

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

E.L.C. ELECTRIC, INC.

and

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, AFL-CIO

Cases 25-CA-28270-1
25-CA-28270-2
25-CA-28283-1 Amended
25-CA-28283-2 Amended
25-CA-28283-4 Amended
25-CA-28398-1 Amended
25-CA-28567
25-CA-28582
25-CA-28637 Amended

and

ALL TRADES STAFFING, INC.

E.L.C. ELECTRIC, INC.

and

Cases 25-CA-28397-1 Amended
25-CA-28406
25-CA-28532 Amended
25-RC-10131

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL
UNION NO. 481, a/w INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO

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for the General Counsel.

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of Indianapolis, Indiana, for the Charging Party/Petitioner.

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. This matter arises out of the following related unfair labor practice and representation proceedings:

(1) An order consolidating cases, consolidated complaint and notice of hearing issued on

June 19, 2003,¹ and an amendment to consolidated complaint issued on August 8 (collectively, the complaint), against E.L.C. Electric, Inc. (ELC or the Respondent), based on charges filed by International Brotherhood of Electrical Workers, AFL-CIO and International Brotherhood of Electrical Workers, Local Union No. 481 (collectively, the Union).

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(2) A report on challenged ballots and objections, order consolidating cases, order directing hearing, and notice of hearing issued on December 23, 2002, following a petition filed on July 29 and an election held on September 26, in the following unit of employees stipulated to be appropriate: journeyman electricians, apprentice electricians, service technicians and electrical helpers engaged in electrical construction work in [named Indiana counties], excluding managers, warehouse employees, delivery drivers, sound and communication workers, telecommunications technicians, trenching equipment operators, part-time help, office clerical employees, professional employees, and guards and supervisors as defined in the National Labor Relations Act (the Act).

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Pursuant to notice, I conducted a trial in Indianapolis, Indiana, on August 20 to 22 and November 4 and 5, 2003, during which all parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. I have duly considered the helpful posthearing briefs that were filed.²

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Issues

1. Whether prior to the election, commencing in July 2002, ELC committed various independent violations of Section 8(a)(1) of the Act and discriminated against employees Jason Dunn, Brad Krebbs, and Corey Leineweber in assignments or conditions of employment, in violation of Section 8(a)(3) and (1).

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2. Whether Dunn, Krebbs, Leineweber, George Nichols, and Robert Nichols in July 2002 went out on an unfair labor practice strike and should have their challenged ballots counted.

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3. Whether ELC's unfair labor practices and other conduct warrant setting aside the election. The Union argues that, in addition to conduct alleged in the complaint, ELC gave pay raises to Mikalis Grunde and DeMarco Thacker in September 2002, and failed to properly post election notices at jobsites where employees worked.

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4. Whether following the election, ELC engaged in further independent violations of Section 8(a)(1), and violated Section 8(a)(3) and (1) by issuing Thacker warnings and not assigning him work in September 2002, and by laying off Bruce Sanderson on January 9; Jonathan Trinosky on February 5; and Grunde on February 17, 2003.

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5. Whether ELC violated Section 8(a)(3) and (1) by laying off all remaining electrical employees on March 14, 2003, and the following week, utilizing them as employees of labor providers to perform unit work (the transition).

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¹ Because the operative dates occurred about equally in 2002 and 2003, specific mention of the year will be omitted when made clear from the context.

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² The General Counsel's unopposed motion to correct transcript (GC Br. at p. 2) is granted.

Facts

5 Based on the entire record, including the pleadings, testimony of witnesses and my observations of their demeanor, documents, and stipulations of the parties, I make the following findings of fact.

Witnesses included:

10 1. All of the above-named employees, with the exception of George Nichols; and Benjamin Adair, an employee of ELC until March 14 and then of All Trades Staffing, Inc. (All Trades).

2. Steven Dunbar, union organizer.

15 3. Greg Maier, vice president of All Trades; Stephen Wise, president of National Construction Workforce (National); and Jerry Tucker, an employee of All Trades assigned to work for ELC both before and after the transition.

20 4. Edward Calvert, ELC's president and sole owner; Kevin Passman, vice president of operations and overseer of day-to-day operations, who is in charge of purchasing materials and estimating jobs; Mike Swalley, general superintendent, who is in charge of field activities, including labor, and has had primary responsibility for handling layoffs; and Supervisors James Corbly and Walter Freese.

25 The title of jobsite supervisors has varied, but their basic duties and responsibilities have remained the same at all times material. For ease of reference, the term "supervisor," will be used throughout this decision. The Respondent concedes their status as agents of ELC and statutory supervisors within the meaning of Section 2(11) of the Act.³

30 Supervisor Christine Patterson a/k/a Christine Rossittis was not called to testify by the Respondent, and no explanation was offered for her nonappearance. Therefore, I draw an adverse inference from its failure to call her as a witness. In any event, statements attributed to her by various witnesses of the General Counsel went un rebutted. The Union challenged her ballot at the election. Inasmuch as the Respondent now agrees that she has been a statutory supervisor at all times relevant,⁴ and the record reflects such status, I sustain the challenge to her ballot.

35 On the other hand, neither the General Counsel nor the Union called George Nichols, who was the only witness who could provide direct evidence of the circumstances surrounding his termination of employment at ELC. In the absence of such testimony, and the Respondent's concomitant lack of opportunity to cross-examine him, I decline to find that he engaged in a strike.

40 ELC, a corporation with an office and place of business in Indianapolis, Indiana, is engaged as an electrical contractor in the construction industry and is a member of the Associated Building Contractors of Indiana (ABC). Its status as an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act is not in dispute, nor is the
45 Union's status as a labor organization within the meaning of Section 2(5) of the Act.

50 ³ Tr. 33.

⁴ Tr. 892.

I. Events Prior to the Election

A. The Union's Organizational Efforts

5 Prior to the Union's organizing campaign, ELC became embroiled in a dispute with the
 Indiana Department of Labor, for allegedly not paying proper fringe benefits on common wage
 projects, and Calvert evidently placed blame on the Union. Thus, Calvert sent a letter dated
 June 10, 2002, to all employees,⁵ decrying the department "for their vicious, defamatory, and
 10 harmful actions taken against our company," and accusing the department of being "pushed by
 their friends at IBEW." The closing paragraph concluded:

15 They are trying to force us out of business, causing you to lose your job. If they succeed
 against ELC, they will then move on to the next non-union contractor and begin again
 with the same tactics. Maybe you will be working for this company then. Where does it
 end? IT ENDS NOW! Stand with me and fight against these corrupt and evil people
 who want to run our lives. (Emphasis in original.)

20 Dunbar began organizing efforts among ELC's employees in July 2002. On July 8,
 Krebbs agreed to be chairman of the organizing committee, and Dunbar sent a letter to the
 Respondent by telefax and certified mail.⁶ Krebbs received a shirt with the union logo,⁷ which
 he wore the following morning to work. From July 11 through 16 or 17, Dunbar engaged in
 passing out handbills and other literature to employees at the Wal-Mart super store, Columbus,
 Indiana (Wal-Mart). A number of employees subsequently called him in response.

25 On about July 15, Dunbar met with Dunn and Leineweber, who agreed to be on the
 Union's organizing committee. Dunbar notified ELC of this by a letter dated July 15 as to Dunn
 and July 17 as to Leineweber, each sent by both telefax and certified mail.⁸

B. Alleged Violations of Section 8(a)(1) and (3) Prior to the Strike

30 The General Counsel contends that on about July 8, 2002, the Respondent changed the
 working conditions of Krebbs by taking away his assigned key, and on about July 8 and 10,
 assigned him more onerous working conditions, to wit, demanding he turn in health insurance
 papers and assigning him work that he could not complete in the time given. These allegations
 35 involve Swalley and Corbly.

40 Krebbs was tentative when it came to the exact dates of certain conversations with
 Swalley, and portions of his testimony were contradicted by documentary evidence. Thus,
 although Krebbs testified that he had one conversation with Swalley regarding submission of
 health insurance forms and that it occurred on either July 9 or 10, General Counsel's Exhibit 38
 corroborates Swalley's testimony that they had two conversations on the matter; the first on July
 8, and the second on July 9, and I so find. I further note that although Krebbs testified that he
 had never been asked to fill out insurance forms prior to July, General Counsel's Exhibit 37 is a

45 ⁵ GC Exh. 2.

⁶ GC Exh. 24. The fax was received on the morning of July 8; the certified letter on July 9.
 See GC Exhs. 24(b) & (c).

⁷ See CP Exhs. 15(a) & (b).

50 ⁸ GC Exhs. 25 & 26, respectively. Both letters were received by mail on July 17, whereas
 the fax for Dunn was received on July 16, and the fax for Leineweber on July 17. See GC Exhs.
 25(b) & (c) and 26(b) & (c).

letter to Krebbs dated June 5 from Darlene Van Treese, administrative assistant, in which she advised Krebbs that he would become eligible for medical insurance on July 18 and needed to return the application by June 21.

5 Corbly answered questions directly and struck me as generally credible. Swalley appeared ill at ease and, during portions of his testimony, did not give direct answers. Thus, as with Krebbs, Swalley was only partially credible.

10 It is further alleged that on about July 17 and 18, the Respondent, through Patterson, assigned more onerous working conditions to Dunn and Leineweber, by isolating them from other employees and assigning them cleanup work. Dunn and Leineweber appeared candid, and I credit their uncontroverted testimony about her words and actions, and their testimony in general.

15 Krebbs

Krebbs, a journeyman electrician, first worked for ELC as a temporary employee through National. When he became a permanent employee in January 2002, his first assignment was at the Sunman Elementary School Project (Sunman), where Corbly was the supervisor.

20 The circumstances surrounding Krebbs getting the key on March 1, 2002, and being asked to return it on July 8, 2002,⁹ are generally not disputed. When Corbly instituted a night shift at Sunman, he assigned two employees, including Krebbs. Because Krebbs had been on the job longer, Corbly put him in charge of the night shift, informed him that would be the supervisor of the night crew, and gave him a key to the ELC lockboxes, in which tools and supplies were kept. The key also was used to enter the jobsite trailer.

25 The night shift lasted only 1 week, after which Krebbs was switched to day shift as a regular journeyman electrician. He continued to use the key to access tools and supplies. Corbly did not immediately ask for its return because it was helpful for Krebbs to have it when Corbly was absent from the site.

