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

TROY GROVE A DIV. OF RIVERSTONE GROUP INC.,
VERMILLION QUARRY A DIV. OF
RIVERSTONE GROUP INC.

Case 25-CA-262611

and

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 150, AFL-CIO

Catherine Schlabowske, Esq.,
for the General Counsel.
Arthur W. Eggers, Esq. and *Carmen Green, Esq.,*
for the Respondent.
Steven A. Davidson, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Christine E. Dibble, Administrative Law Judge. This case was tried, by agreement of the parties, using Zoom technology on March 1, 2021. The International Union of Operating Engineers, Local 150, AFL–CIO (Charging Party) filed the charge on July 6, 2020[1]. The Regional Director for Region 25, Subregion 33 (the Region) of the National Labor Relations Board (NLRB/the Board) issued a complaint and notice of hearing on December 21.[2] On December 30, Troy Grove A Division of Riverstone Group, Inc., and Vermillion Quarry A Division of Riverstone Group, Inc. (the Respondent) filed a timely answer and affirmative defenses to the complaint denying all material allegations in the complaint. (GC Exh. 1(e).)[3]

[1] All dates are in 2020 unless otherwise indicated.

[2] At the time the complaint was heard, Peter Sung Ohr was the Acting General Counsel for the NLRB. On July 21, 2021, Jennifer A. Abruzzo was confirmed by the United States Senate as the General Counsel for the NLRB and sworn into the position on July 22, 2021. Consequently, the legal representative for the NLRB in this matter will be referred to as the General Counsel.

[3] Abbreviations used in this decision are as follows: "Tr." for transcript; "Jt. Exh." for joint exhibit; "GC Exh." for General Counsel's exhibit; "R. Exh." for the Respondent's exhibit; "CP Exh." for Charging Party's exhibit; "GC Br." for the General Counsel's brief; "R. Br." for the Respondent's brief; and "CP Br." for Charging Party's brief. Specific citations to the transcript, exhibits, and briefs are included where appropriate to aid in review and are not necessarily exhaustive or exclusive.

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) when on or about May 30, the Respondent, through Thomas Becker, at the Respondent's Troy Grove Quarry: (1) interrogated its employees about their union membership, activities and sympathies and the union membership, activities and sympathies of other employees; and (2) informed employees that if they requested to see a representative from the Charging Party, it meant the Respondent would consider them supporters of the Charging Party.[4]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, owns and operates quarries which process stones for road construction and other building industries. It has an office and places of business in Utica, Illinois and Oglesby, Illinois. (GC Exh. 1(c) and (e).) During the period as alleged in the complaint and admitted to by the Respondent, the Respondent has provided services valued in excess of $50,000 directly to points outside the State of Illinois. During this same period, the Respondent sold and shipped from its Illinois facilities goods valued in excess of $50,000 directly from points outside the State of Illinois. The Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (GC Exh. 1(e).)

At all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. OVERVIEW OF RESPONDENT'S OPERATION

The Respondent is a construction aggregate that processes stone construction materials at its Troy Grove and Vermillion quarries. Since July 2019, Thomas Becker (Becker) has been the Troy Grove quarry superintendent responsible for its daily operations. Lyle Calkins (Calkins) is the union steward for the Respondent's bargaining unit members.

B. Respondent's Alleged Interrogation of Employees about Union Sentiment

On May 30, Becker met separately with employees Travis Schmidt (Schmidt) and Bradley Lower (Lower) for a series of short meetings to issue them discipline. Schmidt is employed at the Troy Grove quarry and reports to Becker. Becker met twice with Schmidt on May 30 to issue him a

[4] The allegations are alleged in pars. 5(a) and (b) of the complaint.

written discipline for a safety violation that had occurred on May 29. They first met with no one present mid-morning for about 4 minutes. Becker called Schmidt to the shop on the communication radio; and they met near the entrance to the shop by Becker's truck, where Becker told Schmidt he was being issued a written discipline. However, Schmidt objected indicating he wanted a third-party present to observe their talk. He felt the discipline was unwarranted. A few minutes after their conversation ended, Schmidt used his phone to memorialize the substance of his conversation with Becker. Shortly thereafter, Schmidt saw Calkins approaching in a truck, so he sent Calkins the text message recounting his conversation with Becker. Becker returned in the afternoon, and with Calkins present, Becker gave Schmidt the written discipline for him to read and sign acknowledging its receipt.

