

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

DUER CONSTRUCTION COMPANY, INC.

and

Case No. 8-CA-34227

DENNIS LANDAW, AN INDIVIDUAL

and

DUER CONSTRUCTION COMPANY, INC.

and

Case No. 8-CA-34388

TRACY GREER, AN INDIVIDUAL

*Susan Fernandez, Esq. and Nichole Cook, for the General Counsel.
Dean E. Westman, Esq., of Akron, Ohio, for the Respondent.*

DECISION

Statement of the Case

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Cleveland, Ohio on June 1-4, 2004. On March 31, 2004, a consolidated complaint was issued, which was subsequently amended at trial. It alleges that Duer Construction Company, Inc. (Respondent) violated Section 8(a)(1) of the Act on various dates in 2002 and 2003 by unlawfully threatening employees with unspecified reprisals and termination, by making coercive statements to employees, by coercively informing employees that they would never be represented by a union, and by coercively interrogating employees about their union activities. The amended consolidated complaint further alleges that on November 15, 2002, the Respondent violated Section 8(a)(3) of the Act by terminating/laying off Individual Charging Party Dennis Landaw and by failing to recall him from layoff because he supported the Laborers International Union of North America, AFL-CIO, Local 894 (Union). It further alleges that on July 7, 2003, the Respondent violated Section 8(a)(3) of the Act by suspending Individual Charging Party Tracy Greer for one week because he likewise supported the Union.

On the entire record, including my observation of the demeanor of the witnesses, as well as my credibility determinations based on the weight of the respective evidence, established and admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole, and after considering the posthearing briefs filed by the General Counsel and the Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a Ohio corporation, with an office and place of business in Akron, Ohio, is engaged in providing commercial masonry construction services, and in the course and conduct of its business operations, it annually purchases and receives goods valued in excess

of \$50,000 directly from points outside the State of Ohio.

The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. The Supervisory Issue

1. The arguments

The amended complaint alleges, and the General Counsel argues, that the bricklayer foremen employed by the Respondent are supervisors within the meaning of Section 2(11) of the Act. The Respondent denies the allegation and argues that there is no evidence showing that these positions meet the requisite criteria for establishing supervisory status.

It is settled law that the burden of proving supervisory status is on the party alleging that an individual is a supervisor. *Kentucky River Community Care, Inc.*, 523 U.S. 706, 712 (2001); *Health Care Corp.*, 306 NLRB 63 fn 1 (1992). Thus, the General Counsel must show that the foremen are Section 2(11) supervisors.

2. Facts

The Respondent is a commercial masonry construction contractor. Its business is managed by brothers Larry and Tom Griebel, who serve as president and vice-president, respectively. Larry Griebel is responsible for billing, job estimates, and acquiring new jobs. Tom Griebel oversees the day-to-day operation of the jobs in progress, as well as all personnel matters related to those jobs.

In 2002 and 2003, the Respondent employed between 60 to 100 employees, including bricklayer foremen, bricklayers, apprentice bricklayers, laborers, machine operators, a truck driver, and mechanics. On the jobsites, the laborers, machine operators, apprentice bricklayers and bricklayers, reported to seven bricklayer foremen, who reported to Tom Griebel. He visited each jobsite every other day for approximately 15 minutes to one hour during which time he discussed with the bricklayer foremen the job's progress and problems.

Bricklayer foremen do not have the authority to hire, fire, suspend and discipline,¹ promote, reward, layoff or recall bricklayers or laborers or effectively recommend the same. Tom Griebel makes all of these personnel related decisions with the exception layoff and recall decisions, which are jointly made by Larry and Tom Griebel.

Tom Griebel decides how many bricklayers and laborers will be assigned to a job and who will be assigned where. (Tr. 358-359.) If there are too many men assigned to a job or if the work begins to wind down, the bricklayer foremen will phone Tom Griebel telling him that he has too many men and not enough work for all of them. (Tr. 339.) Griebel decides whether to

¹ The evidence shows isolated incidents where bricklayer foremen have had to separate employees having difficulty with each other by sending them to work in different areas of the jobsite. (Tr. 469, 527, 562.) There is no evidence that any of these employees were disciplined by the foremen or Tom Griebel for these personal conflicts.

remove the unneeded men or not to remove them. (Tr. 339, 474.) There is no evidence showing that the bricklayer foremen have the authority to remove workers from a job or transfer them from one job to another job

5 Once on the job, the bricklayers and laborers get their job assignments from the foremen. (Tr. 323.) For example, Bricklayer Foreman Richard Sharp testified that his job is “to make sure the job runs smooth and get things laid out and order material and get the guys going in the right direction.” (Tr. 320.) Asked to explain what he meant by “get the guys going in the right direction,” Sharp stated “to tell them what all to build and how to build it” and what materials to use. (Tr. 321.)

10 The bricklayer foremen read and follow blueprints in giving instructions to the bricklayers and laborers. After reading the blueprint and assessing the difficulty of the work, the bricklayer foremen assign tasks commensurate with the experience and skill levels of the journeyman bricklayers, apprentice bricklayers, and laborers. On more difficult parts of a job, Tom Griebel may tell the foreman where he wants certain people to work. (Tr. 448.) Often times, the bricklayer foremen will work side-by-side with the crew to layout the first row of bricks and mortar and to ensure that the work is done correctly. Thereafter the foremen monitor the work in progress.²

15 Occasionally, the bricklayer foremen are approached by the general contractors seeking to alter the sequence of work or expedite an aspect of the job. The bricklayer foremen have the discretion to accommodate such a request, so long as it does not deviate from the blueprint and have a cost impact on the Respondent. (Tr. 328, 461, 588.) Bricklayer foremen have no authority to deviate from the blueprint for any reason without first contacting Tom Griebel and obtaining his approval.

20 The one exception is Bricklayer Foreman John Duer, who has worked for the Respondent for 50 years. (Tr. 558.) He is a former part owner of the Company and a cousin of the current owners of the Company, Larry and Tom Griebel. Duer has been a bricklayer foreman for 40 years. He testified that if the general contractor requests work which deviates from the blueprint, the general contractor must submit a change order or at least sign something in writing to make sure “we’re covered.” (Tr. 588.) There is no evidence, however, that any other bricklayer foreman has the experience, Company longevity, or familial relationship of John Duer to undertake such changes without first contacting Tom Griebel.

25 Bricklayer foremen sometimes attend field meetings on a jobsite along with other subcontractors and the general contractor. (Tr. 388, 407, 459.) Most meetings with the general contractor are attended by Tom Griebel. (Tr. 22.)

30 Work quality and accuracy is a responsibility of the bricklayer foremen. They must assure that the work is performed correctly. (Tr. 333-335.) Bricklayer foremen have the authority to order employees to tear down a wall and rebuild it correctly. On certain jobs, the foremen have told employees to tear down brick and block that was not done correctly and rebuild it.

35 Bricklayer foremen do not conduct employee meetings to convey Company information to the workers. They do attend safety meetings, along with the field employees, which are conducted by the Respondent’s Safety Director, Vernon Vanyo. (Tr. 38.) There is an employee sign-in sheet for these meetings with a line at the bottom for a “supervisor’s signature” which is

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² On small jobs, the bricklayer foreman may lay brick and mortar for the entire job.

usually signed by a bricklayer foreman. (GC Exh. 9.) The evidence shows, however, that when a bricklayer or laborer has arrived late to a meeting or missed a meeting, he has been reprimanded by Larry Griebel, the Respondent's President, and not by a bricklayer foreman.

5 Bricklayer foremen collect weekly timesheets and review them for accuracy. They are not required to sign them nor can they change the information on the timesheet. (Tr. 414-416, 575-576, 427-428.)

10 With respect to expending Company funds, the Respondent has an account for masonry supplies with one vendor, Tucker Supply. The bricklayer foremen have the discretion and authority to order brick, block, and mortar from Tucker Supply on an as needed basis to keep the job going and to charge the expense to the Company account. (Tr. 341-342, 372-373, 416-417, 428-429.) They do not have authority to make credit card purchases for other supplies or to make equipment purchases.

