supervisors and agents within the meaning of the Act. Each has sole responsibility for running a particular job. In 2003, for example, Kuhn was in charge of a job at the Greenbriar in White Sulphur Springs, West Virginia, and Woodson was in charge of a job at the Tamarack state tourist site in Beckley, West Virginia. In addition, Woodson serves as the Respondent's estimator and Kuhn keeps the books. The evidence establishes that Kuhn and Woodson are the only ones with the authority to hire, fire, discipline, or promote employees and to determine their wages and other terms and conditions of employment.

In the summer of 2003, the Respondent had seven jobs in progress, including the Tamarack and Greenbriar jobs. Each job was assigned a leadman. Marvin Alderman was the leadman at Greenbriar and Rick Atwood was the leadman at Tamarack. According to Kuhn, all lead men have the same duties and responsibilities on the jobs they are assigned. Kuhn or Woodson select the leadman for the jobs over which each is in charge. The leadmen are typically more senior, experienced employees. These employees work as electricians on jobs when they are not assigned to a leadman position. The General Counsel alleges, and the Respondent denies, that Alderman was a statutory supervisor and/or agent for the Respondent at the Greenbriar job.

B. Alderman's Supervisory Status

Farley, one of the alleged discriminatees, testified that he reported to Alderman as the foreman when he worked for the Respondent at Greenbriar. According to Farley, Alderman made sure everyone was busy and had the material they needed to do their job. Alderman also dealt with the architect. If Farley had a question about his job assignment, he would ask Alderman. Farley testified that Kuhn was present on the job "usually two days a week" but that Alderman was there every day. Farley also testified that Alderman did not spend much time working with the tools.

Alderman testified that Kuhn visited the job "at least" 2 times a week, but conceded that, in his pre-trial affidavit, he omitted the words "at least." Kuhn himself denied only being onsite 2 times a week. According to Kuhn, the frequency of his visits to the job depended on what was going on at any given time. He acknowledged, however, that he was not onsite every day and that Alderman ran the job in his absence. Alderman and Kuhn also acknowledged that Alderman kept track of employees' time, assigned work to the employees on his crew, about 10 electricians at the job's peak, and that Alderman would handle changes in the work that came up as a result of what the other trades were doing. However, it was Kuhn who hired employees for the job and who laid out the work and the schedule for the job. Alderman was expected to follow Kuhn's schedule and layout in the absence of unforeseen changes. Alderman and Kuhn also testified that, in making job assignments, Alderman would assign employees to particular tasks based on his knowledge of their individual experience and

skills. Alderman and Kuhn also acknowledged that Alderman ordered material for the job when additional material was needed and Kuhn was not available to order it. When the job was winding down, it was Kuhn, not Alderman, who determined which employees to lay off.

Alderman and Kuhn also acknowledged that Alderman had the authority to allow an employee to leave work early in an emergency situation but claimed that, absent an emergency, only Kuhn could grant time off. Alderman described an incident in which an employee asked for time off to take his son to the hospital. According to Alderman, he told the employee he should have spoken to Kuhn about this request because the employee had known about it in advance. Alderman testified that he told the employee he could not prevent him from leaving under the circumstances, but that it would be up to Kuhn whether permission was granted. According to Alderman, employees rarely asked him for time off.

With respect to the assignment of work, Farley testified to an incident in which two employees were sent from the Greenbriar job to work on the higher-pay prevailing wage job at Tamarack. According to Farley, he was present when another employee, Jeff Akers, questioned Alderman why he had not been selected to make the big bucks. Farley testified that Alderman replied that the two employees who were sent to Tamarack rode together and that, next time, he would let Woodson or Kuhn make the decision. Alderman did not testify about either the conversation with Akers or the transfer of employees but Kuhn testified that he, not Alderman, was the one who made the decision which employees to send to Tamarack and that Alderman merely conveyed his decision to the employees.

Farley also testified that, when he asked Kuhn for a raise shortly after he started working for the Respondent, Kuhn said he would talk to Alderman and get back to him. Kuhn acknowledged that he consulted with Alderman when Farley asked for a raise, by asking Alderman how Farley was doing. Kuhn testified that he made the decision to grant Farley a raise independently of Alderman's assessment of Farley's performance based on a number of factors.

Section 2(11) of the Act defines a supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or 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.

It is well established that a person need possess only one of the enumerated criteria to meet the statutory definition. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949); *Pepsi-Cola Co.*, 327 NLRB 1062, 1064 (1999). It is equally well established that the burden of proof is on the party asserting supervisory status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 712 (2001). The Board has frequently noted that it will not lightly find such status because to do so would deprive the individual of the rights af-

forded by Section 7 of the Act. *Freeman Decorating Co.*, 330 NLRB 1143 (2000).

The evidence in the record here establishes, and it is essentially undisputed, that Alderman possessed few, if any, of the statutory indicia of supervisory status. In order to prove that Alderman was a statutory supervisor, the General Counsel relies upon the evidence described above showing that Alderman assigned work, directed the employees, kept track of their time, could allow employees to leave early in an emergency situation and was involved in the temporary transfer of two employees to Tamarack and the grant of a raise to Farley. The General Counsel also relies on secondary indicia of supervisory status, such as Alderman's authority to order materials and to deal with the architect and other contractors in Kuhn's absence, his presence as the highest ranking employee of the Respondent on the job the majority of the time, and on "admissions" in pre-trial affidavits that Kuhn considered Alderman, and Alderman considered himself, to be a supervisor.

