

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

S & W CRANE, INC.

and

CASES 12-CA-22350  
12-CA-22465  
12-RC-8811

INTERNATIONAL UNION OF  
OPERATING ENGINEERS,  
LOCAL 925, AFL-CIO

*Chris Zerby, Esq.*, for the General Counsel.  
*Mike Kell*, for the Charging Party/Petitioner.  
*Mike Burress*, for the Respondent.

DECISION

Statement of the Case

**MARGARET G. BRAKEBUSCH, Administrative Law Judge.** The original charge in Case No. 12-CA-22350 was filed on July 9, 2002,<sup>1</sup> by the International Union of Operating Engineers, Local 925, AFL-CIO (herein the Union). On July 16, 2002 the Union filed an amended charge. The original charge in Case No. 12-CA-22465 was filed by the Union on August 30, 2002. Based upon these charges, the Regional Director for Region 12 of the National Labor Relations Board (herein the Board) issued a Complaint and Notice of Hearing on September 30, 2002, alleging that on various dates between June 19, 2002 and July 9, 2002, S&W Crane, Inc., (the Company) threatened to discharge its employees, close its business, sell its assets to a related company, and reopen its business under a different name if its employees selected the Union as their collective bargaining representative. The complaint further alleged that the Company interrogated its employees about their union membership and activities and terminated its employee Charles Carlisle because of his Union membership and concerted activities. The Union filed an amended charge in Case No. 22465 on October 17, 2002. In an Order Consolidating Cases, Consolidated Amended Complaint, and Notice of Hearing that issued on October 31, 2002, the Regional Director for Region 12 of the Board alleged that the Company additionally threatened its employees on or about August 15, 2002 with discharge and facility closing if its employees selected the Union as their exclusive collective bargaining

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<sup>1</sup> All dates are 2002 unless otherwise indicated.

5 representative. The Company filed an answer to the Complaint and Notice of Hearing, dated October 7, 2002, specifically denying those allegations relating to the discharge of Charles Carlisle, the conclusionary allegations identifying the sections of the Act that have been violated by the Company's conduct, and the allegation that such practices affect commerce within the meaning of the Act. For all other allegations, the Company referenced a previously given statement. In an Answer dated November 12, 2002, the Company stated that it had already submitted responses to the cases.

10 Pursuant to a Stipulated Election Agreement approved by the Regional Director for Region 12, an election was conducted on August 13, 2002 among certain employees of the Company<sup>2</sup> to determine whether or not they wish to be represented for the purposes of collective bargaining by the Union. The Tally of Ballots reflected that of approximately 3 eligible voters, one vote was against the Union and one vote was cast for the Union. The remaining ballot of Charles Carlisle was challenged by the Board agent who conducted the election because  
15 Carlisle's name was not on the Company's election eligibility list. No objections to the election were filed. An investigation into the issues raised by the challenged ballot was conducted under the direction and supervision of the Regional Director for Region 12 of the Board. The Regional Director determined that inasmuch as the same parties are involved in the representation case and the unfair labor practice cases, and the issues raised by the challenged ballot are the same as  
20 certain of the issues raised in the unfair labor practice cases, the challenged ballot should be consolidated for hearing with the unfair labor practice cases. On November 5, 2002, the Regional Director for Region 12 issued an Order Directing Hearing on Challenged Ballot and Consolidating Cases and Notice of Hearing. Pursuant to Section 102.33 of the Board's Rules and Regulations, Series 8, as amended, Case Nos. 12-RC-8811, 12-CA-22350, and 12-CA-22465  
25 were consolidated for the purposes of hearing, ruling, and decision.

30 A hearing on these matters was conducted before me in Tampa, Florida on January 29 and 30, at which all parties had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses and to argue orally. The Company's General Manager; Michael Burress, represented the Company in this matter. Although advised of his right to legal counsel, Burress declined, and chose to appear and to proceed *pro se*.