30 On July 8, Krebbs saw Swalley at Sunman. The first thing Swalley said was that Krebbs needed to return the lockbox key. Krebbs asked why, and Swalley responded that he (Krebbs) was not allowed to have it anymore. Both Corbly and Swalley testified that Krebbs was asked to give the key back because another employee needed it; specifically, Trinosky, who worked in the kitchen area at Sunman with another employee, was in charge of that area, and was responsible for locking up tools.

35 Although Krebbs testified that taking away his key aggravated him "a little bit," because he thought it was discriminatory and they were taking away his responsibility, the only impact was that it "slowed us down a little bit . . . [A]s far as me, it didn't affect my work at all."¹⁰

40 I credit Swalley's testimony concerning the circumstances surrounding his insistence that Krebbs fill out a health insurance election form. ELC offered health insurance benefits to its employees after a waiting period, and employees were then required to fill out forms either accepting or declining such insurance. Van Treese asked Swalley to remind Krebbs that he had to fill out the form, and Swalley did so on July 8. When Krebbs stated he did not have the

50 ⁹ The dates are established by GC Exh. 36, Krebbs' inventory list.

¹⁰ Tr. 517.

forms, Swalley had Van Treese fax them to the site, and he gave them to Krebbs. The next morning, Swalley asked Krebbs if he had the insurance papers. When Krebbs replied no, Swalley stated that they were needed. He prepared and handed Krebbs a directive to bring the papers to work on July 10, or he would not be allowed on the jobsite.¹¹ Krebbs complied.

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Krebbs testified that starting on about July 9 or 10, Corbly changed his assignments by assigning him to work alone and to jobs that he could not complete in the time given. However, he recounted only one such assignment: when he was given a job on July 10 to complete by July 12, which he believed would have taken six workers to finish. When Krebbs did not complete it by July 12, Corbly said nothing and gave him another assignment.

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Dunn and Leineweber

Dunn worked as an electrical apprentice for ELC for 1 week in July 2002, until he went out on strike on July 19. The only jobsite he worked was Wal-Mart. On July 1, Leineweber started for ELC as an apprentice at Wal-Mart and worked there until he went out on strike on July 29.

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The normal workday was 7 a.m. to 3:30 p.m. At the beginning of the workday, employees regularly gathered at the gangbox to receive their assignments from Patterson, the jobsite supervisor.

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Both Dunn and Leineweber testified consistently that on July 12, the day after Dunbar began handbilling at Wal-Mart, Patterson mentioned at such a gathering that she realized the Union had been on the jobsite handbilling. She said she really did not care if they went union or not, but she did not want any union talk on company time.

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It is clear from the testimony not only of Dunn, Leineweber, and Grunde but of Supervisor Freese, as well, that there was no previous policy in effect prohibiting employees from talking about personal matters during the workday. Freese was a credible witness, other than with regard to the circumstances surrounding the warning issued to Thacker on September 26, in which his superiors apparently intervened, and I credit his testimony where it differs from that of ELC management. Freese testified that his understanding of the no solicitation rule in the ELC policy handbook (the handbook),¹² provided to employees, was that it prohibited people coming in to sell, and this was strictly enforced. However, he further testified that this rule did not prevent employees from talking on the jobsite and that they could talk about whatever they wanted, as long as it did not interfere with production. Freese further testified that in the 6 or so years he has been a supervisor, he has never had occasion to write up an employee for violating the no solicitation rule.

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After receiving a union shirt from Dunbar on July 15, Dunn wore it to work the following morning. At 9:15 a.m., Patterson pulled him off the job on which he was hanging lights with employee "Rorey." She took him to a private area and said, "I can't believe you're doing this. It's a slap in the face. I told you I didn't want any union guys on my job. I'd fire you if I could. I'm going to make sure everybody on this jobs knows you are a union mole working on this job, and nobody will look at you the same."¹³ Dunn responded that he would continue to work the same and wanted no problems. Patterson told him to hang around the gangbox, and she called

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¹¹ GC Exh. 38.

¹² GC Exh. 39 at p. 32.

¹³ Tr. 752.

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over the other 15-20 employees.

5 Dunn, Adair, Grunde, Leineweber, and Thacker all testified about what Patterson then said with all of the employees present. Their accounts were substantially similar, although not
 “scripted.” Because Dunn was the one she targeted, I believe he would have paid the most
 attention to her precise words, and he in fact appeared to have the most complete recall.
 Accordingly, I accept his version of Patterson’s statements. I give no weight to the undated,
 unauthenticated memorandum Patterson purportedly wrote at some point concerning what she
 10 said at the meeting.¹⁴

 Patterson said, “I want to introduce everybody to Jason Dunn. If you haven’t met him
 already, he is our Union mole on this job. I want you to stay away from him and don’t talk to him
 15 about the Union, don’t let him get any of your personal information I’d fire him if I could, but
 I can’t because he works for the Union.”¹⁵ She further stated that if there were any ditches or
 “crap” work to be done, he would be doing it, but there wasn’t any. She concluded by telling
 other employees that they could not reach him on company time between 7 a.m. and 3:30 p.m.
 but “I don’t care what you do to him after that. That’s personal.”¹⁶ She asked Dunn if he
 wanted to comment, but he said no. The meeting ended, and Dunn went back to hanging lights.
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 Leineweber wore a union shirt to work the following morning, July 17. Patterson told him
 that she was not surprised that he was the other union mole. She then assigned him to work
 with Dunn, “so we couldn’t spread the Union shit to other E.L.C. employees.”¹⁷ At about 9 a.m.,
 Leineweber went to Dunn, who was hanging light fixtures with Rorey, and related what
 25 Patterson had said. For the rest of the day, Dunn and Leineweber worked together hanging
 light fixtures.

 On the morning of July 18, before assignments were made, Patterson said to
 Leineweber that if he was going to go union, she did not understand why he did not just get out
 30 and go. That morning, Dunn and Leineweber resumed hanging light fixtures. At about 11 a.m.,
 Swalley approached Leineweber and asked him if he had learned anything about “the fucking
 union” when he worked for a named employer. Swalley did not deny making this comment, and
 I credit Leineweber’s uncontroverted account.

 Later in the morning, after Dunn and Leineweber had hung light fixtures for about 2
 35 hours,¹⁸ Patterson pulled them off the lift without explanation and told them to sweep up the
 whole place and pick up trash. They engaged in such work for the remainder of the day.
 Cleanup work was a function rotated among employees. Previously, Leineweber had never
 performed cleanup, while Dunn had done cleanup in between assignments, for approximately
 40 one-half to 1 hour at a time and had seen others perform such work for similar periods.
 Although the pay was the same, both Dunn and Leineweber considered cleanup work less
 desirable because it required less skill. This was Dunn’s last day of work for ELC. The next
 day, Leineweber was reassigned to hang lights with another apprentice.

45 At the morning gangbox meeting on July 19, Patterson approached Leineweber. She

¹⁴ GC Exh. 31.

¹⁵ Tr. 754.

¹⁶ Tr. 755.

¹⁷ Tr. 268.

¹⁸ See GC Exh. 34, job timesheet for Wal-Mart employees that week.

asked if Dunn had gone union and, if so, why Leineweber did not go with him.

C. The July 2002 Strike

5 By letters dated July 19, 2002, Dunn, Krebbs, George Nichols, and Robert Nichols advised ELC that they were going out on strike to protest ELC's unlawful labor practices.¹⁹ Leineweber did the same by letter dated July 29.²⁰

The July 19 letters stated:

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I am protesting the multiple unfair labor practices of E.L.C. Electric, Inc. E.L.C. has repeatedly discriminated against individuals in violation of the National Labor Relations Act. This unlawful conduct includes but is not limited to, the following incidents:

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1. E.L.C. has repeatedly harassed employee, Jason Dunn, in retaliation for his protected activities.
2. E.L.C. has repeatedly harassed employee, George Nichols, in retaliation for his protected activities.
3. E.L.C. has repeatedly harassed employee, Robert Nichols, in retaliation for his protected activities.
4. E.L.C. has repeatedly harassed employee, Brad Krebbs, in retaliation for his protected activities.

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I request that E.L.C. fully remedy its unlawful conduct by removing all improper discipline from employee personnel records, by making all employees whole for all losses suffered by this discrimination, and by informing its workforce that E.L.C. will no longer discriminate against employees based on their union activities.

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As of this date, I am commencing an Unfair Labor Practice Strike to protest the multiple Unfair Labor Practices committed by Edwards.²¹

Leineweber's letter was identical other than adding his name to the above listed employees.

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Robert Nichols did not testify about any alleged harassment he received. As noted earlier, George Nicholas did not testify at all.

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Krebbs' last day of work for ELC was July 19. Corbly testified without controversy that shortly before lunch that day, Krebbs told him that he had to go to the hospital to see his ailing mother and would get in touch when he would be able to return. Krebbs left at that point and never came back. Krebbs was off from work for 1 to 1-1/2 weeks and then went to work for another company, where he was employed for approximately 6 months.

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On July 19, Dunn, George Nichols, and Robert Nichols went to the union hall and met with Dunbar. After signing letters that they were on strike, the three went with Dunbar to the

¹⁹ CP Exhs. 8-11.

²⁰ CP Exh. 12.

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²¹ The reference to Edwards Electric was, Dunbar testified, an inadvertent error as the result of using a previous letter as a model. I accept his explanation and draw no negative inferences against the strikers or the Union from that erroneous reference.

Union's apprenticeship office, where they received placements with union companies. Dunn worked for his new employer 1 hour that day and began full-time employment the following Monday, July 22. Robert Nichols was placed with another union company, for whom he started on either Monday or Tuesday, July 22 or 23.

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Leineweber's last day of work for ELC was on or about July 28. He went to work for a union employer on August 1.

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The only actions taken by the five employees who went on strike were their signing letters and not returning to work for ELC. None of them ever carried a picket sign or had any further contact with ELC concerning the strike.

D. Other Preelection Allegations and Union Objections

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Objection 1/alleged promise of benefits, interrogation, and impression of surveillance

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These allegations involved employees Adair and Sanderson, and management representatives Passman and Swalley. The promise of benefits is the subject of Union Objection 1 to the election. My assessment of Swalley's credibility was previously set forth. Sanderson appeared candid, and I have no reason to doubt his credibility. Accordingly, his testimony is credited. More will be said about the credibility of Adair and Passman below.