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3. Analysis and Findings

A supervisor as defined by Section 2(11) of the Act is:

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

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30 Section 2(11) is read in the disjunctive. The possession of any one of the authorities listed is sufficient to designate an individual vested with this authority as a supervisor, *Mississippi Power Co.*, 328 NLRB 965, 969 (1999), *citing Ohio Power v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949), so long as the individual exercises independent judgment in conjunction with those authorities on behalf of management, rather than exercising them in a routine manner. *Clark Machine Corp.*, 308 NLRB 555 (1992).

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The Board and the courts have cautioned, however, that supervisory status must not be construed too broadly because a worker who is deemed to be a supervisor loses his organizational rights. *Williamson Piggly Wiggley v. NLRB*, 827 F.2d 1098 (6th Cir. 1987); *Chevron U.S.A.*, 309 NLRB 59 (1992). Thus, it is the individual's actual duties and responsibilities that determine his or her status as a supervisor and not a job title or theoretical authority to carry out one of the enumerated supervisory functions.

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45 There is no evidence, nor argument, that the bricklayer foremen possess the primary indicia reflecting supervisory status such as the authority to hire, fire, suspend and discipline, evaluate, promote, reward, grant overtime, layoff or recall journeymen or apprentice bricklayers or laborers or to recommend the same effectively. Rather, the thrust of the General Counsel's argument is that these foremen assign and responsibly direct work in the interest of the Respondent using independent judgment and therefore they are Section 2(11) supervisors.

50 Although the evidence shows that the bricklayer foremen direct the day-to-day work of the crew members on the jobsite, it also shows that their use of independent judgment is limited in several respects. The foremen must discuss and obtain the approval of Tom Griebel for anything other than routine aspects of the job. They may not deviate from the blueprint without

contacting Tom Griebel and obtaining his approval. On more difficult or complex jobs, Griebel may tell the foreman where he wants certain people to work.

5 The General Counsel argues that the fact that foremen make assignments based on their own assessment and abilities establishes the exercise of independent judgment warranting a finding of supervisory status. In support of this argument, she cites *Lexington Metal Products*, 166 NLRB 878, 881 (1967) and *CBF, Inc.*, 314 NLRB 1064, 1069 (1994). In both those cases, however, the incumbent possessed some authority in addition to assigning work, which supported a finding of supervisory status (e.g., in *Lexington Metal Products*, the incumbent chose which employees worked overtime and in *CBF, Inc.*, the incumbent transferred individuals between jobsites). In the present case, the bricklayer foremen possess only the authority to assign work and that authority is limited to an extent by Tom Griebel, who alone selects and assigns each bricklayer and each laborer to each job and under certain circumstances directs who will perform the difficult tasks on complex jobs. Griebel also decides the size of the crew for each jobsite and who will be removed from the job and when they will be removed.

20 With respect to secondary indicia, the bricklayer foremen are limited to purchasing brick, block, and mortar from one supplier. Although they review the timesheets and note discrepancies, they do not have authority to change a timesheet and must report discrepancies to Griebel for resolution.

25 Accordingly, I find that bricklayer foremen are not supervisors within the meaning of Section 2(11) of the Act.

B. The Agency Issue

30 The amended complaint also alleges, and the General Counsel argues, that the bricklayer foremen are also agents within the meaning of Section 2(13) of the Act. The Respondent denied the allegation in its answer, but did not address the issue in its posthearing brief.

Section 2(13) of the Act provides that:

35 In determining whether any person is acting as an “agent” of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

40 The Board applies common law principles when examining whether an employee is an agent of the employer. Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief for the latter to believe that the principal has authorized the alleged agent to perform the acts in question. *Great American Products*, 312 NLRB 962, 963 (1993). A principal is liable for his agent’s actions, even if the principal did not authorize or ratify the particular acts. *Electrical Workers Local 98 (MCF Service)*, 342 NLRB No. 74, slip op. at p. 3 (2004).

50 Although the evidence does not show that the bricklayer foremen are statutory supervisors, it does show that they acted as agents of the Respondent and that their acts therefore are attributable to the Respondent. The foremen are the Respondent’s point person on the jobsites and that they issue directions to the crew on behalf of the Respondent. They are

viewed by the crew as the “boss” on the job. The foremen tell the bricklayers and laborers what to do, when and where to do it, and sometimes how to do it. Tom Griebel himself has created a basis for the crew member to believe that the foremen are authorized to act on behalf of the Respondent. For example, Griebel testified that in inclement weather the foreman decides whether the crew works or continues working. He further testified that he has told the employees that it would be insubordination if a worker disagreed with the bricklayer foreman’s decision. (Tr. 31-32.) Thus, the evidence viewed as a whole shows that the Respondent placed the foremen in a position that the employees could reasonably conclude that the foremen were acting on behalf of the Respondent. I therefore find that the bricklayer foremen were agents within the meaning of Section 2(13) of the Act.

C. Dennis Landaw

1. Facts

In 1998, the Respondent hired Individual Charging Party Dennis Landaw as a truck driver.³ Over the next four years, Landaw drove two 16-foot flat bed trucks to and from and between construction sites. At the beginning of a construction project, Landaw typically would haul to the jobsite scaffolding and different types of equipment, e.g., tow motors, scissor lifts, mixers, water barrels, mud boards and mud tubs. During the project, he would haul additional scaffolding and equipment to the job and pickup and deliver various supplies to the jobsite. When the project ended, he hauled the scaffolding, equipment and materials back to the yard.⁴

When Landaw was not driving a truck, he kept the outside yard and area clean, fed the geese in a nearby pond, cleaned the break room and restroom, and dumped the trash. He also performed personal work for Larry and Tom Griebel throughout the year. He would pickup trash, help clean yards, drop-off and pickup equipment.

In summer 2002, the Laborers District 8, Regional Organizing Committee (DROC) initiated a focused effort to organize the bricklayers and laborers of the Respondent and two other major construction contractors in the northeast Ohio area.⁵ A letter dated, July 12, 2002, was circulated to Union members announcing the organizing effort. (GC Exh. 53.) Respondent’s president, Larry Griebel, obtained a copy of the letter shortly after July 17 and faxed a copy of it to one of the other targeted construction contractors, C.T. Taylor, on July 26, 2002.

In late summer 2002, Landaw learned about the organizing effort. He testified that Walter Smith, a bricklayer foreman on the Heddy Laram jobsite, made a comment that Larry and Tom Griebel had a meeting with the foremen and supervisors about the Laborer’s campaign. (Tr. 196-197.) Landaw stated Smith did not provide “a lot of specifics.” (Tr. 197.) Smith stated that he did not know of a meeting held by Larry Griebel to discuss a Union organizing campaign by the Laborers and did not remember ever having a conversation with

³ Landaw had previously worked as a laborer for another construction contractor. Although he sought a laborer’s job with the Respondent, the only job available was as a truck driver. Because Landaw has a commercial driver’s license, he was hired for that position.

⁴ Because Landaw had a commercial driver’s license, the Respondent occasionally sought to have him drive a concrete pump truck or a semi-trailer rig, but Landaw declined.

⁵ For more than 10 years, the Union sought on and off to organize the Respondent’s laborers. In 1991, the Union lost a Board directed election for a unit of laborers. Periodically throughout the 1990s and into the early 2000s, the Union picketed the Respondent’s jobsites and engaged in other measures related to organizing the Respondent’s workforce.

Larry Griebel about a union organizing campaign. (Tr. 423.) However, he testified that he “heard talk about” Landaw being involved in union activity during the summer 2002. (Tr. 423-424.) He stated that he heard about Landaw’s involvement while working on the Stan Hewitt job that summer. (Tr. 424.) He elaborated that he and an employee named, Scott Bolding, had a conversation about Landaw talking about the Union while working on the Stan Hewitt job.⁶ (Tr. 425.)