35 Based upon all of the evidence of record, including my observation of the demeanor of the witnesses, I made the following:

## Findings of Fact

### I. Jurisdiction

40 The Company, a corporation has been engaged in the operation of a crane service at its facility in Lakeland, Florida, where it annually purchases and receives at its Lakeland, Florida facility, goods and services valued in excess of \$50,000 from enterprises located inside the State  
45 of Florida, each of which enterprises has received these goods and services directly from points

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<sup>2</sup> The appropriate collective bargaining unit, as set forth in the Stipulated Election Agreement includes all full-time and regular part-time crane operators employed by the Company at its Lakeland, Florida facility, excluding all office clerical employees, guards, and supervisors as defined in the Act.

outside the State of Florida. There being no denial of jurisdiction and no evidence to the contrary, I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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## II. Alleged Unfair Labor Practices

### A. Background Information

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Steve Webb has owned Webb's Towing for 28 years. Webb testified that he has also owned and subsidized S & W Crane, Inc., (the Company) for the last five years. The Company operates a specialized crane service from its facility in Lakeland, Florida, where approximately 90 to 95 percent of its business is involved with setting rafters on residential buildings. Steven Webb owns the Company and Michael Burress is the acting general manager. The Company operates four crane units; an 85-ton industrial crane and three 40-ton cranes. Burress testified that the industrial crane is used less often than the smaller cranes and that one of the three smaller cranes is damaged and limited for use. In early May 2002, The Company employed Ronnie Bowen, Richard Cox, and Billy Langford as crane operators. Burress testified that on May 28, 2002, he injured his knee, which affected his ability to operate a crane when needed. During the month of May 2002, Langford was terminated for refusing to take a drug test.

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### B. The Union's Campaign at the Company

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Charles Carlisle has been a member of a union since 1979 and specifically a member of the International Union of Operating Engineers since 1993. Carlisle previously worked for the Company for approximately four to five months in 1998. At that time, he worked under the provisions of a collective bargaining agreement and the Company made health and welfare contributions pursuant to the agreement. Michael Burress was not employed at the Company during Carlisle's initial employment in 1998.

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In June 2002, Carlisle telephoned owner Steven Webb to ask if there were any available jobs. Although he was unable to speak with Webb, he left a message with the secretary. In response to his inquiry, General Manager Burress called Carlisle and told him that there was a job available. He told Carlisle that he would need to complete an application and to take a drug test before he could begin working. Carlisle testified that it is customary in the industry for an applicant to ask how long a particular job may last. Carlisle testified that Burress assured him that there was plenty of work. Burress asked Carlisle for a date certain when he would be able to begin and he began working within a matter of days.

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Webb testified that although he had authorized Burress to hire Carlisle, the Company set conditions for the hire. Webb contends that when Carlisle was hired, he was told that no union dues would be deducted and the Company would pay no union health and welfare benefits.

After obtaining the job with the Company, Carlisle contacted Union Representative Michael Kell. Kell told him that it was a good time for him to begin working at the Company because there was already an employee there who was interested in joining the Union. After Carlisle began working, he asked employees Bowen and Cox to sign Union authorization cards. While Bowen agreed to sign a card, Cox declined.

**C. The Company’s Knowledge of the Campaign**

Burress testified that Cox told him about Carlisle’s asking him to sign a Union authorization card. Burress then shared the information with Webb. Burress admits that upon hearing this, Webb responded by saying that it would be a cold day in hell before he went union. Webb testified that he couldn’t believe that Carlisle was asking people to sign cards, when the Company had been upfront with him about the Union. Webb testified, “He knew that I didn’t care for the Union.” After Burress told Webb of Carlisle’s Union solicitation, Webb stated that he might just sell everything and close the facility. Webb also suggested to Burress that he could close the facility and reopen it under the name of his towing company. He assured Burress that if he did so, he would provide Burress with a job and he would offer Cox an opportunity to continue employment.

The next morning after talking with Webb, Burress met with Bowen and Cox at the Company’s facility. Burress admits that he told them about Webb’s consideration of closing the facility and reopening it under another name. Burress further admits that he told Cox that even if Webb closed the facility, he would have a job. He explained to Bowen however, that the Company would not be able to hire him if he became a union member. Burress testified that he told Bowen “We do not hire union hands.” Burress also admitted that he had asked Bowen if Carlisle had asked him to join the Union. Bowen recalled that during his conversation with Burress on June 19, Burress stated that he didn’t want Carlisle pressuring either Cox or him. Bowen assured Burress that he would not be pressured or harassed.

