Donaldson Bros. Ready Mix, Inc. *and* International Union of Operating Engineers, Local 400, AFL–CIO. Cases 19–CA–26948–1, 19–CA–26948–2, 19–CA–26948–3, 19–CA–26948–4, 19–CA–26948–5, 19–CA–26948–6, 19–CA–26948–7, and 19–CA–27018, and 19–CA–27024

May 19, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On December 15, 2000, Administrative Law Judge Jerry M. Hermele issued the attached decision. Both the Respondent and the General Counsel filed exceptions and supporting briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and affirms the judge's rulings, findings,[1] and conclusions, except as modified here, and adopts the recommended Order as modified and set forth in full below.[2]

I. INTRODUCTION

The unfair labor practice allegations in this case arise from an effort by the Union, Operating Engineers Local 400, to organize approximately 25 employees working for Respondent Donaldson Bros., a company engaged in the sale and delivery of ready mix concrete, sand, and gravel. The judge found that the Respondent committed numerous violations of Section 8(a)(1) and (3) of the Act in the month-and-a-half following the commencement of the Union's campaign in early April 2000, but he also recommended dismissal of several complaint allegations of additional violations. Both the General Counsel and Respondent have excepted to certain of the judge's findings and conclusions.

II. SUMMARY OF BOARD'S FINDINGS AND CONCLUSIONS

We affirm the judge's disposition of certain issues presented for the reasons set forth in his decision.[3] We affirm or reverse certain other dispositions of the judge for the reasons discussed herein. Some of the Board's findings and conclusions reflect the panel's unanimous views, while others reflect the views of panel majorities, as more fully described below.

We adopt the judge's findings that the Respondent violated Section 8(a)(1) by interrogating employee Allen Dukelow and violated Section 8(a)(3) by laying off employee Jim West and by granting the employees a wage increase in response to the union activity. We find, contrary to the judge, that the Respondent violated Section 8(a)(1) by banning off-duty employees from its premises and by misrepresenting the eligibility of union-represented employees to participate in its Employee Stock Option Plan (ESOP), but did not violate Section 8(a)(1) by alleged Supervisor Vernon Weidow's attendance at a union meeting. Further, a panel majority (Chairman Battista and Member Schaumber) adopts the

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

At fn. 1 of his decision, the judge stated that upon publication, "unauthorized changes may have been made by the Board's Executive Secretary to the original Decision of the Presiding Judge." It is the Board's established practice to correct any typographical or other similar minor errors before publication of a decision in the bound volumes of NLRB decisions.

[2] We agree with the judge that the Respondent's unfair labor practices do not warrant the imposition of a bargaining order.

In our Order, we shall include language regarding the collection of information necessary to determine the discriminatees' backpay in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall also substitute a new notice to conform it to our Order and in accordance with the Board's decision in *Ishikawa Gasket America*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

We also modify the judge's remedy to provide that backpay be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[3] We adopt the judge's finding that the Respondent violated Sec. 8(a)(3) during the organizing campaign by transferring employee Allen Dukelow from his job operating a cat loading machine to a mixer operator/jack-of-all-trades in retaliation for his union activities. In affirming, however, we note that the judge incorrectly stated that the Respondent transferred Dukelow from mixer operator to a jack-of-all-trades position. The judge also stated in his decision that this discriminatory transfer was on either April 7 or 10, 2000, whereas he found in his conclusions of law that Respondent's action occurred on April 6, 2000. We do not find that these misstatements are sufficient to affect our finding of the violation.

We affirm the judge's findings that the Respondent violated Sec. 8(a)(3) by using a subcontractor to reduce employees' hours, that the Respondent did not violate Sec. 8(a)(1) by Vern Weidow's comments to employee Rightnour (Member Walsh does not reach the merits of this allegation as discussed infra), and that the Respondent did not violate Sec. 8(a)(3) by discharging employee James Garcia.

No exceptions were filed to the judge's further findings that the Respondent did not violate Sec. 8(a)(1) by unlawfully substituting a new application policy because of the union activity and by Respondent President Donaldson's alleged threat to employee Dukelow that he would eliminate overtime, reduce wages, and terminate the ESOP if employees unionized; that the Respondent did not violate Sec. 8(a)(3) by attempting to reduce employees' hours and cause layoffs by allegedly taking its phone off the hook, discharging employee Todd Madeen, restricting employee Dukelow's use of his cellular phone, disciplining employee Stueve for failing to wear his hard hat, and implementing a new access policy, fn. 7 infra; or that the Respondent violated Sec. 8(a)(1) by posting a notice that contained an overly broad prohibition of employees from honoring any picket line.

judge's finding that Vernon Weidow is a statutory supervisor and that his conduct violated Section 8(a)(1) as indicated below.[4] Finally, a panel majority (Chairman Battista and Member Walsh) agrees with the judge that the Respondent violated Section 8(a)(1) by creating the impression that employees' union activities were under surveillance and by threatening employees with discharge and violated Section 8(a)(3) by reducing employees' hours of work in retaliation for their union activity and by refusing to allow employee David Raines to clock in early.[5]

A. Panel Findings and Conclusions

The following are the panel's reasons for: one, adopting the judge's findings that the Respondent violated Section 8(a)(1) by interrogating an employee and violated Section 8(a)(3) by laying off employee West and by granting employees a wage increase, and two, finding, contrary to the judge, that the Respondent violated Section 8(a)(1) by banning off-duty employees and by making misstatements about the employees' ESOP, but did not violate Section 8(a)(1) by Weidow's attendance at a union meeting.

1. The Donaldson-Dukelow conversation

For the reasons stated below, we adopt the judge's finding that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating employee Dukelow. The evidence shows that, on April 3, 2000,[6] President Charles Donaldson called employee Allen Dukelow into his office. Donaldson locked two glass doors that led into the office, told Dukelow he had heard talk of unionization, and inquired as to whether Dukelow knew anything about it. Dukelow replied that he had "heard a little bit." Donaldson stated that, if there was union activity, employees Eldon Wolfe and Dukelow were probably the "instigators." Donaldson added that Jim West, Doug Jewell, and Randy Melton "would probably be good options" as other employees behind the organizing campaign.

The judge found Donaldson's statements during this conversation constituted unlawful interrogation. We agree. Under *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), the test of unlawful interrogation is whether, under all the circumstances, the questioning reasonably tended to restrain, coerce, or interfere with employees' Section 7 rights. See, e.g., *Mediplex of Danbury*, 314 NLRB 470, 472 (1994). Here, Donaldson initiated the conversation with Dukelow by calling him into his office, locked two doors behind Dukelow, and described Dukelow and another employee as the "instigators" of the organizing campaign. Given these circumstances, including Donaldson's reference to Dukelow as an instigator, we conclude that Donaldson's questioning of Dukelow had a reasonable tendency to coerce him in the exercise of his Section 7 rights. We therefore adopt the judge's finding that Donaldson's interrogation violated Section 8(a)(1).

2. Banning of off-duty employees

We find merit in the General Counsel's exception to the judge's failure to find that the Respondent violated Section 8(a)(1) by promulgating a rule banning off-duty employees from its premises. On April 17, less than 2 weeks after the organizing campaign began, all employees received an enclosure with their paychecks notifying them that the Respondent had employed an armed security guard to protect the premises after working hours and that off-duty employees would not be allowed on the premises. The judge found that the Respondent's notice was lawful in every respect. Although we agree with the judge that the Respondent had a right to hire a plant security guard and to inform employees of this action, we reverse the judge and find that the Respondent unlawfully banned off-duty employees, for the reasons stated below.

The evidence shows that, before the union organizing campaign began, the Respondent had allowed employees to use its shop after working hours for personal reasons. Further, although the Respondent's stated reason for the new rule was vandalism prevention, there is no evidence in the record of vandalism at the time the rule was announced. Based on the Respondent's numerous 8(a)(1) and (3) violations, and the timing of its new rule, we find that the Respondent banned off-duty employees in order to retaliate against them for their union activities. Although there was testimony that the Respondent did not enforce its new rule and continued to permit employees on its property after the workday ended, the Respondent did not rescind the rule or notify its employees that it would not enforce the rule. We therefore conclude that, in these circumstances, the Respondent also violated Section 8(a)(1) of the Act by promulgating and maintaining a new rule, in response to the organizing campaign, that banned off-duty employees from its property.[7]

[4] Member Walsh has filed a separate dissent on these issues.

[5] Member Schaumber has filed a separate dissent on these issues.

[6] All dates are in 2000, unless otherwise noted.

[7] Because the Respondent's motive for implementing this rule was the union campaign, Chairman Battista and Member Schaumber find it unnecessary to reach the Board's decision in *Tri-County Medical Center*, 222 NLRB 1089 (1976), finding a rule banning off-duty employees from an employer's premises valid under only limited circumstances.

In joining his colleagues in finding that the Respondent violated Sec. 8(a)(1) by banning off-duty employees from its property during the

3. Participation in employee stock option plan (ESOP)

Contrary to the judge, we agree with the General Counsel that the Respondent further violated Section 8(a)(1) by informing employees that they could not continue to participate in the ESOP if they chose union representation. The summary description of the 1995 ESOP that the Respondent's employees received specifically states that employees covered by a collective-bargaining agreement are ineligible to participate in the plan. However, the lengthy ESOP document itself provides that union-represented employees can participate in the plan if the collective-bargaining agreement permits it.

During the organizing campaign, on April 21, the Respondent met with the employees to discuss both the ESOP and its ramifications on any possible sale of the Respondent. It was the first meeting that the Respondent had held with employees regarding the ESOP since its creation in 1995. Donaldson told the employees that three potential buyers had recently approached him about purchasing the Respondent. Donaldson also informed them that, as participants in the ESOP, they had the right to vote on any sale and that the ESOP assets would be distributed to employees if another entity acquired the Respondent.

Because the summary provides that the ESOP itself is controlling if there is a conflict between their provisions, the judge concluded that the Respondent's inaccurate summary of the plan did not violate the Act as it had no effect on the ESOP itself which was lawful. The judge noted that "it cannot be concluded that this five-year-old 'statement' reasonably tended to chill the employees' exercise of their Section 7 rights."

Contrary to the judge, we find that the incorrect language in the ESOP summary violated the Act. We rely on the evidence that the Respondent interjected the employees' ESOP into the union organizing drive as a key campaign issue when Donaldson held an employee meeting on this subject for the first time in 5 years and Weidow commented to employees during a union meeting that he feared their unionization would cause the ESOP to terminate. Indeed, after that union meeting and consistent with the ESOP summary's contents, Weidow, through his comment to employee Transue during the campaign, unlawfully threatened employees that they would lose their ESOP if they voted in the Union. We stress that, because the ESOP itself is a voluminous document, the summary of the plan was the only document that employees were likely to read to educate themselves about this important benefit. It is immaterial in these circumstances that the language of the plan itself lawfully described the consequences of unionization. Furthermore, based on the Respondent's previous distribution of the inaccurate ESOP plan summary to employees and its repeated emphasis on the existence of this employee benefit during the organizing campaign, we reject the judge's finding that evidence demonstrating that the Respondent prepared this summary in 1995 is a relevant consideration here. We therefore conclude that, in these circumstances, the Respondent has further violated Section 8(a)(1) by the contents of the ESOP summary that the employees had received.[8]

4. Weidow's attendance at a union meeting

The judge found that the Respondent engaged in surveillance when Weidow, whom he found was a statutory supervisor, attended a union meeting on about April 10 or 11,[9] and reported back to Donaldson on the events that occurred there. Weidow, a first line supervisor and ESOP member, testified without contradiction that he attended this meeting because he wanted to express his opinion concerning the negative impact he thought that the Union could have on the employees' ESOP. On arriving at the meeting, Weidow asked employee Dukelow, who was standing at the door, if he could participate in the meeting. Dukelow invited him to attend. Weidow made several comments at the meeting that we have found violated Section 8(a)(1) as discussed infra at fn.

organizing campaign, Member Schaumber stresses that the present situation is distinguishable on its facts from *City Markets, Inc.*, 340 NLRB No. 151 (2003), in which he dissented. In that case, unlike here, the evidence supported the argument that the employer promulgated its new rule in response to employee complaints so that it could maintain order and discipline at its facility. Member Schaumber would continue to hold timing alone insufficient to establish the unlawfulness of an otherwise valid rule, as he stated in his *City Markets* dissent.