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In mid-September 2002, as part of ELC's preelection campaign, Passman and Swalley visited various jobsites to address employees. I credit Swalley, Adair, and Sanderson that Passman made preliminary statements about the election prior to asking for questions. In fact, Swalley specifically testified that Passman had "a written presentation" so there would be consistency in what he said at the different sites. In contrast, Passman was evasive when asked if he gave a speech prior to asking for questions, testifying that he could "not recall." The General Counsel does not allege that anything Passman said in his preliminary statements violated the Act, nor does the Union contend that any of those remarks interfered with the election.

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After his remarks, Passman asked for questions. An employee asked if the Company was going to try to get better health insurance. Sanderson's and Adair's accounts of Passman's answer comported with Passman's account. Passman responded that ELC was actively seeking to improve health insurance benefits by the end of the year but made no promise thereof. At the time this occurred, ELC was required to change its health insurance carrier on January 1, 2003, as the result of the settlement of a lawsuit. ELC in fact switched carriers in November or December 2002.

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Adair testified that after the meeting, Passman and Swalley asked him to accompany them around the side of the trailer, to talk in private. After saying it was "off the record," Swalley said he heard Adair was pronoun. Adair replied no and asked who had said that, but Swalley did not answer. is conversation was not mentioned in Adair's April 15, 2003, Board affidavit, and he offered no explanation for its omission. However, neither Passman nor Swalley specifically denied the conversation. Adair never engaged in union activities as an ELC employee and has never been involved in any lawsuits with ELC. He struck me as candid. For example, he testified that Patterson at the September gangbox meeting told employees they could make up their own minds when it came to voting for the Union and vote the way they felt. This would have been inconsistent with an effort to skew his testimony to overstate her antiunion remarks. Similarly, his account of what Passman said at the group meeting demonstrated no apparent desire to show management animus toward the Union. In all of

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these circumstances, I credit Adair's account of what Swalley said to him, and his testimony in general.

5 The Regional Office opined that the allegation in paragraph 5(e) of the complaint might give rise to valid objections to the election. Thus, Thacker testified that on at least five different occasions in late July and early August, after he returned from lunch (sometimes with Dunbar), Patterson told him that he could not talk about the Union on the job. Since Patterson did not testify, this testimony went uncontroverted. The statements Thacker attributed to her were consistent with what she had told other employees, and I credit his account of them.

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Objection 2—pay raises

15 Grunde and Thacker were hired as apprentices and later enrolled in a Bureau of Apprenticeship and Training (BAT) certified 4-year apprenticeship program. ELC encouraged but did not require such enrollment, except when the job was prevailing wage.

20 Thacker signed the apprenticeship documentation on July 9, 2002, and was indentured on July 29, whereas Grunde executed the documentation on June 24 and was indentured on July 9.²² By letters dated September 11 and 18, 2002, respectively,²³ ELC notified them they would receive wage increases to \$11 an hour (from \$10.50 an hour), retroactive to September 9, because they were in the apprenticeship program. Thacker testified that he had not requested the increase and, to his knowledge, was not scheduled for it. Nothing in the handbook states that employees will receive raises upon starting classes, and the Respondent provided no documentation showing that other employees similarly situated have received them.

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Objection 3—posting of election notice

30 Calvert had the notice posted in the main break room at the office and in the warehouse office, and he sent a certified letter dated September 6, 2002, announcing election details to every employee.²⁴ He testified that he understood the Company's obligation was to post it in a conspicuous place in its main business location, and ELC tried to do that. He did not give any instructions about posting the notice at ELC jobsites, and it was not posted at all of them. He conceded that employees did not report to the main office before going to their assigned jobsites each day.

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II. The Election and its Aftermath

40 The *Excelsior* list contained the names of 26 employees, including Corbly, Freese, and Patterson.²⁵ On September 26, 2002, 25 of them voted. Twenty-four voted without challenge, of whom 11 voted for the Union, and 13 against. The five alleged unfair labor practice strikers, who were not on the list, also cast challenged ballots. On October 3, the Union filed timely objections.

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²² CP Exhs. 4 & 6, respectively.

²³ CP Exhs. 2 & 3.

²⁴ GC Exh. 4, a sample. The letter urged employees to remain "union free" and enclosed campaign propaganda.

²⁵ GC Exh. 3. As noted, the Union challenged Patterson's vote. It is problematic whether Corbly and Freese, who are also alleged in the complaint as statutory supervisors and whose status as such is not now in dispute, should have been allowed to vote.

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A. Alleged Discrimination Against Thacker

5 Thacker worked for ELC from July 11 or 12 until mid- or late December 2002, when he went out on strike. He was first assigned to Wal-Mart. He later also worked at Sunman and at Indian Creek School, Trafalgar (Indian Creek), where Freese was the supervisor. Indian Creek was his primary jobsite after early September.

10 Although Thacker earlier engaged in union activity, the first evidence of Company knowledge thereof was on September 26, when Thacker served as the Union's observer at the election. When Thacker showed up at Indian Creek after returning from the election, Freese handed him a written warning for missing work the previous day²⁶ and said that "the shop" had said to write him up. Thacker had never received any prior warnings for attendance, either oral or written (the handbook, at page 13, provides for progressive discipline, starting with a verbal warning).

15 It is undisputed that Thacker had to take his daughter to a medical appointment on the previous morning, September 25, and that he informed Freese of this in advance. However, with regard to other details of what occurred on September 25 and 26, neither Thacker nor Freese was fully credible. According to Thacker, Freese said he would call the shop and inform them that Thacker would be late coming in on September 25. Thacker further testified that, to his knowledge, he was not obliged to call the shop. However, in his April 8, 2003, Board affidavit, he stated, "Freese said that was fine and I just needed to call the shop and tell them."²⁷ Consistent with what Thacker stated in his affidavit, Freese testified that he told Thacker to call the office (Swalley) as per policy (see page 26 of the handbook). I find that Thacker's testimony on this point, impeached by his affidavit and contradicted by other evidence, undermines his credibility.

20 On the other hand, in marked contrast to his unequivocal and straightforward testimony in general, Freese's testimony regarding this incident was confusing, contradictory, and often tentative, leading me to conclude that Freese did not initiate the warning. Although Freese testified that the starting time was 7 a.m., he also testified that when Thacker called him on the early morning of September 25, Thacker said, "[H]e would be roughly, about two and a half hours late. He said he would be there at 10:30 – no later than 10:30."²⁸ If the starting time was 7 a.m., the math simply does not gibe. Freese further testified that the reason Thacker was written up was because he arrived "much later than that [10:30] . . . I believe."²⁹ However, the warning report states, "Called in/But was on job at 10:30 a.m."

25 Also rather curiously, Freese testified that either Passman or Swalley had him prepare a written memorialization of the event,³⁰ addressed to Passman, which also stated that Thacker arrived at 10:30 a.m. but had said he would be "a couple" of hours late. On cross-examination, Freese averred that on no other occasion has he ever prepared such a formal written memorandum for an employee coming in late; rather, he merely notates it on the actual absentee report. It further strikes me as suspicious that although Thacker did come to work on the morning of September 25, the Respondent waited until the next day—and after Thacker served as the Union's observer—to issue him the warning.

26 GC Exh. 47.

27 Tr. 736.

28 Tr. 815.

29 Id.

30 GC Exh. 48.

On September 27, only Freese and Thacker were assigned to Indian Creek. When it appeared that, due to rain, the site was too wet for Thacker to work, Freese called Swalley to see if there was any other work available for him. Swalley said no, and Freese told Thacker to go home and call the next day. Swalley later asked Freese to memorialize the incident in writing and address it to Passman, and Freese did so.³¹ When asked on cross-examination, if he ever prepared a similar document when an employee was not worked, either on account of weather or for any other reason, Freese replied no.

On at least one occasion, in late August or early September 2002, when weather was inclement and there was only outside work to do at Indian Creek, Freese sent Thacker and Grunde to Wal-Mart for the workday. However, on some occasions, Thacker candidly testified, he was sent home on rain days rather than assigned to other jobsites.

In late September or early October, Freese told Thacker at Indian School that they had no further work for him and would call him when work picked up. On his way home, Thacker called the shop. He spoke with Swalley, who said he could work at Sunman. Thacker reported to Sunman the next day and was there for about a week, before returning to Indian Creek.

Thacker last worked for ELC in December 2002 when, he testified, he went on strike. On cross-examination, however, it was revealed that in his affidavit to the Board, he stated, "I quit E.L.C. because I had a job at Barth Electric, a Union contractor."³² He further stated therein that he started at Barth Electric on December 23, and that when he left ELC's employ, he merely said that he was not coming back. The Union never notified ELC that Thacker went out on strike, and neither the General Counsel nor the Union has contended that he was an unfair labor practice or economic striker.

B. The Layoffs of Sanderson, Trinosky, and Grunde in January and February 2003

Calvert and other ELC management and supervisors all testified that Swalley was the one who made decisions regarding when layoffs would take place and which employees would be selected. There was no set policy or criteria for determining who would be laid off.

Sanderson

Sanderson worked as a journeyman electrician for ELC from May 20, 2002, until January 9, 2003, when he was terminated. He worked at Wal-Mart under Patterson until September. At that time, he was reassigned to Sunman, where he remained until his layoff. Although he kept in contact with Dunbar after his hire, he did not overtly express support for the Union at work.

By letter dated November 5, 2002, faxed and sent by certified mail, the Union notified ELC that Sanderson was on the Union's organizing committee.³³

I credit Sanderson's account of his meeting with Swalley on December 18, which was substantially corroborated by Sanderson's notes thereof,³⁴ over Swalley's testimony that he

³¹ GC Exh. 49.

³² Tr. 732.

³³ GC Exh. 28.

³⁴ GC Exh. 72.

had no one-on-one conversations with employees the week of December 18. In this regard, Grunde also testified credibly that he had a performance review meeting with Swalley on December 18,

5 Swalley asked Sanderson to fill out a self-review. Sanderson commented that he did not feel Patterson cared much for him and did not think she would give him a fair review because of his union affiliation (Sanderson testified about accusations Patterson leveled against his performance in September, but they are not alleged as unfair labor practices). Swalley replied that was nonsense. Sanderson also stated that he felt he did not have a future with the
10 Company and would be selected for termination because of his union affiliation. Swalley said that was “hogwash.” He then repeatedly asked Sanderson if he was so proud, why he went to work for a merit shop. Sanderson responded that he was not supposed to talk about the Union on company time, to which Swalley then said that other employees had complained about Sanderson talking about the Union, and his work had fallen off. Sanderson next stated that he
15 was there to organize ELC. Swalley asked if it was fair that someone who just got hired should be able to force other people to go union. Sanderson replied that everyone had a vote. He asked Swalley if there was truth to the rumor of a layoff and how employees would be selected. Swalley answered, “Well, of course, we will try to keep all our loyal employees.”³⁵

20 At this meeting, Swalley stated that work was going to be slow in the months of January, February, and March. Swalley testified that he made a similar statement to Sunman employees as a group during the week of December 18. I find, therefore, that Swalley made such a statement to employees that week.