In the same month, September 2002, Landaw attended a DROC organizing meeting. He learned how to conduct organizing activity at work and was instructed to quietly determine whether any of the Respondent’s employees were interested in having a union. If there was enough interest an informational meeting would be held later. Landaw discretely queried laborers about having a union. He testified that he carefully avoided talking to anyone that he did not trust and that he passed out very little union materials.

On November 2, 2002, a union informational meeting was held for the Respondent’s employees. It was attended by three Union representatives, Landaw, and two other Respondent employees. The Union officials talked about the Union and workers’ rights under the Act. The two employees agreed to help Landaw seek out other employees who might be interested without drawing attention to what they were doing. Over the next few days, Landaw continued talking to laborers about the Union on jobsites and away from work.

A few days after the meeting, Landaw went to a jobsite in downtown Akron, where Don Sorrell was the bricklayer foreman. According to Landaw, he was standing by his truck, when Sorrell walked up to him, “and just said right out, you better watch who you’re telling your secrets to.” (Tr. 207.) Landaw stated that he was taken by surprise and did not respond. Landaw testified that the following day he returned to that job site and called Sorrell on the Company phone to ask him to clarify what he stated the day before. According to Landaw, Sorrell “said you know, what you’re talking about is not going to fly and somebody’s going to lose their job over this.” (Tr. 208.) Sorrell did not deny making either of these statements nor did he attempt to explain what he was referring to.

On the weekend of November 9-10, Landaw spoke by phone with Union organizer Roman Fair about arranging an informational meeting for November 16. Landaw testified that when he got off the phone with Fair he felt very positive about the direction in which the organizing activity was going. He stated that he felt so confident that there was enough interest among the laborers that he was “no longer going to be worried about keeping things quiet or, you know, or speaking to only persons I felt confident. At that point, I was inviting all laborers.” (Tr. 212-213.)

On Monday and Tuesday, November 11 and 12, Landaw worked mostly in the yard. On Wednesday, November 13, Tom Griebel told him to go to the Park Honda jobsite for a pickup. When Landaw arrived at the jobsite at 9:30 am, the crew was taking a break. Landaw testified that he told four laborers coming down off the scaffolding that there was going to be a Union informational meeting on Saturday, November 16. He also told them that could get more information about the Union and invited them to attend.

⁶ Smith testified that he did not tell Larry or Tom Griebel or anyone else about his conversation with Scott Bolding because “it didn’t affect me and there wasn’t anything I could do about it.” (Tr. 432-433.)

Landaw testified that as he was getting into his truck to leave, Bricklayer Foreman Tom Kitchen came up to him holding a cell phone. Landaw testified that Kitchen was “very excited and upset,” and was waving his arms erratically. According to Landaw, Kitchen stated, “I just got off the phone with Tom Griebel, and I’ve talked to Mayo, and Mayo doesn’t know anything about a Union meeting. Do you know anything about a meeting?”⁷ (Tr. 216.) Landaw responded, “No,” and left the jobsite. (Tr. 216.)

Kitchen did not remember discussing a union meeting on a jobsite in November 2002. Asked specifically “did you ever ask any of the employees about whether – when the Union meeting was going to be?” he unequivocally stated, “No, sir.” (Tr. 646.) I credit his denial. The interrogation allegedly took place in the open on the jobsite with other employees in the immediate vicinity. Thus, it is reasonable to expect that at least one other employee could have or would have observed Kitchen’s unusual behavior and/or heard his question. No one, however, was called to corroborate Landaw’s testimony. In the absence of witness corroborating Landaw’s testimony, I credit Kitchen’s testimony denying that he asked Landaw about a union meeting.

Landaw returned to the yard and left for the Mantua Sharesville Fire Station jobsite. It was lunchtime when Landaw arrived at the jobsite, so he parked his truck and walked to the employee parking lot. Along the way, Landaw informed a laborer named Ted Nutter that there would be a union meeting on November 16. He then approached two laborers, Amhet Pelto and Zeljko Curcik, sitting in a car eating lunch. Landaw testified that he told the two that there would be a union meeting to discuss wages, benefits and working conditions and that he invited them to attend. He handed them a piece of paper and pen and asked for their names and phone numbers. At that moment, Landaw realized that bricklayer foreman Richard Sharp had walked up and was standing behind him. Landaw retrieved the pen and paper telling the two laborers that they would be getting a phone call reminding them of the meeting.

As Landaw walked back to his truck, Sharp walked with him. According to Landaw, the following discussion occurred:

Q. Did he say anything to you?

A. Yes. He asked me, he asked me a question. He said what are you trying to accomplish here?

Q. Did you say anything?

A. Yeah. I responded to him that we’re trying to get better benefits and working conditions.

Q. Did he say anything else in response to you?

A. He said there’s a better way about, there’s a better way of going about this. You need to talk to Larry. (Tr. 219.)

Landaw stated that he told Sharp that recently “one of our guys” tried to talk to Larry Griebel about the high cost of healthcare and the conversation did not go anywhere. He also told Sharp that there would be discussions with Larry Griebel after a meeting was held to get information out to the workers. (Tr. 219.) Landaw testified that Sharp responded, “this is not good” and that ended the conversation. (Tr. 220.)

⁷ “Mayo” is the nickname for Greg Maynard, a laborer who operated a machine on the jobsite that day.

Landaw testified that after lunch ended, Sharp tried to engage him in a conversation about the Union, but Landaw did not respond. (Tr. 298.) Landaw stated that Sharp made some negative comments about the Laborers Union and related his personal experience with the bricklayers' union. Landaw also testified that Sharp asked him if he had spoken to Ted Nutter about the Union. (Tr. 300.)

Sharp did not specifically deny having either of these conversations with Landaw. Rather, he was asked by Respondent's counsel if he ever talked "to Dennis Landaw about Unions or Union organizing" to which Sharp responded, "No." (Tr. 371.) An adverse inference is warranted where a witness does not deny or only generally denies without further specificity, certain adverse testimony from an opposing witness. *Asarco, Inc.*, 316 NLRB 636, 640 fn. 15 (1995). The failure of Sharp to specifically deny that he questioned Landaw about his union activities on November 13 and to deny that he asked him if he had spoken to Ted Nutter about the Union, which form the basis of the alleged unfair labor practice, warrant an adverse inference that had Sharp been specifically questioned about the above-referenced conversations with Landaw, his testimony would not have been favorable to the Respondent. I therefore credit Landaw's testimony on this point.

Landaw left the Mantua Fire Station jobsite and drove some scaffolding to the Waterloo School. When he arrived at that jobsite, he called a machine operator to unload his truck. In the meantime, bricklayer foreman Mark Kibler walked over to where Landaw was working. Landaw testified that Kibler "just started saying off different bad experiences that he had with the Union ... he just mentioned that during his years for working for Duer, one time he left and gone to the Union, and that Larry Griebel paid either like a fee or an expense or like a bill or something for Mark to get him back." (Tr. 224.) He added that Kibler finished by stating "that was an example of the Union letting him down and Larry Griebel taking care of him."

After leaving the Waterloo School jobsite, Landaw returned to the shop, where Tom Griebel told him that he did not want him to work any more unneeded overtime and that he should start work at 7:30 am. Landaw typically started work at 7 am, unless specifically instructed to start at 7:30 am. (GC Exh. 47-49.)

On November 14, Landaw spent the day cleaning the yard. The next day, November 15, Tom Griebel told Landaw at the beginning of the day to get everything off of the Park Honda job and to see him before he left for the day. At the end of the day, Landaw was working in the warehouse when Tom Griebel approached him inquiring about a small water pump. Landaw testified that when he climbed a ladder to the second level mezzanine to look for the pump, Griebel followed him up the ladder. Landaw stated that upon reaching the mezzanine, Tom Griebel told him that he and Larry Griebel had been reevaluating the business and were considering scaling down operations. He stated that Tom Griebel told him that they were also going to have the laborers cleanup the jobsites and return the scaffolding and equipment to the yard. (Tr. 229.) According to Landaw, Tom Griebel told him "I'm eliminating your job and we no longer need your services." (Tr. 229.) Landaw asked him, "does that mean I'm laid off, and he said yes." (Tr. 230.) Landaw testified that he offered to work in the yard or work as a laborer or become a bricklayer's apprentice, but Tom Griebel told him that "things were slow and we, don't need you." (Tr. 230.)