Member Walsh finds that the rule denying the off-duty employees access to the Respondent's premises violates Sec. 8(a)(1) under the standards set forth in *Tri-County*, supra. The prohibition is not limited only to the interior of the plant and other working areas, but can instead reasonably be understood by the employees also to prohibit, without justification, off-duty employee access to parking lots, gate areas, and other outside nonwork areas. Id.

We note that no exceptions were filed to the judge's further finding that the Respondent did not also violate Sec. 8(a)(3) by implementing this new rule.

[8] We find it unnecessary to decide whether the summary would violate the Act in the absence of Weidow's statements linking its unlawful contents to this election campaign.

In his separate partially dissenting opinion, Member Walsh finds that the record does not establish that Weidow is a supervisor within the meaning of Sec. 2(11) of the Act. Consequently, Member Walsh does not rely on Weidow's statements in finding that the incorrect language in the ESOP summary violated the Act.

[9] The judge stated in his decision that Weidow attended the union meeting on April 10, whereas he twice stated in his conclusions of law that the meeting occurred on April 11. The date on which the meeting actually occurred is immaterial to our finding on this issue.

19. After the meeting, Weidow told Donaldson what had happened.

We find merit in the Respondent's exceptions to the judge's finding. A supervisor's attendance at a union meeting does not per se constitute unlawful surveillance.[10] In this case, Weidow attended the meeting to present his views on possible unionization and the employees invited him in. Although Weidow subsequently reported back to Donaldson on the meeting, there is no evidence that surveillance was Weidow's express purpose in attending. There was nothing clandestine about his activity. Thus, the unit employees were aware of his presence at the meeting and, indeed, Dukelow, a leading organizer, invited him to attend. There is also no showing that Donaldson specifically directed Weidow's alleged surveillance or even requested any information subsequent to Weidow's attendance at the meeting. We therefore dismiss this complaint allegation.[11]

5. Employee West's layoff

We affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by laying off employee West. The evidence shows that the Respondent knew that West, a mechanic, had been a union member while employed by another employer. Further, during the coercive interrogation of Dukelow on April 3, Donaldson specifically mentioned West as an employee whom he suspected was among the leaders of the organizing campaign. Two days later, on April 5, the Respondent laid off West for about 3 weeks, assertedly because there was a lack of work for him. West and 21 other employees signed union cards that same evening.

To prove a violation of Section 8(a)(3) and (1) under our decision in *Wright Line*,[12] the General Counsel must first prove, by a preponderance of the evidence, that the employee's protected conduct was a motivating factor in the employer's adverse action.[13] Once the General Counsel makes a showing of discriminatory motivation by proving the employee's prounion activity, employer knowledge of the prounion activity, and animus against the employee's protected conduct,[14] the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089.

Based on the facts here, the General Counsel has established that West was engaged in union activity, that the Respondent knew or at least suspected he was a union adherent, that the Respondent laid off West, and that this layoff occurred immediately after the advent of the union activity and in the context of Donaldson's naming West as a union leader and describing union activists as "instigators." We therefore conclude that the General Counsel has met the initial burden of showing that the layoff was discriminatory.

The Respondent argues in its exceptions that it proved West was basically a mechanic's helper and that there was no work available for him after its chief mechanic, William Meuchel, had gone on vacation at the time of West's layoff. The Respondent contends that the judge erred in relying on the evidence that it subcontracted out repairs costing $587.30 while Meuchel was on vacation because West could not have performed this work. Meuchel testified, however, that West could have done this work by himself. Furthermore, Meuchel's vacation lasted less than a week and the Respondent laid off West, the only layoff that calendar year, for about 3 weeks. In these circumstances, we adopt the judge's finding that West's layoff violated Section 8(a)(3).

6. Wage increase

The Respondent excepts to the judge's finding that it further violated Section 8(a)(3) on May 19, by granting all employees, other than its clerical staff, a wage increase of 50 cents per hour. The record shows that the Respondent has a practice of conferring pay raises about once each year. Thus, the Respondent granted raises in November 1997, in July 1998, and during October and November in 1999. There is also evidence that three drivers received raises of 50 cents per hour in January 2000, 4 months before the across-the-board wage increase that the complaint alleges was unlawful.

An employer, when confronted by a union organizing campaign, must proceed as it would have done if the union had not been present.[15] It is well established that a grant of benefits made by an employer during a union organizing campaign violates the Act unless the employer can demonstrate that its action was governed by factors other than the pending election.[16] The employer has the burden of showing that it would have conferred the same benefits in the absence of the union.[17] To meet this burden, the employer needs to establish that the benefits conferred were part of a previously established

[10] See *St. Mary Medical Center*, 339 NLRB No. 51 at fn. 4 (2003), citing *Dr. Philip Megdal D.D.S.*, 267 NLRB 82, 88 fn. 4 (1983).

[11] Member Walsh would dismiss this allegation based on his finding that Weidow is not a statutory supervisor.

[12] 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982).

[13] *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996).

[14] *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999).

[15] *Russell Stover Candies*, 221 NLRB 441 (1975).

[16] See, e.g., *Waste Management of Palm Beach*, 329 NLRB 198, 198–199 (1999); *Village Thrift Store*, 272 NLRB 572 (1983).

[17] *Village Thrift Store*, supra.

company policy and the employer did not deviate from that policy on the advent of the union.[18] Here, the Respondent's practice in the 3 years preceding the alleged unlawful wage increase was to confer pay raises during the second half of the year, twice in November. Although the Respondent could have rebutted the presumption that its May 2000 increase was unlawful by providing a plausible justification for it, the Respondent, as the judge found, has offered no credible explanation for the timing of the pay raise. We therefore conclude that the Respondent has failed to meet its burden of showing that it would have granted the May 2000 wage increase in the absence of the Union.

B. Majority Findings and Conclusions—Chairman Battista and Member Schaumber

The following are the reasons Chairman Battista and Member Schaumber find that Weidow is a statutory supervisor and, therefore, that the Respondent violated Section 8(a)(1) by certain conduct attributable to Weidow.[19]

Weidow's Supervisory Status: Contrary to our colleague, we agree with the judge that Weidow is a supervisor within the meaning of Section 2(11) of the Act. Weidow is a foreman and works along with two other employees in the precast department producing concrete septic tanks. He has a "little shack" as an office and earns $14.50 per hour, whereas the other two employees earn only about $11.50 and $9.50 hourly each. During the 3 years he has served as foreman, Weidow interviewed about 10 employees and recommended at least 2 of them, Charles Rightnour and Todd Madeen, for hire in the precast department. Donaldson approved these recommendations. Later, when Madeen had a problem with frequent tardiness, Weidow recommended Madeen's discharge and Donaldson agreed. Although Donaldson claimed that he does not "rubber stamp" Weidow's recommendations, Donaldson admitted that he does nothing more than review the applications of the employees that Weidow has recommended for hire.

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

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

The statutory indicia are read in the disjunctive. As the Board stated in *Great American Products*, 312 NLRB 962 (1993), an individual need possess the authority to perform only one of the enumerated functions to qualify to meet the statutory definition.

Applying these principles to this case, we find that Weidow has the authority to effectively recommend the hire and fire of employees working in the precast department. Thus, the evidence shows that Weidow alone interviews applicants and that Donaldson's independent evaluation of his recommendations consists solely of reviewing their applications. We find on these facts that the General Counsel has met his burden of proving Weidow's supervisory status. In *Venture Industries*, 327 NLRB 918, 919 (1999), the Board found supervisory authority to discipline where the employer followed such recommendations 75 percent of the time. Here, the Respondent has failed to refute Weidow's possession of hiring and firing indicia by showing any instance in which Donaldson overruled his recommendations following his own cursory investigation. For these reasons, we reject our colleague's finding that the evidence on this indicia is "conclusionary" and does not establish that he exercises any independent judgment. We find to the contrary that Weidow is a statutory supervisor because

[18] *Mercy Hospital*, 338 NLRB No. 66 (2002), citing *American Sunroof Corp.*, 248 NLRB 748, 748–749 (1980), modified on other grounds 667 F.2d 20 (6th Cir. 1981).

[19] We adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by Supervisor Weidow's warning to employees that they would not receive higher wages if they selected the Union to represent them and his telling employees that they were stupid for supporting the Union. Although the record shows that Weidow made the former statement about April 6, and that his comment denigrating the Union likely occurred about April 21, the judge found that Weidow made both remarks on April 6. We do not find that any misstatement in the judge's dating of these violations is sufficient to affect our ultimate findings. Furthermore, in adopting, we stress that the Respondent has excepted to the judge's finding that Weidow is a statutory supervisor, but has not raised any arguments regarding the merits of these two allegations, as required under Sec. 102.46(b)(1) and (2) of the Board's Rules. Accordingly, in light of the limited nature of the exceptions and given that we adopt the judge's supervisory finding, we need not reach the merits of Weidow's statements in affirming the judge's findings of these violations. For the reasons the judge stated, we also adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by Weidow's ordering employee Lindquist to remove a union sticker from his hat and by Weidow's comments to employee Transue regarding the employees' ESOP.

We find it unnecessary to pass on whether the Respondent violated Sec. 8(a)(1) by Weidow's ESOP statements to employee Rightnour on April 6 and to a group of employees at the union meeting he attended on either April 10 or 11, or by his alleged interrogation of employee Russell Transue because the remedy for any violations found would be cumulative.

he effectively recommends the hiring and firing of department employees.[20]

C. Majority Findings and Conclusions—Chairman Battista and Member Walsh

The following are the reasons Chairman Battista and Member Walsh adopt the judge's findings that the Respondent violated Section 8(a)(1) by creating the impression of surveillance and by threatening employees with discharge and violated Section 8(a)(3) by reducing employees' hours of work and by refusing to allow employee Raines to clock in early.

1. Donaldson's conversation with Dukelow

Regarding the conversation in which Donaldson unlawfully interrogated Dukelow, contrary to our colleague, we agree with the judge that Donaldson also violated Section 8(a)(1) by creating the impression that employees' union activities were under surveillance. The test for determining whether an employer has created the impression that its employees' union activities have been placed under surveillance is whether the employees would reasonably assume from the employer's statements or conduct that their union activities had been placed under surveillance. See, e.g., *Tres Estrellas de Oro*, 329 NLRB 50, 51 (1999). Donaldson, as noted, specifically identified five employees to Dukelow, including Dukelow himself, whom Donaldson believed were leaders of the union organizing campaign. We conclude that Donaldson's remarks gave Dukelow reasonable grounds to believe that management knew Dukelow and others were union organizers and that it had a source of information regarding the employees' union activities. Even assuming that this information could have been obtained through the company "grapevine" as our colleague speculates, employee Dukelow would have had no reasonable basis to know, or to infer, that Donaldson was merely referring to information overheard during "casual conversations" at the Respondent's facility.[21]

2. Threat of discharge

Contrary to our colleague, we adopt the judge's finding that Respondent President Donaldson unlawfully threatened discharge when he told employee Charles Rightnour, in late April 2000, that "if it was up to him personally, he would shitcan us, but he couldn't because the business needed [the employees] and it wouldn't run right for 6 months." We find nothing in the record to indicate that Donaldson was joking when he made these remarks to Rightnour. It is immaterial that Rightnour himself initiated the conversation or that he raised the subject of whether Donaldson intended to discharge employees in response to the union activity. Our colleague is remiss in relying on Rightnour's testimony that he was not threatened by Donaldson's remarks as the Board has consistently held that "the subjective reactions of employees are irrelevant." See, e.g., *Electra Food Machinery*, 279 NLRB 279, 280 fn. 8 (1986), quoting *Emerson Electric Co.*, 247 NLRB 1365, 1370 (1980), enfd. 649 F.2d 589 (8th Cir. 1981). Rather, "the issue is whether objectively . . . [the] remarks tended to interfere with the employee's right to engage in" protected activity. *Southdown Care Center*, 308 NLRB 225, 227 (1992). We agree with the judge that Donaldson's threat of discharge constituted such interference in the circumstances here and, therefore, violated Section 8(a)(1) of the Act.