25 Swalley laid Sanderson off at Sunman on the evening of January 9, 2003.³⁶ There were about six employees on the project, including Eric Marshall, who was also laid off at the time; and Ron Hamilton, who was not. Sanderson believed that, according to company policy, he had more seniority than Hamilton, who had been incarcerated for a criminal conviction and therefore had a break in service. The handbook, at page 8, provides that “[a] break in service is when an
30 employee has not worked for 60 days. All company benefits will be lost and He or She will then have to reapply to be considered for rehire.” The Respondent did not rebut this testimony. Sanderson was never referred to a labor provider or recalled.

35 Swalley testified that Sanderson and the other journeyman on the job were laid off because work was slow, and Swalley no longer had need for journeymen on his jobsite. Rather, the work could be performed by Corbly and lower-paid apprentices.

40 Corbly, the jobsite supervisor, conceded on cross-examination that he was not certain if work was slowing down at the site at that time. This equivocation from the jobsite supervisor with much more firsthand knowledge of the job than Swalley seriously undermines Swalley’s testimony. Additionally, strongly suggesting that any decrease in work in late 2002 and early 2003 was cyclical rather than out of the ordinary was Passman’s testimony that during that period, projects were coming to the point where less manpower was required, “as it usually does, during that time of year.”³⁷ This mirrors what Swalley told employees at Sunman in
45 December.

³⁵ Tr. 688.

50 ³⁶ See GC Exh. 41, termination report. It had the notation that Sanderson was “eligible for rehire if work picks up.”

³⁷ Tr. 901.

Further undermining Swalley's testimony was his professed ignorance of the subject of ABC-required apprentice/journeyman ratios described in Charging Party's Exhibit 7, produced by the Respondent in response to a subpoena. He testified on cross-examination that he was not aware of such ratios and, moreover, did not even know who at ELC would be responsible for possessing such knowledge. It is inconceivable that a project manager of ELC, a member of ABC, who had primary responsibility for jobsite labor, would be so ignorant on this matter.

Trinosky

Trinosky was a journeyman electrician for ELC, first through National, from approximately September 2001 until March 5, 2002; and then directly as ELC's employee until February 2, 2003. His primary job assignments were at a K-Mart project, then Sunman and, finally, the Early Childhood School, Warren (Warren), where he was the supervisor until his replacement by Patterson in approximately mid-December 2002.

The General Counsel and the Union argue that Trinosky was never a statutory supervisory but a leadperson, and he testified that he considered himself the latter. However, Trinosky testified that he functioned in the same role as Corbly did. Thus, he assigned work to other ELC employees and coordinated the scheduling of work with the general contractor and other contractors on the job. He testified that in making assignments, he had to determine which employees could better perform the work. As I stated on the record, this reflects that he used independent judgment in making assignments, an indicia of supervisory authority under Section 2(11). Based on this and the record as a whole, I find that he was a statutory supervisor until his replacement by Patterson.

I note that Trinosky had a conversation with Passman a couple of weeks before the election, in which Passman told him it was his job to convince younger employees to vote against the Union. Presumably, if Trinosky were an employee, Passman's instruction would have constituted unlawful coercion and interference, but the General counsel has not alleged it as a violation. Moreover, the General Counsel has not alleged that warnings Trinosky received in November and early December 2002, during his tenure as a supervisor, violated Section 8(a)(3). Inasmuch as these warnings, which related primarily to Trinosky's performance as a supervisor, are neither alleged in the complaint nor advanced by the Respondent as justification for his layoff, I need not address them further.

In any event, in approximately mid-December 2002, Patterson replaced Trinosky as the supervisor at Warren. He testified without controversion that his authority over other employees then stopped, although Patterson consulted with him on occasion. By letter dated February 3, 2003, sent and received by fax that day by ELC and also sent by certified mail, the Union notified ELC that Trinosky was on the Union's organizing committee.³⁸

On February 5, 2 days later, Swalley laid Trinosky off.³⁹ Approximately 10 to 12 employees were working at Warren that day, including two journeymen who had more seniority than him. Trinosky testified there appeared to be at least another 3 months of work remaining on the project. He was never recalled or offered referral to a labor provider.

Swalley testified that Trinosky was a supervisor at the time of his layoff, and ELC no longer needed his services. However, prior to Trinosky's layoff, he had already been replaced

³⁸ GC Exh. 30.

³⁹ See GC Exh. 46, termination report. It had the same notation as Sanderson's.

by Patterson as supervisor and had resumed status as a journeyman electrician.

Grunde

5 Grunde was employed by ELC from mid-June 2002 until his layoff on February 17, 2003. His primary work locations were Wal-Mart and Indian Creek. Patterson was his supervisor at the former; Freese at the latter.

10 In November 2002, Dunbar asked him to be a member of the union organizing committee, he agreed, and the Union notified ELC accordingly, by letter dated November 25.⁴⁰

15 Grunde testified that in December 2002, when he was meeting with Swalley concerning his scheduled personnel review, Swalley said, "We got the letter. Can you tell me what this letter means to you?"⁴¹ Grunde replied that he was officially supporting making ELC a union shop. Grunde's recall of Swalley's response was not precise, but Grunde indicated that Swalley expressed unhappiness over the Union's organizing effort but said it was not directed against Grunde in any form.

20 On the day Grunde was laid off at Indian Creek,⁴² Swalley stated that things were slowing down and they had to lay off some people. He further said that things might pick up in a month or so when the project moved forward. There were seven employees at the jobsite that day (previously, the number had varied from three to ten). At the time of Grunde's layoff, ELC retained five employees with less seniority who were making the same or a higher hourly rate than Grunde.⁴³ Grunde was never referred to a labor provider or recalled.

25 Swalley testified that Grunde was laid off because work at the jobsite was "moving a little slow and I really didn't need anyone of his skill level."⁴⁴ Swalley went on to explain that he did not consider Grunde to be "mechanically inclined." Any claim that Grunde's performance had anything to do with his selection for layoff is undermined by the fact that Grunde had been employed since June 2002, and the Respondent furnished no evidence that he had ever received any verbal or written warnings concerning the quality of his work.

C. The Layoffs of Remaining Employees and the "Transition" to Labor Providers

35 Use of labor providers prior to March 14, 2003

40 Meier of All Trades and Wise of National appeared candid and forthcoming in answering questions, and they provided documentation corroborating their testimony. I also credit Freese and Corbly regarding the use of labor provider employees at their jobsites before and after the transition.

All Trades contracts labor in the construction industry and has had ELC as a customer or

45 _____

⁴⁰ GC Exh. 29, faxed and sent by certified mail that day.

⁴¹ Tr. 329.

⁴² See GC Exh. 40, termination report, containing the same notation as Sanderson's and Trinosky's.

50 ⁴³ See GC Br., app. A.

⁴⁴ Tr. 966.

client since approximately August 2000, providing it with electrical labor.⁴⁵ National has contracted electrical labor to ELC since the middle of 2001.⁴⁶

5 All Trades and National operate very similarly. Both pay the employees they refer, determining hourly pay rates using such factors as the type of job, prior earnings, experience, and assessed skills. They also pay their employees various fringe benefits and handle payroll and administrative functions. All Trades and National do not provide jobsite supervision or large tools or equipment, which remain the responsibilities of the client. Clients are able to direct referred employees to projects where they are needed.

10 Both companies charge a client with what is called a “multiplier”—a billing rate times the hourly rate paid to the employee.⁴⁷

15 Prior to the transition, employees of All Trades and National were used occasionally, when the workload was greater than ELC’s own employees could handle. The number of All Trades employees used by ELC varied. Some months, there were none; at other times, there could be 10 or 12. At Indian Creek, temporary employees were used when needed. They worked full 40-hour weeks but only for short periods of time. Prior to the March 2003, all of the Sunman electricians were ELC employees.

20 The transition

25 ELC employed about 15 electricians (helpers, apprentices, and journeymen) as of March 14, 2003, the date of the transition to labor providers. On or about March 7, ELC mailed to employees a letter notifying them of the transition.⁴⁸ It opened by saying, “The fluctuations in our work load and the need for flexibility is causing ELC Electric to transition its business practices” and went on to state that some of the workforce would be added to the management team, while all other employees would be offered assistance in locating to labor providers. Enclosed was a placement assistance form to complete and return to ELC, which would forward it to a labor provider.

30 On March 14, 13 electrical employees were laid off, including Adair and Tim Grow. General Counsel’s Exhibit 12 is a sample of the termination letter that they received. Two previously nonsupervisory employees—Clint Beck and Josh Graham—were promoted to supervisors and continued in that capacity as ELC employees. ELC retained its managers, Passman and Swalley; and its supervisors, Corbly, Freese, Patterson, and Richard Shuster. I credit Freese’s testimony and find that the job duties of ELC supervisors did not change after the transition. Van Treese and other office personnel have also continued to remain ELC employees, and Calvert conceded that administrative overhead has stayed the same.

40 Swalley told Adair and Grow at the time they were laid off at the Lawrence Township Fire Department jobsite (Lawrence) on March 14, to report back to that location the following

45 ⁴⁵ See GC Exh. 19.

46 ⁴⁶ See GC Exh. 23.

47 ⁴⁷ For All Trades, the current multiplier is 1.36 on straight rate, meaning that the client pays \$1.36 per \$1 paid to the employee, and 1.30 on overtime work. For prevailing or common wage jobs, the multiplier is 1.33 for straight time. See GC Exhs. 20, 21, & 62. For National, the multiplier ranges from between 1.45 and 1.60, based on the dollar amount and the length of time for the job.

48 ⁴⁸ GC Exh. 11, a sample.

Monday. Swalley asked Adair to return the handbook, but not ELC's hat or safety glasses.

