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High Point Construction Group, LLC and Mid-Atlantic Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America. Case 6–CA–32853–1

June 30, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

On April 28, 2003, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed limited cross-exceptions, an answering brief and a motion to strike Respondent's exceptions. The Respondent filed a brief in opposition to the General Counsel's motion.

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 forth in full below.²

1. On September 9, 2003, the Board granted in part and denied in part the General Counsel's motion to strike the Respondent's exceptions to the judge's decision. The General Counsel contended that the exceptions did not comport with Section 102.46(b)(1)(i) and (iv) of the Board's Rules and Regulations. The General Counsel contended that the exceptions did not set forth specifically the questions of procedure, fact, law, or policy to which exceptions were taken, and did not concisely state the grounds for the exceptions. In an unpublished order, the Board ruled in part in favor of the General Counsel. Thus, the Board said that it would limit its consideration of the Respondent's exceptions to three matters: the su-

¹ The Respondent and the General Counsel have 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'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's recommended dismissals, except for his dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by interrogating Robert Riley. The General Counsel also excepts to the finding that Riley was a statutory supervisor.

The General Counsel notes that the judge mistakenly referred to Foreman Greg Woody as Greg Moody. The record is hereby corrected.

² We shall modify the Order to conform to our findings.

pervisory status of Randall Burke, the Respondent's alleged threat to reduce wages, and the appropriateness of a *Gissel*³ bargaining order in this case.⁴

Because of our ruling on the General Counsel's motion, we shall adopt the judge's findings, to which no proper exceptions were filed that the Respondent violated Section 8(a)(1) of the Act, as follows: (1) when it intentionally and boisterously interrupted the July 27, 2002⁵ union meeting at Randall Burke's house, intimidating employees and creating the impression of surveillance of employees' union activities; (2) when it threatened employees with loss of work by telling employees at the Merle Norman jobsite that, because the residential agreement required less pay, the Respondent would not know how to bid for future jobs; (3) when its owner, Tim Shaw, interrogated employee John Snyder on July 17, asking him "how the union meeting went last night," and again interrogated Snyder 2 weeks later, after the Union filed an unfair labor practice charge, when Shaw asked Snyder why the employees had sought out the Union instead of settling their problems some other way; and (4) by threatening employees with plant closure when, shortly after the Union filed its representation petition, Shaw approached Burke, accused him of being a union supporter, and angrily told Burke that he, Shaw, was not going to work under "any damn union rules" and that he would shut down the company and file for bankruptcy first. The judge found that Burke disseminated this threat to at least four employees at a Union meeting at his house shortly thereafter.⁶

2. We disagree with the judge that the Respondent violated Section 8(a)(1) by threatening to reduce its employees' wages if the Union prevailed in a representation election. The relevant facts are as follows.

The Union filed a representation petition on June 28. The representation hearing was held on July 16, at which

³ *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

⁴ Chairman Battista, dissenting, would have granted the General Counsel's motion in toto, without prejudice to the Respondent's ability to file amended exceptions.

⁵ All dates are in 2002 unless otherwise indicated.

⁶ We find it unnecessary to decide the supervisory status of Randall Burke and Bob Riley. The Respondent contends that both are supervisors. The judge found Riley to be a supervisor and Burke not to be a supervisor. The General Counsel excepted to the finding regarding Riley, and the Respondent excepted to the finding regarding Burke. The General Counsel alleged that the Respondent interrogated both Riley and Burke and that Burke was threatened with plant closure. However, we need not resolve these alleged interrogations as they would be cumulative of other unlawful interrogations we have found and would not affect the remedy. As for the threat of plant closure, inasmuch as we have found that it was disseminated to at least four employees, a determination of Burke's status as an employee or supervisor is not necessary to our conclusion that the threat interfered with, restrained, and coerced employees in violation of Sec. 8(a)(1).

time the parties signed a stipulated election agreement. Following the hearing, Union Representative Leroy Stanley spoke with the Respondent's owners and its counsel, in an attempt to persuade them to recognize the Union without an election. To convince them, Stanley gave them the Union's two primary contracts: the master agreement and the residential/light agreement (residential agreement).⁷ To promote the Union's position, Stanley said that he could help Respondent get work, and represented that the residential agreement contained a "very attractive rate for jobs under a million dollars." Stanley also said that, in order to get the benefit of the wage rates in the residential agreement, Respondent had to sign the master agreement, as the front page of that agreement made clear. Stanley made no representation about any favorable rates under the master agreement. In fact, that agreement contained wage rates considerably higher than the "attractive rates" of the residential agreement.

The day after the hearing, the Respondent's co-owner, Critchfield, went to the Merle Norman jobsite. He showed the employees the wage rate page of the residential agreement and told them they would take a two-dollar cut in wages if the Respondent signed that agreement, which set forth lower wages than the employees were currently receiving. The judge found that, on that same date, Shaw "made the same threat" to employees at another jobsite, Hastings, which was an industrial multimillion-dollar job. Shaw told those employees that if the Union came in, the employees would be working under the residential agreement contract and making the wages set forth in that agreement, about two dollars less per hour than the employees were currently making.

The judge dismissed the threat allegations regarding the statements made by Critchfield to employees at the Merle Norman jobsite.⁸ The judge found that Critchfield was entitled to make the claim that employees would make less under the residential agreement, as the Merle Norman jobsite appeared to require work of less than one million dollars and the Residential Agreement would therefore apply. The judge found, however, that because the Hastings job was a multimillion-dollar job, Shaw was not justified in making the claim that the residential agreement would apply to that jobsite. The judge found, therefore, that even though the comments were the same, Shaw, unlike Critchfield, had no justification for his claims. The judge found Shaw's statement to be a threat

of reduced wages in violation of Section 8(a)(1). We disagree.

We find that Shaw's statement, like Critchfield's statement, was not a threat to reduce wages. The Union had told the Respondent that the residential agreement contained "attractive rates." The Respondent told employees what the contract would mean to them: that they would make less under the residential agreement than they were currently making. Critchfield made the statement at the Merle Norman jobsite, but the judge found no violation because that job was under one million dollars and the residential agreement would apply. The sole fact that the Hastings job, where Shaw made the same comment, was in excess of one million dollars does not warrant finding a violation with respect to Shaw's comments. There is no evidence that the Respondent's workforce was divided into two groups—one that worked on million dollar jobs and one that worked on less expensive jobs. The judge found that both groups of employees were told the same thing: that the Union's residential contract called for less money than the employees were currently making. Further, there is evidence that Shaw gave the residential contract to employees, and gave them the opportunity to read it. The contract itself said that it applied only to jobs worth less than one million dollars. Shaw's comment, like Critchfield's, was a simple repetition of the Union's own proffering of the residential agreement to the Respondent. Such a comment does not constitute a violation of Section 8(a)(1) of the Act. Cf. *Montgomery Ward & Co.*, 288 NLRB 126 fn. 3 (1988) (no violation for employer's statement that employees would not get pay raise as frequently under a union because union only provided for raises once every 3 years; the statement reflected employer's understanding of union contract provision regarding frequency of pay raises, and was not a threat that employer would grant fewer wage increases if union selected as representative).