**D. The Union’s Petition**

On July 3 2002, the Union filed a petition with the Board to represent all crane operators employed at the Company’s Lakeland, Florida facility. Bowen recalled that he had been at his father’s home on July 5 when he received a call on his company cell phone. He jokingly answered the call by saying “I didn’t do it.” Burress responded by saying “Apparently, you did.” Burress went on to explain that Bowen had apparently signed a petition for the Union and the Company planned to fight it. Burress told him that the Company was not going to be union and if Bowen continued, he would not have a job. Burress admits that when he spoke with Bowen by telephone, he told Bowen that he would not be allowed to work for the Company if he joined the Union. Burress admits that he told Bowen that the Union would force the Company to raise prices and cause the Company to lose customers, which would result in closing down the business. He admits that he told Bowen that he needed to make a decision as to what was best for him and for his family. He told Bowen that if he wanted to join the Union, he should go to the Union hall and not join it at the Company.

**E. Carlisle’s Layoff**

It is undisputed that in September 2001 the Company paid expenses of \$37,375.72 with sales of only \$34,338.14. In January 2002, the Company’s sales were only \$36,486.51 while its paid and incurred expenses totaled \$47,594.28. Counsel for the General Counsel submitted into evidence Company records to show that the Company paid and incurred expenses of \$57,570.63 for the month of May 2002. Burress testified that the Company also owed an additional \$7,000 to \$8,000 for crane payments. Its sales however, were only to \$52,979.34.

5 On July 9, 2002, the Company laid off Carlisle. Burress testified that the decision to layoff Carlisle was based upon a number of reasons. He listed the reasons as the following: June had not been a productive month, Webb was adamant about recouping money from the Company, Burress had recovered from his knee injury and could return to work, and litigation involving one of the cranes required limited use of that crane and restricted its use to only Burress.

10 When Carlisle reported to work on July 9, Burress told him that he was being laid off. Burress told him that it was based upon economics and Webb couldn't justify the payroll. Bowen testified that he was present during part of Burress' conversation with Carlisle. Burress explained that he was laying off Carlisle because the Company was losing money and that he (Burress) needed to get back into a crane. Burress added that the decision was not because of the Union. Bowen recalled Carlisle's telling Burress that it didn't matter because he would still get  
15 to vote in the election either way.

After Carlisle's layoff, Burress spoke with Bowen and Richard Cox later in the day on July 9. Bowen described the conversation as:

20 And Mike and Richard Cox were at the truck and Mike told us that S&W couldn't afford to be union, that they weren't going to be union. Steve wasn't going to have it, that he would sell the company before it was union. There would be no union operators, that he would take care of all the non-union employees and Mike said, I understand that you're going to be union, and I said yes, I need the  
25 benefits, and he said we still have no place for union employees.

#### F. After the Election

30 Bowen testified that his next conversation with Burress about the Union occurred on or about August 15. He recalled that he had been talking with Webb about the placement of a particular crane. Burress spoke up and told Bowen that it was time to go to work and that "We can handle it, we are a non-union operation." Bowen asked Burress why suddenly the Union was all bad. In describing Burress' response, Bowen testified:  
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40 We can't afford this. S & W just cannot afford this, and you've made a lot of people mad at you here. He said that himself, Richard, and Paula were all mad at me because of all this union shit that I was doing, and that they wouldn't have a job, that Steve was going to close the company.

45 Bowen recalled that Burress said that the company would pay Carlisle "the thousand dollars"<sup>3</sup> and would just close the company. Burress explained that the Company could pay on the cranes for a year and then sell them and take a "write-off." Bowen confirmed that Burress did not explain why the company could not afford the Union other than to say that the company was struggling to make payroll and Webb was having to pay for fuel out of his own pocket.

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<sup>3</sup> This conversation is alleged to have occurred after the Union filed its charge on July 9, 2002 alleging the discriminatory layoff of Carlisle.