3. Reduction in employees' hours of work

We agree with the judge that the Respondent violated Section 8(a)(3) on April 6 and 7, 2000, by reducing the hours of employees Rick Zundel, Douglas Linquist, Randy Melton, and Joe Crouchet in retaliation for the employees' union activities. The evidence shows that the reduction in the employees' hours came within a day or two after the Union had presented about 22 authorization cards to Donaldson that included cards signed by these four individuals. Furthermore, as the judge found, Zundel testified that the Respondent had not previously told him that there was no work for him. Melton similarly testified that, during his 3 years of employment, Donaldson had not told him to take off a day during the Respondent's busy season.

Based on this evidence and the other violations the Respondent committed in response to the union activity, we find that the General Counsel has established under *Wright Line*, supra, that union activities were a motivating factor in the Respondent's decision to reduce the four employees' hours. Although there is vague evidence that Donaldson had previously reduced employees' hours as necessary, and that the weather was rainy during April 2000, we find, contrary to Member Schaumber, that this showing is far short of establishing that the Respondent would have reduced the hours of these four employees at this particular time. We also note that the Respondent's unlawful subcontracting of unit work during this period further bespeaks the Respondent's discriminatory motive in taking work away from union adherents. Accordingly, we adopt the judge's finding that the reduction of hours, like the subcontracting, was unlawful.

[20] Cf. *Progressive Transportation Services*, 340 NLRB No. 126 (2003), where the Board found that the "deck lead supervisor" could effectively recommend employee discipline.

[21] See *Continental Bus System*, 229 NLRB 1262, 1265–1266 (1977).

4. Refusing to allow David Raines to clock in early

a. Facts

David Raines is a 9-year employee who signed a union authorization card on the evening of April 5. The next morning, before Raines arrived for work, the Union requested that Respondent President Donaldson recognize the Union as the representative of the Respondent's employees. In support of its request, the Union showed Donaldson union authorization cards signed by 22 employees—including Raines. Donaldson declined to recognize the Union. As found above, very shortly thereafter, but still that morning, Donaldson discriminatorily and unlawfully sent card-signer Rick Zundel home from work and notified card-signers Randy Melton and Douglas Lindquist not to report for work, all in violation of Section 8(a)(3) and (1) of the Act.

Raines' official starting time was 8 a.m. It had become his practice, however, to clock in about an hour early each day.[22] Donaldson testified that Raines consistently clocked in about an hour earlier than his scheduled starting time. Donaldson had generally acquiesced in this practice. Nevertheless, our colleague asserts that Raines "admitted" that his clocking in early was an "issue" prior to the April 6 incident in question, and that Donaldson had told him about 6 to 8 times before not to clock in before 8 a.m. In fact, however, there is no evidence that Donaldson ever warned Raines about clocking in early. Rather, on about 6 to 8 previous occasions during Raines' 9-year term of employment, all occurring during the Respondent's annual November—March winter slow seasons, Donaldson had told Raines *as Raines was leaving work at the end of the day (or by telephone early the following morning*) that Raines did not need to come to work until 8 a.m. *the next day (or later that morning)*. Moreover, Raines was asked at the hearing whether his clock-in time had ever been "an issue" before the April 6 incident in question. Raines replied that it had been "an issue," but he immediately explained in the same answer what he meant by that:

> There's times I've come in voluntarily and then find something to do and [Donaldson] didn't ask me to do it . . . . I'd come in because I have a hard time sleeping. So I'd come in and go to work early. And if I don't have nothing to do, if [Donaldson] doesn't have anything to do, I'll start sweeping the shop or something like that.

Finally, the evidence does not support our colleague's assertion that Donaldson wanted to bring the matter of Raines clocking in early to a head because Donaldson thought Raines was padding his timeclock. While Donaldson in the past had suspected Raines of padding his timeclock by *not clocking out for lunch*, Donaldson also testified that he had finally "got[ten] through" to Raines on that subject, Raines had stopped not clocking out for lunch, and Donaldson had not had a problem with Raines about this matter for "a long time."

Consistent with his practice, Raines arrived for work on April 6 at around 6:30–6:45 a.m.; his official starting time was 8 a.m. By this time that morning, the Union had presented Donaldson with the authorization cards, Raines' among them. Donaldson decided that morning to bring the matter of Raines' continual early arrival "to a head," and to make it clear to Raines that he did not have permission to clock in early. Thus, Donaldson told Raines not to clock in until 8 a.m. that morning, that he had been consistently clocking in an hour earlier than scheduled, and that he was not permitted to clock in early anymore.

In section 38 of his attached decision, the judge found that in addition to violating Section 8(a)(3) and (1) on the morning of April 6 by sending card-signer Zundel home from work and notifying card-signers Melton and Lindquist not to report for work, the Respondent also violated Section 8(a)(3) and (1) by prohibiting card-signer Raines from continuing to clock in early. Contrary to our dissenting colleague, we affirm the judge's finding.

b. Applicable principles

As stated above, to prove a violation of Section 8(a)(3) and (1) under *Wright Line*, supra, the General Counsel must first prove, by a preponderance of the relevant evidence, that an employee's union activity was a motivating factor in an employer's adverse action against that employee. Once the General Counsel makes a showing of such discriminatory motivation, by establishing the employee's union activity, the employer's knowledge of it, and the employer's animus against it, the burden of persuasion shifts to the employer to establish that it would have taken the same adverse action against the employee even in the absence of the employee's union activity.

c. Application of principles

Raines, along with about 20 of his fellow employees, signed a Union authorization card on the evening of April 5. The Union showed the cards, including Raines' card, to Donaldson around 6 a.m. the following morning, April 6. Shortly thereafter, still very early that morning, and in retaliation for the employees' signing the authorization cards, Donaldson discriminatorily sent card-signer Rick Zundel home from work and notified card-signers

[22] The Respondent's employees are paid from the time they clock in.

Randy Melton and Douglas Lindquist not to report for work, all in violation of Section 8(a)(3) and (1) of the Act.

Thus, the record conclusively establishes that Raines engaged in union activity, the Respondent knew about it, and the Respondent had animus against such activity. During the very same time that Donaldson was discriminatorily imposing adverse consequences on Zundel, Melton, and Lindquist for their union activity, it also, apparently for the first time, prohibited Raines from clocking in prior to 8 a.m. after he had already arrived at work around 6:30–6:45 a.m. And, at the same time, and also contrary to the Respondent's established past practice, Donaldson prohibited Raines from clocking in early anymore.

The Respondent did not establish any business reason for taking these actions against Raines on the morning of April 6, or for not having taken such actions during Raines' prior 9-year tenure with the Respondent up to that morning. Accordingly, the Respondent has failed to establish that it would have prohibited Raines from clocking in early on April 6, and thereafter in the absence of Raines' union activity the evening before, which Donaldson had just found out about a few minutes before imposing these prohibitions on Raines.

Our colleague infers that we are simplistically finding that the Respondent must be acting out of union animus solely because Raines signed a Union authorization card the night before. Our above analysis of the Respondent's motivation is obviously fuller and more complex than that. It considers the Respondent's unlawful treatment of *other* card signers the same morning and the failure of the Respondent to establish any business reason for prohibiting Raines from clocking in early again on the morning in question. Our colleague also claims that we are immunizing Raines from the consequences of his purported timeclock abuse just because Raines was for the Union. As seen, however, the Respondent has failed to establish that it was motivated by any such purported timeclock abuse by Raines when it prohibited him from clocking in early.

Finally, our colleague says that we are "ignor[ing]" the Respondent's legitimate interest in enforcing its policy of refusing to allow employees to clock in more than 15 minutes early and preventing Raines from clocking in an hour early. We are not "ignor[ing]" that interest. We are, however, finding that the Respondent was not motivated by that interest when it discriminatorily prohibited Raines from clocking in early on the morning of April 6 because he signed a Union authorization card on the evening of April 5. This was the first time, as far as the record shows, that the Respondent had ever prohibited Raines from clocking in early after he had already arrived for work. Consequently, the General Counsel has established, under *Wright Line*, supra, that the Respondent's conduct in question toward Raines on the morning of April 6 violated Section 8(a)(3) and (1) of the Act.

AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraphs 3 and 4 of the judge's Conclusions of Law:

"3. The Respondent violated Section 8(a)(1) of the Act by

(a) Creating the impression that employees' union activities were under surveillance.

(b) Interrogating employees about their union activities or sympathies.

(c) Telling an employee that it would "shitcan" the employees for attempting to bring in the Union.

(d) Misstating to employees that they would lose their Employee Stock Option Plan (ESOP) if they selected the Union to represent them.

(e) Telling employees that they would not receive higher wages if they selected the Union as their bargaining representative.

(f) Telling employees that they were stupid for supporting the Union.

(g) Telling an employee to remove a prounion sticker from his hard hat.

(h) Promulgating a rule that restricts employees from lawful picketing.

(i) Implementing a rule banning off-duty employees from its premises in order to retaliate against them for their union activities."

"4. The Respondent violated Section 8(a)(3) and (1) of the Act by

(a) Temporarily laying off employee James West on April 5, 2000.

(b) Subcontracting out unit work in order to diminish the hours of employees because they engaged in union activities.

(c) Reducing the hours of employees Joe Crouchet, Douglas Linquist, Randy Melton, and Rick Zundel on April 6 and 7, 2000, in retaliation for their union activities.

(d) Refusing to allow employee David Raines to clock in early for work in retaliation for his union activities.

(e) Transferring employee Allen Dukelow to a less desirable position about April 7 or 10, 2000, in retaliation for his union activities.

(f) Implementing a 50 cents per hour wage increase for the unit employees on May 19, 2000, to discourage them from engaging in union activities."

ORDER

The National Labor Relations Board orders that the Respondent, Donaldson Bros. Ready Mix, Inc., Hamilton, Montana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression that employees who are engaged in protected concerted or union activities are under surveillance.

(b) Coercively interrogating employees about their protected concerted or union activities.

(c) Threatening to discharge employees who engage in protected concerted or union activities.

(d) Misstating to employees that they will lose their Employee Stock Ownership Plan (ESOP) if they select the International Union of Operating Engineers, Local 400, AFL–CIO (the Union) as their collective-bargaining representative.

(e) Threatening employees that they will not receive higher wages if they select the Union to represent them.

(f) Denigrating employees who support the Union.

(g) Ordering employees to remove prounion stickers from their hard hats.

(h) Promulgating rules that restrict employees from engaging in lawful picketing.

(i) Implementing rules banning off-duty employees from its premises in order to retaliate against them for their union activities.

(j) Laying off employees for engaging in protected concerted or union activities.

(k) Subcontracting out unit work in retaliation for the employees' protected concerted and union activities.

(l) Reducing employees' hours in retaliation for their protected concerted or union activities.

(m) Refusing to allow employees to clock in early for work in retaliation for their protected concerted or union activities.

(n) Transferring employees to different jobs in retaliation for their protected concerted or union activities.

(o) Granting wage increases designed to undermine the employees' support for the Union.

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

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

(a) Within 14 days from the date of this Order, reinstate Allen Dukelow to his former job as a cat loading machine operator or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make employees whole for any loss of earnings and other benefits they may have suffered as a result of Allen Dukelow's unlawful job transfer, James West's discriminatory layoff, the Respondent's unlawful subcontracting out of unit work about April 6, 2000, employees Joe Crouchet's, Douglas Linquist's, Randy Melton's, and Rick Zundel's unlawful reduction in hours on April 6 and 7, 2000, and David Raines' discriminatory treatment regarding his clocking in early for work in the manner set forth in this decision.

(c) Within 14 days from the date of this Order, expunge from its records any reference to Allen Dukelow's unlawful transfer, James West's unlawful layoff, the unlawful reduction in hours affecting employees Joe Crouchet, Douglas Linquist, Randy Melton, and Rick Zundel, and the refusal to permit employee David Raines to clock in early for work. Within 3 days thereafter, notify these employees in writing that this has been done and that these unlawful actions will not be used against them in any way.

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

(e) Within 14 days after service by Region 19, post at its Hamilton, Montana facility copies of the attached notice marked "Appendix."[23] Copies of the notice, on forms provided by the Regional Director for Region 19, 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 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 April 3, 2000.

[23] 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."

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

MEMBER SCHAUMBER, dissenting in part.