3. We find, contrary to the judge, that a bargaining order is not necessary to effectuate the purposes of the Act under the circumstances in this case. The Supreme Court held in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614–615 (1969), that "[i]f the Board finds that the possibility of erasing the effects of past [unfair labor] practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue[.]"

Although the appropriateness of a bargaining order depends on the nature and extent of the Respondent's misconduct, there are no mechanical or per se rules. Rather,

⁷ The master agreement pertains to jobs that are "heavy commercial" or industrial in nature. The residential/light agreement is applied to those jobs for which the total construction costs are less than one million dollars, and which do not fall into several categories of exception.

⁸ The General Counsel did not except to the judge's dismissal of this allegation.

each case must be fully examined for the “infinitely various circumstances which will influence employee perceptions of such prohibited conduct.” *General Stencils*, 195 NLRB 1109, 1112 (1972) (Chairman Miller, dissenting). Some violations, however, are so likely to undermine majority strength and impede the election processes that a bargaining order may be justified in the absence of extenuating or mitigating circumstances. Such hallmark violations include discharging employees for union activity, closing or threatening to close, and granting benefits. A *Gissel* order is an extraordinary remedy, however; the preferred route is to provide traditional remedies for an employer’s unfair labor practices wherever such remedies may be sufficient to cleanse the atmosphere of the effects of unlawful conduct. *Aqua Cool*, 332 NLRB 95, 97 (2000).

In this case, the Respondent has committed a number of 8(a)(1) violations, including unlawfully interrogating, surveiling, and intimidating employees, and threatening employees that there is a good possibility of a lack of upcoming work because of the Union. The Respondent also committed one “hallmark” violation by threatening plant closure. This set of violations would generally preclude the possibility of holding a fair election because of its lasting adverse effect, but under the circumstances presented here we find that the imposition of special remedies should serve to cleanse the atmosphere of the effects of the Respondent’s unlawful conduct, and that a bargaining order is therefore unnecessary. In this respect, we agree with the judge that the Respondent’s unfair labor practices are sufficiently egregious to warrant a broad cease-and-desist order enjoining the Respondent not only from committing again the specific violations found, but also from violating the Act “in any other manner.” See *Hickmott Foods*, 242 NLRB 157 (1979). We also shall require that a responsible management official of the Respondent, at its Buckhannon, West Virginia facility, read aloud to employees the notice to employees. At the Respondent’s option, a Board agent, in the presence of a responsible management official, may instead read the notice to employees. As the Board has previously observed, “the public reading of the notice is an ‘effective but moderate way to let in a warming wind of information and, more important, reassurance.’” *McAllister Towing & Transportation Co.*, 341 NLRB No. 48, slip op. at 7 (2004) (internal quotations omitted).⁹

⁹ Chairman Battista does not join his colleagues in ordering this expanded remedy. In the Chairman’s view, this Respondent is not a recidivist and the violations are not egregious, and thus, the Board’s traditional cease and desist remedy, as posted for employees, would suffice to erase the effects of the Respondent’s unfair labor practices.

ORDER

The National Labor Relations Board orders that the Respondent, High Point Construction Group, LLC, Buckhannon, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Coercively interrogating its employees about their support for the Union.

(b) Telling its employees there was a good possibility of a lack of upcoming work because of the Union.

(c) Telling its employees that it would shut down and file for bankruptcy if the employees selected the Union as their representative.

(d) Engaging in surveillance and intimidating its employees where they are gathered at a Union meeting.

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

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

(a) Within 14 days after service by the Region, post at its facility in Buckhannon, West Virginia, copies of the attached notice marked “Appendix.”¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 6, 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 July 1, 2002.

(b) During the time the notice is posted, convene the unit employees during working time at the Respondent’s Buckhannon, West Virginia facility, and have a responsible management official of the Respondent read the notice to the employees or permit a Board agent, in the presence of a responsible management official of the Respondent, to read the notice to employees.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a re-

¹⁰ 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.”

sponsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 30, 2004

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

The National Labor Relations Board has found that we violated 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 coercively interrogate you about your support for the Union.

WE WILL NOT tell you that there is a good possibility of lack of upcoming work because of the Union.

WE WILL NOT tell you that we will shut down and file for bankruptcy if you choose the Union as your representative.

WE WILL NOT engage in surveillance of you or intimidate you when you are gathered at a union meeting.

WE WILL NOT in any other manner interfere with, restrain or coerce you in the exercise of the rights set forth above.

HIGH POINT CONSTRUCTION GROUP, LLC

Suzanne S. Donsky, Esq., for the General Counsel.
Fred F. Holroyd, Esq. (Holroyd & Yost), of Charleston, West Virginia, for Respondent.
John Znoy, of Morgantown, West Virginia, and *Leroy Stanley*, of Bridgeport, West Virginia, for the Union.

DECISION

FINDINGS OF FACT

BENJAMIN SCHLESINGER, Administrative Law Judge. The complaint alleges a discharge, a refusal to hire, a grant of benefits, and a variety of other unfair labor practices so severe that a Gissel¹ bargaining order is warranted. Respondent High Point Construction Group, LLC denies that it violated the Act in any manner. The charge was filed by Mid-Atlantic Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (Union), on July 18, and amended on August 27, 2002,² and the complaint was issued on September 20. The hearing was held in Clarksburg, West Virginia, on November 18, and December 17 and 18.

Respondent, a limited liability corporation, with its main office in Buckhannon, West Virginia, is engaged in commercial construction as both a general contractor and a subcontractor at various jobsites in West Virginia and Pennsylvania. It is owned and operated by Tim Shaw (Shaw), Tim Critchfield, and Chris Critchfield, all of whom are member-managers, supervisors, and agents of Respondent. During the year ending June 30, it purchased and received at its Buckhannon facility goods valued in excess of \$50,000 from points outside of West Virginia and derived gross revenues in excess of \$250,000. I conclude that it is an employer within the meaning of 2(2), (6), and (7) of the Act. I also conclude that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

By mid-June, Respondent's employees had become particularly unhappy that Respondent, they thought, had been deducting amounts from their wages for health insurance; yet, when they filed claims, they were told by their health providers that they had no coverage. On June 13, employees John Snyder and Joe Morgan met with Leroy Stanley, the Union's Director of Organizing for the State of West Virginia, who gave them union authorization cards to sign, which they did, and blank cards to solicit other employees. By June 26, the Union had secured 11 signed cards, a majority, if the General Counsel is correct that there were 17 employees in the unit. The next day, Stanley faxed Respondent, as well as sent his letter by mail, and requested recognition. Having received no response, Stanley called on June 28, and spoke with Chris Critchfield, who acknowledged receipt of the Union's request, but declined recognition. The Union filed with the Regional Office its petition for representation that day.