Alderman's timekeeping responsibilities were clearly clerical in nature. Although he had some authority to let employees leave early, it was limited to emergency situations that did not require the exercise of independent judgment, e.g., if someone were sick or had to deal with a family crisis. Alderman's testimony that he couldn't grant permission for an employee to go fishing demonstrates the limits of his authority. Kuhn, on the other hand, could permit an employee a day off for such a purpose. Alderman's assignment of employees was based upon the schedule of work prepared by Kuhn and Alderman's knowledge of the skills and experience of the employees working under him. Even where a change in the schedule or layout of the work was necessitated by an unforeseen event on the job, Alderman's decisions were constrained by the order within which the job had to be done and did not evidence the type of independent judgment one would expect from a true statutory supervisor. Thus, there is no evidence that Alderman had the authority to delay a particular task simply because he thought it would be better for the overall performance of the job. Nor is there any evidence that Alderman could decide to assign an inexperienced employee to a complex task to test the limits of his capabilities. Alderman's direction of his crew was similarly limited to making sure they kept busy and had the materials they needed. There is no evidence that Alderman inspected their work, instructed employees to re-do work, disciplined, or recommended discipline for an employee he believed had not done satisfactory work, or otherwise displayed independent judgment in carrying out his responsibilities. See *Arlington Electric*, 332 NLRB 845, 845-846 (2000), and cases cited therein.

The General Counsel relies on Farley's testimony regarding the conversation he witnessed between Alderman and employee Akers to prove that Alderman had the authority to reassign employees to a higher-paid job. Alderman's response to Akers' complaint about not being transferred to the Tamarack job, i.e., that next time he would let Woodson or Kuhn make the decision, suggests that Alderman had made the decision in that instance. Although Kuhn disputed this, Alderman was not asked about either the conversation with Akers or the transfer itself. It should also be noted that the General Counsel did not

call Akers to corroborate Farley's testimony. Farley's testimony is suspect because he was able to recall this conversation without it having been recorded yet had difficulty recalling his conversation with Kuhn on June 25 that had been recorded. In the absence of corroboration, I am not inclined to rely on such an off-hand comment as proof that Alderman had in fact made the decision regarding which employees to reassign to Tamarack or that Alderman had the authority to make such decisions independently.

Kuhn's testimony that he spoke to Alderman in response to Farley's request for a raise and granted the raise after Alderman told him Farley was doing good work does not establish that Alderman had the authority to effectively recommend raises for employees generally. It appears from Kuhn's testimony, which was credible at least as to this aspect of the case, that he had made the decision to grant Farley's request independently of Alderman's report that Farley was a good worker. From other evidence in the record, it is clear that Kuhn had the same opinion of Farley's work. Moreover, the decision to give Farley a raise was primarily based upon Farley's claim of financial hardship rather than being a reward for good work. The record contains no evidence that Alderman regularly evaluated the performance of electricians on his crew or had any input, beyond this one isolated incident, into Kuhn's decisions regarding wages or raises.

Finally, factors such as the ratio of supervisors to employees and whether the employer or the individual whose status is in dispute consider the individual to be a "supervisor," are secondary indicia and not enough, standing alone, to convey supervisory status within the meaning of the Act. *Ken-Crest Services*, 335 NLRB 777, 779 (2001); *John N. Hansen Co.*, 293 NLRB 63, 64 (1989). See also *Adco Electric, Inc.*, 307 NLRB 1113, 1120 (1992), and cases cited therein. I note, in this regard, that the purported "admissions" contained in Kuhn's and Alderman's pre-trial affidavits were based on their understanding of the lay definition of the word rather than any legal analysis of the statutory criteria relied upon by the Board.

I find, based on the above, that the General Counsel has not met his burden of proving that Alderman possessed any of the statutory authority that would make him a supervisor within the meaning of the Act. At most, Alderman possessed "the kind of routine, decision-making authority typical of non-supervisor leadmen." *Chrome Deposit Corp.*, 323 NLRB 961, 964 (1997). Accord: *Arlington Electric*, supra. The General Counsel alleges that Alderman was an agent of the Respondent even if he was not a supervisor. I shall discuss this allegation later in this decision in connection with the alleged unlawful statement attributed to Alderman.

C. Evidence Regarding the Alleged Unfair Labor Practices

Michael McLean was first hired by the Respondent in July or August 2001. He was not a member of any union at that time. After about 1 year, he was laid off when work slowed. At that time, the Respondent put McLean on what is known in West Virginia as "low earnings." This status, for unemployment purposes, means that the Respondent intended to recall McLean when work became available. The effect of such status is that the laid off employee is not subject to having to report efforts to

find other work as a condition of receiving unemployment benefits. Woodson explained that, when McLean was laid off in 2002, the Respondent was anticipating a new job starting shortly in McLean's area. The Respondent ended up not getting this job and McLean was not recalled. The Respondent nevertheless continued to carry McLean in "low earnings" status until it learned that he had found another job, at which point McLean was placed in lay off status.

The Respondent did call McLean to come back to work in May 2003 when it had work available on the Tamarack job. The Respondent's records show that McLean started working for the Respondent again on May 5. McLean had joined the Union since his last employment by the Respondent and, admittedly, was waiting for a referral to a union job. There is no dispute that McLean made this known to the Respondent although there is a dispute as to when he reported his union status. According to McLean, Woodson pulled him aside on May 7, and asked what plans McLean had. McLean testified that he told Woodson that he wanted to be up front with him, that "it looks like I'm going to join the Union and go to work for the Union." He explained to Woodson that, if a union job came up, he would quit to take it. Woodson replied that he didn't have a problem with that, with somebody trying to better themselves. Woodson told McLean that he appreciated his honesty. Woodson also told McLean that he had a stack of applications from union electricians looking for work. Woodson's version of this conversation does not differ significantly from McLean's testimony. However, Woodson recalled that it was McLean who approached him on his first day on the job and that McLean volunteered his plans to join the Union and quit when he got a union job. According to Woodson, he told McLean that he could work for the Respondent until he got another job or until the Respondent didn't have any more work for him.