Contrary to my colleagues, I would reverse the judge and find that the Respondent did not violate Section 8(a)(1) of the Act by creating the impression of surveillance because the evidence does not establish that the Respondent's president, Charles Donaldson, conveyed to the employee listener that he learned of employee union activities through surreptitious surveillance. Further, I reject the majority's finding, consistent with the judge, that the Respondent violated the Act by Donaldson's comment that he would "shitcan" the employees for their union activities. As explained below, Donaldson's remark constituted nothing more than a flippant, offhand reaction to an employee's inquiry about whether he would terminate employees for supporting the Union. I also disagree with my colleagues and the judge that the Respondent violated Section 8(a)(3) by reducing the hours of four unit employees on April 6 and 7, 2000, because, in my view, the evidence is insufficient to support the conclusion that the diminished hours resulted from employees' union activities.[1] Finally, I would find, contrary to my colleagues, that the Respondent did not violate Section 8(a)(3) by refusing to allow employee David Raines to clock in well before his scheduled starting time based on evidence that the Respondent previously warned Raines about timeclock abuse. I agree with the majority decision in other respects.

1. Whether Donaldson's conversation with Dukelow created an impression of surveillance

Although not fully explicated by the judge, the record shows that, on April 3, Donaldson called employee Dukelow into his office and inquired whether he knew anything about the union organizing campaign. Dukelow replied that he had "heard a little bit" about it. During this conversation, Donaldson also stated that employees Eldon Wolfe and Dukelow were probably the "instigators" of any union activity that had begun. Donaldson then mentioned the names of three other employees whom he thought were leaders of the organizing campaign.

I agree with my colleagues, for the reasons stated in the majority decision, that Donaldson violated Section 8(a)(1) by coercively interrogating Dukelow during this meeting.[2] I disagree, however, with their further finding that Donaldson's remarks to Dukelow tended to create an impression that employees' union activities were under surveillance. It is the General Counsel's burden to prove that employees would reasonably assume from the remarks that their activities had been placed under surveillance or were being closely monitored. See *Heartshare Human Services of New York*, 339 NLRB 842, 844 (2003), *SKD Jonesville Division*, 340 NLRB No. 11, slip op. at 2 (2003). In my view, Donaldson's statements at most created an impression that he had learned in some way that employees were engaged in union activities. However, the statement did not indicate to Dukelow whether Donaldson had obtained this information through surreptitious means or had simply obtained it via the company grapevine. In these circumstances, I am unable to find that Donaldson's statements, without more, conveyed the impression of surveillance. Accordingly, I would dismiss this complaint allegation.

2. Alleged threat of discharge

In late April, employee Charles Rightnour went into Donaldson's office to discuss whether he thought the employees' organizing campaign would negatively affect their Employee Stock Option Plan. Rightnour also inquired whether Donaldson would fire all of the employees if he could. Donaldson replied that, "if it was up to him personally, he would shitcan us, but he couldn't because the business needed [the employees] and it wouldn't run right for about 6 months." Rightnour testified that he did not view Donaldson's remarks as intimidating or constituting a threat.

Contrary to the majority, I would not find that Donaldson's remarks unlawfully threatened discharge in these circumstances. Rightnour initiated the conversation and raised the subject about the Respondent discharging the employees. Although my colleagues seize on Donaldson's remarks, in response to Rightnour's query, that he wanted to "shitcan" the employees in order to find a violation here, they ignore the plain meaning of Donaldson's remarks—he would not discharge the unit employees because he needed them on the job. I also stress that the context of the conversation suggests that Donaldson made these comments in jest as a spontaneous reaction to Rightnour's question about the Union's impact on the employees' employment tenure. Further, Rightnour was the only employee, according to the record, who heard Donaldson's remark and, as noted,

[1] All dates are in 2000, unless otherwise noted.

[2] In finding this violation, I stress my view that employer inquiries into union activities do not constitute unlawful interrogation without any further evidence demonstrating that the conduct tended to interfere with employees' Sec. 7 rights.

Rightnour stated that he was not threatened by it. Contrary to the majority, as stated in my concurring opinion in *Corner Furniture Discount Center*, 339 NLRB No. 146, slip op. at 4 fn. 2 (2003), while I agree with an objective standard, I believe that the reaction of the employees, albeit subjective, is not irrelevant but should be considered along with other relevant evidence in evaluating whether a statement reasonably tends to interfere with their exercise of Section 7 rights.[3] For these reasons, I do not find that the General Counsel has established a violation of the Act in this instance. I therefore would also dismiss this allegation.

3. Reduction in employees' hours of work

The judge found that the Respondent reduced employees' hours on April 6 and 7 in retaliation for their union activities. The evidence shows that, on the morning of April 6, Donaldson sent employee Rick Zundel home and told employee Douglas Linquist to stay home because there was a lack of work. Zundel also was sent home or told not to report the following day. Additionally, Donaldson called employee Randy Melton on the morning of April 6 and told him to stay home that day. The next day, April 7, Donaldson instructed Melton to report for work a bit later than usual. Also on April 7, employee Joe Crouchet was sent home early by the Respondent.

Contrary to my colleagues, I would not agree that the Respondent violated Section 8(a)(3) by this conduct. The judge found that, even during the Respondent's busy season of April through November, the Respondent instructed employees to stay home, to report later than their usual starting time, or to go home early when work is slow. Indeed, Donaldson testified without contradiction that these incidents occur between three and five times per week. There was also evidence that it was particularly rainy during the spring of 2000 at the Respondent's location. It is undisputed that bad weather would have a detrimental impact on the Respondent's ready-mix concrete business. Thus, based on the judge's finding that the Respondent frequently alters its employees' working hours and the rainy weather during the relevant time, I conclude that the Respondent's conduct was consistent with its established practice as set forth by the judge. As Donaldson testified, the Respondent had a past practice of telling employees to stay home, report late, or leave work early as the day-to-day workload fluctuated. This result is not inconsistent with my finding that the Respondent violated Section 8(a)(3) by subcontracting out unit work during this same period. In separately analyzing each allegation to determine whether a violation actually occurred, there was no evidence to establish that the Respondent used outside subcontractors to haul sand into the facility before union organizing began. Thus, the subcontracting of such unit work was unprecedented and the Respondent did not meet its rebuttal burden of establishing any past practice in doing it. By contrast, assuming the General Counsel has met his initial burden regarding the reduction in employees' hours of work,[4] I accept Donaldson's testimony on this subject and find that the Respondent has shown, as required by *Wright Line*,[5] that it would have taken this action even in the absence of any union activities. I would separately analyze each allegation to determine whether a violation actually occurred. Accordingly, I would dismiss the allegation that the Respondent violated Section 8(a)(3) of the Act by reducing employees' hours.

4. Refusing to allow employee Raines to punch in early

Contrary to my colleagues, I would reverse the judge's finding that the Respondent violated Section 8(a)(3) by refusing to allow employee David Raines to punch his timecard before his scheduled starting time. As the judge found, the Respondent allowed employees to clock in 15 minutes early before their 7:30 to 8 a.m. start time and get paid for this additional time. Raines, however, frequently punched the timeclock about an hour early and performed light chores until his actual work began. Before Raines reported for work at 6:30 a.m. on April 6, Donaldson removed Raines' timecard from its usual location. Donaldson directed Raines to clock in at 8 a.m. In this regard, Donaldson testified that:

> I guess to summarize the incident that he's speaking of, is that historically if I tell Dave to come in at eight o'clock, he's in at seven o'clock. And if I tell him to come in at seven o'clock, he's in at six o'clock . . . . He was always punching in anywhere, probably on the av-

[3] I suggested in that case that the Board should revisit precedent holding that an employee's subjective reaction is irrelevant to whether conduct is proscribed by the Act.

[4] As my colleagues state, the General Counsel's initial burden of showing discriminatory motivation involves proving the employee's union activity, employer knowledge of the union activity, and animus against the employee's protected conduct. The Board and circuit courts of appeals have variously described the evidentiary elements of the General Counsel's initial burden of proof under *Wright Line*, sometimes adding as a fourth element**,** what is otherwise inferred under the *Wright Line* analysis, the necessity for there to be a causal nexus between the union animus (i.e., Sec. 7 animus) and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB No. 76, slip op. at 2 (2002). As stated in *Shearer's Foods*, 340 NLRB No. 132, slip op. at 2 fn. 4 (2003), I agree with this addition to the formulation.

[5] 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 495 U.S. 989 (1982).

> erage, close to an hour earlier than what he was asked to do. [Tr. 430.]

Donaldson further testified that Raines had "a pattern" of "not clocking out for lunch" that ceased when he warned Raines about this conduct. Donaldson said that he wanted "to bring [Raines' practice of clocking in early] to a head" because he again thought that Raines "was padding his time clock." In his testimony, Raines admitted that punching in early was an "issue" before April 6, and that Donaldson previously told him "probably six to eight times" not to punch in before 8 a.m.

Even assuming that the General Counsel has met the initial burden of proving antiunion motivation as the basis for Donaldson's conduct, I find that the Respondent has demonstrated that Donaldson would have taken the same action in the absence of union activity. The judge himself stated that Donaldson's refusal to permit Raines to clock in an hour early was consistent with the Respondent's policy of restricting such an early start. The judge implicitly credited Donaldson's testimony on this subject and found that "Donaldson told him this previously but confronted Raines on April 6 to 'bring this to a head.'" Furthermore, the judge found that "Raines conceded that Donaldson had told him not to clock in early before . . . ." Thus, contrary to my colleagues' assertion, I find that Donaldson previously warned Raines about his practice of clocking in early and that Raines admitted as much. Although it appears that this was the first time Donaldson brought the matter to Raines' attention in precisely this manner, Donaldson's response does not detract from evidence showing that the Respondent had prior "issues" with Raines on this account. Furthermore, the onset of the organizing campaign did not insulate Raines from the Respondent's concern with his abuse of its timeclock. Specifically, the practical result of concluding, as my colleagues do, that the Respondent must have been acting out of antiunion animus because Raines signed an authorization card the day before, is to immunize an employee, just because he happens to be prounion, from the consequences of the employee's timeclock abuse. I am unprepared to make such a causal connection.

To support their 8(a)(3) finding here, my colleagues rely on Raines' testimony that all prior warnings he received about clocking in early occurred during the Respondent's November-March winter slow seasons. I note, however, that the incident here occurred only 6 days after the winter season ended and during a year which the evidence shows was particularly rainy. Thus, I find that my colleagues' reliance on the seasonal timing of Donaldson's conduct to support the finding of a violation is misplaced.

In sum, I stress that, although Donaldson's decision to "bring this to a head" occurred immediately after the organizing campaign began, Donaldson did not impose any discipline on Raines. He simply enforced the Respondent's policy of refusing to allow employees to clock in more than 15 minutes early. By preventing Raines from again "padding" his time, Donaldson was only requiring him to comply with the Respondent's policy on starting time. My colleagues, in finding a violation, ignore the Respondent's legitimate interest in addressing this situation. For these reasons, I would dismiss the complaint allegation pertaining to Raines.

MEMBER WALSH, dissenting in part.

I agree with my colleagues in all respects except (1) where noted in the majority opinion and (2) in their finding that precast foreman Vernon Weidow is a supervisor within the meaning of Section 2(11) of the Act.

The complaint alleges that Weidow is a supervisor within the meaning of Section 2(11) of the Act, and that in that capacity he committed several specifically alleged violations of Section 8(a)(1). In section 32 of his attached decision, the judge found that Weidow is a supervisor as alleged, apparently on the grounds (according to the judge) that Weidow interviewed prospective employees and recommended them for hiring, recommended employees for firing, set the working hours for certain employees, and gave the other two workers in the precast department daily assignments that were not shown to be merely routine. In section 33, the judge found that Weidow violated Section 8(a)(1) in certain respects. The Respondent excepts to the judge's finding that Weidow is a supervisor within the meaning of Section 2(11) and that he violated Section 8(a)(1). My colleagues affirm the judge's finding that Weidow is a 2(11) supervisor and they affirm some of the judge's consequent findings of Section 8(a)(1) conduct by Weidow.

Contrary to my colleagues and the judge, I find for the reasons set forth below that the record does not establish that Weidow is a supervisor within the meaning of Section 2(11) of the Act and thus does not establish that Weidow's conduct violated the Act.

a. Section 2(11) of the Act

Section 2(11) defines the term "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

b. Facts

Weidow is the foreman in the precast department.[1] He testified without contradiction as follows: Three people work in the precast department, including him. He has no office or desk. All of his work is performed on the work floor. He works side-by-side with the other two workers in the department. Like them, he is paid by the hour. (He is paid $14.50, the other two are paid $11.50 and $9.50, respectively.)