A number of events followed; and I deal with them not chronologically, because one incident shows Respondent's feeling towards the Union and is helpful in resolving some credibility issues. On July 27, the Union held a meeting or a get-together on the back porch of employee Randall Burke's home, located in the country, off a rural blacktop road that turns into gravel not far from his home, which in turn is reached by 150 yards of gravel drive. Not long after a number of employees had gathered there, Shaw arrived in a truck, with his brothers, Tom, who was drinking beer, and Terry, and friends Bill Clevenger and Chris Chapman, all described as large men.

¹ *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

² All dates are in 2002, unless otherwise indicated.

Shaw approached his employees and asked them why he had not been asked to be part of their meetings. The employees did not answer. Burke's wife told Shaw and the others that there would be no drinking on her property and asked them to put away their beer or to leave. Tom ignored her, and she repeated her demand. Tom became irate, calling the employees "[n]o-good motherfuckers" and telling them "[F]uck all of you Union guys" and "Fuck all of you motherfuckers." Shaw and his four cohorts left. Stanley, having been advised that Shaw was known to carry a gun, called the state police to file a complaint.

State Trooper John Smith came to Burke's house and was taking a report, when someone said that he had just seen the same truck that Shaw had arrived in. Smith immediately got into his squad car and pursued the truck, stopping it about a mile from Burke's house. Smith first interrogated designated driver Clevenger, who explained that he had driven to Burke's house to "sit in the Union meeting They just asked me to drive up that way, so I drove." Smith next talked to Shaw, asking him the reason that the men had returned to the area near Burke's house. Shaw told Smith, "I'll tell you what's going on. Them motherfuckers are a bunch of god-damn Union organizers and they're fucking with my company To be truthful with you, these guys, these guys are trying to fuck me. Just to be honest with you, just blatant, the way it is, these guys are trying to screw me over." He added:

And they want me to sign, go Union. Okay. But they won't come right out and ask me to come to their fucking meeting. This is a fucking union organizing meeting. But the god damn Union, pardon my French, these guys want me to join their Union, but they won't invite me to their fucking meeting. Period.

He explained the reason that he had gone to the union meeting: "I decided, I decided on my own this evening, that I'd come down, that they were having a meeting and I invited myself to their meeting." After he left the meeting, the truck was parked at an intersection a mile from Burke's home. He explained why the truck had come back near Burke's house: "I wanna know who those people are that are trying to screw me. That's the only reason I was sitting down at the corner of the road."

Little is needed to discuss the legal implications of Shaw's obscenities. They show, without more, for the purpose of the various Section 8(a)(3) allegations, animus. By themselves, they prove the complaint's allegations that Respondent's owner intentionally and boisterously interrupted the union meeting and intimidated the employees by this show of force of five large men. Shaw's intention was to find out what was happening and who was involved. That is illegal surveillance. One final point: Shaw testified that he attended the meeting because Snyder invited him there, testimony credibly denied by Snyder. More importantly, Shaw told Trooper Smith that he had invited himself to the union meeting, which is wholly at odds with what he testified to several times under oath. In addition, Shaw characterized his uninvited appearance at the Union gathering as cordial, despite the testimony that Tom told everyone that he would leave as soon as the Union Organizer John Znoy moved his "green piece of shit," referring to Znoy's vehicle, and his obscene references to the Union. I find nothing about Shaw's

appearance, with his four henchmen, "cordial." His inane testimony that he was in the truck "just running around together" and that he was following the State trooper requires no more than mention. I find his recollections purposefully at odds with what actually happened and refuse to credit him, except when his testimony was adverse to the interests of Respondent or corroborated by a credible witness or so indisputably probable that it was most likely truthful.

To the extent that it was Tom, not Shaw, that did most of the yelling and cursing, his conduct was nonetheless attributable to Respondent because Shaw was the one who wanted to go to the meeting and directed Clevenger to drive him there, with all the others, who acted as Shaw's agents at the meeting. Indeed, Shaw remained silent, listening to Tom's diatribe, and implicitly approving of it. In addition, Tom was not unknown to the employees as the owner of another construction company, TKS, often working with Respondent as its contractor or subcontractor and regularly on Respondent's jobsites. In fact, some of Respondent's employees had been employed by Tom in the past, and Tom was, in their eyes, speaking for Shaw both as his brother and his business associate. Finally, Shaw himself explained to the state trooper: "I didn't feel that the unions were good for our company, that I felt betrayed by my employees, that I didn't appreciate them wanting the union."

Now, I go back a month, to the end of June, about the time of the filing of the representation petition. At the same time, so the complaint alleges, Respondent, in anticipation of a Board-conducted election, transferred Laura Chewning from its office, where, as a project manager/estimator, she was clearly a supervisor and manager, and placed her out in the field as a laborer, all in an attempt to "stack" the bargaining unit. As an estimator, she priced jobs for bids; as a project manager, she wrote subcontracts, made purchases, attended jobsite meetings, and worked with the architect. She also prepared Respondent's financial statements. Although she testified that she did not supervise the employees on those jobs and that either Shaw or the job superintendents did, there was sufficient evidence that she did.

In 2001, Respondent lost \$61,873. By the end of May 2002, Respondent lost an additional \$81,509. In an effort to cut its expenses, in April or May, Respondent laid off a woman who had been doing the bookkeeping and accounting and answering the telephone. In March or April, Respondent also reduced Chewning's workweek from 5 to 4 days a week. She and Shaw were discussing the upcoming Hastings job, where Respondent was to build an industrial compressor for Dominion Gas Company; and he was telling her how much work he anticipated for rebar or concrete reinforcement. Having performed a great deal of rebar at former jobs, she made some suggestions about ways to do the rebar better, telling him that she could read the steel drawings, could tie steel, and could be more of a help to Respondent on the job rather than in the office, where, even with her workweek reduced to 4 days, she had insufficient work to keep her fully occupied. Shaw promised to think about it and ultimately assigned her to that job, on which she started on July 9. Later, she worked on the Mount Storm power plant, and another job for Dominion Gas, before finally being laid off several weeks before she testified at the hearing. All of her

work was as a unit worker, except for approximately 15–18 days of sporadic office work—mostly bidding jobs, preparing one financial statement at the end of September, and preparing some time and material billings on jobs that she had done before she went in the field—sometimes 2 or 3 days in a week, sometimes none at all, for which she was paid at an hourly sum of \$16 an hour, somewhat more than her normal \$13 (or, very infrequently, \$12) an hour rate for field work.