There is no dispute that McLean continued to work for the Respondent, without incident, until May 30, when Woodson laid him off. McLean admitted that he engaged in no union organizing activity while working for the Respondent and that he did not wear any union hats, clothing, or other insignia on the job. McLean testified that, at the time of his lay off, he was working on outside lighting in the parking lot. Woodson told him that "work was getting jammed up, meaning they didn't have, with the rainy season everything was—they didn't have places for everybody to go, and since I'd told him I was probably going to be quitting and going into the Union anyway, he felt it better to lay me off than someone else." McLean asked Woodson if he would be on "low earnings" and Woodson said he didn't see a problem with that but he had to talk to Kuhn. Woodson later told McLean that there was a new company policy not to put people on "low earnings." There is no dispute that McLean was the only employee laid off from the Tamarack job that day and that Woodson did not offer McLean work at any of the Respondent's other jobsites.

Woodson admitted laying off McLean on May 30 but he did not recall McLean asking to be put on "low earnings." Woodson also admitted that McLean asked if Woodson would consider him for other work. According to Woodson, he told McLean that he would. During the General Counsel's ques-

tioning of Woodson under Rule 611(c), Woodson acknowledged that the Respondent hired employees after McLean was laid off, including Farley who was hired on June 2. Woodson explained that he did not offer McLean work at other jobs because those jobs were not prevailing wage jobs like the Tamarack job,² and because they were outside the geographic area where McLean had indicated he wanted to work. Woodson claimed that McLean had previously indicated that he would not work a nonscale job because he needed the money. The application McLean filled out in February 2001 does not reflect this. On the contrary, McLean wrote \$13/hour in the space "hourly rate required." Although McLean did indicate in his application that he was not willing to work in all areas of West Virginia, he wrote that he "prefer[ed] to work southern half from Charleston to Lewisburg and down." White Sulphur Springs, where the Greenbriar job was located, is about 10 miles east of Lewisburg.

Several letters submitted by the Respondent to the Board's Regional Office during the investigation show that the Respondent did hire new employees after McLean was laid off.³ None of these employees was hired to work at the Tamarack job which was in the process of winding down and was finished by August. There is no evidence that the Respondent had any other prevailing wage work available at the time of McLean's lay off. The employees who were hired after McLean's lay off appeared to have been hired, like Farley, for the Greenbriar job, which was essentially gearing up at the time and continued through the remainder of the year. These position statements also show that McLean was the last person hired on the Tamarack job and that another employee hired the same date as McLean, i.e., Gary Smith, was laid off shortly after McLean, on June 3.⁴

Joe Farley was hired by Kuhn to work at the Greenbriar job on June 2. Farley had not worked for the Respondent before. He was a union member and admitted being sent to work for the Respondent with the purpose of organizing the employees, i.e., he was a "salt." There is no dispute that Farley did not identify himself as a union member when he applied for a job with the Respondent. When he started working at the Greenbriar job, there were seven or eight other electricians working there, all but one of whom had started before Farley. Dean Dix started working at Greenbriar the day after Farley. As previously noted, Farley reported to Alderman. Farley testified that, during his third week of employment, he asked Kuhn for a raise. According to Farley, Kuhn told him he could give him as much as \$1/hour more, and that he had heard good things about Farley from Alderman. Shortly after this conversation, Farley got a \$1.25/hour raise. There is no dispute that Farley had not engaged in any overt union activity up to this point in time.

² The records show that McLean was paid \$34.07/hour on the Tamarack job.

³ Both the General Counsel and the Respondent apparently rely upon the summaries of the Respondent's records that were submitted with these position letters. Neither party offered records to contradict the information contained in these summaries.

⁴ The Respondent's position letter indicates that Smith was paid \$14/hour, suggesting that he was not working at the Tamarack job.

On Thursday, June 19, Farley made his first attempt to organize his coworkers. Farley testified that he revealed his membership in the Union to Dix and explained to Dix the benefits of membership in the Union. The next day, Friday, Farley gave Dix some union literature. The following Monday, June 23, Farley wore a union shirt and hat with union stickers to work and handed out union literature to coworkers in the parking lot. At 7 a.m. that morning, Kuhn conducted his regular safety meeting. According to Farley, while speaking about work other crafts were doing, Kuhn looked at him and, in a “slip of the tongue,” said “rooftop unions,” instead of “units,” were being installed. Kuhn immediately corrected himself and there was no further mention of the Union in the meeting.⁵ Farley testified that, later that morning, when he asked Kuhn for some material he had been looking for, Kuhn looked at him and shook his head from side to side. According to Farley, this differed from the usual friendly manner in which Kuhn greeted him before he wore the union insignia to work.

Farley testified that, at lunchtime that Monday, he attempted to give Alderman a union pamphlet. Alderman rejected it, telling Farley that he didn’t need to read it, that he wouldn’t work a union job unless the Respondent joined the Union. Alderman also told Farley that he wouldn’t join the Union because he was working and the union guys were not. Alderman then told Farley that Kuhn had said he would close rather than go union. Alderman did not dispute this testimony but he did admit, during the General Counsel’s Rule 611(c) examination of him, that he made a similar remark to Dean Dix. Alderman admitted telling Dix that “Kuhn said he would rather disassemble his company as go union.” Although he admitted making such a statement, Alderman claimed that it was not true, that Kuhn never said such a thing. Kuhn also denied ever saying that he would close the company before going union. Although Alderman did not testify as to the precise date or location of his conversation with Dix, I shall infer that the conversation took place during the time that Dix worked for the Respondent at Greenbriar. There is no evidence in the record that Alderman had a preexisting relationship with Dix or would have had any occasion to make such a statement before Farley’s efforts to organize Dix and the other employees at Greenbriar.