Weidow interviews prospective precast department employees (about 10 interviews in the preceding 3 years). He makes hiring and firing recommendations about precast department applicants and employees, but he does not have authority to hire and fire "without authorization." He recommended that precast employees Charles Rightnour and Todd Madeen be hired. Madeen was often late to work and was ultimately discharged because of that. Weidow spoke with Donaldson a couple of times about Madeen's repeated lateness. Madeen reported late for work on April 3 and 5. After Madeen reported late again on April 6, Weidow again consulted with Donaldson that same morning, and then informed Madeen that he was discharged.[2]

Occasionally, on his own, Weidow will tell an employee to report to work an hour earlier than normal in order to "beat the heat," or an hour later if Weidow has to be out of the plant at the normal reporting time.

Consistent with Weidow's testimony, Donaldson testified as follows: Weidow does not have authority to hire or fire. While Weidow makes recommendations to Donaldson, hiring and firing is done with Donaldson's "final blessing." Weidow is required to consult with Donaldson and present him with the relevant facts regarding hiring and firing matters. Alternatively, Donaldson will review an application himself prior to a hiring, because of his expressed belief that his 30 years of experience enable him to "read more into" an application than Weidow can.

Donaldson testified that he wants to give Weidow the leeway to make his own "minor decisions" in the precast department, and not "micromanage" what Weidow does there, because to do so would take away from Donaldson's performance of his own important duties. Donaldson testified that he "basically concur[s]" with any "major decision" that Weidow makes in the precast department, e.g., purchasing new precasting forms and hiring and firing, but that he does not always agree with Weidow's recommendations.

Mixer driver/equipment operator Russell Transue testified that he works about one third of his time in the precast department, that when he does he "reports" to Weidow, and that Weidow assigns him work to perform in the department.

Conveyor truck driver Charles Rightnour formerly worked in the precast department. He testified, without elaboration or explanation, that Weidow "hired" him for precast, and that Weidow gave him "work assignments" while Rightnour worked in that department.

c. Applicable principles

An individual need possess only one of the enumerated indicia of authority in order to be encompassed by Section 2(11), as long as the exercise of such authority is carried out in the interest of the employer, and requires the exercise of independent judgment. *California Beverage Co.*, 283 NLRB 328 (1987). "[T]he employee is [not] required to regularly and routinely exercise the powers set forth in the statute. It is the existence of the power which determines whether or not an employee is a supervisor." *NLRB v. Roselon Southern, Inc.*, 382 F.2d 245, 247 (6th Cir. 1967). However, only individuals with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen . . . and other minor supervisory employees." *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985), enfd. in relevant part 794 F.2d 527 (9th Cir. 1986). Therefore, an individual who exercises some "supervisory authority" only in a routine, clerical, or perfunctory manner will not be found to be a supervisor. *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). Further, the burden of proving that an individual is a supervisor is on the party alleging such status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 712 (2001).[3]

d. Application of principles

I find that the General Counsel has failed to carry his burden of producing sufficient evidence to establish that Weidow is a supervisor within the meaning of Section 2(11) of the Act.

First, the evidence affirmatively establishes that Weidow does not have independent authority to hire or discharge. Second, the record does not recount any instance in which Weidow was shown to have exercised independent judgment in effectively recommending either hiring or discharge. Rather, the evidence about this as-

[1] The precast department makes septic tanks, sewer materials, grave liners, manholes, and other precast concrete products.

[2] The record does not establish who made the decision to discharge Madeen on April 6. Weidow testified that he consulted with Donaldson about Madeen on the morning of April 6, after Madeen again reported late for work, and "the decision [was] . . . [t]o let him go as long as he was late."

[3] See generally *Arlington Masonry Supply, Inc.*, 339 NLRB 817 (2003) (Member Walsh dissenting from the finding of supervisory status in that case).

pect of Weidow's alleged supervisory authority is no more than conclusionary, consisting of only: (1) Weidow's bare testimony that (a) he has interviewed approximately 10 applicants in his 3 years as precast foreman, (b) he recommended that employees Rightnour and Madeen be hired, and (c) he consulted with Donaldson about the decision to discharge Madeen for repeated lateness; (2) Donaldson's equally unadorned testimony that Weidow is required to "consult" with Donaldson about hiring and discharge, presenting Donaldson with "relevant facts" before Donaldson bestows his "final blessing;" and (3) Rightnour's also unexplained testimony that Weidow "hired" him for precast.[4] This conclusionary testimony fails to establish that Weidow exercised independent judgment in carrying out any of these functions. Thus, it falls short of establishing that Weidow possesses supervisory authority within the meaning of Section 2(11) effectively to recommend hiring or discharge.[5]

Likewise, the record does not recount any instance in which Weidow was shown to have exercised independent judgment in assigning or responsibly directing the work of the other two precast workers. Rather, the evidence about this aspect of Weidow's alleged supervisory authority, like the evidence about his alleged hiring and discharge authority, is no more than conclusionary, and fails to establish that any authority exercised by Weidow to assign and direct the work of the other two precast workers was more than routine in nature and instead required the exercise of independent judgment.

On this aspect of his alleged supervisory authority, Weidow testified only that he will occasionally tell an employee to report for work an hour early, "to beat the heat," or an hour late, if Weidow was going to be out of the plant at that time. Donaldson testified only that while he wants to give Weidow leeway to make his own "minor" decisions in the precast department, Donaldson "concurs" with any "major" decisions made by Weidow in the department. Donaldson provided no examples at all of any such "minor" decisions, and no specific examples of any such "major" decisions, giving only two general examples of the latter: purchasing new precasting forms and "hiring new people, firing people" (see discussion above of this latter aspect). Transue testified, with equal lack of specificity, that when he is working in the precast department (about one third of Transue's time), he "reports" to Weidow. Finally, both Transue and Rightnour testified, without explanation, elaboration, or specific examples, that Weidow gives them "assignments."

The above conclusionary testimony about Weidow's assignment and direction of work in the precast department fails to establish that any authority he exercised to assign and direct the work of the other two precast workers was more than routine in nature and instead required the exercise of independent judgment within the scope of Section 2(11) of the Act.[6]

Finally, there is no evidence at all that Weidow possesses any of the other indicia of supervisory authority contained in Section 2(11). In light of all of the above considerations, the General Counsel has failed to establish that Weidow is a supervisor within the meaning of Section 2(11) of the Act.

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 create the impression that our employees' protected concerted or union activities are under surveillance.

WE WILL NOT coercively interrogate our employees about their protected concerted or union activities.

WE WILL NOT threaten to discharge our employees who engage in protected concerted or union activities.

WE WILL NOT misstate to our employees that they will lose their Employee Stock Ownership Plan if they select International Union of Operating Engineers, Local 400, AFL–CIO (the Union) as their collective bargaining representative.

[4] Transue, on the other hand, testified that Weidow had no role in hiring him.

[5] See *Chevron Shipping Co.*, 317 NLRB 379 fn. 6 (1995), citing *Sears, Roebuck & Co.*, 304 NLRB 193 (1991) (conclusionary statements made by witnesses in their testimony, without supporting evidence, do not establish supervisory authority).

[6] See *Palagonia Bakery Co.*, 339 NLRB No. 74, JD slip op. at 20–21 (2003) (Saintvil, Arroyave, Justi, Sigismondi).

WE WILL NOT threaten our employees that they will not receive higher wages if they select the Union to represent them.

WE WILL NOT denigrate our employees who support the Union.

WE WILL NOT order employees to remove prounion stickers from their hard hats.

WE WILL NOT promulgate rules that restrict our employees from engaging in lawful picketing.

WE WILL NOT implement rules banning off-duty employees from our premises in retaliation for their protected concerted or union activities.

WE WILL NOT lay off our employees because they engage in protected concerted or union activities.

WE WILL NOT subcontract out unit work because our employees engage in protected concerted or union activities.

WE WILL NOT reduce our employees' hours in retaliation for their protected concerted or union activities.

WE WILL NOT refuse to permit our employees to clock in early for work in retaliation for their protected concerted or union activities**.**

WE WILL NOT transfer our employees to different jobs in retaliation for their protected concerted or union activities.

WE WILL NOT grant our employees wage increases designed to undermine their support for the Union.

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

WE WILL reinstate employee Allen Dukelow to his former job as a cat loading machine operator 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 employees whole for any loss of earnings and other benefits they may have suffered as a result of Allen Dukelow's unlawful job transfer, James West's discriminatory layoff, the Respondent's unlawful subcontracting out of unit work about April 6, 2000, Joe Crouchet's, Douglas Linquist's, Randy Melton's, and Rick Zundel's unlawful reduction in hours on April 6 and 7, 2000, and David Raines' discriminatory treatment regarding his clocking in early for work.

WE WILL expunge from our records any reference to Allen Dukelow's unlawful transfer, James West's unlawful layoff, the unlawful reduction in hours affecting employees Joe Crouchet, Douglas Linquist, Randy Melton, and Rick Zundel, and the discriminatory refusal to allow employee David Raines to clock in early for work, and notify them in writing that this has been done and that these actions will not be used against them in any way.

DONALDSON BROS. READY MIX, INC.

Daniel R. Sanders, Esq., for the General Counsel.
Samuel M. Warren, Esq. (St. Peter & Warren), of Missoula, Montana, for the Respondent.
Timothy J. McKittrick, Esq., of Great Falls, Montana, for the Union.

DECISION[1]

I. STATEMENT OF THE CASE

JERRY M. HERMELE, U.S. Administrative Law Judge. In a June 30, 2000 complaint, the General Counsel alleges that the Respondent, Donaldson Bros. Ready Mix, Inc., committed numerous violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act following the employees' April 2000 selection, by signing union cards, of the International Union of Operating Engineers, Local 400, AFL–CIO, to be their collective-bargaining representative. Thus, even though no election was ever held, the General Counsel seeks an order requiring the Respondent to bargain with the Union. In a July 12, 2000 answer, however, the Respondent broadly denied these allegations.

So, a trial was held in Hamilton, Montana, on August 22 and 23, 2000, during which the General Counsel called 18 witnesses and the Respondent called 10 witnesses. Then, briefs were filed by the Respondent on September 25, and by the General Counsel on September 26.

II. FINDINGS OF FACT

The Respondent, a $4 million business based in Hamilton, Montana, is the Bitterroot Valley's largest seller of ready-mix concrete, sand, and gravel. Annually the Company purchases and receives over $50,000 in interstate goods. Charles Donaldson is the Company's president and 49 percent owner, with 51 percent being owned by the approximately 25 employees through an employee stock ownership plan (ESOP) (GC Exhs. 1(q), (s); R. Exhs. 1–2; Tr. 290, 316–17, 371–72, 379). The ESOP was created in 1995 and is 100 percent employer-funded. Since 1995, Donaldson has timely paid into the ESOP and in fact has overpaid at times. Employees represented by a union could be excluded from the ESOP; a standard exclusion for most closely-held companies. If a union came to represent the employees, the employees' accounts would be frozen, the employer would make no more contributions, and the accounts would be distributed to the employees upon their retirement. Otherwise, with no union, each employee would vest after 6 years and receive up to 43 percent of their salary upon retirement (R. Exhs. 1–2; Tr. 296, 298–99, 302–03, 319–20, 326–27, 330).

With the population growth of the Bitterroot Valley since 1970, and the corresponding increase in residential construction, the Company's business has grown. But the four winter months of December to March are usually slow, resulting in layoffs and only part-time work for the employees (Tr. 116,

[1] Upon any publication of this Decision by the National Labor Relations Board, unauthorized changes may have been made by the Board's Executive Secretary to the original Decision of the presiding judge.

373, 378–80). The Company usually hires new employees via referrals from the State job service. But occasionally the Company hires new people directly. One such person was James West, whom Donaldson interviewed and hired as a mechanic in June 1999. West disclosed beforehand that he was a union member (Tr. 181–83, 405–09, 490).

On Monday, April 3, 2000, at 5:30 p.m., Donaldson called employee Allen Dukelow to his office, suspecting that a union organizing campaign was underway. Commenting that Dukelow was probably leading the effort, Donaldson inquired whether Dukelow knew anything about a union. Donaldson then showed Dukelow three pieces of paper he had prepared comparing his Company's pay rate and benefits with two local unionized companies (GC Exh. 11; Tr. 50–53, 385–88). According to Dukelow, Donaldson said that if the Union came in there would be no more overtime for the employees, that the maximum hourly wage would be no higher than the rate paid by those local unionized companies, and that he would reduce his contribution to the ESOP (Tr. 54–55). Donaldson, however, denied threatening to reduce Dukelow's wages or overtime. Rather, according to Donaldson, he told Dukelow that he had the right to unionize (Tr. 389–90).