The Board has approved findings that employers engage in unlawful Section 8(a)(1) conduct when they add employees to the bargaining unit in an effort to avoid unionization. *Sonoma Mission Inn & Spa*, 322 NLRB 898, 900 (1997). Here, however, although there is some circumstantial evidence that Respondent's motivation was unlawful—indeed, she started on the Hastings job shortly after the Union made its recognition demand—the evidence is very slight. The Hastings job began about the same time as the Union made its demand, and new employees were hired for that job at the same time as Chewning was transferred. So, the timing of her transfer was merely coincidental. In addition, it appears that Chewning herself made the suggestion for her transfer, not because of the incipient union organization, but because she was employed for only 4 days a week, Respondent was losing money, she did not have enough work to do, and she was attempting to preserve her own livelihood.

I find no shifting defense, as the General Counsel contends. Respondent was trying to save money. There were less jobs to bid on. Respondent had already terminated the employment of the bookkeeper and had reduced Chewning's workweek, several months before the union campaign began. Chris Critchfield was assuming more bookkeeping functions in the office. Chewning became somewhat expendable (not wholly, because she came back to the office from time to time); and her request helped Respondent to achieve a saving of money by eliminating a permanent job in the office and employing her in the field, as it would have had to do, at least in hiring someone to do the rebar work, in any event. Even that, however, did not ultimately save Chewning's job; and she too was eventually laid off in the winter, a layoff she had never suffered when she was employed solely in the office.

The General Counsel questions Respondent's method of saving money, suggesting that it could have been done in other ways and that Respondent paid Chewning too much for her work as a laborer. But Respondent's choice is not for the Board to judge, as long as there is a legitimate, not unlawful, reason for its action; and the amount that Respondent paid Chewning, even though it exceeded that paid to some newly employed laborers by as much as \$3 an hour, was not shown to be a pay-back for her vote, as opposed to the amount that it deemed necessary to recompense an employee who would perform the dual functions of production and office and bidding work, as necessary. The only possible showing of an unlawful motive was Snyder's testimony, not denied by Chewning, that, "one day she told me that she would be glad when it was over, so she could go back to the office." However, there is no showing of what "it" referred to, when she made the statement, and what was the context of her remark. She might have been talking about Respondent's lack of work. Thus, there is no proof that

Respondent's motive was solely to stack the unit. By using Chewning in the field, Respondent employed a laborer who was skilled in rebar, exactly what it needed, preserving her for some days in the office to perform exactly what Respondent needed there, but never hiring in the office another employee to replace her. I dismiss this allegation.

Several of the alleged unfair labor practices concern conduct involving Randall Burke and Bob Riley, both having the title "jobsite foremen" and both, Respondent contends, are supervisors. Both denied that they had or were given or exercised any supervisory authority. Most of their time was spent working with their tools (Burke, 80-90 percent of his time; Riley, 80 percent), the remainder recording information on daily work sheets for Respondent's payroll and billing purposes, and attending jobsite meetings with Respondent's project managers. On Respondent's larger jobs, Shaw spent the first month or two on the jobsite, putting the operations in place, before assigning a jobsite foreman to that project. After that, Shaw moved to other projects and jobsites, visiting again from time to time and maintaining contact with the jobsite foreman by telephone, but primarily leaving them to carry out the directives of the project manager and architects and to follow the blueprints for the job. Burke and Riley were paid \$18 per hour, \$2 more than anyone else on Respondent's payroll. On the other hand, both were skilled craftsman; and the mere difference of hourly rate does not necessarily reflect supervisory status.

Regarding traditional supervisory functions, Respondent contends that they both had the right to hire and fire employees and exercised that authority. However, while Shaw claimed that Burke hired and fired Ryan Hamner, without Shaw's authorization, Burke contacted Shaw, who told Burke to hire the man on Respondent's behalf, if he was needed on the job. Four or 5 days later, Shaw sent Nathan Davis to the jobsite and told Burke to lay off Hamner. Nor is there any showing that Respondent invested Burke with authority to discipline employees. He was merely a working foreman. In so holding, I do not agree with Respondent's contention that his control of the work flow of the four or five employees who worked with him, permitting them to leave early and requiring them to work late, made him a supervisor. Regarding the laying off of work early, on some occasions he sought permission; on other occasions, he did not, but he had been permitted by Shaw to do so on very hot days, providing that the employees still worked their 40 hours during the week. Regarding staying late, that was more the result of the work that the employees, including Burke, were performing. If they were pouring concrete, the work on the forms had to continue to completion; otherwise, the job then uncompleted would be lost. In neither event did Burke have to exercise the independent judgment to invest him with supervisory status.

In any event, allowing for early release is not among the statutory criteria for establishing supervisory status under Section 2(11) of the Act. This secondary indicia of supervisory authority is insufficient, by itself, to establish Burke as a statutory supervisor. *Ken-Crest Services*, 335 NLRB 777, 778 (2001). That he divided the tasks among the jobsite employees, based on the blueprints, does not alter this conclusion. *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994). Burke, as a jobsite fore-

man, was not authorized to perform work beyond what the blueprints provided. The exercise of authority on the part of more skilled and experienced employees (such as typical leadmen in crafts) to assign and direct other employees in order to assure the technical quality of the job does not in itself confer supervisory status. *Id.* at 22 fn. 8. His attendance at meetings with Respondent's project manager and the architects on the job are wholly unrelated to any supervisory authority; rather, his attendance was required to understand Respondent's directions of the manner it wanted the project to proceed. I conclude that Burke, like Gregory Moody, another jobsite foreman, whom Respondent stipulated was an "employee" within the meaning of the Act, was a working foreman and an employee under the Act.

Although Riley held the same position as Burke, he exercised more supervisory authority and referred to himself as a "superintendent." On one occasion, John Snyder and Tom Critchfield stopped by Shaw's house one evening, after work, and asked that he give a job to Kevin Critchfield. Shaw said that he would discuss the matter with Riley to see what his needs were. Later, he called Riley and told him that he could use his best judgment on hiring, if he needed help, and put him to work. Riley hired him. On another occasion Riley called Shaw to tell him that he was looking for an employee who was skilled in drywall work, and Sam Zerkel had stopped by, and he had interviewed him. Shaw told him to go ahead and hire him. Riley did so, and Zerkel started the next day. Finally, Shaw testified that on another occasion Riley told him that he needed some people and recommended that Shaw hire Snyder. Shaw knew that Snyder was "a pretty good employee" and "had good qualifications" and told him to hire him. Shaw never interviewed Zerkel or Snyder. Not only did Riley hire employees, he also fired one. When Zerkel did not work out as well as Riley had originally thought, he terminated him, as attested to by employee Tom Critchfield. In addition, one time, at the site of work being done at the Yeager Airport in Charleston, West Virginia, two employees were involved in a fight, and Riley told Shaw that he had said to Danny Bailey: "If you are going to be a troublemaker, you are gone." And Bailey "quit."