Farley testified that he wore the union shirt and the hat with union stickers the next day and continued his organizing activity. Neither Kuhn or Alderman said anything to him about the Union that day. On Wednesday, June 25, Farley continued his organizing activities. Kuhn was present on the job that day. Farley testified that, at about 1 p.m., he approached Kuhn and asked to speak to him. There is no dispute that Farley and Kuhn went into a building where no one else was within earshot to have this conversation. Farley tape recorded part of this conversation, using a mini-cassette recorder. Farley admitted that he did not begin taping the conversation until about 5 minutes into it. Farley had almost no recollection of what was said before he turned on the tape. When pressed, he admitted that Kuhn told him, near the beginning of their conversation, that the Respondent had no more work for him. He also recalled telling Kuhn that he was there to prove that the Union could

⁵ Kuhn had no recollection of making such a “slip of the tongue.”

provide the Respondent with good workers, to educate the workers about the Union, and possibly to convince Kuhn to join the Union. The only other thing that Farley was able to recall, before listening to the tape at the hearing, was that Kuhn said he had already told the union guys that he wasn’t interested in joining the Union, now or ever, and that he had offered to sell the business to the Union but they did not want any part of it. Even after the tape and a purportedly enhanced CD-rom copy of it were played at the hearing, Farley still had difficulty recalling any part of the conversation independently. Farley’s apparently poor recall of this particular conversation leaves the audio recording he made as the only evidence in the record supporting the General Counsel’s allegations that Farley violated Section 8(a)(1) of the Act.⁶

The General Counsel also played the CD-rom version of the tape for Kuhn during his examination under Rule 611(c). Before listening to the recording, Kuhn testified that Farley approached him before noon in the Sporting Lodge, away from where others were working. Kuhn recalled that Farley said he was working for the Union, that he was handing out union literature to the other employees and that the Union wanted to speak to him. Before listening to the tape, Kuhn denied that he told Farley that the Respondent was a nonunion company and would remain a nonunion company and that if people wanted to be in the Union, they needed to go to another company to work. Kuhn also denied telling Farley that he already had a partner and that would be the only partner he’d ever have. Kuhn also denied telling Farley that he had already told the Union that he would not sign an agreement with them. Kuhn did admit telling Farley in this conversation that he was terminated but claimed that this was the first thing he said to Farley before any mention of the Union came up in the conversation. Kuhn did admit that he already knew before this conversation, from reports he had received from Alderman, that Farley was trying to organize his employees.

When the CD-rom version of the tape was played at the hearing, it was virtually inaudible. The court reporter was unable to transcribe any of it.⁷ Nevertheless, Kuhn did recognize his voice on the recording. He continued to deny that he told Farley, “in an entire sentence all put together,” that the Respondent was and would remain nonunion and that employees who want to be in the Union should go work for another company. Kuhn also continued to deny making the statement about his partner. Kuhn did acknowledge saying that he had already told the Union, when they approached him about signing a contract, that he wasn’t interested. When Kuhn was recalled to testify as a witness for the Respondent, he appeared to acknowledge that the tape accurately reflected the conversation he had with Farley that day, but claimed that all the statements recorded were made after he had informed Farley that he was being laid off because there was no more work for him. Kuhn also testified

⁶ As previously noted, Farley did not display a similar lack of recall when testifying about other conversations that he had not recorded.

⁷ The same situation occurred later in the hearing when the original cassette recording was played. Although it was a little more audible than the CD-rom, the court reporter was still unable to transcribe any of it.

that Farley elicited the statements by asking him questions, essentially claiming some kind of entrapment.

I received both the original cassette recording and the CD-rom copy into evidence, over the Respondent's objection, after hearing testimony from the individuals who had custody of the original tape after Farley transcribed it by hand and from the acknowledged audio expert regarding the manner in which the cassette was copied and the audio "cleaned up" on the CD-rom. See *Williamhouse of California, Inc.*, 317 NLRB 699 (1995); *Wellstream Corp.*, 313 NLRB 698, 711 (1994). Cf. *Medite of New Mexico, Inc.*, 314 NLRB 1145, 1146 fn. 7 (1994), *enfd.* 72 F.3d 780, 787 (10th Cir. 1996). Although the quality of both the original cassette and CD-rom were poor when played at the hearing, the CD-rom is much more audible when listened to on a personal computer. The handwritten transcript prepared by Farley and duplicated on the CD-rom also accurately tracks the audio recording. While the tape admittedly does not capture the entire conversation and remains difficult to understand in parts, these factors go to the weight, rather than admissibility. *U.S. v. Parks*, 100 F.3d 1300 (7th Cir. 1996). In this regard, I note that the Respondent, who was provided copies of both the cassette and the CD-rom at the hearing and was offered the opportunity to submit its own transcript of the recording with its brief, has not disputed the transcript prepared by Farley.

The audio recording of the June 25 conversation is about 11 minutes long. Because Farley concedes that he did not begin taping until about 5 minutes into the conversation, I shall infer that the entire conversation lasted approximately 15 minutes. The recording reveals a rather amiable conversation in which Kuhn displayed no overt hostility, or anger toward the Union or Farley. On the contrary, several times during the conversation Kuhn complimented Farley on his work and told him he appreciated all the work he had done. The tape does confirm that Kuhn told Farley that the Respondent "is a non-union company and will be a nonunion company. If people want to be in the Union, then they need to go to another company to work." This statement was made after Kuhn expressed frustration with union efforts to get him to voluntarily sign a contract, with Kuhn asking Farley at one point how Farley felt when someone kept calling him at home trying to sell him something he didn't want. Farley expressed empathy for Kuhn's frustration over this. The above statement also was made in the context of Kuhn saying, several times, that he sees no difference between union and nonunion, that all he cares about is that someone is a good worker. Kuhn also expressed the opinion, with which Farley apparently agreed, that the Union only wanted to sign up the Respondent because the Respondent was successful at getting work. The tape also confirms that Kuhn said, in the context of these remarks, that he already had a partner, that would be the only partner he will have and that will be the only contract he would sign.

There is no dispute that Farley was informed that he was being laid off during this conversation on June 25. It is more likely than not that Kuhn informed Farley that he was being laid off at the beginning of the conversation, before Farley turned on the recording. Based on Kuhn's testimony, which I found more credible than Farley's lack of recall, at least with regard to this aspect of the conversation, I find that Kuhn told

Farley he was being laid off before Farley began talking about the Union. Farley testified that he made the decision to terminate Farley the day before, based on a lack of work, and that he had tried calling Farley the night before to tell him not to come to work. When Farley's answering machine picked up, Kuhn decided to wait to tell Farley in person the next day rather than leave such a message on a recording. Farley acknowledged that his caller ID revealed that Kuhn had called his home while Farley was out on June 24.