Adair and Grow, along with 10 of the other 11 employees laid off on March 14, returned to ELC jobs the following week as employees of All Trades. They remained under the supervision of ELC. Adair and Grow reported back to Lawrence. Adair later worked as an All Trades employee at other projects of ELC, including Indian Creek and Warren. He testified without controversy that when he worked for ELC as an All Trades employee, his rate of pay remained the same, he continued to go to Passman or Swalley with requests for vacation or other absence, and nothing changed other than the name of the issuer of his paycheck.

Since the transition, there have been an average of approximately 15 employees of labor contractors working at Indian Creek: approximately 80 percent are from All Trades, with the remainder from National. Indian Creek remains an ongoing project.

General Counsel's Exhibit 60 reflects that as of the week of July 23, 2003, 21 All Trades employees were assigned to ELC, to six different sites, including Indian Creek (11 employees). Seventeen of the 21, and all of those at Indian Creek, worked 30 or more hours that week. One of those employees was Tucker, who worked there fulltime for 4 or 5 weeks. After March 2003, two employees (more, if needed) from All Trades have been performing work at Sunman.

As reflected in General Counsel's Exhibits 63 and 64, in the months of June through August 2003, National provided four employees to ELC at Indian Creek. There are no National employees currently on ELC projects.

The reasons for the transition

Calvert, the sole owner and 100-percent shareholder of ELC, testified that he alone made the decision to implement the transition in March 2003. His testimony on the subject, consistent with his testimony in general, smacked of evasion, was replete with internal inconsistencies, and was frequently contradicted by other witnesses of the Respondent. Calvert demonstrated an attitude of defensiveness, sometimes crossing over into argumentative, and at times appeared to show a contemptuous indifference to providing responsive answers.⁴⁹ For these reasons, I find his testimony about the transition unreliable and not to be credited. The following testimony reflects his patent unreliability as a witness.

Calvert continually professed lack of knowledge or uncertainty about matters that I would expect the sole owner and 100-percent shareholder of a small company to know. Thus, his testimony about his types of customers and the percentage of his business in each category was hopelessly confusing and vague. He could only make "a wild guess" what percentage of the business was for retail stores or what percentage was for institutional customers. Similarly, when asked whether he recalled when the Wal-Mart project and the Sunman project started and ended, Calvert said he could not.

As to when he decided to transition to labor providers, Calvert was evasive and ambiguous, as the following reflects:⁵⁰

⁴⁹ For example, when asked when the transition occurred, he testified, "I believe, August or September [2002]" (Tr. 37), even though his counsel then immediately stipulated that it took place on March 14, 2003.

⁵⁰ Tr. 99-100.

A. We had—we had thought—about doing it several years ago. We had talked about it in various meetings, staff meetings . . . I can't give you an exact time and date when I started working on doing it.

* * * *

5 Q. Who did you talk to in the staff meetings, and when was that?

A. I don't have dates. And I don't have the exact people that . . . I had discussed things with.

10 Later, when asked for how long he had been planning the transition, he replied, for at least 1 to 2 years.

When asked how long it was between the time he made the decision to use labor contractors and when he communicated the decision to employees, he answered, "I can't tell you. I don't really know."⁵¹

15

When asked when he had discussions with All Trades about the transition, his response was, "I 'm not sure about the dates."⁵²

20 When asked how many ELC projects were going on in March 2003, at the time of the transition, his answer, once more, was, "I don't really know."⁵³

When asked how many employees of labor providers ELC presently employs, he replied, "I don't know."⁵⁴

25 When asked how many projects ELC currently is working on, he answered, "It could be five. There again, I don't really know."⁵⁵

30 After he testified that ELC has used an outsource payroll company rather than ELC office personnel, he was asked when this started. He replied, "I'm not sure," and when next asked if it was under or over 2 years ago, again answered, "I'm not sure."⁵⁶

35 Calvert also was frequently inconsistent in his testimony on important matters. Thus, he first testified that ELC had one major ongoing project at the time of the trial but later testified that he had to look at his books to determine if either Indian Creek or Southport is now the largest, clearly implying that there are two, not one, "major" ongoing project. Swalley also contradicted Calvert, testifying that ELC currently has four "large" school projects.

40 Calvert also shifted in answering why he decided to transition employees from ELC to labor providers. He initially testified that the reasons were for increased productivity and profitability, stating nothing about the workload at the time. Later, however, he testified the decision was made in March because "[o]ur workload was down with projects that we were finishing up."⁵⁷ Still later, however, he reverted to his earlier answer, and said that transition was made because, "First of all, health insurance was extremely high. There are so many

45 ⁵¹ Tr. 102-103.

⁵² Tr. 118.

⁵³ Tr. 113.

⁵⁴ Tr. 39.

⁵⁵ Tr. 127.

50 ⁵⁶ Tr. 101.

⁵⁷ Tr. 171.

employee laws and regulations anymore, we didn't feel like our present staff could keep up with them. . . ."58

5 Any claim by Calvert that workload played a role in the decision to implement the transition was totally undermined by Passman, who testified as follows.⁵⁹

Q. You said that at the time you made the transition to eliminate your whole labor force, that things were slowing down; correct?

A. No, not at the time of the transition. I don't believe I said that.

10 Passman went on to say that the workload at the time of the transition was substantially the same as before. Passman's testimony on this was implicitly supported by Swalley's remarks to Adair on March 10, as will be described subsequently. I so find as a fact that the level of work was not down in March 2003.

15 Jerry Tucker, who is not a union member, has worked as a journeyman electrician for ELC through All Trades on several occasions. The most recent was from June 1 until August 12, 2003, when he was laid off.

20 Tucker had three conversations with Swalley regarding employment: the first was on December 31, 2002. at the ELC Tractor Supply, Greenfield site; the second and third were on January 7 and March 14, 2003, respectively, at Warren. Although his recollection of exact words was not precise, particularly in the first conversation, Tucker appeared sincere. While Tucker testified about three specific conversations with Swalley, Swalley could not recall any
25 conversations with Tucker present in December or January, and in his testimony he did not address the March 14 conversation as related by Tucker, which therefore went rebutted. For these reasons, I credit Tucker's testimony.

30 Swalley rarely spoke with Tucker, other than to greet him, but in December, Swalley initiated the conversation. Swalley stated that he wanted to hire Tucker and Wes Fink, another All Trades employee, but couldn't "because of all the union stuff." He further said that the Union wanted to run him out of business. Tucker, afraid of sounding prounion, responded to the effect that he thought the Union was unfair. In the January conversation, Swalley approached Tucker and stated that he wanted to hire Tucker and to get rid of a couple of other people for various
35 reasons, but he couldn't just hire and fire whomever he wanted because he was afraid of getting sued by the Union.

40 After a layoff, Tucker was reassigned to Warren on March 14. That day, he told Swalley that he was glad to be back to work. Swalley responded that for all practical purposes, he was an employee of ELC. Swalley further said that Tucker and Fink were the kind of employees he wanted to keep. At Indian Creek, Tucker's last assignment for ELC, Freese was his supervisor.

45 Adair, an employee of ELC since July 8, 2002, testified that on March 10, 2003, Swalley came to him and Grow at Lawrence. He gave them enrollment forms for All Trades and said that they had to fill them out and give them back to him in order to continue working at the project. When Grow asked why, Swalley stated, "off the record," that ELC was doing this because of all of the pending lawsuits and the problems with the Union; Swalley also said that everybody but a few individuals who were going to be kept as managers had to switch to All

50 ⁵⁸ Tr. 1015.

⁵⁹ Tr. 917-918.

Trades.

Swalley made a general denial about having any conversations about the Union that day but did not specifically deny the statements Adair attributed to him. When Swalley was asked what he told Grow and Adair on that occasion, he did not give a direct answer, testifying, almost apologetically, "Basically I was just as surprised as they were. I had just found out about it the day before. And I was just instructed to give them the letters. . . . We were all kind of confused as to what was going on It happened very quickly, It caught me by surprise."⁶⁰

In light of my conclusion that Adair was a credible witness, as detailed earlier, and Swalley's somewhat nonresponsive answer, I credit Adair's version of what Swalley said regarding the reasons for the transition. Swalley's testimony about his reaction to finding out about the transition did seem spontaneous and genuine, and I credit it.

III. Analysis and Conclusions

A. The Respondent's Conduct Before the July 2002 Strike

I will first address the allegations in the complaint of independent violations of Section 8(a)(1) and then turn to the alleged discrimination against Krebs, Dunn, and Leineweber.

Paragraph 5(a) relates to Swalley telling Krebs at Sunman on about July 9, 2002, that he had to complete insurance forms. Although the complaint alleges that Swalley "informed employees they would be discharged unless they completed insurance forms because those employees engaged in union activity," the record does not reflect that Swalley said anything about union activity in his conversations on the subject with Krebs, either directly or indirectly. Accordingly, I recommend dismissal of this allegation.

Paragraphs 5(b), (c), (d), and (k) all relate to Patterson's conduct at Wal-Mart in mid-July. In her conversations with employees at the gangbox on July 12 and 16, Patterson told them that they could not talk about the Union on worktime. There is no evidence that employees were previously told they could not talk about nonwork matters on company time and, indeed, Supervisor Freese testified that employees were permitted to talk about anything they wanted on the jobsite, as long as it did not interfere with production. Patterson never notified employees that she was rescinding the new rule. Accordingly, Patterson, by promulgating and maintaining a rule prohibiting employees from discussing or soliciting only on behalf of the Union violated Section 8(a)(1). See *ITT Industries*, 331 NLRB 4 (2000); *Emergency One*, 306 NLRB 800 (1992). Therefore, I sustain the allegation in paragraph 5(b).

Patterson singled Dunn out, both one-on-one and before a group. She called him a union "mole;" told other employees not to talk to him about the Union, to stay away from him, and to avoid giving him personal information; said she would fire him if she could; said she would give him "crap work" if there was any to be done; and finished by saying that other employees could not "reach him" on company time but "I don't care what you do to him after that." I find that her statements, all directed against Dunn, included an implicit threat of physical violence (indeed, she seemed to encourage it), an implicit threat of more onerous work assignments, denigration, and an instruction to employees not to discuss the Union with him. Accordingly, I sustain all of the allegations in paragraph 5(c).

⁶⁰ Tr. 951-952.