The counsel for the General Counsel contends that Shaw, not Riley, hired Snyder based on the fact that Shaw had known of his qualifications and that Bailey had quit and not been fired. But the fact remains that Riley gave Bailey a strong warning that fighting would not be tolerated, and Bailey's quitting, if not evidencing just the fact of departing and thus being fired, was obviously forced on him and was a constructive discharge. In addition, Riley had used his independent judgment in telling Shaw that he had need for another employee and effectively recommending that Snyder be hired. He used that same independent judgment to recommend that Zerkel be hired, and he also fired him. Those incidents demonstrate sufficient exercise of authority and control of the worksite to support a finding that he was a supervisor. *Carlisle Engineered Products*, 330 NLRB 1359, 1361 (2000). In addition, because the projects that Riley worked on involved as many as a dozen employees, it is probable that, to keep control of that many employees, Riley was invested with significantly more authority than he was willing to admit.

Because of my conclusion regarding Riley, I dismiss the allegations involving Respondent's interrogation of him, noting, however, as further evidence of Shaw's animus, his reference to the Union as "MF'ers." But I conclude that Shaw did violate the Act shortly after the Union filed its representation petition. Shaw approached Burke, "fishing, . . . wanting to know what was going on," according to Burke, and then Shaw angrily accused Burke of supporting the Union, saying he was not going to work under "any damn union rules," and he would shut Respondent down and file bankruptcy first. The "fishing" part of the conversation was intended to evoke a response from Burke, and thus constituted an illegal interrogation, followed by threats of plant closure and filing of a bankruptcy petition, all in violation of Section 8(a)(1) of the Act.

On July 17, Shaw approached Snyder and asked him "how the Union meeting went last night." Snyder replied that he had not attended a union meeting that night. Two weeks later, after the Union filed its unfair labor practice charge, Shaw again questioned Snyder, this time asking why the men had gone to the Union, instead of settling their problems some other way. Snyder explained that he had tried to talk to Shaw about Respondent's insurance coverage 2 weeks before going to the Union, and it had not done any good. Shaw said that that was a weakness of his, that he did not pay any attention to what Snyder had to say to him. I find that these two interrogations were unlawful. They were coercive because, among other factors, they occurred at a time when Respondent was committing numerous other unfair labor practices, and the interrogation was being conducted by Respondent's highest ranking official. *Medicare Assoc., Inc.*, 330 NLRB 935, 939-940 (2000); *Rossmore House*, 269 NLRB 1176 (1984), *enfd. sub nom. Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

The representation case hearing was held on July 16, and the parties signed a Stipulated Election Agreement. Then, Union Representative Stanley spoke with Respondent's owners, and its counsel, in an attempt to persuade them to agree to recognize the Union. To convince them, he gave them the Union's two primary contracts: the master agreement and the residential/light commercial agreement (residential agreement). To promote the Union's position, he said that he could help Respondent get work and represented that the residential agreement contained a "very attractive rate for jobs under a million dollars." Stanley also made it clear that, in order to get the benefit of the rates in the residential agreement, as the front page of that agreement made clear, Respondent had to sign the master agreement, as to which he made no representation about the favorable rates and which in fact contained rates considerably higher than the "attractive" rates of the residential agreement.

On the day after the representation hearing, Tim Critchfield went to the Merle Norman jobsite, apparently a beauty spa, and showed the employees the wage rate page of the residential agreement, stating that the employees would take a two dollar cut in pay if Respondent signed that agreement, which required wages less than what the employees were actually making. Shaw made the same threat to the carpenters and laborers at the Hastings jobsite: if the Union came in, the employees would be

working under the residential agreement contract and making the wages set forth in that agreement, about two dollars less per hour than the wages the employees were currently making.

The complaint alleges that both Shaw and Tim Critchfield threatened the employees that their wages would be reduced if they chose the Union as their representative. Regarding the Merle Norman job, that appeared to require work of less than one million dollars, and based on Stanley's representation, Tim Critchfield was entitled to make that claim, despite Stanley's convoluted explanation, one that I reject, that the Union's consent would have to be granted before the residential agreement could be applied. However, the Hastings job was an industrial, multimillion dollar job, and Shaw had no justification for making that claim. He misstated the residential agreement's application to that job and omitted any mention of the Master Agreement. I conclude, therefore, that he violated Section 8(a)(1) of the Act by making the threat.

In his talk with the employees at the Merle Norman jobsite, Tim Critchfield also stated that, because the residential agreement required less pay, Respondent would not know how to bid for future jobs, the result of which, according to only one of the General Counsel's witnesses, Tom Critchfield, but not Riley, was that "it could mean lack of work." Tim Critchfield did not directly deny Tom Critchfield's testimony. The only reason that Tim Critchfield would have made this statement was to threaten a lack of work as a result of Respondent's lack of knowledge about how to bid for jobs. That would result in a reduction of its bids and thus the loss of prospective work. I conclude that Respondent violated Section 8(a)(1) of the Act.

The complaint alleges that, for the payroll week ending July 18, "Respondent initiated the payment of back fringe benefit payments to its employees." The General Counsel concedes that employees who work on prevailing rate jobs are entitled to earn an established wage, as well as receive a benefits package, which is comprised of monies to be used for pension plans and health insurance coverage. Employers who do not provide fringe benefits for their employees on prevailing rate jobs are required to remit the fringe benefit directly to the employees, so that the employees may secure the coverage for themselves. Before 1999, when Respondent first started providing health insurance coverage for its employees on prevailing rate jobs, Respondent paid its employees the fringe benefits monies by including the amounts in their weekly paychecks. What the counsel for the General Counsel is alleging is not that Respondent gave its employees anything more or less than they were rightfully entitled to, but that Respondent gave them "lump sum benefits checks, for the first time ever. Something they have never done before." And those checks were given to some of the employees, without explanation, making it appear that the checks were bribes for their votes against the Union.