Griebel denied that Landaw asked to work as a laborer. (Tr. 101.) He did not explain or attempt to explain what Landaw stated to him when he was told he was laid off, other than to say that Landaw was pretty upset. (Tr. 101.)

2. Analysis and Findings

a. *The 8(a)(1) violations*

5 1. The unlawful threat by Foreman Don Sorrell

10 The un rebutted credible evidence shows that on November 7, 2002, Foreman Don Sorrell walked up to Charging Party Landaw and confronted him by stating, “you better watch who you’re telling your secrets to.” (Tr. 207.) The Respondent asserts that no violation occurred because Sorrell did not use the word “union” and because there is no direct evidence that he knew about Landaw’s union activity. The argument ignores the evidence showing that as early as the summer of 2002 the employees and foremen were discussing the organizing drive and Landaw’s union activity on the jobsites. (Tr. 423-425.) It also ignores the evidence showing that the Union was the only topic that Landaw had been “secretly” talking to employees about for 15 three months. Thus, the circumstantial evidence supports a reasonable inference that Sorrell was referring to Landaw’s union activity when he told him that he better watch who he was telling his secrets to.

20 While not explicitly threatening, the manner in which unprompted statement was phrased constitutes nothing less than a veiled threat of possible repercussions because of Landaw’s suspected union activities. *Leather Center, Inc.*, 308 NLRB 16 (1992). According, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 6(A) of the amended complaint.

25 The un rebutted and credible evidence also show that the next day, Sorrell elaborated on this earlier remark by telling Landaw “what you’re talking about is not going to fly and somebody’s going to lose their job over this.” (Tr. 208.) It is unlawful to imply that that continued support for the Union might result in job loss. *Ferguson-Williams, Inc.*, 322 NLRB 695, 699 (1996). Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in 30 paragraph 6(B) of the amended complaint.

2. The alleged interrogation by Foreman Tom Kitchen

35 Paragraph 6(G) of the amended consolidated complaint alleges that on November 13, 2002, Foreman Tom Kitchen unlawfully interrogated Landaw by asking him about a Union meeting. Because I have credited Kitchen’s denial of that incident, there is no evidence to support the allegation. Accordingly, I shall recommend the dismissal of paragraph 6(G) of the amended complaint.

40 3. The unlawful interrogation by Foreman Richard Sharp

45 Paragraph 6(C) alleges that on November 13, 2002, Foreman Richard Sharp unlawfully interrogated Charging Party Landaw about his union activity and made coercive statements in order to discourage such activity. “In evaluating allegations of coercive interrogation, the Board considers the totality of the circumstances presented in each case, including the background of the employer-employee relationship, the nature of the information sought, the identity of the questioner, and the place and method of interrogation.” *Volair Contractors*, 341 NLRB No. 98, slip op. at page 4 (2004).

50 Sharp’s November 13 statements to Landaw must be divided into two parts for analysis: the before lunch conversation and the after lunch conversation. In the before lunch conversation, Sharp walked with Landaw back to his truck asking him what he was trying to

achieve. There is no evidence that Sharp was belligerent, hostile or talking in harsh tones. Landaw indulged Sharp by explaining that he was trying to get improved benefits and working conditions. Sharp replied that there was a better way of going about it and suggested that Landaw talk to Larry Griebel. The discussion was casual and informal. Landaw continued the dialogue by telling Sharp that one of the Union representatives tried once before to talk to Larry Griebel about healthcare costs and the conversation went nowhere. At that point, Sharp stated, “this is not good” and the conversation ended. The nature of the question and the discussion that followed was open, general, and nonthreatening. *Sunnyvale Medical Clinic*, 277 NLRB 1217-1218 (1985).

After lunch, however, Sharp reinitiated the conversation. Although Landaw refused to participate in further discussion, Sharp continued the conversation by disparaging the Union, relating his bad union experiences, and probing into Landaw’s union activities by asking if Landaw had been talking with a co-worker, Ted Nutter, about the Union. The question put to Landaw in the context of negative remarks about the Union was coercive. It was also uttered in the context of another unfair labor practice committed a few days earlier when Foreman Don Sorrell made a coercive threatening statement (i.e., that if Landaw continued his union activities it could result in possible job loss). *Reno Hilton*, 319 NLRB 1154, 1155 (1993). I therefore find that the after lunch questioning by Sharp reasonably tended to restrain, coerce, and interfere with Landaw’s right to organize. Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 6(C) of the amended complaint.

b. *The 8(a)(3) violation*

The amended complaint alleges that the Respondent violated Section 8(a)(3) of the Act by terminating and/or laying off and failing to recall Charging Party Dennis Landaw to a truck driver’s or laborer’s position because he engaged in union activity. (Tr. 9.)

In *Wright Line*, 251 NLRB 1083 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding discrimination cases turning on employer motivation. The General Counsel must persuasively establish that the evidence supports an inference that union activity was a motivating factor in the employer’s decision.⁸ Specifically, the General Counsel must establish union and/or protected concerted activity, knowledge, animus or hostility, and adverse action, which tends to encourage or discourage union activity. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991). Inferences of animus and unlawful motive may be inferred from the total circumstances proved and in some circumstances may be inferred in the absence of direct evidence. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991). Once accomplished, the burden shifts to the employer to persuasively establish by a preponderance of the evidence that the reasons for its decision were not pretextual or that it would have made the same decision, even in the absence of protected concerted activity. *T&J Trucking Co.*, 316 NLRB 771 (1995).

1. The General Counsel’s evidence

a. Union activity

The undisputed evidence shows that throughout the fall 2002 Dennis Landaw discretely sought to organize the Respondent’s laborers. After several weeks of quietly talking to workers on and off the jobsite, he was instrumental in arranging an information meeting to be held on

⁸ *Manno Electric, Inc.*, 321 NLRB 278, 280, fn. 12 (1996).

November 16, 2002. The undisputed evidence also shows that once the November 16 meeting was scheduled, Landaw became less apprehensive and cautious about talking to employees about the Union, and began encouraging all employees to attend the information meeting, without much concern for whether they were for or against having a union. Thus, ample
5 evidence exists that Landaw was involved in union activity.

b. Knowledge

10 The Respondent asserts, however, that neither Tom nor Larry Griebel had any knowledge of Landaw's union activity prior to making the decision to terminate his employment. It points out, and the evidence shows, that Landaw admittedly took a very low-key approach to organizing (at least up until November). He did not pass out very much Union literature, did not wear Union T-shirts or hats, and was very careful about who he spoke to about the Union. More specifically, the Respondent asserts, and the evidence shows, that neither Tom nor Larry
15 Griebel observed Landaw engage in union activity or spoke to him about the Union.

20 The countervailing evidence shows that in late July 2002, the Respondent's president, Larry Griebel, obtained a copy of the DROC organizing letter. He thought that the information was important enough to fax a copy of the letter to C.T. Taylor, another construction contractor being targeted for an organizing drive. Larry and Tom Griebel are brothers, co-owners, and officers of the Respondent. Tom Griebel is responsible for all of the Respondent's personnel matters. He visits each jobsite almost daily. The evidence therefore supports a reasonable inference that if Larry Griebel told a competitor about the upcoming Union organizing drive, he also told his brother and co-owner Tom Griebel that Duer Construction was being targeted by
25 the Laborers' Union for an organizing drive, particularly because it is an issue that affects the majority of the Respondent's workforce. Thus, the evidence viewed as a whole shows that Larry and Tom Griebel knew about the Union organizing drive in its very early stages.