Paragraph 5(d) relates to Patterson's assigning Dunn and Leineweber to work together on July 17. Leineweber testified without controversy that Patterson told him he was being assigned to work with Dunn, "so we couldn't spread the union shit to other E.L.C. employees." I find sustained allegation (d)(i), that she told employees they were being isolated because of their support for the Union. Subparagraph (d)(2) further alleges that by isolating them, Patterson created the impression among employees that their union activities were under surveillance. However, prior to this, both Dunn and Leineweber wore union shirts to work, and the Union sent letters to ELC stating that they were on the organizing committee. Their union affiliation therefore was open and known, rather than covert. Patterson said nothing to suggest that her knowledge of their activities was based on anything else. Contrast, *Peter Vitale Co.*, 310 NLRB 865, 874 (1993). Accordingly, I recommend this allegation be dismissed.

Paragraph 5(k) concerns Patterson's statements to Leineweber on July 18 and 19. The first was that if he was going to go union, she did not understand why he did not just leave; the second, that if Dunn had gone union, why Leineweber did not go with him. The General Counsel alleges this constituted solicitation to quit his employment. Although I would characterize her statements as implied threats of termination (see *McDaniel Ford*, 322 NLRB 956 (1997)), I conclude that they also amounted to such solicitation and therefore violated Section 8(a)(1) on that basis.

Turning to the allegations of discrimination, the framework for analysis is *Wright Line*, 251 NLRB 1083 (1980), *enfd.*, 662 F.2d 889 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of such animus.

Direct evidence of an antiunion motive in discharge cases is often lacking and, for that reason, reliance on circumstantial evidence, and reasonable inferences deriving there from, is appropriate and often necessary. *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995); *NLRB v. Warren L. Rose Castings*, 587 F.2d 1005, 1008 (9th Cir. 1978); *McGraw-Edison Co. v. NLRB*, 419 F.2d 67, 75-76 (8th Cir. 1969). Thus, "Illegal motive has been implied by a variety of factors such as 'coincidence in U activity and discrimination.' . . . 'general bias or hostility toward the union' . . . 'variance from the employer's normal employment routine' . . . and 'an implausible explanation used by the employer for its action'" *McGraw-Edison Co. v. NLRB*, *Id.* at 75.

Under *Wright Line*, if the General Counsel establishes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a motivating factor in the employer's action. The burden of persuasion then shifts to the employer to show that it would have taken the same adverse action even in absence of the employee's protected activity. *NLRB v. Transportation Corp.*, 462 US 393, 399-403 (1983); *Kamtech v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Serrano Painting*, 332 NLRB 1363, 1366 (2000); *Best Plumbing Supply*, 310 NLRB 143 (1993). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting*, *supra* at 1366, citing *Roure Bertrand Dupont*, 271 NLRB 443 (1984).

Although the Board cannot substitute its judgment for that of an employer and decide what would have constituted appropriate discipline, the Board does have the role of deciding

whether the employer's proffered reason for its action was the actual one, rather than a pretext to disguise anti-union motivation. *Detroit Paneling Systems*, 330 NLRB 1170 (2000); *Uniroyal Technology Corp. v. NLRB*, 151 F.3d 666, 670 (7th Cir. 1998).

5 Prior to the actions of the Respondent alleged to be discriminatory, Krebbs, Dunn, and
Leineweber all had engaged in union activity, and the Respondent was aware of such. Thus,
Dunbar faxed a letter to ELC on July 8, 2002, stating that Krebbs was chairman of the
organizing committee, and faxed letters to ELC on July 15 and 17, stating that Dunn and
10 Leineweber were on that committee. Moreover, before any action was taken against Dunn and
Leineweber, they had worn their union shirts to work.

 Specific animus directed against Dunn and Leineweber is evidenced by Patterson's
8(a)(1) statements to them. Indeed, Patterson expressly told Leineweber on July 17 that she
was assigning him to work with Dunn so they would not "spread the union shit" to other
15 employees, and on the morning of July 18, both Patterson and Swalley made remarks to him
expressing anti-union animus.

 As to Krebbs, animus can be inferred from the fact that the conduct against him occurred
almost immediately after the Respondent learned of his union activity and the animus previously
20 demonstrated by Patterson. ELC is small company run by Calvert as the sole owner, and I
believe that Supervisor Patterson's statements about the Union were made not sua sponte but
with the approval, express or tacit, of higher management.

 The actions taken with regard to Krebbs included management's asking for the return of
25 his lockbox key, Swalley demanding he complete health insurance papers, and Corbly giving
him an assignment that he could not complete in the time he was given. Regarding Dunn and
Leineweber, Patterson isolated them from other employees and assigned them to work together
on cleanup.

 The threshold issue regarding Krebbs is whether the actions taken against him were
30 adverse. As to Swalley's taking away his key, Krebbs testified that it aggravated him "a little"
but had no effect on his work. Regarding the job assignment on July 10, which Krebbs did not
finish in time, Corbly said nothing about his failure to complete it, issued no warning, and
instead merely gave him another assignment. Krebbs continued working for ELC until on about
35 July 19, when he went out on strike. I conclude that these actions of the Respondent did not
rise to the level of acts of discrimination violating Section 8(a)(3).

 On the matter of the health insurance papers, Krebbs testimony was not credible.
Although he denied having being told earlier that he had to fill out an election form, Van Treese
40 had sent him a letter dated June 5, specifically asking him to do so by June 21. In any event, I
find it difficult to see how telling an employee to complete an election form, accepting or waiving
a fringe benefit, has any kind of coercive or otherwise negative impact on the employee.
Assuming arguendo that the Respondent's insistence that Krebbs fill out the form was an
adverse action, based on Van Treese's letter and Swalley's testimony, I conclude that the
45 Respondent acted in conformity with its normal practice and had a legitimate business reason,
to wit, documentation of an employee's wishes. I therefore conclude that the Respondent has
met its burden of persuasion of showing that it would have demanded Krebbs submit the form in
the absence of his union activity.

50 Based on the above analysis, I conclude that the allegations of discriminatory conduct
against Krebbs should be dismissed.

Turning to Dunn and Leineweber, I credit the latter's testimony that Patterson told him on the morning of July 17 that she was assigning him to work with Dunn to prevent them from talking about the Union to other employees. Patterson did not testify, and the Respondent has failed to meet its burden of persuasion of showing that they would have been segregated absent their union activity. Accordingly, this violated Section 8(a)(3) and (1).

Concerning Patterson's assignment of Dunn and Leineweber to sweep and otherwise clean up on July 18, cleanup was a task rotated among employees. However, the timing of the assignment vis-à-vis statements that Patterson and Swalley made to Leineweber that morning raises a strong inference that the action was motivated by animus. Patterson did not testify, and I conclude that the Respondent has failed to meet its burden of persuasion of showing it had a legitimate business reason for pulling Dunn and Leineweber off their electrical job and having them perform the less desirable work of cleanup for the remaining 6 hours of the workday. See *L.S.F. Trucking*, 330 NLRB 1054 (2000); *Bestway Trucking*, 310 NLRB 651 (1993). Therefore, I conclude that this assignment constituted unlawful discrimination in violation of Section 8(a)(3) and (1).

B. The Strike in July 2002

The above conduct of ELC constitutes the sole evidence of employer action alleged to have constituted prestrike unfair labor practices. The Union's letter of July 19, 2002, announced that Dunn, Krebbs, George Nichols, and Robert Nichols were going out on strike, due to discrimination against each of them. However, although Robert Nichols testified, he did not testify about any actions taken against him by ELC, and the record does not reflect any actions taken against George Nichols. The letter of July 29 regarding Leineweber going out on strike added his name to the list of alleged discriminatees.

As I stated at the trial, the fundamental issue here is whether the above-named employees went out on "strike." The Taft-Hartley Act added a definition of "strike" to the Act that reads as follows:

- (1) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.⁶¹

In determining the existence of strike activity, the Board has distinguished between an employee's withholding of services pending desired remedial action by the employer, and abandonment of employment with no intention of returning. The latter activity, whether undertaken individually or in concert, is unprotected. *Greyhound Food Management*, 198 NLRB 1146 (1972); *Crescent Wharf & Warehouse Co.*, 104 NLRB 860, 861-862 (1953). This is so even if the concerted action resulted from dissatisfaction with wages or working conditions (*Essex International*, 222 NLRB 121 (1976); *Eaborn Trucking Service*, 156 NLRB 1370 (1966)), or it was in protest of the discharge of another employee (*Fashion Fair*, 163 NLRB 97 (1967)).

George Nichols did not testify about the circumstances surrounding his cessation of work for ELC, and I therefore conclude that he has failed to show that he was a striker. Corbly testified without controversy that Krebbs stated that he had to stop working because his mother was in the hospital and that he would get back in touch when he would be able to return

⁶¹ 29 U.S.C. §142(2).

to work. Krebbs, in fact, went to work for another company about a week or so after he left ELC. I conclude in these circumstances that Krebbs voluntarily quit his employment rather than became a presumptive striker.

5 I now address the remaining strikers: Dunn, Leineweber, and Robert Nichols. Almost simultaneously with their signing of letters to ELC that they were going out on strike, all of them received union hiring hall referrals to union employers, for whom they began work almost immediately. After they left ELC's employ and sent the letters, they never took any other action in support of their purported strike, otherwise returned to ELC jobsites, or engaged in any other
10 conduct evidencing an interest in ever returning to work for ELC. Obtaining employment after going on strike does not ipso facto establish that an employee quit his or her job. *Noel Corp.*, 315 NLRB 905, 909 (1994). Here, however, the employees got new jobs at the same time they ceased working for the Respondent. The close timing and other circumstances suggest that they knew they already had new jobs at the time they signed their letters to ELC.

15 In light of all of the above circumstances, I conclude that Dunn, Leineweber, and Robert Nichols voluntarily quit the Respondent's employ with no intention of returning, rather than engaged in a bona fide strike, whether characterized as unfair labor practice or economic. It follows that they were not eligible to vote in the September 26, 2002, election.

20 I therefore sustain the challenges to the ballots of all five alleged strikers.

C. The Respondent's Conduct After the "Strike" and Before the Election

25 Paragraph 5(e) concerns Patterson's telling Thacker on at least five occasions in late July and early August 2002 that he could not talk about the Union on worktime, a reiteration of the rule she announced at the gangbox in July. For reasons previously explained, I conclude that this violated Section 8(a)(1). I also conclude that constituted an additional basis for setting
30 aside the election.