During the conversation, Bowen asked Burress how the Union was his fault. Burress explained that even before Carlisle came, Bowen had spoken with Langford and Cox about the Union and that he was responsible for the Union sending Carlisle as a “salt.”

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**III. Factual and Legal Conclusions**

**A. 8 (a)(1) Allegations**

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**1. Alleged Interrogation**

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General Counsel alleges that Respondent, acting through Michael Burress, interrogated its employees about their union membership and activities on or about late June 2002 and on or about July 5, 2002. I find the record supports General Counsel’s allegation with respect to both alleged incidents of interrogation.

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Ronnie Bowen testified that on or about June 19 2002, Burress asked him if Carlisle had mentioned anything to him about the Union. Burress went on to say that he did not want Carlisle pressuring or harassing Bowen or Cox about the Union. In testimony, Burress admitted that in approximately mid-June, he asked Bowen whether Carlisle had asked him to join the Union. Bowen testified that during the July 5, 2002 telephone conversation, Burress accused him of signing the Union petition. Burress did not deny the discussion about the petition, but freely admitted that during this conversation he told Bowen that the Union would force the company to close and that Bowen would not be able to work for the Company if he joined the Union. Based upon his admissions otherwise and his failure to specifically deny the allegation of interrogation, I find that Burress also interrogated Bowen about his involvement in the Union’s July 3 petition. By accusing Bowen of being involved in the petition, Burress’ comment was effectively an interrogation into his Union support and sentiments.

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Interrogation is not per se a violation of section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176 (1984) affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9<sup>th</sup> Cir. 1985). In determining whether an interrogation is unlawful, the Board examines whether under all the circumstances, the questioning reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Rossmore House* at 1177-1178, *Emery Worldwide*, 309 NLRB 185, 186 (1992).

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Under the totality of circumstances approach, the Board examines factors such as whether the interrogated employee is an open and active union supporter, the background of the interrogation, nature of the information sought, identity of the questioner, and the place and method of the interrogation. *Rossmore House* at 1178, fn. 20; *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964); *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985). In this case, Bowen was not an open and active union supporter. As Bowen’s immediate supervisor, Burress conducted the interrogations at the company’s facility and on the company cell phone. In the initial conversation, Burress asked about the Union activities of Carlisle. In responding, Burress placed Bowen in a position of disclosing his response to Carlisle and thus exposing his own Union sentiments. In *Sumo Container Station, Inc.*, 317 NLRB 383 (1995), the Board reiterated

its earlier finding<sup>4</sup> that an interrogation is coercive and violative of 8(a)(1) when it seeks to elicit information about other employees’ union activity and is not just limited to information about the questioned employee. By telling Bowen on July 5 that he had apparently been involved in the Union’s petition for an election, Burress’ statement was coercive and sought information about Bowen’s union activities and sentiments. Accordingly, the evidence supports a finding that the Company unlawfully interrogated employees on or about June 19, 2002 and on or about July 5, 2002.

**2. Alleged Threat of Discharge**

General Counsel also asserts that on or about July 5 2002, Respondent, acting through Michael Burress, threaten its employees with discharge if they joined the Union.

Bowen testified that during the July 5 telephone conversation, Burress told him that if he continued with the Union, he would not have a job. Burress admits that during this telephone conversation, he told Bowen that he would not be able to work for the Company if he joined the Union. Based upon the total testimony, including the admission of Burress, I find that on or about July 5, 2002, the Company threatened its employees with discharge if they joined the Union.

**3. Alleged Threats to Discharge Employees and Threats to Close the Facility**

The Board has long held that threats of plant closure and other threats of job loss are more likely than other unfair labor practices to affect election conditions negatively for an extended period of time. *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), enf. 47 F.2d 1141 (3<sup>rd</sup> Cir. 1995). Specifically, threats of plant closure have been viewed as arguably the most serious of all the “hallmark” violations of 8(a)(1) of the Act. See *Springs Industries, Inc.* 332 NLRB No. 10, at p. 2 (2000). Such threats have been recognized as an “insidious reminder to employees every time they come to work that any effort on their part to improve their working conditions may be met with complete destruction of their livelihood.” *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 (1996).