Since it started to supply health insurance, Respondent had purchased insurance from two companies, first, Unicare, and then a second, Trust Mark Insurance, from which it was attempting to switch because Trust Mark had just increased its premium from about \$600 to \$1000 per month per employee. Respondent apparently found a carrier to start providing benefits beginning in June and then distributed new enrollment forms for all its employees to complete, but only one did so. As

a result, because there were no employees enrolled in the plan and the carrier required all the employees to be covered, Respondent could not make its premium payment and paid the money instead to its employees. Respondent might have made a stronger case to justify its entire delay in making whole its employees for the health insurance that it did not buy and might have better explained its payments to its employees; but the General Counsel does not suggest, and the record does not prove, that Respondent never intended to pay its employees these amounts, as the law required, but for the Union's representation petition. Indeed, following the lump sum payments, Respondent included the amounts for insurance in its weekly paychecks to its employees. The General Counsel does not complain about those later weekly payments.

I fail to see anything that Respondent did unlawfully. The General Counsel contends that, in the past, it had not paid for insurance and never reimbursed its employees. Respondent contended, on the other hand, that its employees were always properly covered under the plan and that, in certain circumstances where employees were laid off and did not pay their own contributions, there would be a waiting period of approximately 1 month, until the employee had worked 140 hours, when Respondent was again responsible for payment of premiums for the following month. Respondent also had no obligation to cover employees who did not work 140 hours per month. This record is filled with numerous complaints of the employees, but no proof that Respondent in fact failed at any time to make the payments that its insurer required to cover them. All there is here, at best, is double hearsay and proof that some employees were not paid the benefits to which they thought that they were entitled. These are claims that the employees should have pursued with their insurer.

Assuming, however, that there were proof that Respondent skipped its premium payments, the General Counsel's position would be narrowed to the argument that, because Respondent did not live up to its obligations before and failed to make its employees whole for health insurance that it did not provide, it may not now lawfully reimburse employees because that would change its illegal past practice. Such an argument collapses from its own weight. I also find no credible proof that Respondent failed to tell the employees what its lump sum payments were for. The employees knew exactly what they were being given. No employee testified that he did not know what he was being given. Joe Morgan, for example, did not enroll in the insurance because he and his wife agreed that he would rather have the money. Then, he received his money. Now, the General Counsel complains that, when he and the other employees received the money, the money should not have been paid in this fashion. I find this allegation concocted. I believe that the employees were well aware of the choice that they had made not to apply for insurance and to receive, instead, money to buy their own insurance. In this respect, I believe Tim Critchfield. I dismiss this allegation.

In early June, Shaw told Snyder that Respondent was getting the new Hastings job and that he needed to hire more people. Snyder asked if he would hire his stepson, Joshua Nicholson. Shaw replied that, as soon as he hired some more experienced labor, he would put Nicholson to work as a laborer. The Hast-

ings job began in mid-June, but Respondent did not hire Nicholson; so on July 8, he went to another contractor, MEC, to seek employment there. He saw Shaw there, who asked Nicholson what he was doing there. Nicholson replied that he was dropping off a resume to seek employment with MEC. Shaw asked why he was dropping off a resume: Shaw had work. Nicholson said, "Well, you know I need to go to work as soon as possible." Shaw said that that was no problem; he would have work "within a week or two," according to Nicholson, or "a couple, three weeks, a couple weeks," according to his mother, and Nicholson should get in contact with him. Shaw even asked whether Nicholson could pass a drug test, and Nicholson assured him that he could, and he could do it that day. Shaw said that that was unnecessary and that he would contact Nicholson within a week or so. Then, Nicholson, in order to protect himself, asked, if something happened and Shaw had no work, whether, because Shaw was a subcontractor for MEC, he could put in a good word for Nicholson, as long as Shaw was there. Shaw said: "No need to, I got work for you." Nicholson never heard from Shaw again.

I find it difficult to believe that Shaw was making up this entire story, to the extent of withholding a recommendation from MEC on the ground that he assured Nicholson of work within a short period of time. He really thought that he would have work. On the other hand, nothing was asked of Shaw when he testified to explain the changed circumstances that prevented his keeping his promise. Nonetheless, Respondent convincingly defends on the ground that it never had need for additional laborers and has not hired any, and that is the sole reason that it did not hire Nicholson. The counsel for the General Counsel, on the other hand, contends that Respondent hired two laborers, Loren Huffman and Dustin Snyder. However, she concedes that it was only when Shaw visited the Hastings jobsite on July 17, to tell the employees that they would be getting a wage reduction if they selected the Union as their representative, described above, that Snyder indicated to Respondent for the first time that he had been in contact with the Union by noting that the residential agreement was not the agreement that the Union had shown him. It was only then that Respondent knew that Snyder had been in contact with the Union, even though he had signed a union authorization card and had been one of the in-house leaders of the Union's campaign. And, because the General Counsel's allegation of a violation--that Respondent declined to hire Nicholson, as it had promised--is based on its knowledge of Snyder's union activities, the violation could have occurred only on or after July 17, when Respondent gained knowledge of those activities.

I have already found that the transfer of Chewning (she first worked on the Hastings job on July 9) was lawful. Dustin Snyder first worked on July 8. Huffman, the last laborer hired by Respondent, first worked on July 11, having submitted an application the month before. The General Counsel did not prove that these two were less experienced than Nicholson and that, therefore, Shaw had broken his earlier promise to hire Nicholson only as soon as he had hired some more experienced employees. It was only on July 8, that Shaw promised to hire Nicholson within 2 or 3 weeks, that is, toward the end of July. By that time, both Huffman and Dustin Snyder had been work-

ing for several weeks; and, true to Respondent's position, there is no proof that it from that point on hired anyone else. Thus, even if Respondent considered the fact that Nicholson was Snyder's stepson, and Snyder was a union advocate, or even an in-house leader, and that was the reason that it would not have hired him had the opportunity arisen, Respondent has demonstrated that it did not hire another laborer, the position for which Nicholson appears qualified. In fact, laborer Kevin Critchfield quit on about July 19; and, when Snyder asked Shaw to replace him with Nicholson, Shaw said that he no longer needed to hire anyone. And he did not

The General Counsel's concluding argument is that Respondent's employees, particularly those on the Hastings job, worked overtime. Instead of their working overtime, Respondent should have hired Nicholson. However, there was overtime worked on that job even before the end of the 2 or 3 weeks when Shaw promised to put Nicholson on the payroll; and so the overtime was not incurred in order to prevent Nicholson from having work to do. Furthermore, the Act does not force Respondent to hire additional employees, rather than requiring the employees on its payroll to work overtime, particularly when the record does not suggest even the slightest unlawful motive. I thus find not even a prima facie case of a Section 8(a)(3) violation and dismiss this allegation. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Mgmt Corp.*, 462 U.S. 393 (1983). Even assuming that there had been a prima facie case, Respondent has demonstrated that it had no need to hire any additional employees; and it did not. *Wright Line*; *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