On Wednesday, April 5, Donaldson laid off mechanic James West, telling West that there was insufficient work. But there was scheduled work to be done in the mechanic's department that day, and the only other full-time mechanic, William Meuchel, was scheduled to be on vacation starting the next day (Tr. 186–87, 334, 339–40). Donaldson denied that there was any connection between his decision to lay off West and West's union status (Tr. 415–17). Because of West's layoff, two outside mechanics had to perform repairs on three company vehicles, on April 7, 8, and 12, costing $587.30 (GC Exhs. 12–14). But Donaldson claimed that this was cheaper than keeping West on salary (Tr. 417–18). Neither of these two companies, however, was used for vehicle repair work before. While the Company sometimes farmed out vehicle repair work, Meuchel and West believed that West could have done this particular work adequately (R. Exhs. 5–6; Tr. 176–78, 188–89, 336–37, 341). West was the only employee laid off in 2000 (Tr. 418–19). He was rehired for 2 weeks in May 2000, and then let go again (Tr. 420–21).

After work that evening, union organizer Sandi Curriero obtained 22 signed authorization cards, plus two more cards the next day (GC Exhs. 3, 10; Tr. 18–20). On Thursday morning, April 6, she visited the Company with two others, Quinton Roland and Bob Paddock, and showed the cards to Donaldson, requesting that Donaldson recognize the Union as the employees' representative. Donaldson responded that he needed to talk to a lawyer. The three union officials then asked for job application forms. Donaldson said there may be some openings, and all three filled their applications out and turned them in. None of them ever received a response. Shortly thereafter, another group of union applicants, including John Owens, applied and were told by Donaldson to apply with the State job service (Tr. 24–28, 146–55, 166–72).

The employees typically start work at 7:30 to 8 a.m. If work is slow, even during the busy season, Donaldson would sometimes tell an employee to come in later for the next day by telling them at work that evening or calling them at home early in the morning. Donaldson also sends employees home in the middle of the day (Tr. 381–82, 435–40). On the morning of April 6, Donaldson sent home employee Rick Zundel; the first time such a thing happened to Zundel. He had signed one of the union cards the night before. On his way home, Zundel noticed that another employee was driving his truck. Zundel was also sent home again or called at home and told to stay home for the day (Tr. 41–43, 216–17). Donaldson also called card-signing employee Randy Melton on the morning of April 6 and told him to stay home that day. That had never happened before to Melton during the Company's busy season of April through November. And the next day, April 7, Donaldson told Melton to come to work a little bit later than usual; another first for Melton (Tr. 114–16, 120). Also on April 6, employee Douglas Lindquist, who had signed a union card, was called at home that morning and told to stay home. This had happened to Lindquist before (Tr. 197). Also on April 6, when card-signing employee David Raines came to work at around 6:30 a.m. he was unable to find his timecard to punch in. Donaldson had taken the timecard and told Raines not to punch in until 8 a.m. (Tr. 213–14). Donaldson told him this previously but confronted Raines on April 6 to "bring this to a head." Previously, the Company allowed employees to clock in 15 minutes early, but Raines was habitually 1 hour early (Tr. 429–33). Employee Joe Crouchet, who also signed a union card, was sent home early on April 7 (Tr. 83–84).

On April 6, employee Todd Madeen, who was hired on March 7, was fired. Supervisor Vern Weidow recommended this action to Donaldson because Madeen was again late to work on April 5 as well as once before that week (Tr. 364–66). Madeen's timecards reveal that he was 5 minutes late on March 14, 31 minutes late on March 15, 3 minutes late on March 16, 2 minutes late on March 17, 2 minutes late on April 3, and 5 minutes late on April 5 (R. Ex. 11). According to employee Charles Rightnour, Madeen was late to work "almost every day" (Tr. 228, 236).

Before April 5, Supervisor Al Widdifield saw employee Dukelow using his cellular telephone several times while working (Tr. 478–81). Dukelow, however, testified that he used the phone only after ceasing work on his loading machine, and then only three times at that (Tr. 70–71). Dukelow was a fire department official.[2] According to Dukelow, Donaldson permitted him to use the phone provided work was not interfered with (Tr. 59–60). But Donaldson denied granting permission. And when Widdifield brought the matter to his attention, on April 7, Donaldson told Dukelow to use the phone only during lunch or if there was a real emergency (Tr. 426–28).

According to Wayne Weidow, Supervisor Vern Weidow's nephew, Dukelow said that he had Donaldson "where he wanted him and [was] going to ram something up his ass" (Tr. 293). Dirk Wolff, the owner of Ideal Construction, which does a great deal of business with Donaldson, also heard Dukelow say this (Tr. 286–90). Dukelow denied saying such a thing (Tr. 76–77).

[2] There were serious fires in western Montana during the summer of 2000.

Also on April 7, trucks from local construction firms J-5, Rapid Excavating, and Ellis Bruhner hauled in sand to the Respondent's plant. Some of the Respondent's trucks were idle that day. Normally, outside help was utilized only when all the Respondent's trucks were in use, and then only to haul material out of the plant (Tr. 61–62, 85, 117, 123–25, 135–36, 139–41, 201–02). Donaldson denied that the use of these outside contractors that day was connected to the Union. Rather, he testified that he used them for a "multitude of reasons," noting that he used J-5 before April 2000 (Tr. 441–45).

On either April 7 or 10, management transferred Dukelow from the mixer job he performed for 5 years to a new "jack of all trades" job. This new job yielded about 5 hours of weekly overtime as opposed to the 10-20 hours in the mixer job. But Dukelow had previously worked at other jobs, having been with the Company for 23 years (Tr. 49, 57–58, 79–80). On April 14, the Union sent a letter to Donaldson stating that employees Dukelow and Eldon Wolfe were the lead organizers and reminding the Company not to retaliate against them (GC Exh. 4).

Sometime in mid-to-late April, employee Earl Stueve received a written warning for not wearing his hard hat after Donaldson noticed him without one. The Company instituted a new policy requiring the wearing of hard hats at all times beginning April 1. From January 1998 to the end of April 2000, Stueve was only one of two employees to receive a written discipline for any violation of company rules (Tr. 157–58, 180, 455–57).

After the union effort began, one of the company telephones was off the hook a few times. Employee Scott Neumann testified that Donaldson took a telephone off the hook, and said "[w]e're going to slow things down around here a little bit" (Tr. 34–35, 39, 125–26). Donaldson denied ever telling anyone to take a telephone off the hook or trying to slow down business. And even if a telephone were off the hook, Donaldson explained that other incoming lines would still be available (Tr. 383–85). But he added that a telephone was taken off the hook in April to compensate for the absence of a clerical worker that day (Tr. 452–53). Bookkeeper Janet Born, however, was never told to take a telephone off the hook or to slow down business (Tr. 246, 250).

On April 10, Donaldson posted the following notice for about a week (Tr. 463):

> IMPORTANT NOTICE TO ALL EMPLOYEES
>
> In the event that the Operating Engineers or any other labor organization commences picketing at any of the Company's facilities, it is important that all employees be informed that they will be expected to report to work as normal. Since Donaldson Bros. Ready Mix has no legal relationship with any union, employees do not have the right to withhold their services by recognizing a picket sign.
>
> Therefore, any employee who fails to report to work based on the union's picketing of our facilities or for any other unauthorized reason will be considered absent without authorization. Employees who are absent without authorization and fail to report to work are risking their employment and may be terminated.

(GC Exh. 2). The same day, Donaldson sent each employee a list of "non-permissible conduct by company management" and "permissible conduct" during the union campaign. Donaldson's lawyer supplied him with this information (R. Exhs. 3–4).

Before the union effort began, Donaldson allowed employee Douglas Lindquist to use the company shop for personal projects during nonwork hours (Tr. 202). But after April 6, employee Joseph Crouchet testified that Donaldson denied his request to use a company truck to get gravel at a discount (Tr. 518). Donaldson testified that he never denied anyone's request (Tr. 467–68). Moreover, he stated that since April 6 he still allows employees to "use the shop or haul gravel home on their own time" (Tr. 412–13).

On April 17, all employees received the following enclosure with their paychecks:

> Beginning Monday night, Donaldson Bro's. Ready Mix will have, on staff, an armed security guard for the plant and pit. The management feels this precaution is necessary for the protection of all *our* equipment during these times.
>
> This precaution is protection from the outside public, as we all know they are some "loose cannons" out there that would get a thrill out of causing some mischief. This has nothing to do with the employees of Donaldson Bro's. Ready Mix, but again we feel we need to protect our equipment as well as yours.
>
> Therefore, employees will not be allowed on the premises unless you are punched in on the clock.

(GC Exh. 5). Donaldson issued this notice to prevent vandalism. Also in that connection, he hired a security company to protect the premises because the plant usually closes at 6 p.m. (Tr. 410–12).

During the week of April 10, the Union held a second meeting with the employees. Vernon Weidow, the precast foreman for 3 years, attended. Weidow interviews employees for jobs at the Company and recommends hiring and firing employees to Donaldson (Tr. 97–98, 347, 364–65, 459). He also instructs employees when to report in the morning (Tr. 369–70). At the meeting, Weidow said that the employees should reject the Union because the Union would ruin the ESOP (Tr. 101, 184–86). Weidow had said the same thing to employee Rightnour on April 6 (Tr. 227–28). Weidow testified that he told the employees to wait a few years until they were 100 percent vested in the ESOP (Tr. 352–54). Weidow reported the events of the meeting to Donaldson (Tr. 367).

Sometime after the union organizing campaign began, employee Douglas Lindquist wore a union sticker on his hard hat. Weidow told Lindquist, his brother-in-law, to remove the sticker and "quit this Union thing" (Tr. 200, 350–51).

On April 21, management met with the employees to discuss the ESOP, and the ramifications of any sale of the Company. Three potential buyers had approached Donaldson in late 1999 and early 2000. This was the first such meeting with employees since the creation of the ESOP in 1995. According to em-

ployees Eldon Wolfe and William Keiser, Donaldson said that he would no longer make voluntary contribution to the ESOP and that he would sell the Company (Tr. 103–06, 211–12, 307–08, 313–14, 390–92). Donaldson denied threatening to discontinue his contribution to the ESOP (Tr. 393). Donaldson's lawyer, Don St. Peter, who created the ESOP, testified that Donaldson did not threaten to discontinue his participation. Rather, Donaldson advised the employees that if the Company were sold, the ESOP assets would be distributed to the employees. And because of the ESOP, the employees had the right to vote on any sale of the Company (Tr. 294, 309–13).

After the meeting, Weidow asked employee Russell Transue if he still supported the Union. Weidow added that if the Union came in, the employees would lose all their ESOP money (Tr. 142–43). Weidow denied asking any employee about his union activity. But he did tell employees that there would be no higher wages if the Union came in (Tr. 360–61). And he "may have" said that the employees were stupid for supporting the Union (Tr. 361, 369). Employee Charles Rightnour also testified that shortly after April 5, Weidow had asked if he signed a union card, and Weidow then jokingly said that Rightnour would be getting some competition from a new employee (Tr. 237, 240–41, 359–60).

According to Rightnour, Donaldson said in late April he would like to fire or "shit can" all the employees but couldn't because the Company needed to operate (Tr. 230, 238). Donaldson could not recall making such a threat (Tr. 393–94).

Again, 24 of 26 employees signed union authorization cards (GC Exhs. 3, 8, 10).[3] According to Donaldson's wife, Office Manager Cathy Donaldson, those who signed cards did not have their hours systematically reduced. Rather, some employees received more hours after April 6 and some received less on a random basis (Tr. 493, 495). Employee James Garcia started work on March 27 after Donaldson told him to expect 50 hours a week. Garcia signed a union card and worked as follows:

Week of	Hours Per Week
March 27	48.46
April 3	55.73
April 10	44.10
April 17	13.67
April 24	49.82
May 1	25.19
May 8	26.43
May 15	35.31
May 22	0
May 30	24.54

Garcia was on vacation during the week of May 22 and left in late May when Donaldson told Garcia there was not enough work (R. Exh. 10; Tr. 31–38). During the workweek of April 10, for 10 card-signing employees, eight received anywhere from 4 to 17 less hours than the last week they worked. But two card-signers received more hours (R. Exh. 10).