Paragrapahs 5(l)(i) and (ii) of the complaint relate to the conversation between Swalley and Adair following the preelection meeting Swalley and Passman held with employees at Sunman on September 19. Swalley said that he had heard that Adair was prounion. Adair said
35 no and asked who had said that. Swalley did not answer. I conclude that Swalley's statement created the impression of surveillance and implicit interrogation of Adair concerning his union sympathies (as reflected by Adair's response). Therefore, I sustain these allegations.

Turning to the Union's objections to the election, Objection 1 relates to paragraph 5(f) of
40 the complaint, which alleges that Passman at the above preelection meeting impliedly promised employees improved benefits if they did not select the Union as their collective-bargaining representative. The subject of benefits was not contained in Passman's presentation. Rather, an employee asked if the Company was going to try to get better health insurance, and Passman responded that ELC was seeking to improve employees' health insurance benefits. I
45 conclude that his answer did not expressly or implicitly associate an increase in benefits with the employee's rejection of the Union. Therefore, I conclude that he did not unlawfully promise a benefit. See *LRM Packaging*, 308 NLRB 829 (1992).

Accordingly, I overrule Objection 1.

50 Objection 2 concerns the pay raises that were given to Grunde and Thacker in September 2002, presumably because they enrolled in the apprenticeship program.

The conferral of benefits to employees during the critical period is not per se grounds for setting aside an election. The focus of the inquiry is whether the benefits were granted for the purpose of influencing the employees' votes and were of a type reasonably calculated to have that result. *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *Lampi, L.L.C.*, 322 NLRB 502 (1993); *United Airlines Services Corp.*, 290 NLRB 954 (1988). There is an inference that benefits conferred during the critical period are coercive, but the employer may rebut this by showing that it had a valid reason separate and apart from the pending election, such as following an established practice. *Lampi*, supra; *Uarco*, 216 NLRB 1, 2 (1974). Whether the employer committed other unfair labor practices during the same time period is a relevant factor. *Lampi*, supra at 503.

Here, the policy handbook is silent on the matter of an employee receiving a pay raise for enrolling in an apprenticeship program. The Respondent submitted absolutely nothing in writing to establish that it had a policy of giving pay raises for that reason or that any other employees ever received them. In the absence of such evidence, and in light of the Company's commission of numerous unfair labor practices in September, I cannot conclude that the Respondent has rebutted the inference that the pay raises granted to Grunde and Thacker were designed to influence their votes in the election. Consequently, their pay increases constitute a ground for setting aside the election.⁶² *Lampi*, supra.

Therefore, I sustain Objection 2.

Objection 3 relates to posting of the notice of election. Admittedly, ELC posted the notice to employees only in the main breakroom at the office and in the warehouse, where employees did not report before going to their jobsites. It did send, by certified mail, a letter to employees telling them the details of the election.

Section 103.20 (a) of the Board's Rules and Regulations, 29 C.F.R. § 103.20(a), provides that "Employers shall post copies of the Board's official Notice of Election in conspicuous places at least 3 fully working days prior to . . . the day of the election." This requirement is mandatory in nature and may not be satisfied by alternative means of communication to employees. Thus, in *Terrace Gardens Plaza*, 313 NLRB 571, 572 (1993), the Board, in disagreement with the Regional Director, found an employer's mailing of the notice to employees in lieu of posting inadequate to satisfy the posting requirement. Here, ELC did not even mail the notice itself but instead communicated election details in letters that urged employees to vote against the Union.

The failure to comply with the notice requirement is an ipso facto ground for setting aside an election. No inquiry is made into whether the failure had any actual impact on whether employees voted. *Terrace Gardens Plaza*, supra at 572; *Smith's Food & Drug*, 295 NLRB 983 at fn.1 (1989).

Accordingly, Union's Objection 3 is sustained.

D. Violations of Section 8(a)(1) After the Election

Paragraph 5(g) relates to Swalley's conversations with Sanderson and Grunde on December 18, 2002, during their performance reviews. It is alleged in 5(g)(i) that Swalley interrogated employees about their union activities, and in 5(g)(ii) that he informed employees

⁶² The General Counsel does not allege the pay increases as an unfair labor practice.

that employees would be laid off because of such activities.

5 Interrogation of employees is not per se unlawful. The Board looks at whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Emery Worldwide*, 309 NLRB 185,186 (1992); *Rossmore House*, 269 NLRB 1186 (1984). In *Rossmore House*, the Board held it was no violation to question open and active union supporters about their union sentiments, unaccompanied by threats or promises.

10 Sanderson initiated mention of the Union and opined that Patterson would not give him a fair review because of his union affiliation. Swalley replied this was nonsense. Sanderson stated he did not feel he had a future with the Company and would be selected for termination because of his union affiliation, to which Swalley responded, "Hogwash." It was then that Swalley kept asking Sanderson if he was so prounion, why he went to work for a merit shop.

15 Thus, Sanderson triggered the discussion about the Union and his union affiliation, Swalley denied there would be retaliation against him for that affiliation, and Swalley's questions did not seek any information but were merely rhetorical in nature. Even if Swalley's questions are characterized as "interrogation," under all the circumstances, such interrogation was not
20 coercive.

25 However, when Sanderson asked whether there would be a layoff and what criteria would be used for selection for layoff, Swalley gratuitously responded that ELC would try to keep its "loyal" employees. This occurred after their lengthy discussion about the Union and immediately after Sanderson stated he was there to organize employees and Swalley's comment questioning whether it was fair that someone who just got hired could force other people to go union. In this context, Swalley's statement about keeping loyal employees logically referred to employees who did not support the Union, and was therefore not overly ambiguous. Accordingly, I conclude that Swalley's statement was coercive.

30 In contrast to Swalley's conversation with Sanderson, Swalley raised the subject of the Union in his conversation with Grunde, by asking the meaning of the letter announcing Grunde was a member of the organizing committee. Swalley expressed unhappiness about the organizing effort, undercutting his assurance to Grunde that the unhappiness was not directed
35 against him. The conversation took place in the context of Grunde receiving his performance review. In all of these circumstances, I conclude that Swalley's interrogation was coercive and violated Section 8(a)(1).

40 Based on the above, I sustain allegation 5(g)(i) (interrogation of Grunde) and allegation 5(g)(ii).

45 Paragraphs 5(h) and (i) concern Swalley's conversations with All Trades employee Tucker on December 31, 2002, and January 8, 2003, respectively, and allege that Swalley informed employees they could not be hired on a permanent basis because ELC employees had engaged in union activity. Inasmuch as Swalley's conversations with Tucker concerned the latter's being employed by ELC, I will consider Tucker to have been an applicant for employment and thus to have occupied the status of employee for 8(a)(1) purposes. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *J. L. Philips Enterprises*, 310 NLRB 11 (1993). The Respondent has not contended otherwise.

50 In the December conversation, Swalley stated that he wanted to hire Tucker and another All Trades employee but could not do so "because of all the union stuff." He further stated that

the Union wanted to run him out of business. In the January conversation, Swalley volunteered that he wanted to hire Tucker and get rid of a couple of other people “for various reasons,” but he could not just hire and fire whom he wanted because he was afraid of getting sued by the Union.

5

An analysis of whether Swalley’s statements violated Section 8(a)(1), as with employer interrogation, hinges upon whether or not they were coercive. I deem it dispositive of this issue the fact that Swalley rarely engaged in conversation with Tucker but on those two occasions approached Tucker and accused the Union of being responsible for his not being able to obtain permanent employment with ELC. Swalley’s statements had the natural effect of discouraging union activity or support, and, indeed, Tucker testified that he was afraid of voicing his pronoun sentiments in response. I conclude, therefore, that Swalley’s statements were coercive of Tucker’s Section 7 rights, and I sustain the allegations in paragraphs 5(h) and (i).

10

15

Finally, the allegations in paragraphs 5(j)(i) and (ii) pertain to Swalley’s conversation with Adair on March 10, 2003. Swalley told him that ELC was laying off employees and converting to the use of temporary labor services because of “pending lawsuits and the problems with the Union.” I conclude that such statements were coercive and that these allegations therefore have been sustained.

20

E. Actions Taken Against Thacker After the Election

On September 26, 2002, Thacker received a written warning immediately upon returning from serving as the Union’s observer at the election. The element of animus is established by violations of Section 8(a)(1) committed prior to September 26 by the Respondent. In any event, the timing of the issuance of the warning—on the same day Thacker served as the Union’s observer—gives rise to the inference of animus. See *Olathe Healthcare Center*, 314 NLRB 54 (1994); *NLRB v. Rain-Ware*, 732 F.2d 1349, 1354 (7th Cir. 1984). The General Counsel has therefore established a prima facie of discriminatory conduct under *Wright Line*.

25

30

As detailed earlier, Freese’s testimony—credible in general—was markedly confusing and contradictory regarding why he issued Thacker a written warning on September 26 for what Thacker had allegedly done the day before. Further, it was not consistent with ELC’s documentation of the incident. A company’s shifting of reasons for imposition of discipline is frequently indicative of discriminatory motive. See, e.g., *Central Cartridge*, 236 NLRB 1232 (1978). Moreover, this was the first occasion when either Passman or Swalley instructed Freese to prepare a formal written memorialization of an incident involving an employee coming in late, and no explanation was offered for this unusual step. It is also significant that Thacker had received no prior warnings, oral or written, for absenteeism or tardiness but was issued a written warning instead of a verbal one.

35

40

I conclude, therefore, that the Respondent has failed to meet its burden of persuasion of showing that Thacker would have received the written warning had he not engaged in union activity. Therefore, its issuance violated Section 8(a)(3) and (1).

45

The General Counsel also contends that Swalley’s refusal to reassign Thacker to work at another jobsite on September 27 was discriminatory. Again, the General Counsel has established the elements of union activity, knowledge, and animus. The pivotal question here is whether the “action” element has been met, to wit, whether the General Counsel has shown that there was other work available to which Thacker was not assigned.

50

There is no dispute that it was raining on September 27, that no other employees

besides Thacker were assigned to Indian Creek, and that there were previous occasions when Thacker was sent home on rain days rather than having been reassigned to work at other jobsites.

5 The fundamental problem is that the General Counsel has not established, let alone identified, other work that Thacker could have performed that day, either in terms of jobsites or number of hours. The Respondent has claimed there was none, and the General Counsel has provided no evidence to contradict that assertion. In these circumstances, I conclude that the General Counsel has failed to make a prima facie showing that the Respondent refused to
10 reassign Thacker to available work and recommend that this allegation be dismissed.