Kuhn denied that Farley's union membership or activities had anything to do with his decision to lay Farley off on June 25.⁸ Kuhn testified that Farley was hired with a group of electricians when the contractor was pushing the Respondent to get a lot of work done. According to Kuhn, Farley was laid off as that phase of the project was finishing because there wasn't enough work to keep everyone busy. Although no one else was laid off at the same time, other electricians were laid off in the weeks and months after Farley's lay off. The summaries of the Respondent's records that were submitted to the Board's Regional Office during the investigation confirm this. Kuhn testified that he selected Farley as the first to be laid off in this group because he was one of the higher-paid employees on the job and because he was the last one "hired." As to the latter point, Kuhn admitted that the Respondent's records show that the date of hire for Dix was 1 day after Farley's date of hire. However, Kuhn testified that Dix had been offered the job and accepted it 2 weeks earlier but had to give notice to his current employer before starting work. According to Kuhn, he considered Dix to have been hired when he accepted the job, not when he started working. Kuhn acknowledged that no records documented this claim.

Kuhn also acknowledged that the reason Farley was one of the higher-paid employees on the Greenbriar job was that he had just given him a raise. According to Kuhn, he gave Farley the raise when Farley complained that he needed more money to pay for gas to get to the job. Kuhn claimed that he agreed to give Farley more money knowing that he would be laying him off shortly. Farley testified he would not have given such a generous raise to an employee if he thought he would be carrying him on the payroll for any length of time. The circular nature of Kuhn's reasoning makes his testimony somewhat suspect.

The position statements submitted by the Respondent, referred to previously, contain summaries which show that McLean was laid off before several employees who were hired after him. These summaries do not show that any employees were hired, after McLean's lay off, to work at Tamarack. The summaries also show that Farley was hired June 2 and Dix was hired June 3. Although Farley was laid off on June 25, Dix continued to work for the Respondent until the week of August 29 when he was laid off. These summaries also show that Akers, who was hired May 12, after McLean but before Farley,

⁸ Kuhn also denied an antiunion motivation behind McLean's termination on May 30. However, because Kuhn admits he did not make the decision to lay off McLean and only knew of the reasons by virtue of his position as a co-owner of the company, I attach no weight to this denial.

was still employed by the Respondent as of October 13 and that Roger Sargent Jr., who was not hired until July 14, was also still employed in October. The last position statement submitted to the Region, signed by the Respondent's attorney and dated October 13, includes a statement suggesting that McLean was terminated when work at Tamarack slowed down because "he was the last man hired on that job." Alderman had also stated, in his pre-trial affidavit, "employers lay off employees in the order they are hired. The last person hired at the job site would be the first person laid off at the job site." At the hearing, Alderman explained he was only voicing his assumption regarding how lay offs are done. Alderman denied that he had any role in making lay off decisions. In contrast to these prior statements, Kuhn denied that the Respondent had a practice of laying off employees by seniority. According to Kuhn, a number of factors are considered in making lay off decisions, including the type of work available, whether it is prevailing wage work or not, the skills and experience of particular employees and whether they fit the work that is available, the distance of the available jobs from the employees' homes, as well as the employees' relative hire dates.

D. Analysis

The complaint alleges several violations of Section 8(a)(1) and (3) of the Act involving the Respondent's discharge of two employees. Because resolution of the discharge allegations turns on employer motivation, the test adopted by the Board in *Wright Line*,⁹ applies. Under this test, the General Counsel bears the initial burden of proving by a preponderance of the evidence that union or other protected concerted activity was a motivating factor in the employer's actions. To meet this burden, the General Counsel must offer evidence of union or other protected activity, employer knowledge of this activity, and the existence of antiunion animus that motivated the employer to take the action it did. The Board has recognized that direct evidence of an unlawful motivation is rarely available. The General Counsel may meet his burden through circumstantial evidence, such as timing and disparate treatment, from which an unlawful motive may be inferred. See *Naomi Knitting Plant*, 328 NLRB 1279 (1999), and cases cited therein. If the General Counsel meets his burden, then the burden shifts to the respondent to prove, by a preponderance of the evidence, that it would have taken the same action, or made the same decision, even in the absence of protected activity. The complaint also alleges independent violations of Section 8(a)(1) of the Act. In analyzing these allegations, motivation is irrelevant. Rather, the test applied by the Board is an objective one. The Board seeks to determine whether statements made by an employer would reasonably tend to chill employees in the exercise of their statutory right to engage in or refrain from engaging in union or other protected concerted activity. *American Freightways Co.*, 124 NLRB 146, 147 (1959). Accord: *Yoshi's Japanese Restaurant*, 330 NLRB 1339 fn. 3 (2000).

⁹ 251 NLRB 1083 (1980), enf'd. 622 F.2d 899 (1st Cir. 1980), cert. denied 455 U.S. 988 (1982). See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

The complaint, as amended at the hearing, alleges that the Respondent terminated McLean on May 30 in violation of Section 8(a)(1) and (3) of the Act and that Woodson independently violated Section 8(a)(1) of the Act that day by informing McLean he was being discharged because of his membership in the Union. There is very little dispute factually regarding what happened to McLean. Woodson and McLean agree that, either at the time McLean was hired or within his first few days of employment, McLean informed Woodson that he was attempting to join the union and planned to quit working for the Respondent as soon as the Union referred him to a job.¹⁰ It is also undisputed that Woodson did not react negatively to this news and, in fact, wished McLean luck with his plans to "improve himself." McLean then worked without any problem and without engaging in any type of union activity for more than 3 weeks until Woodson told him that work was getting jammed up and he had to let him go. Woodson essentially admitted that he decided to lay McLean off because McLean planned to leave anyway once he got a job through the Union. The General Counsel argues that Woodson's statement to McLean was an admission of unlawful motivation in violation of Section 8(a)(3) and that McLean's lay off was therefore an unfair labor practice.