[3] GC Exh. 8 contains the names of 28 (not 26 as listed) workers, as of April 10, two of whom are supervisors, and one who was hired on April 10.

According to Donaldson, there was no set policy on when employees receive pay raises except that it occurs annually (Tr. 448–52). Indeed, company records reveal that in 1997, most employees received 50 cents an hour raises in November; in 1998 most employees received raises in July; and in 1999 most employees received raises in October and November (R. Exh. 7). But three drivers received 50-cent raises in January 2000, just a few months after their 1999 raises, as well as raises in May 2000. Employee Dukelow testified that he always received a pay raise in the fall; a view shared by employee Eldon Wolfe. And for 2000, all employees, other than the clerical staff, received 50-cent raises on May 19 (R. Exh. 7; Tr. 64, 107).

III. ANALYSIS

The General Counsel alleges that the plethora of 8(a)(1) and (3) violations committed by the Respondent immediately after the union organizing campaign got underway in April 2000 warrants an order requiring the Respondent to recognize and bargain with the Union, thus dispensing with an election. The Respondent, in its brief, disputes all of the alleged violations, but says nothing about possible remedies in this case.

A. 8(a)(1) Violations

The first alleged violation concerns Donaldson's meeting with Dukelow on April 3, when Donaldson called him into his office to discuss the brewing union effort. Donaldson conceded that he asked Dukelow whether a union organizing campaign was underway and commented that Dukelow was probably behind it. Clearly, Donaldson's statement that he knew the identity of the union supporters created an unlawful impression of surveillance of the employees' union activity. *Hamilton Plastic Products*, 309 NLRB 678, 684 (1992). Likewise, it was unlawful for Donaldson to interrogate Dukelow about the Union in his office. *Dealers Mfg. Co.*, 320 NLRB 947, 948 (1996). Donaldson, however, denied threatening to eliminate overtime or reduce wages if the employees unionized. Instead, Donaldson maintained that he told Dukelow that he had the right to unionize and simply offered him written comparisons of the benefits the employees were currently receiving versus those received by employees in other unionized companies in the area. Dukelow, on the other hand, testified that Donaldson threatened to eliminate overtime, reduce wages, and reduce the ESOP contribution.

The presiding judge resolves the additional aspects of the April 3 meeting in the Respondent's favor. Initially, the presiding judge found Donaldson to be a generally credible witness. While Dukelow and Donaldson had different versions of what was said, Dukelow demonstrated a certain degree of untrustworthiness by denying a threat to "screw" Donaldson; a threat corroborated by two other credible witnesses. Also, as discussed infra, Dukelow testified incorrectly about the Company's timing of pay raises. Further, Dukelow's allegations of threats during the April 3 meeting are largely predicated on Donaldson's written comparisons regarding the two unionized companies' wage rates and benefits. But nobody questioned the accuracy of these comparisons and they show that the union companies had some better, and some worse, aspects than the

Respondent. Thus, it is concluded that the written comparisons, based on objective facts, were lawful. *Deer Creek Mining Co.*, 308 NLRB 743 (1992).

The second 8(a)(1) violation concerns the Respondent's alleged new job application policy on April 10, whereby applications would have to be submitted to a State job service rather than to the Company. In this regard, the General Counsel relies on applicant John Owens' testimony that Donaldson told him to file his application with the State job service. But Donaldson and his wife credibly testified that the Company's usual practice as of April 2000 was to use the State job service to hire new employees, especially when gearing up for the new work season in the spring (Tr. 405–06, 490). But they both acknowledged exceptions. In this regard, the first group of three union applicants who applied on April 6 were all able to file applications directly with the Respondent. So, the General Counsel has failed to prove that the Respondent adopted a new, restrictive job application policy in response to the April 2000 union organizing effect.

The third alleged 8(a)(1) violation concerns the Respondent's posting of two employee notices: an April 10 notice that employees who failed to work because of any union picketing could be fired; and an April 17 notice that an armed security guard would be present at night to protect the Company's equipment from "loose cannons" among the general public. The General Counsel contends that the April 10 notice was intimidating and legally incorrect, and that the Respondent presented no evidence to justify the necessity of the April 17 notice.

The picketing notice did not specifically limit the employees' right to strike or to engage in any protected concerted activity. But it prohibited the employees from honoring any picketing by the instant Union "or any other labor organization . . . ." In the presiding judge's view, this prohibition was too broad and thus violated Section 8(a)(1) because nonstriking employees who refuse to cross a picket line maintained by a picketing union, for example, may not be fired. See *ABS Co.*, 269 NLRB 774 (1984); *Redwing Carriers, Inc.*, 137 NLRB 1545 (1962). As for the April 17 security guard notice, it is essential to determine whether this employer action reasonably tended to chill employees in the exercise of their Section 7 rights or whether the policy addressed the employer's legitimate business concerns. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Although it is conceivable that the notice could be read to scare employees about union-inspired vandalism, it is highly significant that the General Counsel fails to cite any authority showing the inherent illegality of this type of notice. Thus, the presiding judge cannot simply conclude that the language *reasonably* tended to chill the employees' Section 7 rights. Moreover, Donaldson testified persuasively that vandalism was a legitimate concern for him in mid-April. Although there is no evidence that vandalism occurred before April 17, the presiding judge believes it would be unfair to require vandalism prior to allowing the Respondent to take reasonable steps to prevent such misconduct. Hence the allegation regarding the April 17 notice will be dismissed.

The fourth set of 8(a)(1) allegations concern Vern Weidow, whom the Respondent contends is only a "lead man" with limited supervision over as few as two employees. But regardless of how many men were in this unit, the evidence shows that Weidow, who has been in his current position for 3 years, interviewed prospective employees, recommended their hiring, recommended which employees should be fired, and set the working hours for certain employees. Further, two employees in Weidow's unit testified that Weidow gave them daily assignments, and the Respondent has not shown that these assignments were merely routine (Tr. 139, 227). Moreover, Weidow ordered an employee to remove a union sticker from his hard hat. Therefore, it is concluded that the General Counsel has successfully proven that Weidow possesses at least one of the indicia of authority set forth in Section 2(11) of the Act, and thus is a supervisor. Compare *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426 (1998).

Turning to the allegations of misconduct by Weidow, the General Counsel first points to an April 2000 conversation between Weidow and employee Rightnour in which Weidow said that Rightnour would be getting job competition because he signed a union card. But both men testified that this was a lighthearted remark said in jest. Thus, it is concluded that this particular statement did not violate the Act. See *Reeves Bros., Inc.*, 320 NLRB 1082, 1084 (1996). But Weidow's jokes ended thereafter. Specifically, he attended the April 10 union meeting with the employees and reported the events thereof to Donaldson. Although the Respondent correctly notes that nobody barred Weidow from attending, and that Weidow merely wanted to voice his opinion about the Union's effect on the ESOP, it is well-settled that a supervisor's "surveillance" of a union meeting violates Section 8(a)(1) even if it is motivated by his own curiosity. *Superior Container*, 276 NLRB 521, 526 (1985). Further, Weidow admitted that he told the assembled employees to reject the Union now because they would not be fully vested in the ESOP for a few years. Objectively, however, Weidow was wrong: employees with 6 years' service were fully vested in the ESOP. Thus, Weidow's statement constituted another violation of Section 8(a)(1). Similarly, Weidow's April 21 remark to employee Transue that the Union would cost the employees their ESOP money violated the Act, as did Weidow's inquiry to Transue whether he still supported the Union; an inquiry not specifically denied by Weidow. Next, Weidow admitted saying to employees that there would be no higher wages if the Union came in, and "may have" said that the employees were stupid for supporting the Union—all additional 8(a)(1) violations. Finally, he also told employee Lindquist in mid-to-late April to remove a union sticker from his hard hat and to "quit this union thing;" another illegal act notwithstanding the Respondent's legally unsupported defenses that Weidow was Lindquist's brother-in-law and not his direct supervisor.

Fifth, according to employee Rightnour, Donaldson said on approximately April 29 that he would like to "shit can" or fire all the employees but couldn't because he needed them to operate the Company. Donaldson simply could not recall making such a statement. Further, the Respondent incorrectly reads the record in arguing that Donaldson's remark was jokingly made (Tr. 238–39). While it is true that Donaldson's threat was equivocal because he also told Rightnour that it would not hap-

pen, the test for determining the illegality of an employer's statement is whether the conduct reasonably tended to interfere with an employee's Section 7 rights, not the employer's actual intent in making the statement. *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997). Thus, Donaldson's statement violated Section 8(a)(1).

The final 8(a)(1) allegation concerns the Respondent's 1995 ESOP, which excludes employees covered by a collective-bargaining agreement. According to the General Counsel, the summary description of the ESOP (R. Exh. 2), contains this exclusionary language, contrary to the ESOP itself (R. Exh. 1). But the summary also states that if there is a conflict between the language of the summary and the ESOP itself, the latter's language controls. Further, the Respondent's tax lawyer countered that this exclusion is common for small companies such as the Respondent's. As such, it cannot be concluded that this 5-year-old "statement" reasonably tended to chill the employees' exercise of their Section 7 rights. *Lafayette Park Hotel*, supra.

B. The 8(a)(3) Allegations

After the union organizing campaign started in early April 2000, the General Counsel alleges that the Respondent committed a host of unfair labor practices against various employees. To prove its allegations, it must show by a preponderance of the evidence that the employees' protected Section 7 activity was a motivating factor in the Respondent's various actions against these employees. If so proven, the burden then shifts to the Respondent to show, also by a preponderance of the evidence, that its actions were based on lawful reason(s), and would have occurred absent the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *Transportation Management Corp.*, 462 U.S. 393 (1983).

First, there is the matter of Donaldson's April 5 decision to lay off employee James West for approximately 3 weeks. The General Counsel contends that Donaldson named West as a likely union supporter in his April 3 meeting with Dukelow (Tr. 51), and retaliated against West after learning of the organizing campaign. Upon a review of the evidence, it is concluded that the General Counsel has met his *Wright Line* burden of showing that West's union activity motivated Donaldson to lay him off. Donaldson named West as a likely union supporter to Dukelow on April 3; an illegal creation of the impression that he was surveilling the Union's efforts, as discussed supra in paragraph 27. Also, Donaldson illegally interrogated Dukelow about the Union that day. Thus, the Respondent's two violations of Section 8(a)(1) of the Act on April 3, and suspicious timing of the decision to lay off West just 2 days later, establishes union animus by Donaldson. As for the Respondent's defense that it was merely saving money by laying off West, it is significant that West was the only such layoff through mid-2000. Also, it is inexplicable why West would be laid off exactly when work needed to be done in his shop the next day and the lead mechanic was set to go on vacation that same day. Therefore, it is concluded that the Respondent's decision to lay off West on April 5 violated Section 8(a)(3). However, West was recalled for work in May and the General Counsel does not allege anything improper about West's termination shortly thereafter.

The second set of alleged 8(a)(3) violations concern the reduction of employees' hours. First, on April 6, the day he was presented with the signed union cards, Donaldson sent employee Zundel home early and called employees Melton and Lindquist and told them to stay home. Zundel was restricted to some part-time days thereafter, and Melton worked less than a full day on April 7, as did employee Crouchet. Because, as discussed supra, there is evidence of union animus by Donaldson as of April 3, the burden shifts to the Respondent to justify these actions. Although there is evidence, from Donaldson and the affected employees, that hours were reduced before April 2000, depending on the Company's workload for a particular day, the Respondent has failed to advance a specific reason(s) for the reduction of hours for employees Zundel, Melton, Lindquist, and Crouchet. Hence, the General Counsel's showing of union animus has not been rebutted. Second, it is alleged that Donaldson confronted employee Raines on April 6 and told him not to punch in early anymore. Raines conceded that Donaldson had told him not to clock in early before and it is uncontested that Raines' early clock-ins were contrary to the Respondent's established practice. Again, however, the Respondent has failed to explain specifically why Donaldson brought this matter to a head on April 6. Thus, it is concluded that the action against Raines was prompted by union animus.