Burress admits that in his conversation with Cox and Bowen, he talked about the possibility of the Company closing. Burress admitted that he told Bowen and Cox that the shop would close or would reopen under another name if the union went in. He told Cox that he would continue to have a job but explained to Bowen that he would not if he were a Union member. Bowen also testified that during his conversation with Burress on July 9, Burress threatened that Webb would sell the business before he would have a Union. Burress had added that the Company would take care of its non-Union employees. Bowen further testified that during his conversation with Burress on August 15, Burress talked about employees losing their jobs and threatened that the Company might pay back pay to Carlisle and then close down the facility. In his testimony, Burress did not address the July 9 and August 15 alleged threats to close the facility. He admits however, that he and Webb discussed the possibility of closure among themselves when they first spoke after learning of Carlisle’s Union solicitation. It is certainly reasonable that Burress continued to threatened closure on July 9 and August 15 just as

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<sup>4</sup> *Cumberland Farms*, 307 NLRB 1479 (1992).

he had in June and July and I credit Bowen’s testimony in this regard.

5 The Company does not deny that employees were told that the Company might close  
 operation because of the Union. Based upon the testimony of Webb and Burress and the  
 apparent financial circumstances of the Company, I am convinced that Webb and Burress  
 10 believed that the Company could not operate with a mandatory obligation to pay health and  
 welfare benefits for its employees. While Burress admittedly shared this belief with employees,  
 there is no evidence that the Company provided any objective information as to why it could not  
 operate if a union represented employees. An employer may lawfully tell employees what he  
 15 reasonably believes will be the likely consequences of unionization that are outside his control.  
 When the employer makes threats of economic reprisal that will be taken solely on his own  
 volition however, such predictions have been found to be unlawful. *NLRB v. Gissel Packing  
 Co.*, 395 U.S. 575, 618 (1969), *NLRB v. River Togs*, 382 F.2d 198, 202 (2d Cir. 1967) Under  
 20 *Gissel*, when an employer makes a prediction regarding the consequences of unionization, the  
 prediction must be “carefully phrased on the basis of objective fact to convey an employer’s  
 belief as to demonstrably probable consequences beyond his control.” Burress’ statement to  
 employees that Webb would close the facility because of the Union did not meet the criteria for a  
 lawful prediction. Burress left no doubt that the decision to close was completely within the  
 25 discretion of Webb and was clearly a threat of discharge or job loss. Burress’ threat that the  
 Company would close the facility and reopen it in another name further emphasized the  
 Company’s control. Accordingly, the evidence supports a finding that the Company, acting  
 through Michael Burress; threatened to discharge its employees, close its business, sell its assets,  
 and reopen its business under a different name if its employees selected the Union as their  
 exclusive bargaining representative. I find such threats violative of Section 8(a)(1) of the Act.

**B. Carlisle’s Layoff**

30 In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1<sup>st</sup> Cir. 1981), cert denied  
 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393,  
 403(1983), the Board set forth the causation test it would employ in all cases alleging violations  
 of Section 8(a)(3). The Board stated that it would first require the General Counsel to make an  
 35 initial “showing sufficient to support the inference that protected conduct was a ‘motivating  
 factor’ in the respondent’s decision. If General Counsel makes that showing, the burden would  
 then shift to the respondent to demonstrate that the same action would have taken place even in  
 the absence of the protected conduct.” 251 NLRB at 1089.

40 In order to make such a showing, General Counsel must establish four elements by a  
 preponderance of the evidence. First, General Counsel must show the existence of activity  
 protected by the Act. Second, the General Counsel must prove that the employer was aware that  
 the employee had engaged in such activity. Third, General Counsel must show that the alleged  
 45 discriminatee suffered an adverse employment action. Fourth, General Counsel must establish a  
 motivational link, or nexus between the employer’s protected activity and the adverse action.