Looking at these facts from a purely theoretical point of view, one might conclude that the General Counsel was correct. After all, Woodson did say that he chose to lay off McLean rather than someone else because McLean had announced his intention to join the Union. However, in reality, McLean's decision and statement reflects the simple fact that McLean had no intention of continuing his employment with the Respondent for the long term. He admittedly was biding his time until something better, i.e., a union job, came along. McLean wasn't laid off because he was attempting to organize his fellow employees. In fact, McLean wasn't even a "salt." Moreover, there was no union organizing campaign taking place during the time that McLean worked at Tamarack. Woodson displayed no animus at all toward McLean's announcement of his intention to join the Union and quit for a union job. While it is true that another employee hired the same day as McLean was not laid off until 4 days later and that other employees were hired after McLean was laid off, it is undisputed that the job at Tamarack was in fact winding down. New employees hired after McLean's lay off worked at Greenbriar and other jobs. Although Woodson acknowledged that the Respondent occasionally transferred employees to other jobs when work slowed on their current job, it would make little sense for the Respondent to make such a commitment of future employment to McLean when he was unwilling to make a similar commitment to the Respondent. I have considered the statements Kuhn made to Farley about a month later but find that they shed very little light on Woodson's animus in ~~terminating McLean.~~ Woodson and Kuhn had sole

¹⁰ McLean testified that he was already a union member when he started working for the Respondent on May 5. Nevertheless, by his own testimony, McLean merely informed Woodson that "it looks like I'm going to join the Union." This is consistent with Woodson's testimony and the statements in the letters that the Respondent submitted to the Regional Office during the investigation.

Woodson and Kuhn had sole responsibility for their respective jobs in terms of hiring and firing and there is no evidence that Kuhn had any input into Woodson's decision to lay off McLean. Even assuming Kuhn's statements to Farley on June 25 violated the Act, they are not enough to prove an unlawful motivation behind Woodson's decision to terminate McLean on May 30.

Applying the *Wright Line* test to these facts, I find that the General Counsel has failed to establish that the Respondent was motivated by any protected activity engaged in by McLean when it laid him off on May 30. Although McLean was a member of the Union and had expressed to the Respondent his intent to work for a union company, the Respondent displayed no animus toward this very limited activity. When work slowed to the point that the Respondent needed to lay off an employee at McLean's job, it chose him not because of his status as a union member but because he intended to quit anyway. I conclude that an employer who chooses to retain employees who are willing to make a commitment to continued employment over employees who are unwilling to do so is not the kind of discrimination proscribed by the Act. Accordingly, I shall recommend dismissal of this allegation of the complaint. Similarly, I find that Woodson's statement that he was laying McLean off because of his plans to quit and take a job through the union when one became available was nothing more than a statement of the facts admitted to by McLean. Viewed objectively, such a statement would not have a reasonable tendency to interfere with the rights of employees generally to exercise their statutory rights. Woodson's statement did not amount to a statement that Woodson's membership in the Union was incompatible with continued employment by the Respondent but an acknowledgement that McLean apparently believed it did. Accordingly, I shall recommend dismissal of the 8(a)(1) allegation amended into the complaint at the hearing.

The complaint also alleges that the Respondent violated Section 8(a)(1) of the Act through statements by Alderman that the Respondent's owner, Kuhn, would close the business rather than join the Union. Alderman admitted making such a statement to employee Dix.¹¹ I shall also credit Farley's testimony that Alderman made a similar statement to him, notwithstanding my doubts about the reliability of Farley's memory. Farley's testimony is consistent with the statement Alderman admits making to another employee making it more probable that Alderman would have made a similar statement to Farley in the course of discussing his views of the Union. The Board has consistently found statements that an employer will close or go out of business in the event of unionization to be unlawful and highly coercive when attributable to the Respondent. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-619 (1969); *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001); *Overnite Transportation*, 296 NLRB 669, 670 (1989), *enfd.* 938 F.2d 815 (7th Cir. 1991). Having found above that Alder-

¹¹ I disagree with the Respondent's contention that Alderman's statement to Dix that Kuhn would "rather disassemble his company as go union" is somehow less threatening than a threat to close the business. Whether the business was closed or "disassembled," the effect on employees would be the same, i.e., loss of employment.

man was not a statutory supervisor, the Respondent could only be liable for these threats if Alderman were found to be an agent of the Respondent.

The Board applies common law agency principles to determine whether a nonsupervisory employee is an agent of the employer and thus whether the employee's conduct is attributable to the employer. If the employee was acting with the apparent authority of the employer with respect to the alleged conduct, then the employer is responsible for the conduct. Under the doctrine of apparent authority, "an agency relationship is established where a principal's manifestations to a third party supply a reasonable basis for the third party to believe that the principal has authorized the alleged agent to perform the acts in question." *Fleming Companies*, 336 NLRB 192 (2001), and cases cited therein. To determine whether the alleged agent had such apparent authority, the Board will consider "whether, under all the circumstances, the employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Id.* See also, *D & F Industries*, 339 NLRB No. 73 (2003); *Hausner Hard-Chrome of KY*, 326 NLRB 426, 428 (1998); *Delta Mechanical, Inc.*, 323 NLRB 76, 77-78 (1997).

In the present case, there is no dispute that Alderman, as the Respondent's leadman on the Greenbriar job, told the employees what to do, made sure they kept busy and had the material they needed to do their work, kept track of their time and, generally, acted as the Respondent's representative when Kuhn was not onsite. Kuhn himself admitted that he "tell[s] Marvin [Alderman] a lot of things that he can relay for me." This testimony acknowledges Alderman's role as a "conduit for transmitting information [from management] to other employees." *Debber Electric*, 313 NLRB 1094, 1095 fn. 6 (1994), as quoted in *Hausner Hard-Chrome of KY*. The Board has found agency status based on facts almost identical to those present here. I find that, when Alderman told Dix and Farley that Kuhn would rather close or disassemble the company as go union, the employees would reasonably believe that he was speaking for management. Whether Kuhn in fact ever made such a statement is immaterial because it is the coercive nature of Alderman's statement that is at issue. See *Buckeye Electric Co.*, 339 NLRB No. 42, slip op. at 1 fn. 1 (2003). Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act, as alleged in the complaint, through Alderman's threats of closure.