Third, the General Counsel broadly alleges in paragraph 12(a) of the complaint that since April 6 the Respondent diminished unnamed employees' hours, which the presiding judge reads to encompass the litigated matter of outside contractors which were used to perform various jobs, and the Respondent's attempt to slow down business by taking its telephone off the hook.[4] Specifically, on April 7, the Respondent subcontracted work out to three local construction companies, mainly to haul material in to the Respondent's plant, while some of the Respondent's trucks were idle. Although the evidence reveals that the Respondent subcontracted out work before April 7, that was done to haul material out of the plant and when all the Respondent's trucks were in use. Further, Donaldson offered only a vague justification for this change of practice as of April 7. Therefore, given the Respondent's existing union animus, it is concluded that this temporary subcontracting practice violated Section 8(a)(3). As for the allegation that Donaldson took one of the company telephones off the hook, employee Neumann testified that Donaldson said that he was going to "slow things down" a little bit. Donaldson denied saying this and this alleged statement is ambiguous at best. Moreover, Donaldson explained that a telephone was taken off the hook in April because of the absence of a clerical employee. So, no violation can be found regarding this matter.

Fourth, it is alleged that the firing of new employee Todd Madeen on April 6 violated the Act. In the General Counsel's view, Madeen's lateness was not significant and warranted discipline less than termination. The record is silent whether

[4] The General Counsel clarified this allegation with a September 19, 2000 motion.

the Respondent had a progressive disciplinary system for tardiness. As for Madeen, who did not testify but signed a union card, he was hired in early March and was late on March 14, 15, 16, and 17. After this initial burst of tardiness, Madeen's problem resumed on April 3 and 5, albeit he was late by 2 and 5 minutes, respectively. Nevertheless, given Madeen's track record, the presiding judge concludes that the Respondent's decision on April 6 appears justified, notwithstanding its existing union animus. Madeen's tardiness had started again on April 3 and he was late yet again on April 5. Also, evidence submitted by the Respondent regarding two other employees' timecards indicates no disparate treatment of Madeen (R. Exh. 11). Therefore, this aspect of the General Counsel's complaint will be dismissed.

Fifth, on either April 7 or 10, employee Dukelow was transferred from his mixer job to a jack-of-all-trades position, resulting in about 5-to-10 less overtime hours a week, including not working that Saturday, April 8. Dukelow testified that the new position was less desirable because it offered less consistent hours. Given the existing animus against Dukelow, one of the union leaders, the burden is on the Respondent to establish a valid nondiscriminatory reason for the job change, especially given the timing thereof. But none was offered, other than Dukelow's admission that he had worked at many jobs within the Company during his 22 years there. So, it is concluded that Dukelow's transfer violated Section 8(a)(3) as well.

Sixth, also on April 7, Donaldson restricted Dukelow's use of his cellular telephone to lunch or emergencies after supervisor Al Widdifield saw Dukelow taking a break from work to use the telephone. Dukelow admitted doing so. Dukelow testified that he could use the telephone if work was not interfered with while Donaldson denied granting any such permission. So, the key to this matter is to determine the reason for the policy change. Again, the burden is on the Respondent to demonstrate a nondiscriminatory reason. Given the fact that the sequence of events on April 7 started with Widdifield, not Donaldson, and that Dukelow apparently violated the existing policy of allowing his telephone use to interfere with work, albeit slightly, and Donaldson's credible explanation that Dukelow's conduct was a valid safety concern, the presiding judge concludes that this action against Dukelow did not violate the Act.

Seventh, on April 17, the Respondent implemented a new access policy for the employees, set forth in the notice regarding the posting of a nightly security guard on the plant premises. Thereafter, employees were told that they were "not allowed on the premises unless you are punched in on the clock." As discussed in paragraph 31 supra, the posting of this notice did not violate Section 8(a)(1). Regarding the policy itself, it applied only to the plant premises, was disseminated to all employees, and did not discriminate against those employees engaged in union activity. *Tri-County Medical Center*, 222 NLRB 1089 (1976). Moreover, Donaldson testified that he still allows employees to use the shop off-hours and to get gravel at a discount; testimony refuted by only one witness as to only the discount policy on one occasion. Therefore, the preponderance of the evidence fails to establish any violation of Section 8(a)(3).

Eighth, sometime in April, employee Stueve received a written warning after Donaldson observed that he was not wearing his hard hat, which violated the Respondent's new April 1 policy. The General Counsel, however, contends that Stueve was only one of two employees to receive a written discipline for any reason from 1998 to 2000. Nevertheless, the policy was promulgated on April 1, before any union activity began, and it is clear that Steuve violated the rule. Thus, notwithstanding any animus by the Respondent against Steuve, who also signed a union card, he was properly disciplined.

Ninth, the General Counsel contends that employee James Garcia, who signed a union card but was not a union leader, was constructively discharged on May 27 because his weekly hours dropped after commencement of the union campaign. Specifically, Garcia started work in late March and worked 48 and 55 hours a week. Then during the week of April 10 he worked 44 hours and only 13 hours during the week of April 17. But during the week of April 24, he worked 49 hours. Thereafter, Garcia worked between 24 and 35 hours a week, until leaving in late May. The Respondent defends this allegation on two grounds, claiming that Garcia's employment was too short to discern any pattern of what his hours should have been. Also, it is noted that Donaldson called Garcia for work less than other employees in part because of the great distance Garcia lived from the Company (Tr. 435).

The presiding judge accepts the Respondent's argument. Significantly, the evidence reveals that there was no clear pattern of prounion employees receiving less hours after April 5 and noncard signers receiving more hours. Rather, the evidence is decidedly mixed on this question. Further, there is also no discernable pattern regarding Garcia's "normal" workweek, given the brevity of his tenure. Further, Donaldson offered a credible explanation of why he would schedule another employee early in the morning who lived closer to the Company—who was almost certainly prounion also—rather than Garcia in meeting the Company's daily workload. Therefore, it cannot be concluded that Garcia was constructively and illegally discharged.

Tenth, and finally, it is alleged that the Respondent's May 2000 pay raise of 50 cents an hour for the employees violated Section 8(a)(3) because such raises occurred previously in either July or November. The 2000 pay raise was no greater than past years and it is true that the Respondent had no set month to award raises. Nevertheless, Donaldson offered no credible explanation of why he decided to award a raise 1 month after the Union organizing drive began. In view of the suspicious timing of the raise and the Respondent's failure to offer an alternative justification, it is concluded that the May 2000 raises violated Section 8(a)(3).

The Remedy

In summary, the Respondent committed a variety of illegal acts upon learning of the union organizing campaign in early April 2000. Specifically, Donaldson's April 3 meeting with union leader and employee Allen Dukelow violated Section 8(a)(1) because Donaldson interrogated Dukelow about the nascent union activity and created the impression he was surveilling the union effort by naming the leaders thereof. On

April 5, Donaldson illegally laid off employee James West, for a few weeks, in retaliation for West's union involvement. On April 6, and 7, Donaldson effectively reduced the hours of several employees who signed union cards by subcontracting out work for the day and by outright reducing their hours. On April 7, Donaldson illegally transferred Dukelow to a slightly less desirable position. On April 10, the Company posted an illegal notice warning the employees against picketing and not reporting for work. From April 10 to 24, Supervisor Vern Weidow committed several violations of Section 8(a)(1) by surveilling a union meeting, interrogating employee Transue about his union sympathies, making two incorrect statements about the Union's effect on the existing ESOP, telling employees that they were stupid for supporting the Union, threatening that wages would not increase if the Union won, and ordering an employee to remove a prounion sticker from his hard hat. On April 29, Donaldson violated Section 8(a)(1) by telling an employee he would like to get rid of all the employees. Finally, on May 19, the employees received their annual pay raises a few months sooner than normal. On the other hand, the General Counsel has failed to prove many of his allegations, including one discharge and one constructive discharge.

That brings us to the selection of the appropriate remedy in this case. The Respondent does not discuss this matter at all in its brief, while the General Counsel argues that the Respondent's violations warrant a category II bargaining order, pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Specifically, such an order is warranted, in the absence of "outrageous" employer misconduct, where there are "less persuasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." In fashioning this remedy, it is important to:

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

395 U.S. at 614–615.

All of the cases cited by the General Counsel involve "hallmark" violations of the Act warranting a bargaining order, such as discharges, threats to close the business if a union represents the employees, and an employer's granting of benefits which unfairly undermine the Union's support. But in the instant case, only one of these factors exist. Compare *M.J. Metal Products*, 328 NLRB 1184 (1999) (discharge of one-quarter of the employees and threats to shut down operations if the Union was selected). To be sure, there was also one layoff of an employee for a few weeks and several employees who lost a few hours or days of work, out of approximately 25 employees. Also, there were several violations of Section 8(a)(1) of the Act. But, the Respondent's misconduct was tightly confined to the period immediately following the beginning of the union campaign in early April to mid-May. Indeed, most of the Respondent's illegal acts occurred within a few days of April 3, and the final misdeed occurred on May 19. Compare *Bonham Heating & Air Conditioning*, 328 NLRB 432 (1999) (Respondent persisted in its unfair labor practices). Further, there is no actual *evidence* that a future election would be impeded by unfairly diminished union support. In this regard, out of two dozen, only one employee testified that he has changed his mind about the Union (Tr. 261). Compare *Sheraton Hotel Waterbury*, 312 NLRB 304, 305 (1993) (clear dissipation of union support). In sum, the presiding judge concludes that traditional remedies, not a bargaining order, are warranted to remedy the Respondent's various violations of the Act.

IV. CONCLUSIONS OF LAW

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

2. The Union, International Union of Operating Engineers, Local 400, AFL–CIO, 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 as follows:

(a) On April 3, 2000 by creating an impression of surveillance to an employee (as alleged in paragraph 5(a)(i) of the complaint);

(b) On April 3, 2000 by interrogating an employee about his union activity;[5]

(c) On April 29, 2000, by telling an employee that he would "shit can" the employees if they chose the Union (as alleged in paragraph 5(c) of the complaint);

(d) On April 6, 2000, by telling employees that they would lose their ESOP if they selected the Union (as alleged in paragraph 6(a)(iii) of the complaint);

(e) On April 6, 2000, by telling employees that they would not receive higher wages if they selected the Union (as alleged in paragraph 6(a)(iv) of the complaint);

(f) On April 11, 2000, by engaging in surveillance of a union meeting (as alleged in paragraph 6(b)(i) of the complaint);

(g) On April 11, 2000, by telling employees that the Union would destroy the ESOP (as alleged on paragraph 6(b)(ii) of the complaint);

(h) On April 21, 2000, by interrogating an employee about his union sympathy (as alleged in paragraph 6(c)(i) of the complaint);

(i) On April 21, 2000, by telling employees that they were stupid for supporting the Union (as alleged in paragraph 6(c)(ii) of the complaint);

(j) On April 24, 2000, by telling an employee to remove a prounion sticker from his hard hat (as alleged in paragraph 6(d) of the complaint); and

(k) On April 10, 2000, by promulgating a no-picketing rule (as alleged in paragraph 7 of the complaint).

4. The Respondent violated Section 8(a)(1) and (3) of the Act as follows:

[5] This matter was not specifically alleged in the complaint, but was fully litigated and is closely connected to the allegation in paragraph 5(a)(i) of the Complaint. Hence, it is appropriate to find a separate violation. *William Pipeline Co.*, 315 NLRB 630 (1994).

(a) On April 5, 2000, by temporarily laying off employee James West (as alleged in paragraph 11 of the complaint);

(b) On April 6, 2000, by subcontracting out work, thus diminishing employees' hours (as alleged in paragraph 12(a) of the complaint);

(c) On April 6 and 7, 2000, by reducing the hours of employees Rick Zundel, Randy Melton, Douglas Lindquist, Joe Crouchet, and David Raines (as alleged in paragraphs 12(c), (e), and (g) of the complaint);

(d) On April 6, 2000, by transferring employee Allen Dukelow to a less desirable position (as alleged in paragraph 12(d) of the complaint); and

(e) On May 19, 2000 by implementing a 50 cent per hour wage increase for the employees (as alleged in paragraph 12(j) of the complaint).

5. The General Counsel has failed to prove his allegations at paragraphs 5(a)(ii) and (iii), 6(a)(ii), 8, 9, 10, 12(b), 12(f), 12(h), 12(i), 12(k), 15, 16(c), and 17 of the complaint.

6. The unfair labor practices of the Respondent, described in paragraphs 3 and 4, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]