There is no dispute that Charles Carlisle engaged in union activity prior to his layoff and  
 the Company was fully aware of his actions. Burress not only acknowledges that Cox told him  
 of Carlisle’s Union solicitation, but he further admits that he asked Bowen if Carlisle had talked  
 with him about signing a Union card. Thus, the first three elements are without dispute.  
 Additionally, I find that General Counsel has further demonstrated sufficient nexus between

Carlisle’s Union activity and his layoff. Admittedly, the Company not only interrogated employees about Carlisle’s Union activity, but also threatened to discharge employees and to close down the facility if other employees supported the Union. Thus, General Counsel has clearly established a prima facie case under the Board’s guidelines as set forth in *Wright Line*.

5           Despite the fact that the Company does not deny certain alleged interrogation and threats of discharge and plant closure, the Company contends that its basis for Carlisle’s layoff was lawful. The Company contends that there were a number of factors that caused Carlisle’s layoff.

10           Burress explained that one of the reasons for Carlisle’s layoff was the fact that June was not a productive month and Webb had been adamant about recouping his money. Webb testified that while his primary business is Webb’s Towing, he has operated S&W Crane Inc. as a write-off over the last five years. He asserts that to date, the Company has made no money. Webb’s testimony was consistent with the Company records documenting that expenses exceeded sales in September, 2001 as well as January, May, and June 2002. Webb testified that he personally contributes approximately \$40,000 a year to keep the business open. In return for his contribution to the Company, he receives a weekly paycheck as well as hospitalization coverage. He added that the Company also serves as a means of pulling in “a lot of low boy work” for his primary company. Thus, while the Company contends that June was not a productive month, there was no evidence that the Company has been profitable since its inception.

25           The Company also contends that Carlisle was no longer needed in July 2002 because Burress had recovered from his May 28, knee injury and could return to work. Invoices for the period of time from May 1 through May 28 reflect that Burress was the operator for 13 separate jobs on 11 workdays. Invoices covering the period of time from June 3 through June 20 reflect that Burress was the operator for 10 separate jobs on 7 workdays.<sup>5</sup> While the invoices reflect that Burress worked to a lesser extent for the month following his injury, he nevertheless continued to work and was working at the time that Carlisle was hired. Accordingly, the discrepancy between Burress’ crane operation before and after his injury is not sufficiently significant to justify Carlisle’s July layoff.

35           The Company also maintains that Carlisle was laid off in July because of litigation involving one of its cranes. Although Burress acknowledged that the litigation involving the crane’s bent frame began in late 2001, he admitted that the Company continued to use the crane after reporting it to the insurance company. Burress maintained however, that the Company’s attorney advised using that particular crane on a limited basis. General Counsel submitted into evidence a September 13, 2001 fax to Webb from the crane manufacturer. The fax explains the procedure for repairing the crane’s frame. The fax also suggests that no overloads should be lifted with the crane and it is suggested that the Company limit capacity picks from the side and corner where the frame is slightly bowed until the repair is completed. The Company produced no documentation from its attorney<sup>6</sup> or the manufacturer to show any additional limitations imposed in July that would support its rationale for the layoff.

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5           Two of the jobs in May involved as much as 9 hours. All of the jobs in June were documented as six hours or less. Most of the June jobs were billed as three to four hours.

6           Webb testified only that in June his attorney had advised him to begin documenting downtime for the damaged crane.

Webb further testified that the Company lost additional business after its May termination of Billy Langford. Webb contended that after his termination, Langford began working for one of the Company's competitors and taking away some of the Company's customers.

5 As discussed above, the Company cited a number of reasons to justify Carlisle's July 9  
layoff. I find the reasons individually and in total to be pretextual and not the true basis for the  
layoff. Carlisle's separation notice shows that he was laid off for lack of work. There is no  
10 dispute however, that operators are paid based upon ticket time. The Company admits that by  
using the ticket time method of paying its operators, the operators are paid only for the number  
of hours billed to the customer. Webb admitted that if there is no work for a crane, there is no  
expense for an operator. Thus, even when business is slow, operators receive no pay other than  
15 for work billed to customers. Accordingly, there is no evidence that Carlisle's layoff reduced  
expenses. Had there been no work available for Carlisle, the Company would have borne no  
additional expense by retaining him as an employee. Additionally, the Company's records show  
that expenses exceeded sales in September, 2001 as well as January, May, and June 2002.  
Despite this discrepancy, there was no layoff and Carlisle was hired after Langford's  
termination.