30 By September 2002, some of the Respondent's employees were talking about the Union campaign on the jobsites. The un rebutted evidence shows that Landaw overheard Foreman Walter Smith talking about a meeting he attended where Larry and Tom Griebel told the foremen about the Union's organizing campaign. Smith testified that during the summer of 2002 he "heard talk about" Landaw being involved in union activity and discussed Landaw's union involvement with a laborer named Scott Bolding. The un rebutted evidence therefore supports a
35 reasonable inference that within a relatively short period of time the word was out among the Respondent's employees that the Union was starting an organizing drive and that Landaw was involved in that effort.

40 During the first week of November 2002, Foreman Don Sorrell approached Landaw on an Akron jobsite cautioning him about telling "secrets" to employees, which I find to be a transparent reference to the fact that Landaw had been talking quietly and discretely to the employees about the Union. The un rebutted evidence shows that the following day when Landaw asked Sorrell to explain remarks Sorrell told Landaw that his efforts were futile and implied that Landaw's job was at risk. This episode further supports a reasonable inference that
45 the foremen were aware of Landaw's union activity.

The following week, Landaw began to solicit laborers openly to attend an information meeting scheduled for November 16. The credible evidence shows that on Wednesday, November 13, two different foremen on two different jobsites questioned Landaw about his
50 union activity (Sharp/Mantua Fire Station) and told him about bad personal experiences with the Union (Kibler/Waterloo).

The knowledge of the foremen is imputed to Larry and Tom Griebel because they are Section 2(13) agents of the Respondent. In addition, the small size of the Respondent's crews, along with Tom Griebel's daily contact with each foreman, and his almost daily visitation to each jobsite makes the circumstances comparable to a "small plant" type situation whereby the foremen's knowledge is imputed to the employer.⁹ *Retail Clerks Union Local 455*, 252 NLRB 432 (1980). Finally, the evidence shows that with the exception of John Duer, the former owner of the Company and cousin of the Griebels, none of the foremen are allowed to do anything out of the ordinary without contacting first Tom Griebel and obtaining his approval. It is implausible, therefore, that Sorrell, Sharp, or Kibler or any other foreman would question Landaw and/or engage him in conversation about the Union without conferring with Tom Griebel first.

The credible evidence viewed as a whole, therefore, warrants a reasonable inference that Larry and Tom Griebel had knowledge of Dennis Landaw's union activity prior to the date he was terminated.

c. Animus

The statements made by bricklayer foremen Sorrell and Sharp in violation of Section 8(a)(1) of the Act demonstrate antiunion animus. The Board has held that unlawful statements by a Respondent's agent are direct evidence of animus because they tend to interfere with, restrain, or coerce employees in the exercise of rights protected by Section 7 of the Act. *EPI Construction*, 336 NLRB 234, 238 (2001); see also, *Greyston Bakery, Inc.*, 327 NLRB 433 fn.1 (1999); *Lemon Drop Inn*, 269 NLRB 1007, 1007 (1984), and cases cited therein.

d. Adverse action

Timing is a well-recognized factor indicating antiunion motivation. *Lemon Drop Inn*, supra. The un rebutted evidence shows that on the weekend of November 9-10, 2002, Landaw spoke with Union Organizer Roman Fair to arrange another information meeting on November 16. Landaw was so confident that the organizing drive was progressing that he decided to openly solicit employees to attend the meeting.

As soon as Landaw began to openly solicit employees on the jobsites he was confronted with questions and comments from foremen about the Union and his union activity. The credible evidence shows that on November 13 at the Mantua Fire Station jobsite, Foreman Sharp asked what he was trying to accomplish, told him that there was a better way to go about this, and asked him if he had spoken to another employee about the Union; at the Waterloo School Foreman Kibler described his bad experiences with the Union; and when he returned to the yard, Co-owner/Vice President Tom Griebel warned Landaw to start work at 7:30 pm and to stop working overtime. Two days later, Tom Griebel told Landaw that he was being terminated for lack of work. I find that the timing and sequence of these events indicates an antiunion motive for the adverse action. Accordingly I find that the General Counsel has satisfied its *Wright Line* evidentiary burden.

The burden of now shifts to the Respondent to persuasively show that it would have terminated/laid off Landaw, even if he had not engaged in activity protected by Section 7 of the Act.

⁹ The Respondent's crews typically range in size from 2 to 14 bricklayers and laborers. The men work in close proximity of each other and the foremen. The evidence also shows that the Union and Landaw were discussed by crew members on the jobsites.

2. The Respondent's defense

5 The Respondent asserts that Dennis Landaw was laid off¹⁰ because (1) the Respondent had made a business decision to focus on fewer, but larger jobs, which eliminated the need for a truck driver position, and (2) because Landaw worked unnecessary overtime, argued about cleaning his truck, and made crude remarks while drunk at a Company picnic in July 2002.

10 With respect to the elimination of his position because there was no longer a need for a truck driver, the evidence shows that the Respondent had a total of 64 jobs in 2002 as compared to 81 jobs in 2001. (GC Exh. 36.) However, it also shows that in 1999 the Respondent had only 63 jobs, some of which were small to medium jobs, yet Landaw worked full-time for the Respondent without interruption, and continued working through the 1999-2000 winter months when certain laborers were laid off. In addition, the unrebutted evidence shows
15 that since he began working for the Respondent in 1998, Landaw had always worked year round despite the seasonal variations associated with construction work and had been assigned yard work and odd jobs whenever there was not enough driving work for him to do.

20 The credible evidence also shows that at the time his employment was terminated Landaw told Tom Griebel that he was willing to work as a laborer. It further shows that Landaw had worked as a masonry laborer before going to work for Respondent and that no particular training or skill is required to be a laborer. (Tr. 322, 454-455.) In addition, Tom Griebel testified that seniority and ability are two factors that he considers in making layoff decisions. (Tr. 120.) In this connection, the evidence shows (1) that Landaw had more seniority than several laborers
25 who were not laid off (Robert Cables, Michael T. Chadwick, Eugene Primes, Benjamin Rezabek, and Curtis Williams) and (2) that he had more seniority than three laborers who were laid off, but later recalled (Will Terihay, Ted Nutter, and Mike Rezabek). (GC Exhs. 40-43.) It also shows that three new laborers were hired in spring 2003. (GC Exh. 44.) This evidence, coupled with the fact that no position other than Landaw's position was eliminated, casts doubt
30 on whether the lack of work was the real reason for Landaw's termination.

Adding further doubt is the lack of any evidence specifically identifying a single laborer with a commercial driver's license or identifying the laborers who performed the driver's duties on each jobsite after Landaw was terminated. In fact, there is no evidence showing exactly who
35 was doing that work or whether it was being done by one or more individuals. Stated otherwise, there is no persuasive evidence showing that there was no longer a need for one truck driver because the workload was being shared by several laborers.

40 Thus, for these reasons, I am unpersuaded that Charging Party Dennis Landaw would have been terminated for the proffered business reason (lack of work) had he not engaged in union activity.

45 ¹⁰ The Respondent's assertion that Landaw was laid off is disingenuous. When Tom Griebel told Landaw that he was "laid off," he also told him that his job had been eliminated and that there was no longer a need for his services. (Tr. 229.) The evidence does not support an inference that Tom Griebel intended to recall him because his job no longer existed. Moreover, Griebel's subsequent conduct fails to support such an inference because the five laborers that
50 were "laid off" at the same time as Landaw were all recalled in the spring of 2003, even though they all had less seniority than Landaw (who held a commercial driver's license).

In addition, the evidence shows that when Tom Griebel terminated Landaw on November 15, 2002, the business reason was the sole reason he gave to Landaw for terminating him. (Tr. 94, 229.) On May 23, 2003, the Respondent's counsel submitted a position statement, which reiterated that Landaw was "laid off" because of lack of work. (GC Exh. 37.)