F. The Layoffs of Sanderson, Trinosky, and Grunde in January and February 2003

15 The elements of union activity and employer knowledge thereof are satisfied for these employees by their agreeing to serve on the Union's organizing committee and by the Union's notification thereof to ELC. Swalley alluded to such notification when he spoke with Grunde on December 18. On that same day, Sanderson expressly told Swalley he was a union supporter. In terms of animus, I have found that agents of ELC committed numerous independent
20 violations of 8(a)(1) in the time period from September 2002 to March 2003, including Swalley's interrogation of Grunde and his remark about loyal employees to Sanderson on December 18. All three employees were laid off. I conclude that the General Counsel has established prima facie cases of unlawful termination under *Wright Line*.

25 Turning to the Respondent's defenses for the layoffs, the Respondent submitted no documentation showing specifically what work levels were at the times of these layoffs and how they compared with work at the end of 2002.

30 Although Swalley testified that Sanderson and the other journeyman at Sunman were laid off on January 9 because work was slow, Corbly, the job supervisor, did not corroborate this justification. Certainly, Corbly had much more firsthand knowledge of the work at the site than Swalley, and his testimony seriously undermined the Respondent's proffered ground for Sanderson's layoff. Further, Sanderson testified that employee Hamilton was not laid off, even though he had had a break in service that caused him have less seniority than Sanderson. The
35 handbook provision on break in service, on its face, supports Sanderson's assertion. The Respondent did not controvert Sanderson's testimony and, indeed, offered no evidence at all on this point.

40 According to Swalley, Trinosky was a supervisor at the time of his layoff on February 5, and the Respondent no longer needed his services. Inasmuch as Trinosky was replaced as supervisor by Patterson the previous December, this asserted justification must fail. The Respondent has not provided any other reason for why Trinosky was selected for layoff.

45 Finally, as to Grunde, on February 17, the day he was laid off, ELC retained five employees with less seniority who were making the same or a higher hourly rate than he was. Swalley testified Grunde was laid off because work at the site was "a little slow" and because he considered Grunde to lack mechanical abilities. As previously stated, the latter reason is undermined by the fact that Grunde had been employed since June 2002 and never received any verbal or written warnings concerning the quality of his work. The Respondent offered no
50 other reasons for why he was chosen for layoff.

In the absence of supporting documentation, conflicting statements from the

Respondent's witnesses as to the volume of work in early 2003, and the Respondent's failure to establish bona fide reasons why Sanderson, Trinosky, and Grunde were selected for layoffs, I conclude that the Respondent has failed to meet its burden of persuasion of showing that they would have been laid off but for their having engaged in union activities. Accordingly, their layoffs violated Section 8(a)(3) and (1).

G. The Transition to Labor Providers in March 2003

At the time of the transition on March 14, 2003, the Union's objections to the election were still pending before the Regional Office. The Respondent had already committed numerous unfair labor practices, including the recent layoffs of Sanderson, Trinosky, and Grunde. Swalley had told employees Adair and Grow on March 10 that ELC was laying them off and changing to the use of labor providers because of pending lawsuits and problems with the Union. Prior to March 2003, the Respondent had used employees of labor providers only on an on-needed basis, to supplement the work of regular ELC employees. After March 14, most of the work on ELC jobs were performed by electricians who had been previously employed by ELC, and they continued under the supervision of ELC supervisors. Some continued on the same ELC jobsites where they had worked prior to March 14. Managers, supervisors and office personnel all remained in ELC's employ after March 14. In sum, very little changed after the transition other than the elimination of electrical employees as ELC employees.

In light of these factors, I conclude that the General Counsel has established a prima facie case that ELC laid off its employees on March 14, 2003, because of their union activities, to wit, to avoid having further NLRB proceedings and the risk that the Union might ultimately be certified as the collective-bargaining representatives of its employees.

Calvert alone made the decision to eliminate ELC employees who performed electrical work and to switch to the use of labor contractors. As I previously detailed, his testimony on the reasons he made the decision—and his testimony in general—was evasive, inconsistent, and contradicted by other agents of the Respondent.

Specifically as to why he made the decision, Calvert gave three reasons during the course of his testimony. He initially testified it was for increased productivity and profitability, but he offered no elaboration on how the transition would accomplish this. Later, he testified the reason was because "our workload was down," an assertion directly contradicted by Passman, vice president of operations, who testified that the workload at the time of the transition was substantially the same as before. General Superintendent Swalley's testimony that he was very surprised to learn of the transition also implicitly contradicts Calvert's assertion that workload was a bona fide reason for the transition. Still later in his testimony, Calvert stated that the transition was made because he did not feel his administrative staff could keep up with "so many employment laws and regulations," again offering no elaboration. As noted earlier, a respondent's offering shifting reasons for its actions frequently reflects discriminatory motive. Cf. *Central Cartridge*, supra.

In conclusion, Calvert's testimony on the transition was wholly unreliable and utterly failed to rebut the General Counsel's prima facie case that the layoffs of employees and switch to labor providers was motivated by legitimate business considerations rather than antiunion animus.

I conclude, accordingly, that the layoffs of ELC employees on March 14, 2003, and their having to work for ELC thereafter through labor providers violated Section 8(a)(3) and (1).

Conclusions – Case 25-RC-10131

I recommend that the challenges to the ballots of Christine Patterson a/k/a Christine Rossittis, Jason Dunn, Brad Krebbs, Corey Leineweber, George Nichols, and Robert Nichols be sustained and their ballots not opened or counted.

I recommend that Union's Objections 2 and 3 be sustained and that the election held on September 26, 2002, be set aside, and a new election ordered, due to objectionable conduct of the Respondent.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

3. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act.

(a) promulgated and maintained a rule prohibiting employees from discussing or soliciting on behalf of the Union.

(b) suggested physical violence against employees because they supported the Union.

(c) denigrated employees because they supported the Union.

(d) instructed employees not to discuss the Union with other employees.

(e) isolated employees from other employees because of their support for the Union.

(f) solicited employees to quit employment because they supported the Union.

(g) created the impression among employees that their union activities were under surveillance.

(h) interrogated employees concerning their union activities and sympathies.

(i) told employees they would be laid off because of their union activities.

(j) told prospective employees they could not be hired because the Respondent's employees had engaged in union activity.

(k) told employees they were being laid off and would be required to work through a labor provider because they engaged in union activity.

4. By assigning more onerous working conditions to Jason Dunn and Corey Leineweber; by issuing written discipline to Demarco Thacker; by laying off employees Bruce Sanderson, Jonathan Trinosky, and Mikalis Grunde; and by laying off all remaining employees and requiring them to apply for employment through a labor provider, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the

(f) Soliciting employees to quit employment because they support the Union.

(g) Creating the impression among employees that their union activities are under surveillance.

5

(h) Interrogating employees concerning their union activities and sympathies.

(i) Telling employees they will be laid off because of their union activities.

10

(j) Telling prospective employees they cannot be hired because ELC employees engaged in union activity.

(k) Telling employees they are being laid off and will be required to work through a labor provider because they engaged in union activity.

15

(l) Assigning more onerous working conditions to employees because of their union activities.

(m) Issuing written warnings to employees because of their union activities.

20

(n) Laying off employees because of their union activities.

(o) Requiring employees to apply for employment through a labor provider.

25

(p) 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.

30

(a) Within 14 days from the date of the Board's Order, offer Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, 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.

35

(b) Make Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, 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.

40

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful layoffs of Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, and, within 3 days thereafter, notify each of them in writing that this has been done and that the layoffs will not be used in any way against them.

45

(d) Within 14 days of the Board's Order, remove from its files any reference to the unlawfully written warning issued to DeMarco Thacker on September 26, 2002, and within 3 days thereafter, notify him in writing that this has been done and that the written warning will not be used in any way against him.

50

(e) 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.

5 (f) Reinstitute its practice of employing electrical employees as it existed prior to March 14, 2003.

10 (g) Within 14 days after service by the Region, post at its facility in Indianapolis, copies of the attached notice marked "Appendix."⁶⁴ Copies of the notice, on forms provided by the Regional Director for Region 25, 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 15 July 12, 2002.

20 (h) 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.

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

IT IS FURTHER ORDERED that the proceeding in Case 25-RC-10131 be severed and remanded to the Regional Director for Region 25 for further action consistent with this Decision.

30 Dated, Washington, D.C. April 7, 2004

35 _____
Ira Sandron
Administrative Law Judge

45 _____
50 ⁶⁴ 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."

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 promulgate and maintain a rule prohibiting employees from discussing or soliciting on behalf of the International Brotherhood of Electrical Workers, Local Union No. 481 (the Union).

WE WILL NOT suggest physical violence against employees because they support the Union.

WE WILL NOT denigrate employees because they support the Union.

WE WILL NOT instruct employees not to discuss the Union with other employees.

WE WILL NOT isolate employees from other employees because of their support for the Union.

WE WILL NOT solicit employees to quit employment because they support the Union.

WE WILL NOT create the impression among employees that their union activities are under surveillance.

WE WILL NOT interrogate employees concerning their union activities and sympathies.

WE WILL NOT tell employees they will be laid off because of their union activities.

WE WILL NOT tell prospective employees they cannot be hired because our employees engaged in union activity.

WE WILL NOT tell employees they are being laid off and will be required to work through a labor provider because they engaged in union activity.

WE WILL NOT assign more onerous working conditions to employees because of their union activities.

WE WILL NOT issue written warnings to employees because of their union activities.

WE WILL NOT lay off employees because of their union activities.

WE WILL NOT require employees to apply for employment through a labor provider.

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 Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, 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 Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, 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 layoffs of Mikalis Grunde, Bruce Sanderson, Jonathan Trinosky, and those employees laid off on March 14, 2003, and WE WILL, within 3 days thereafter notify each of them in writing that this has been done and that the layoffs will not be used in any way against them.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful written warning issued to DeMarco Thacker on September 26, 2002, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the warning will not be used in any way against him.

WE WILL reinstitute our practice of employing electrical employees as it existed prior to March 14, 2003.

E.L.C. ELECTRIC, INC.

(Employer)

Dated _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

575 North Pennsylvania Street, Federal Building, Room 238, Indianapolis, IN 46204-1577
(317) 226-7382, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (317) 226-5530.