20 The overall record failed to show that economic or business circumstances changed with  
any significance in July. While the Company contends that it was restricted in its use of the  
damaged crane, the Company had been advised of the crane's limitations and had continued to  
operate the crane since at least September 2001. The Company offered no specific information  
25 or evidence to document its claim that Langford had pulled away customers after leaving in May.  
As discussed above however, Carlisle's layoff would not have reduced expenses even if  
Langford had caused a reduction in orders.

30 Webb testified that the Company needs three operators in a full-time position. With  
Carlisle's layoff in July, the Company was left with only two full-time operators. While Burress  
has also been an operator since Carlisle's layoff, it is undisputed that he did so prior to Carlisle's  
hire and while the Company employed Cox, Bowen, and Langford.

35 It is apparent that the only change in circumstance that triggered Carlisle's layoff was the  
filing of the Union's petition on July 3. I found both Webb and Burress to be very credible  
witnesses. Burress did not deny that he interrogated Bowen about the Union nor did he deny that  
he told Bowen that he could not continue to work there if he supported the Union. Webb freely  
40 admitted that he told Carlisle at the outset that the Company would not pay union benefits or  
withhold dues. Webb testified that he couldn't believe that Carlisle had solicited employees to  
join the Union when Carlisle knew that the Company "didn't care much for it." He explained  
that he felt that Carlisle had stabbed him in the back. It was apparent that both Burress and  
Webb believed that they were fully within their rights to set these restrictions for employees.  
45 Webb credibly described Carlisle as a knowledgeable and trained operator who treated the  
equipment as though it were his own. Despite the fact that Carlisle was a good operator  
however, the company was faced with an upcoming election and three potential voters. Webb  
was asked on cross examination if he had made the statement to Burress that it would be a cold  
day in hell before he went union. Webb credibly responded, "That sounds like something I  
would say."

The Company presented its case solely through its General Manager, Michael Burress, and without benefit of legal representation. In presenting its case, the Company failed to deny or rebut certain of the 8(a)(1) allegations, while readily admitting others. Both Burress and Webb appeared totally candid about their reaction to the Union’s organizing efforts. Because of their candor, I found the majority of Webb and Burress’ testimony to be credible. It is apparent however, that the various reasons cited for Carlisle’s layoff were pretextual. The Company’s recitation of these various reasons appeared as more of an afterthought and a hopeful attempt to justify the layoff. Based upon the demeanor of Webb and Burress, it appears that they simply tried to present reasons that would otherwise justify a layoff. Where an employer’s explanation fails to withstand scrutiny, it is considered pretextual and buttresses general counsel’s prima facie showing of unlawful discrimination. See *Doug Wilson Enterprises, Inc.*, 334 NLRB No. 51, slip op. at 7 (2001) citing *York Products, Inc. v. NLRB*, 881 F.2d 542, (8<sup>th</sup> Cir. 1989). The overall record therefore, supports a finding that the Company would not have laid off Carlisle in the absence of his Union activity. Accordingly, I find that the layoff is violative of Section 8(a)(3) and (1) of the Act.

**IV. Report and Recommendations on Challenged Ballot**

Pursuant to a stipulated election agreement executed by the Company and the Union, and approved by the Regional Director for Region 12 on July 16, 2002, an election was conducted on August 13, 2002, in an appropriate unit of the Company’s employees. The unit was described as “all full-time and regular part-time crane operators employed by the Employer out of its Lakeland, Florida, facility, excluding all office clerical employees, guards and supervisors as defined in the Act.” As reflected in the Tally of Ballots, there were approximately 3 eligible voters. Of them, one vote was cast for the Union and one vote was cast against the Union. Because the ballot of Charles Carlisle was challenged, the total number of challenged ballots was determined to be sufficient to affect the outcome of the election. Accordingly, on November 5, 2002, the Regional Director for Region 12 issued an Order Directing Hearing on Challenged Ballot and Consolidating Cases and Notice of Hearing in Case Nos. 12-RC-8811, 12-CA-22350, and 12-CA-22465. By virtue of this order, the issue of whether this challenge is to be sustained is included in this decision.