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On June 6, 2003, however, Tom Griebel presented an affidavit to the Board agent, stating that he and his brother, Larry Griebel, jointly decided to "lay off" Landaw and for the first time identified "other reasons" for doing so (e.g., that Landaw made inappropriate comments to Tom Griebel's niece and wife at a July 4, 2002 picnic and he continued to work overtime without Company authorization. (GC Exh. 59.)

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However, at trial, on direct examination by the General Counsel, Tom Griebel testified that Landaw was terminated because there was no longer a need for a driver. He elaborated that by eliminating the truck driver job, the Respondent was simply acting on a recommendation made by Landaw in his May 2002 performance review to save money. (Tr. 94-95.) In an attempt to pin down all the reasons for terminating Landaw, the General Counsel asked Tom Griebel the following questions:

15

Q. Okay. Any other reasons why he was laid off or no longer worked for you?

20

A. No.

Q. Are you sure?

A. Yes.

Q. There were no other reasons why you took the job action that you did?

A. No.

25

(Tr. 95.)

At that point, counsel for the General Counsel showed Tom Griebel his prior affidavit which reminded him that in addition to the "business reason" there were "other reasons" for terminating Landaw. Tom Griebel did not explain, however, why he did not mention these other reasons to Charging Party Landaw at the time of termination and why he apparently forgot to tell Respondent's counsel to include the other reasons in the Respondent's May 23 position statement.

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At some point in time, Larry Griebel also remembered that that there was another reason for terminating Landaw (i.e., in May 2002 he and Landaw argued about cleaning out a truck). At trial, Larry Griebel testified about the garbage in the truck incident (Tr. 789-793; R. Exh. S), but did not explain why that reason was not mentioned in his brother's affidavit and why it was not mentioned in the Respondent's position statement.

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Under settled Board law, shifting explanations warrant a reasonable inference that the reasons given are pretextual and that the true reasons are unlawful. *Atlantic Limousine, Inc.*, 316 NLRB 822, 823 (1995). The Respondent's evolving reasons for terminating Landaw warrant a reasonable inference that they are pretextual.

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In addition, careful analysis of the evidence shows that the Respondent's assertions that Landaw worked unauthorized overtime and made inappropriate remarks are not legitimate reasons for terminating Charging Party Landaw. The Respondent's records show that throughout his employment with the Respondent, Landaw routinely started at 7:00 a.m. and worked overtime. (GC Exhs. 47-49.) Although Tom Griebel testified that on three occasions in 2002, he told Landaw to punch in at 7:30 a.m. and to stop working overtime (i.e., September 27, October 25, and November 13, 2002; R. Exh. U, V, and W), there is no evidence that Landaw

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ever received a formal verbal or written warning as required by Company policy¹¹ for starting early or working overtime, even though he was arguably insubordinate for failing to follow Griebel's directives and even though the employee handbook states that unverified time will not be paid. (GC Exh. 29 and 50, p. 4.) Rather, the evidence shows that all three incidents relied on
 5 by the Respondent were informally documented by Tom Griebel and that all three took place after the Union organizing drive began in July 2002 with the last one occurring two days before Landaw was terminated.

Regarding the inappropriate crude remarks that Landaw did not deny making in the
 10 presence of Tom Griebel's niece and wife on July 4, 2002, Tom Griebel asserted that he took no formal disciplinary action against Landaw because it did not occur on work time. Even though Tom and Larry Griebel discussed the matter and "decided that as this was not a work related function, nothing could or should be done other than my remarks at the party for Dennis to
 15 "knock it off," Tom Griebel inexplicably wrote a handwritten note on July 8, 2002, detailing the incident and placed the note in the Respondent's files for some unknown purpose. (R. Exh. T.) Query if the crude incident did not formulate the basis for disciplinary action on or about the time that it occurred, which was before the Union organizing drive began, then how could it possibly constitute a reason for termination five months later, which was four months after the Union organizing campaign began.

20 The credible evidence viewed as a whole therefore shows that the Respondent would not have terminated Charging Party Landaw for the proffered business reason in the absence of union activity. It also shows that the "other reasons" for terminating Landaw, which evolved over time as reasons, constitute nothing more than post hoc rationalizations to bolster a "business"
 25 reason defense lacking in merit. Accordingly, I find that the Respondent has failed to persuasively show that it would have terminated Charging Party Landaw in the absence of his union activity. I therefore find that on November 15, 2002, the Respondent violated Section 8(a)(3) of the Act as alleged in paragraph 7(A) and (B) of the amended complaint.

30 D. Tracy Greer

1. Facts

35 Individual Charging Party Tracy Greer, a laborer, was employed by the Respondent from March 2002 to July 7, 2003, and worked primarily on two jobsites: the Federal Express Building in Green, Ohio and the Highland High School jobsite in Medina, Ohio. The Highland High School job was a relatively large project employing between 25-40 bricklayers and laborers, under the supervision of a general foreman, John Duer, and two subforemen, Donald Fisher and Donald Sorrell. Greer worked mainly on the Highland High School job from August 2002
 40 through July 7, 2003.

In October 2002, Greer contacted the Union and shortly thereafter met with DROC Organizer Matt MacCellan to discuss the benefits of joining the Union. Over the next few months, the DROC organizing committee informed Greer about union organizing methods.
 45 In early 2003, Greer began talking to co-workers about the benefits of union representation. (Tr. 531-532.)

50 ¹¹ According to the Respondent's handbook, a first offense warrants a verbal warning, a second offense warrants a written warning that is mailed to the employee and placed in his employee file, and a third offense warrants an unpaid disciplinary layoff of up to one week. (GC Exh. 50, p. 3.)

In late January 2003, Greer attended a regularly scheduled safety meeting for bricklayer foremen, bricklayers, laborers and other field personnel. He testified that as the meeting ended, Respondent's president, Larry Griebel, entered the room and "asked everybody did they want to form a union here. And he said we can take a vote, but I'm going to tell you guys, this company ain't never going to be a union." (Tr. 533.) Greer testified that Larry Griebel asked everyone who wanted to have a union to raise their hands. According to Greer, when no one raised their hands, Griebel stated, "since nobody raised their hand, so be it, this company ain't going to be a union, he said, so we're going to keep on making money like we're making and keep working like we're working and be happy." (Tr. 534.) Larry Griebel did not deny making these statements.

Over the next few months, Greer selectively spoke to employees about the benefits of union representation. (Tr. 702.) In May 2003, he became a member of the Union and for six weeks, the Union subsidized the wages that the Respondent paid him in order to compensate Greer at the prevailing wage rate for the area. (Tr. 535.) On June 9, 2003, Greer began wearing a Union T-shirt to work on a daily basis. (Tr. 535-536.) The front of the T-shirt stated, "America works best when they say union yes," with a check mark in a square box and the back of the T-shirt stated, "Laborers." (Tr. 537.) Greer also wore another Union T-shirt to work, which stated, "Union Yes."

According to Greer, the first day he wore a Union T-shirt, June 9, Supervisor Don Fisher asked him why he was wearing a Union T-shirt? (Tr. 539.) Greer testified that when he told Fisher that he was trying to make his co-workers aware of the Union, Fisher replied, "Tracy, there's jobs elsewhere... This Company ain't union. If you want a union job, you can go elsewhere and find a job there with somebody who is union." (Tr. 539-540.) Contrary to the Respondent's assertions, Fisher did not deny making this statement. Rather, he testified as follows:

A. Did you observe Tracy Greer on the Hyland High School job wearing a union T-shirt?
 A. Yes.
 A. Did you ever go up to Tracy Greer on one of those occasions and tell him to take it off?
 A. No.
 Q. Did you ever threaten Tracy Griebel – or Tracy Greer in any way in conjunction with him wearing that T-shirt?
 A. No.
 Q. Did you ever take away from him any union organizing materials that he had?
 A. No.
 Q. Did you ever tell him to not talk to your employees about the Union?
 A. No. (Tr. 619.)

In the absence of a denial, specific or otherwise, that Fisher told Greer that he could go work someplace else if he wanted a union, I credit Greer's testimony on this point.