Finally, the complaint alleges that the Respondent committed several independent violations of Section 8(a)(1) of the Act during Kuhn's conversation with Farley on June 25, and that the Respondent's decision to lay Farley off that day was discriminatorily motivated in violation of Section 8(a)(1) and (3) of the Act. Because of Farley's inability to recall most of this conversation, the General Counsel's best evidence in support of the independent 8(a)(1) allegations is the audiotape of the conversation made by Farley. Although parts of the recording are inaudible and Farley admittedly did not record the first 5 minutes of the conversation, I find that the recording accurately reflects those statements that are relevant to the complaint. Moreover, Kuhn essentially admitted, after listening to the recording, that he made the statements attributed to him. Thus, I find that Kuhn told Farley that the Respondent "is a non-union

company and will be a non-union company. If people want to be in the Union, then they need to go to another company to work.” I find that Kuhn also told Farley that he already had a partner and that was the only partner he would have and the only contract he would sign.

The General Counsel alleges that these statements amounted to statements of futility that are unlawful under the Act. The Respondent argues that the statements, when considered in the context of the entire conversation, were lawful expressions of opinion protected by Section 8(c) of the Act. As noted above, the Board applies an objective test to determine whether employer statements would reasonably tend to interfere with, restrain, or coerce employees in exercising their statutory rights. In making this determination, words must be considered in context, but the realities of the economic relationship between employer and employee can not be ignored. *NLRB v. Gissel Packing Co.*, supra. In *Rossmore House*, the Board, in discussing the lawfulness of employer questioning of employees, stated generally that “to fall within the ambit of Section 8(a)(1), either the words themselves or the context in which they are used must suggest an element of coercion or interference.” 269 NLRB 1176, 1177 (1984). The Respondent also argues in its brief that the statements made by Kuhn are not coercive because they were elicited by a union “salt” who would not be threatened by such remarks. The Board has rejected such arguments in the past. See *Miller Electric Pump & Plumbing*, supra at 824.

The Board, in *Ready Mix, Inc.*,¹² rejected the General Counsel’s claim that an employer made an unlawful statement of futility when its operations manager, in response to questions from employees, told the employees on several occasions that the employer was not union and had no plans to go union. The Board noted that, in making these statements, the manager never stated or implied that the employer intended to ensure its nonunion status through discriminatory or coercive means. The Board contrasted the relatively innocuous statements there with the situation found to be unlawful in *Wellstream Corp.*,¹³ where the company president told employees that “no [s.o.b.]” would bring a union into the company and he would see to it that the company was never unionized. 337 NLRB at 1190–1191. In *Miller Electric Pump & Plumbing*, supra, the Board found unlawful an employer’s statement to a union business agent, in the presence of a prospective “salt,” that the organizer was “wasting his time” trying to organize the employees. In that case, the Board noted that the statement was made in the context of threats to close the business in the event of unionization. The “waste of time” statement, in such a context, amount to an unlawful statement of futility. 334 NLRB at 825.

The Board has also addressed statements similar to Kuhn’s statement at issue here that people that want to be in the union need to go to another company to work. In *JS Mechanical, Inc.*,¹⁴ the Board recently dismissed an allegation that an employer violated the Act when its superintendent said to a group of union “salts” wearing union hats, who were seeking to apply

for work, “why would you want to [apply for work]; we’re an open shop . . . I can see by the gentleman’s hat he’s a union worker.” The Board concluded that such a statement merely expressed surprise that a union member would be interested in working for a nonunion company and was not coercive. See also *Colden Hills, Inc.*, 337 NLRB 560 (2002) (statement by employer that she did not think union members could work for a nonunion company was not unlawful because, taken in context, it merely conveyed the employer’s belief that union rules, rather than employer action, precluded union members employment with the employer). In contrast, the Board found an employer’s statement, during an unlawful interrogation of an employee identified in a union flyer as a union organizer, that the employee should not be working for the respondent if he was a union member, violated the Act. *Arlington Electric, Inc.*, 332 NLRB 845 (2000). See also *McDaniel Ford*, 322 NLRB 956 fn. 19 (1997) (company president’s statement in a meeting that “if employees were unhappy, should look for jobs someplace else” unlawful).

The above cited decisions by the Board suggest that whether statements like those at issue here are coercive turns on the context within which they are made and whether it can be said that the statements reflect the respondent’s intent to try to remain union free through unlawful means. I find that Kuhn’s statements, when considered in the context of Alderman’s earlier statements to Farley and Dix, were unlawful. Although the conversation between Kuhn and Farley was amiable and Kuhn repeatedly assured Farley that it made no difference to him whether Farley was union or not, his statement that anyone who wanted to work union had better find work elsewhere conveys the impression that union membership was incompatible with continued employment by the Respondent. This impression would be buttressed by Alderman’s previous warning that Kuhn would rather close the business than go union. Taken as a whole, Kuhn’s statements on June 25 are closer to those found unlawful in *Miller Electric Pump & Plumbing*, supra, and *Arlington Electric*, supra, than the harmless noncoercive expressions of opinion found lawful in *Ready-Mix, Inc.*, supra, and *JS Mechanical*, supra. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act, as alleged in the complaint, by making statements of futility and by telling an employee that he should work for another company if he wanted to be union.