The final allegation concerns the termination of Jasper Riley, the son of Respondent's employee, Bob Riley. A full-time laborer of Respondent from 1998, he broke into his father's garage and stole some tools in April 2001. He was charged with two misdemeanors, destruction of property, and petty larceny, spent 2 weeks in jail, and then was placed on probation, with a suspended sentence. He spent some time in a rehabilitation center for drug addiction and then returned to employment with Respondent, where he worked until he injured his collarbone in an accident. After his recovery from that accident, he returned to Respondent's employ, but violated his parole and was sent to a halfway house for rehabilitation. His stay there was cut short when he breached the rules of the halfway house, resulting in an order, dated February 27, revoking his probation and his serving the remainder of his sentence in jail, from which he was released on July 24.³

The day after, according to Jasper, he went to Respondent's office and asked Chris Critchfield to return to work. Chris said that he had to talk to Shaw. But his brother, Tim Critchfield, who was at first on the telephone, said that he could take care of this problem, so he would not have to disturb Shaw in the

³ The counsel for the General Counsel moves to amend the official Tr. at p. 209 L.4, to reflect the date "July 24," rather than "July 4." The amendment is granted. Jasper previously answered that he was released on July 24.

field. According to Jasper, he announced that he was out of jail and ready to return to work, but Tim said, "No, not at this time." When Jasper asked him why, he said there were a lot of things going on with Respondent "at this present time" and he would not be able to employ Jasper, who asked whether he was talking about the union organizing. Tim replied, "Well, yes, but I am not allowed to talk about that, at this point in time." Jasper asked whether, after the representation election, "if everything went smooth," maybe he could be employed after that; and Tim said that that was a possibility, and he would have to see after the vote. (The representation election had been set for August 6, but was blocked by the Union's filing of the instant unfair labor practice charges.) Respondent never hired him.

While in jail, Jasper signed a union authorization card. More importantly, he was the son of Bob Riley, to whom Shaw had promised in June two or three times, testified Bob, that Jasper had his old job when he got out of jail. Bob, however, became troublesome to Respondent when the union campaign began. Within days of the Union's demand for recognition, Shaw and Tim Critchfield asked him if he had been in contact with the Union. When he denied that he had, Shaw told him that he was "was a lying motherfucker." Tim Critchfield told Shaw not to say that. Shaw left, and Critchfield again asked if he had had contact with the Union, which Riley again denied. The point being, according to the General Counsel, both obviously suspected Riley as a Union organizer, and that supplies the unlawful motivation for the discharge and the refusal to rehire his son, Jasper. (Had Bob not been a supervisor, I would have these questions to be unlawful interrogations.)

The difficulty with the General Counsel's case, and Respondent's defense, too, is that no one has told the truth. Neither Bob nor Jasper Riley testified truthfully to the full nature of Jasper's legal problems, taking the position that what caused Jasper initial trouble was the mere destruction of property and the further violation of parole because he returned to the halfway house 10 minutes late and was thus incarcerated for an additional 5 months. Poignantly omitted from their narration was Jasper's kicking in of his father's garage door and stealing of a chain saw from his father, so that the initial charge that his father levied against him was not only destruction of his property but also the petit larceny of his saw. What caused Jasper trouble at the halfway house was not a 10-minute lateness but his failure to remain free from the use of drugs. I find that the testimony of Bob Riley and his son cannot be relied on. They were both interested in protecting Jasper in order to get his job back, concealing in their testimony Jasper's past drug use.

This finding does not fully dispose of this allegation, because neither the testimony of Shaw nor Tim Critchfield was consistent. Each claimed that one or the other of them, they could not definitively state who, terminated Jasper's employment at a much earlier date. Their testimony was not mutually corroborative. If Jasper is to be believed, when he asked for his job back in July, Tim never told him that he had been terminated earlier. And Tim did not directly deny Jasper's allegation that on July 25, Tim suggested that the failure to rehire him was due to the upcoming election. Furthermore, Respondent never sent him a termination notice. Finally, their testimony is at odds with Respondent's position statement given to the Regional Office

during the investigation of the underlying charge. That stated that Respondent terminated Jasper in June, while Shaw testified April or June, and Critchfield testified February or March, and the personnel file reflects December 10, 2001.

Nonetheless, I distrust Bob Riley's false attempt to help his son so much and Jasper's attempt to disclose his criminal violations that I am inclined to refuse to credit their testimony about their conversations with Shaw and Tim Critchfield concerning Jasper's return to work; and I accept as truthful, at least reflecting the understanding and motivation of Tim Critchfield, his testimony, including his statement, not denied by Bob Riley, that Bob had specifically told Tim about Jasper's drug problems, as follows:

He was arrested for stealing tools from his father, and we did hire him back after that. And he was in an ATV [all terrain vehicle] accident. [A]lso at that time went into, as I understand, a drug rehab center. We hired him back again, I think he worked another three weeks, and he was sent back to rehab center

...

[H]is father talked to me on numerous times about the drug problems [Jasper] had been having, ever since he married a woman, and started hanging out at the local strip club. And he said, he got into problems at that time, and continued to have drug problems.

He said they put him back into the drug treatment center, and then, I'm not sure when he came to me the last time, and said that he had been accused of stealing, and tested positive for drug use in the rehab center, and he was going back to jail.

At that time I told him I didn't want him back; that I couldn't give him any more chances.

...

I told his father, in, it was probably February or early March, whenever he went back to jail, his father came to me, and told me that he was - wouldn't be back for a long time because, his words, he said he was caught doing drugs in the rehab center, and stealing, and that he would be going back to jail. So I told him that I didn't want him back at that time.

When Bob Riley asked Shaw to reconsider his decision about Jasper in July, Shaw reaffirmed then the decision that Tim Critchfield had made previously, thus explaining part of the discrepancy in Respondent's overall story. Nicholson's testimony demonstrates that Respondent was concerned about the use of drugs by its employees. Although it is true, as the General Counsel contends, that Respondent continued to employ several other persons who had criminal problems, those related to the use of alcohol, one involving a driving violation. While I do not minimize the conduct, there is clearly no relation to the type and nature and extent of Jasper's conduct, which kept him away from work for such a long period.

It may well be that the General Counsel has presented a prima facie case of discrimination under Wright Line, solely because of Jasper's relationship to his father; but Respondent has proved that it would have taken the same action, even in the absence of Jasper's perceived union activities. *Wright Line*; *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). Clearly, Respon-

dent has hired no one after Jasper was released from jail. I also reject once again the General Counsel's contention about the amount of overtime warranting the hiring of another laborer. Even assuming the validity of that argument, there was not enough overtime to warrant the hiring of both Nicholson and Jasper. Finally, the General Counsel contends that Respondent should give Jasper some preferential treatment in recalling employees from layoff, thus replacing other employees to make room for Jasper. The General Counsel has not proved that Respondent followed any such practice in the past. I dismiss this allegation.