Lower has been employed by the Respondent since October 2016 and currently works at the Troy Grove and Vermillion facilities. He operates heavy equipment, maintenance but his duties vary daily. On May 30, approximately 30 to 40 minutes after Becker's morning conversation with Schmidt, he spoke with Lower for about 3 minutes, and then left to hold a safety meeting. Lower estimated that the conversation occurred about 11 a.m. in the "west bay shop."[5] Prior to his encounter with Becker, Lower was at the shop to get some hardware while the plant was running. According to Lower, Becker approached the truck he was in and asked ". . . if I wanted to do this now." He responded quizzically with "what do you mean?" and Becker replied "write-up." In Lower's version, he then told Becker ". . . no, we're not going to talk any further unless I have the union steward, Lyle Calkins, in front of us." (Tr. 17.) Lower testified that Becker seemed taken aback by his response and supposedly said "really" to which Lower with "yes." Lower claims that Becker then asked him if Schmidt was also going to want the union steward; and he responded, "I couldn't tell you." In Lower's version of the conversation, Becker persisted and again asked him "you really don't know where Travis stands with the Union and River Stone?" According to Lower, he responded "no" to Becker's alleged query at which point the conversation ended. In the afternoon, Becker again met with Lower to issue him discipline and that conversation lasted, based on Becker's estimate, about 5 minutes.

Becker denies most of the statements attributed to him by Lower and Schmidt. He acknowledges, however, approaching Lower to ask him if he wanted to get his discipline "over with." According to Becker, when he handed Schmidt a written discipline and told him to read and sign it, Schmidt responded that he wanted a "witness." Becker admitted asking him why he wanted a "witness"; and Schmidt replied because he did not feel the discipline was warranted. According to Becker, when Lower responded that he wanted union representation, he told Lower, "that's fine. Travis wanted a witness anyways." (Tr. 53.)

Schmidt's, and Lower's versions of their conversations with Becker differ significantly on key points from Becker's versions. According to Schmidt, on May 20, at about 2:30 or 3 p.m., Becker approached his truck explaining, "I called you up here to talk, to tell you—talk to you about—ask me about reference into lockout/tag[6] out with Mike Ellis and at the secondary plant and then he handed me a piece of paper." (Tr. 25–26) Schmidt insists that Becker demanded he read the paper and "sign agree or sign disagree." Later, he clarified his testimony by explaining that he told Becker he was not signing "nothing" until he had a "union steward" present, so Becker told him to

[5] There is an east and west bay which are large steel buildings where tools, hardware, and other heavy equipment are stored. (Tr. 16.)

[6] A lockout/tag out is a safety procedure used to lock equipment to ensure that no one other than the employee can operate or gain access to it. (Tr. 26.)

write disagree if he did not agree with the write-up. (Tr. 43.) Schmidt is adamant that he told Becker he would not sign the document unless he had a "union steward" present. Despite Becker's denial, Schmidt contends that Becker responded with a question "you're supporting the union?" and he answered "I don't know. I guess so." (Tr. 27.) According to Schmidt, the conversation continued with Becker telling him "well, that's Lyle. I said, if it's Lyle, it's Lyle. I want the union steward. He says—Tom told me—he goes, if you ask for the union steward, that means you're union." (Tr. 27.) Schmidt replied to him that because he had two "write-ups" in 2 weeks his "head was on the chopping block" so he needed the union's support. The conversation ended with Schmidt returning to work.

The General Counsel argues that Becker's testimony should not be credited because (1) he "essentially parroted his attorney's opening statement back to the court" without testifying in his own words; (2) he offered vague testimony, single word responses, and blanket denials of the statements attributed to him; and (3) his testimony was "generated in the form of leading questions by his attorney specifically tailored to Respondent's litigation theory." (R. Br. 4–5.) Likewise, the Union contends Becker's testimony should be given lesser weight because his recollection of his conversations with Schmidt and Lower is "unclear and inconsistent"; and as a supervisor he is not likely to provide testimony adverse to the Respondent's interest. (CP Br. 7–8.) Furthermore, the General Counsel and the Union insists that Schmidt and Lower are more credible than Becker because (1) Schmidt's and Lower's recollections of the events were accurate and detailed; (2) Schmidt and Lower are current employees testifying against their employer and their own interests "with nothing to gain financially" from the outcome of the case "and therefore [their] testimony is particularly reliable"; and (3) Lower was found to be a credible witness in a prior case before the Board.[7] (CP Br. 3.)