Greer further testified that on the same day, Foremen Don Sorrell told him, "Tracy, what are you doing with that shirt on, you better take that shirt off, Tommy's going to come out here." (Tr. 540.) Greer stated that he told Sorrell, "I'm not taking this shirt off for him, or anybody else. I'm not taking this shirt off." (Tr. 540.) Sorrell testified that he saw Greer wearing a Union T-shirt, but denied that he ever talked to him about the shirt or told him to take off a Union T-shirt. (Tr. 604.) Sorrell further testified that he did not tell Tommy Griebel that Tracy Greer was wearing a

Union T-shirt on the job because it did not matter to him whether he wore a Union T-shirt at work. (Tr. 604-605.)

5 Sorrell's testimony on this point is implausible. The un rebutted evidence shows that a few months earlier, the Respondent's president, Larry Griebel, told a roomful of employees that they could vote if they wanted, but "this company ain't never going to be a union." His message was heard clearly because not a single employee raised his hand when Griebel solicited a show of support for a union. The un rebutted evidence shows that Larry Griebel concluded by declaring that there would be no union, and that the Company would "keep on making money like we're making and keep working like we're working and be happy." I am unpersuaded that it did not matter to Sorrell, a foreman, that Greer was wearing a Union T-shirt on the job and that he simply shrugged it off without saying anything to Greer, particularly after the owner/president of the Company made it very clear that he was not in favor of a union. Thus, I do not credit Sorrell's denials and I do credit Greer's testimony on this point.

15 In addition to wearing a Union T-shirt on a daily basis beginning June 9, 2003, Greer spoke daily to employees about the Union and also passed out Union literature. On one occasion, while on break, he told a few employees in the presence of foremen Sorrell and Fisher that his wages were being subsidized by the Union and showed them a copy of his Union pay stub. (Tr. 544-545.)

25 Greer also testified that prior to June 9, 2003, Tom Griebel was cordial when he visited the jobsite each day. Greer stated that after he began wearing Union T-shirt to work, Tom Griebel did not speak to him or look at him. (Tr. 546.) On June 25, 2003, Tom Griebel gave Greer a verbal warning for being late to work. (Tr. 547-548.) Greer testified that at about 11:30 a.m., Tom Griebel told Greer that one of the foremen reported that he came to work late. (Tr. 548.) Greer disputed that he was late. He also stated that Tom Griebel did not give him any paperwork documenting the fact that he was given a verbal warning for tardiness.

30 According to Greer, in early July, after he left work he phoned Larry Griebel from a gas station nearby the Highland High School jobsite telling him that he wanted to come by the office to talk to him about the Union. (Tr. 555.) Greer stated that Larry Griebel replied, "We already talked about the Union at that safety meeting and nobody wants to be union, so I don't even want to talk about it. Don't --- if you're coming here for that, don't come here." (Tr. 555.)

35 On July 6, Foreman Tom Kitchen approached Greer toward the end of the day telling him to report to Tom Griebel's office in the morning. (Tr. 549.) The following morning, Greer reported to Tom Griebel, who according to Greer told him, "Hey, Tracy, I heard you were late two of the four or five days last week." (Tr. 550.) When Greer denied that he was late, Tom Griebel told him, "That's not what my foremans told me. And my foremans - and, you know, I tend to believe my foremans." (Tr. 551.) Tom Griebel suspended Greer for one week beginning July 8.¹² Greer did not argue. He testified that as he was leaving the building, an agitated Larry Griebel accused him of stealing time from the Company.

45 2. The 8(a)(1) violations

Paragraph 6(D) of the amended complaint alleges that on January 15, 2003, Respondent's president, Larry Griebel, "coercively informed employees that they would never

50 ¹² Two days later, Charging Party Tracy Greer took a job with a Union company and never returned to work with the Respondent.

be represented by a union.” The un rebutted credible evidence shows that at a meeting of all field personnel Larry Griebel “asked everybody did they want to form a union here” and told them “we can take a vote, but I’m going to tell you guys, this company ain’t never going to be a union.” (Tr. 533.) The un rebutted credible evidence also shows that Larry Griebel asked everyone who wanted to have a union to raise their hands and when no one raised their hands, Griebel stated, “since nobody raised their hand, so be it, this company ain’t going to be a union, he said, so we’re going to keep on making money like we’re making and keep working like we’re working and be happy.” (Tr. 534.)

The General Counsel asserts that the Respondent engaged in unlawful interrogation by taking a vote at the meeting and that the interrogation was coercive because Larry Griebel told the employees that regardless of the vote there was never going to be a union. The Respondent did not address the allegation in its posthearing brief.

The evidence shows that every bricklayer foremen, bricklayer, laborer, equipment operator or other field workers is required to attend the monthly safety meetings. Thus, Larry Griebel, the highest-ranking officer of the Respondent, effectively was addressing a captive audience on January 15, 2003. The surroundings were not informal and Larry Griebel’s remarks were not casual. Rather, they were blunt and direct. Even before he asked for a show of hands to determine which employees supported a union, Larry Griebel told everyone that there was not going to be a union at the Respondent, and that it did not matter if one or more employees wanted a union. When no one understandably raised his hand, Larry Griebel declared again that there would be no union, that the Respondent would keep making money, keep working, and be happy. The unmistakable implication being that if there was a union the Respondent would not be making money, would not keep working, and everyone would not be happy. Under the totality of circumstances I find that the Respondent unlawfully interrogated the employees in violation of Section 8(a)(1) of the Act.

Paragraph 6(E) of the amended complaint alleges that on June 9, 2003, Foreman Don Fisher coercively told Charging Party Tracy Greer that the Respondent would never be represented by a union. The un rebutted credible evidence shows that Fisher initiated the conversation with Greer, asked him why he was wearing a Union T-Shirt, and told him that the Respondent was not a union company. Fisher told Landaw that if he wanted to work for a union company he should go work someplace else. Fisher’s statements are consistent with that of Larry Griebel’s remarks of January 15, 2003, and reflect the Respondent’s position that it was never going to be a union company. By telling Landaw he should go work someplace else if he wanted a union, Fisher’s statements constitute an unlawful threat. *Tualatin Electric*, 312 NLRB 129, 134 (1993). Accordingly, I find that Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 6(E) of the amended complaint.

Paragraph 6(F) of the amended complaint alleges that on June 9, 2003, Foreman Don Sorrell unlawfully threatened Charging Party Tracy Greer with unspecified reprisal when he told him that he better take off his Union T-shirt before Tommy Griebel comes out to the jobsite. It is settled law that the display of items, such as a Union T-shirts, is protected by Section 7 of the Act, unless the employer can show that special circumstances existed that outweigh the employees’ statutory rights. *Escanaba Paper Co.*, 314 NLRB 732, 733 (1994). There is no evidence or argument that special circumstances existed here. Moreover, the comment by Sorrell that Tom Griebel would be displeased or disapprove of the wearing of such an article was coercive. Accordingly, I find that by Sorrell’s statements the Respondent violated Section 8(a)(1) of the Act as alleged in paragraph 6(F) of the amended complaint.

3. The 8(a)(3) violation

Paragraphs 8(A) and (B) of the amended complaint alleges that on July 7, 2003, the Respondent violated Section 8(a)(3) of the Act by suspending Charging Party Tracy Greer for one-week because of his Union activity.

a. *The General Counsel's evidence*

Ample evidence exists showing that Greer openly supported the Union. He spoke with employees about the benefits of union representation, wore a Union T-shirt to work, and passed out Union literature. The credible evidence shows that Tom Griebel and several foremen saw Greer wearing a Union T-shirt on the job and at least two of the foremen commented and/or questioned Greer about wearing the T-shirt. Ample evidence also exists showing that the Respondent opposed union representation. Respondent's president Larry Griebel bluntly told the employees gathered for a mandatory safety meeting that the Respondent was never going to be a union company. His sentiments were echoed by Foremen Fisher and Sorrell in statements they made to Greer on June 9, which was the very first day he began wearing a Union T-shirt to work.