In general, to be eligible to vote, an employee must have been employed both on the eligibility date, which in this case was July 14, 2002, and on the election date, which in this case was August 13, 2002. See *Plymouth Towing Co.*, 178 NLRB 651 (1969). Discriminatory personnel actions cannot be used to make an employee eligible or ineligible to vote in a Board election. Having found that Respondent’s layoff of Charles Carlisle violated Section 8(a)(3) of the Act, *supra*, it follows that he should properly be considered as an employee at all relevant times. Accordingly, I find that he was eligible to vote in the election. I recommend the challenge to his ballot be overruled and his ballot be opened and counted.

**Conclusions of Law**

1. The Company, S&W Crane, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5 2. International Union of Operating Engineers, Local 925, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

10 3. The Company violated Section 8(a)(1) of the Act by coercively interrogating its employees concerning their Union activities and the activities of other employees.

4. The Company violated Section 8(a)(1) of the Act by threatening its employees with discharge and with closing its facility if they chose a union to represent them.

15 5. The Company violated Section 8(a)(3) and (1) of the Act by laying off Charles Carlisle because he assisted the Union and engaged in protected concerted activity.

20 6. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

**Remedy**

25 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.

30 The Respondent having discriminatorily laid off Charles Carlisle, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall recommend that the Company be required to expunge from its records all references to its unlawful layoff of Carlisle, and to inform him in writing that this has been done, and that this action will not form the basis of any future employment action.

40 Regarding the consolidated representation case, it is recommended that the representation case be returned to the Regional Director, with the direction to open and count the ballot of eligible voter Charles Carlisle. If the additional ballot gives the Union the majority of the total votes, it is further recommended that the Union be certified as the exclusive representative of the bargaining unit employees.

45 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:<sup>7</sup>

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<sup>7</sup> 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.

**ORDER**

The Company, S &W Crane, Inc., Lakeland, Florida, its officers, agents, successors, and assigns, shall:

5

1. Cease and desist from:

(a) Coercively interrogating employees about their Union activities and the Union activities of other employees.

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(b) Threatening employees with termination or facility closing if they choose a union to represent them.

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(c) Discharging or laying off employees because of their Union activities or sympathies.

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

20

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

(a) Within 14 days from the date of this Order, offer Charles Carlisle 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 right or privilege previously enjoyed.

25

(b) Make Charles Carlisle 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 this decision.

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

35

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

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(e) Within 14 days after service by the Region, post at its Lakeland, Florida facility, copies of the attached notice marked "Appendix."<sup>8</sup> Copies of the notice, on forms

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<sup>8</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read

Continued

provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company 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 Company has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 19, 2002.

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

Dated, Washington, D.C.

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**Margaret G. Brakebusch**  
**Administrative Law Judge**

APPENDIX

NOTICE TO EMPLOYEES

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

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

10

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.

15

**WE WILL NOT** discharge, layoff, or otherwise discriminate against any of you for supporting International Union of Operating Engineers, Local 925, AFL-CIO or any other union.

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**WE WILL NOT** coercively question you about your union support or activities.

**WE WILL NOT** threaten you with discharge or with closing the facility because of your support and activities on behalf of the International Union of Operating Engineers, Local 925, AFL-CIO or any other union.

25

**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.

30

**WE WILL**, within 14 days, offer Charles Carlisle 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 right or privilege previously enjoyed.

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**WE WILL** make Charles Carlisle whole for any loss of earnings and other benefits, resulting from his layoff, 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 layoff of Charles Carlisle and **WE WILL**, within 3 days thereafter, notify him in writing that this has been done and that the layoff will not be used against him in any way.

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**S & W CRANE, INC.**

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

5 The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy 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](http://www.nlr.gov)

10 201 East Kennedy Boulevard, South Trust Plaza, Suite 530, Tampa, Florida 33602-5824  
(813) 228-2641, Hours: 8 a.m. to 4:30 p.m.

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

15 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 ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2662.

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