The Gissel Request

In *Douglas Foods Corp.*, 330 NLRB 821, 821-822 (2000), enfd. in part, remanded in part 251 F.3d 1056 (D.C. Cir 2001), the Board wrote:

In *Gissel*, the Supreme Court "identified two types of employer misconduct that may warrant the imposition of a bargaining order: 'outrageous and pervasive unfair labor practices' ('category I') and 'less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes' ('category II')." ⁴ The Supreme Court stated that in fashioning a remedy in the exercise of its discretion in category II cases, the Board

can properly take into consideration the extensiveness of an employer's unfair labor practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue. ⁵

⁴ *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1078 (D.C. Cir. 1996) (quoting *Gissel*, 395 U.S. at 613-64).

⁵ 395 U.S. at 614-615.

The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time construction employees employed by High Point Construction Group, LLC at its Buckhannon, West Virginia, facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

The employee sentiment was demonstrated in the General Counsel's proffer of properly authenticated union authorization cards. I count the cards of the following employees, which were signed by June 26, the day that the Union filed its petition for a representation election: Snyder, Tom Critchfield, Morgan, Burke, Tim Vincent, Kevin Critchfield, Carl George, Thomas McClain, and Gary Miller. I have not considered the cards of Bob and Jasper Riley. Because there were only 15 employees in the unit, excluding the Rileys, the Union, with 9 cards, represented a majority of Respondent's employees on June 26,

within 5 days of the date that Respondent committed its first unfair labor practice.

Respondent's actions were serious, severe, and swift. Within days of the Union's filing its representation petition, Shaw threatened Burke that, if the Union was elected by the employees, he would close Respondent and file for bankruptcy. Burke disseminated this threat to four other employees at a meeting at his house shortly thereafter. I presume that those employees disseminated this threat of closure to yet other employees. *Tellepsen Pipeline Services Co.*, 335 NLRB 1232, 1233 fn. 7 (2001), enfd in principal part 320 F.2d 554 (5th Cir. 2003); *Springs Industries*, 332 NLRB 40, 40-41 (2000). This threat was a "hallmark violation," highly coercive and having a lasting effect on election conditions. *Climatrol, Inc.*, 329 NLRB 946, 948 (1999); *Precision Graphics*, 256 NLRB 381 (1981), enfd. 681 F.2d 807 (3d Cir. 1982). The barging into the Union's meeting at Burke's house was indeed serious and undoubtedly threatening to the employees, whose attendance at union meetings declined thereafter. Tom Critchfield hid, so as not to be seen; but he was seen even after Shaw left Burke's house, but waited down the road to see who was leaving. Burke quit his job, refusing to be sent on an assignment where he would have had to work with Shaw's brother, Terry. In addition, Respondent threatened that the employees would face reductions in their pay and that there would not be as much work for them to do because of the intervention of the Union. In sum, Respondent threatened its employees' wages, jobs, and physical safety. There was nothing more to threaten.

Respondent made it painfully obvious that it utterly controlled the employees' destiny by its threat of closure and declaring itself bankrupt. The mere posting of a notice is inadequate to dispel the notion that the employees' jobs are at total risk should they seek to organize. Assuming that their jobs remain, the next threat is that they will earn less, either because Respondent will enter into an agreement that will ensure that they earn less, or that Respondent will not bid on jobs, thus ensuring less hours of work. That assuredly will not be forgotten. In this case, there is even more: the threat of physical harm, which had to be the intended result of Shaw's action in barging into the Union's meeting. Tim Shaw's vile epithets remain, long after any 60-day posting of the Board's notice.

The employees have a Section 7 right to organize. They cannot do so under the threat of the loss of their jobs, the loss of wages, and the fear of thuggery, instilled by the highest level of management, *Electro-Voice, Inc.*, 320 NLRB 1094, 1096 (1996). There is no likelihood of a fair election here. From the decline of attendance at union meetings and Burke's quitting, there is ample evidence that the unfair labor practices tended to dissipate that majority and destroy any chance of the holding of a fair rerun election. I recommend a *Gissel* bargaining order.

CONCLUSIONS OF LAW

1. By coercively interrogating its employees about their support for the Union, threatening its employees with reduced wages if they choose the Union as their collective-bargaining representative, telling its employees that there was a good possibility of a lack of upcoming work because of the Union, telling its employees that it would shut down and file for bank-

ruptcy if the employees selected the Union as their representative, and engaging in surveillance and boisterously intimidating its employees where they were gathered at a union meeting, Respondent has 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 embarking on its course of illegal conduct as set forth in paragraph 1 above, and refusing on and after June 28, to recognize and bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate collective-bargaining unit, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that 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, including bargaining with the Union. Given the serious nature of the unfair labor practices found and the likelihood that they will be repeated by Shaw in particular, I shall recommend broad cease-and-desist language, pursuant to *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record, including my reading of the briefs filed by the General Counsel and Respondent and my observation of the witnesses as they testified, I issue the following recommended⁴

ORDER

Respondent High Point Construction Group, LLC, Buckhannon, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Coercively interrogating its employees about their support for the Union.
 - (b) Threatening its employees with reduced wages if they choose the Union as their collective-bargaining representative.
 - (c) Telling its employees that there was a good possibility of a lack of upcoming work because of the Union.
 - (d) Telling its employees that it would shut down and file for bankruptcy if its employees selected the Union as their representative.
 - (e) Engaging in surveillance and boisterously intimidating its employees where they are gathered at a union meeting.
 - (f) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) On request, bargain with the Union as the exclusive representative of its employees in the following appropriate unit concerning their rates of pay, hours, and other terms and condi-

tions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time construction employees employed by High Point Construction Group, LLC at its Buckhannon, West Virginia, facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Buckhannon, West Virginia, copies of the attached notice marked "Appendix." [FN5] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by 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, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since July 1, 2002.

(c) 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. April 28, 2003

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 any 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 coercively interrogate our employees about their support for the Mid-Atlantic Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America (Union).

WE WILL NOT threaten our employees with reduced wages if they choose the Union as their collective-bargaining representative.

WE WILL NOT tell our employees that there was a good possibility of a lack of upcoming work because of the Union.

⁴ 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.

WE WILL NOT tell our employees that we would shut down and file for bankruptcy if our employees selected the Union as their representative.

WE WILL NOT engage in surveillance and boisterously intimidate our employees where they are gathered at a union meeting.

WE WILL NOT in any other manner interfere with, restrain, or coercing our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL on request, bargain with the Union as the exclusive representative of our employees in the following appropriate

unit concerning their rates of pay, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time construction employees employed by High Point Construction Group, LLC at its Buckhannon, West Virginia, facility; excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

HIGH POINT CONSTRUCTION GROUP, LLC