There is no dispute that the Respondent laid off Farley on June 25, the same day that Kuhn and Farley spoke about the Union for the first time. Although I credited Kuhn’s testimony that he informed Farley that he was being laid off before Farley initiated the conversation by advising Kuhn that he was a union member sent to organize the Respondent’s employees, Kuhn admitted that he already was aware of Farley’s organizing activities based on reports he received from Alderman and others. In fact, Kuhn admitted having this knowledge before he made the decision to lay Farley off. Thus, the General Counsel has established the first two elements of his *Wright Line* burden, protected activity and knowledge. The independent 8(a)(1) violations found above, committed through Alderman and Kuhn, are sufficient to establish the Respondent’s antiunion animus, another element of the General Counsel’s case. *Naomi*

¹² 337 NLRB 1189 (2002).

¹³ 313 NLRB 698, 706 (1994).

¹⁴ 341 NLRB No. 46 (2004).

Knitting Plant, supra. The timing of Farley's layoff, soon after the Respondent learned of his union organizing activities, in the context of the Respondent's animus, is enough to convince me that the General Counsel has met his initial burden of proving that Farley's union activity was a motivating factor in Kuhn's decision to lay him off. The burden thus shifts to the Respondent to prove that it would have laid Farley off on June 25 even in the absence of any union activity.

Kuhn specifically denied that Farley's union activity motivated the decision to lay him off. The Respondent contends that Farley was laid off due to lack of work as the Respondent caught up with the phase of the project for which Farley had been hired. The Respondent notes that Farley apparently agreed that his lay off was for lack of work by writing this down as the reason for his unemployment when he filed for benefits with the State of West Virginia. Kuhn, in his testimony, explained that he chose Farley for lay off because he was one of the highest paid employees at Greenbriar and because he was the last hired. Kuhn conceded that the raise he gave to Farley about a week before the lay off made him one of the highest paid employees on the job. Nevertheless, Kuhn did not advise Farley when he asked for a raise that this might jeopardize his continued employment and he did not offer Farley the opportunity to continue working without the raise.

Kuhn's contention that Farley was the last hired is contradicted by position letters submitted to the Board's Regional Office during the investigation which show that Dix' date of hire was 1 day after Farley's date of hire. Kuhn's testimony that Dix started working the day after Farley but was "hired" 2 weeks earlier is not supported by any documentary evidence. The Respondent could have offered into evidence Dix' employment application which may have shed light on when he applied or was hired, but it did not do so. All the Respondent relied upon to prove this point was Kuhn's testimony, which included hearsay testimony that Dix said he needed to give his former employer 2 weeks' notice. In the absence of any corroborating evidence, I am reluctant to credit Kuhn's testimony in this regard. I also note that the Respondent never mentioned this fact in any of the four position letters it submitted during the investigation.

The Respondent also offered no evidence, other than Kuhn's testimony, in support of its contention that there was a lack of work at the time of Farley's layoff. The position letters submitted during the investigation contain some contradictory evidence. The summaries attached to these letters show, for example, that no other employee was laid off from the Greenbriar job until Dix was laid off on August 29, 3 months later.¹⁵ These summaries also show that the Respondent hired a new employee, Sargent, on July 14, within 3 weeks of Farley's layoff, and that employees at Greenbriar had been working overtime shortly before the layoff.

¹⁵ The summary attached to the September 20 position letter does show that two employees, Berger and McLoud, were laid off on July 4 and July 25, respectively. However, the reason stated for these two layoffs was "medical/lack of work." The Respondent offered no other evidence to show that these two layoffs were attributable to a decline in work at the Greenbriar job.

Having considered the evidence in the record and the parties' arguments, I must conclude, albeit reluctantly, that the Respondent has not met its burden of rebutting the General Counsel's case. Although the Respondent had the opportunity to document its case that Farley's layoff was necessitated by business reasons unrelated to his union activity and would have occurred even absent that activity, the Respondent instead chose to rely on Kuhn's unsupported testimony which was not entirely consistent with positions taken previously. I agree with the Respondent that Farley would have been laid off eventually as work on the Greenbriar job wound down. However, I cannot agree that he would have been laid off on June 25, within days of openly trying to organize the Respondent's employees, had he not engaged in that activity. Accordingly, I find that the Respondent's June 25 lay off of Farley was discriminatorily motivated, as alleged in the complaint, and thus violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. By telling employees that the Respondent would rather close than go union, that the Respondent was and would remain nonunion, and that employees who wanted the Union should work for another company, the Respondent has made statements of futility and engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By terminating Joe Farley on June 25, 2003, because he engaged in union organizing activities on behalf of International Brotherhood of Electrical Workers, Local 466, AFL-CIO, the Respondent discriminated against its employees and engaged in an unfair labor practice affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2 (6) and (7) of the Act.

3. The Respondent's May 30, 2003 termination of Michael McLean and the statements of Michael Woodson that day did not violate the Act as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The evidence in the record indicates that Farley would have been laid off in any event as the Respondent's Greenbriar job finished. I shall leave to the compliance stage of the proceedings a determination as to precisely when Farley's employment would have ended in the ordinary course and whether he would have been offered work at any other jobs the Respondent may have had. See *Casey Electric, Inc.*, 313 NLRB 774 (1994); *Dean General Contractors*, 285 NLRB 573 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

ORDER

The Respondent, K.W. Electric, Inc., Fayetteville, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from
(a) Threatening employees with closure of the business in order to avoid unionization.

(b) Making statements that convey to employees that their union activities are futile.

(c) Discharging or otherwise discriminating against any employee for supporting International Brotherhood of Electrical Workers, Local 466, AFL-CIO or any other union.

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

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

(a) Within 14 days from the date of the Board's Order, offer Joe Farley full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Farley whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Farley in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Fayetteville, West Virginia, copies of the attached Notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁷ 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."

taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any 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 employees and former employees employed by the Respondent at any time since June 23, 2003.

(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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 18, 2004

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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT threaten you that we will close the business rather than go union or make statements that suggest your union activities are futile.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting International Brotherhood of Electrical Workers, Local 466, AFL-CIO or any other union.

WE WILL NOT in any other 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 this Order, offer Joe Farley full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Joe Farley whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Joe Farley, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

K.W. ELECTRIC, INC.