Lastly, the timing of the disciplinary action leading up to Greer's suspension, as well as the Respondent's failure to follow its own discipline procedure supports a reasonable inference that Greer's suspension was unlawfully motivated. With respect to the former, Greer began wearing Union T-shirts on June 9, was given a verbal warning two weeks later, and was suspended less than two weeks after that. Regarding the latter, the evidence shows that the Respondent has a form called an "employee warning report" that it uses for disciplinary matters including attendance problems. (GC Exh. 29, 30, and 33.) It also has a written disciplinary procedure which states that an employee will be given a verbal warning for the first offense, a written warning for the second offense, a 1-week suspension for the third offense, and termination of employment for the fourth offense. (R. Exh. A.) Although Larry Griebel purportedly spoke to Greer about coming to work late on April 17, May 8, and May 21, 2003, Greer was never given a written warning at any time nor was he suspended after the third offense in accordance with Company policy. Tom Griebel did not explain why he gave Greer a verbal warning for a fifth offense, particularly since his brother, Larry Griebel, had already given Greer three prior verbal warnings in less than two months, and in addition a foreman had reported that Greer was late on June 19. Thus, the Respondent did not follow its disciplinary procedures and its enforcement of its attendance policy with respect to Greer was lax until he began his open union activity.

The timing of the Respondent's conduct, coupled with its lax enforcement of its attendance policy before Greer began wearing a Union T-shirt, and its failure to follow its disciplinary procedure afterwards, are evidence of a discriminatory motive for the suspension. Accordingly, I find that the General Counsel has satisfied its initial *Wright Line* evidentiary burden.

b. *The Respondent's evidence*

The Respondent asserts that the suspension was warranted because Greer had a chronic and excessive tardiness problem. It points out that several foremen testified that Tracy Greer was frequently late, that Larry Griebel gave Greer three verbal warnings (April 17, May 8, and May 21, 2003), and that Tom Griebel gave him a verbal warning on June 25. It did not explain, however, why it failed to give Greer a written warning and why it failed to follow its progressive disciplinary process in addressing Greer's so-called excessive tardiness problem.

In addition, the evidence shows that the Respondent did not record many of the days that Greer supposedly was tardy on the official attendance calendar. Although two of the foreman daily reports reflect that Greer was late on April 19 and 26, 2002, it is not reflected on the attendance calendar maintained by the Respondent. (R. Exh. B, and J, p. 1.) While the dates that Larry Griebel talked to Greer about being late in 2003 are reflected on the calendar, the dates for which Tom Griebel disciplined Greer for being late (June 24) and a prior date reported by a foreman (June 19) are not reflected on the attendance calendar. Thus, the Respondent's evidence is internally inconsistent and not totally supportive of its position that Greer had an excessive tardiness problem.

The evidence also shows that the Respondent did not formally document the disciplinary actions it took against Greer until after June 9. (See R. Exh. D, F, G, and H.) Indeed, it was not until June 25 that Tom Griebel first prepared a typed letter indicating that he gave Greer a verbal warning and then subsequently wrote a letter outlining that he was suspending Greer for being late. Tom Griebel did not explain why he did not take these measures prior to June 9. These omissions cast doubt on the reason proffered for suspending Greer.

Lastly, the Respondent further asserts that the suspension was warranted because Greer falsified his time records by writing on his timecard that he worked 8 hours, when he was at least 10 minutes late. Inexplicably, there is no evidence showing that the Respondent docked Greer's pay at any time prior to the date that he was suspended, even though it claims that his tardiness was excessive and that he filled out his time cards showing that he worked eight hours a day. The failure of the Respondent to take any action against Greer for falsifying his timecard until he was suspended supports a reasonable inference that this reason was an after thought used to bolster the Respondent's justification for suspending Greer and to deflect attention from its lax enforcement of its disciplinary rules.

Based on the evidence viewed as a whole I find that the Respondent has failed to persuasively demonstrate that its reasons for suspending Charging Party Tracy Greer are not pretextual or alternatively that it would have suspended him even in the absence of his union activity. Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act as alleged in paragraph 8(A) and (B) of the amended complaint.

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. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:
 - (a) Threatening its employees with unspecified reprisals because of their union activities.
 - (b) Threatening its employees with possible loss of jobs because of their union support and activities.
 - (c) Coercively interrogating its employees concerning their union activities and sympathies.

(d) Threatening its employees by telling them that they should go work someplace else because they sought to be represented by a union.

5 (e) Threatening its employees with unspecified reprisals because they wear Union T-shirts and engage in union activities.

4. The Respondent violated Section 8(a)(3) of the Act by engaging in the following conduct:

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(a) Discharging Individual Charging Party Dennis Landaw because he engaged in union activities.

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(b) Suspending Individual Charging Party Tracy Greer because he engaged in union activities.

5. The aforesaid unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

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6. The Respondent did not otherwise engage in any other unfair labor practice alleged in the amended complaint in violation of the Act.

Remedy

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

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The Respondent having discriminatorily discharged Individual Charging Party Dennis Landaw, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to the date of a proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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The Respondent having discriminatorily suspended Individual Charging Party Tracy Greer, it must make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the first date of suspension to the date he would have been eligible to return to work, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹³

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¹³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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ORDER

The Respondent, Duer Construction Company, Inc., its officers, agents, successors, and assigns, shall

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1. Cease and desist from

(a) Threatening its employees with unspecified reprisals because of their union activities.

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(b) Threatening any employee with possible loss of job for supporting the Laborers International Union of North America, AFL-CIO, Local 894 or any other union.

(c) Coercively interrogating any employee about union support or their union activities and union sympathies.

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(d) Threatening any employee by telling him to go work someplace else because he sought to be represented by a union.

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(e) Threatening any employee with unspecific reprisals for wearing Union T-shirts and supporting the Laborers International Union of North America, AFL-CIO, Local 894 or any other union.

(f) Discharging or otherwise discriminating against any employee for supporting the Laborers International Union of North America, AFL-CIO, Local 894 or any other union.

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(g) Suspending or otherwise discriminating against any employee for supporting the Laborers International Union of North America, AFL-CIO, Local 894 or any other union.

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(h) 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.

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

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

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(c) Make Tracy Greer whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the Decision.

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(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Dennis Landaw and the unlawful suspension of Tracy Greer, and within 3 days thereafter notify the employees in writing that this has been done and that the discharge and suspension will not be used against them in any way.

(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 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) Within 14 days after service by the Region, post at its facility in Akron, Ohio, copies of
the attached Notice marked "Appendix."¹⁴ Copies of the Notice, on forms provided by the
Regional Director for Region 8, 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.
10 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 November 7, 2003.

(g) 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.

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

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C. Richard Miserendino
Administrative Law Judge

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¹⁴ 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."

JD-96-04
Akron, Ohio

JD-96-04
Akron, Ohio

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT threaten our employees with unspecified reprisals because of their union activities.

WE WILL NOT threaten our employees with possible loss of jobs because of their union support and activities.

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

WE WILL NOT threaten our employees by telling them that they should go work someplace else if they want to be represented by a union.

WE WILL NOT threaten our employees with unspecific reprisals because they wear Union T-shirts and engage in union activities.

WE WILL NOT suspend or otherwise discriminate against any of you for supporting the Laborers International Union of North America, AFL-CIO, Local 894 or any other union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Laborers International Union of North America, AFL-CIO, Local 894 or any other union.

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

WE WILL, within 14 days from the date of this Order, offer Dennis Landaw full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

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

WE WILL make Tracy Greer whole for any loss of earnings and other benefits resulting from his one week suspension, less any net interim earnings, plus interest.

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WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension and unlawful discharge of Tracy Greer and Dennis Landaw, respectively, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the suspension and discharge, respectively, will not be used against him in any way.

DUER CONSTRUCTION COMPANY, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

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 with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1240 East 9th Street, Room 1695, Cleveland, Ohio 44199-2086, Telephone 216-522-3740