The Respondent counters that Schmidt and Lower are not believable because (1) they disagree with their discipline from Becker and want a finding that Becker violated the law; (2) Schmidt was concerned about losing his job because of personal financial stressors; (3) Schmidt had a history of discipline making him more likely to give false testimony in a bid to keep his job; (4) Schmidt gave "false" testimony that the written discipline he received required him to sign that he agreed or disagreed with it; and (5) Schmidt gave inconsistent testimony on the timeline of his actions after he received discipline from Becker; and the timeline of his conversation with Becker.

This complaint turns almost entirely on credibility, and the General Counsel has the burden of proving credibility. Consequently, the General Counsel must establish that its witnesses are more credible than the contradictory testimony. See *Central National Gottesman*, 303 NLRB 143, 145 (1991) (finding that the General Counsel did not meet its burden of proof because the testimony that the allegation occurred was equally credible as the testimony that denied the allegation); *Blue Flash Express*, 109 NLRB 591, 591–592 (1954) (same), questioned on other grounds, *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997). Often credibility findings are based on multiple factors rather than an all or nothing proposition. These factors may include "the witness' testimony in context, including among other things his demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole." *Double D*

[7] *Troy Grove, a Div. of Riverstone Group, Inc., and Vermillion Quarry, a Div. of Riverstone Inc., and IUOE, Local 150, AFL–CIO*, Case 25–CA–234477 (2021 WL 86882) (N.L.R.B. Div. of Judges) at 8.

Construction Group, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). A fact finder may sometimes find parts of a witness' testimony more credible than other parts of their narrative and at other times discount a witness' testimony in its entirety.

In the case at issue, I find that each witnesses' descriptions of the conversations they had with each other is plausible and credible; and their demeanors on the stand gave me no reason to doubt their overall veracity. Consequently, I must consider other factors in assessing whether the General Counsel has established her burden of proof. A witness' position as an employee is an element that may be considered in judging credibility disputes because the employee risks retaliation from the employer. It is presumed that an employee testifying in reason the employee is likely to testify truthfully. See, e.g., *American Wire Products*, 313 NLRB 989, 993 (1994) (witness testified adverse to the Respondent, thus placing "himself in considerable peril of economic reprisal and for that reason his testimony is not likely to be false"); *DHL Express, Inc*., 355 NLRB 1399, 1404 fn. 13 (2010) (current employees who testify in contradiction of their employer are "likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests"); *Flexsteel Industries*, 316 NLRB 746 (1995) (testimony of current employees that is adverse to their employer likely to be reliable) . Since Schmidt and Lower are current employees of the Respondent, this factor weighs in favor of their credibility. However, I do not find persuasive the Union's contention that because an administrative law judge in a prior case before the Board found Lower credible, I should follow suit. (CP Br. 3.) I decline to consider the judge's credibility findings in the prior case because exceptions were filed, and the case is pending before the Board. Moreover, witness credibility findings made in one case are not determinative of that witness' credibility in a subsequent case. *Electrical Workers (Nixdorf Computers Corp.)*, 252 NLRB 539 n. 1 (1980) (it is "generally inappropriate" to base credibility findings entirely on credibility determinations made in a previous case); *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 972 (6th Cir. 2003), cert. denied, 543 U.S. 1089 (2005) (judge was "under no obligation to consider determinations made by another ALJ in a wholly different case regarding the credibility of a particular witness").

The General Counsel and the Union argue that I should find that Becker's testimony was vague, consisted of single word responses and blanket denials of statements, and "specifically tailored to Respondent's litigation theory"; and, therefore, discredit his testimony as a result. I decline. The Union pointed to Becker's inability to recall the exact timeline of his conversation with Schmidt and insists that based on the content of the conversation it could not have lasted as long as Becker claimed. While Becker may have been fuzzy on what time the conversations occurred and the length of his discussions with Schmidt and Lower, it is not unreasonable for a witness not to recall down to the minute how long a conversation lasted that happened more than a year prior to testifying about it. Moreover, I do not find that Becker's inability to recall whether the conversations occurred in the morning or mid-morning or if they lasted one minute or five minutes to be consequential. Regardless, Schmidt also gave inconsistent testimony on the timeline of his actions after he received discipline from Becker and the timeline of his conversation with Becker.[8] (Tr. 25, 27–28, 32, 34.) However, I also do not view this memory lapse as a reason to discredit Schmidt's entire testimony. The Respondent also argues that

[8] Schmidt likewise could not testify with exact specificity the timeline of his conversation with Becker. He estimated only that their conversation occurred about 2:30 or 3 p.m. (Tr. 25.)

Schmidt is not credible because he gave "false" testimony that the written discipline required him to sign that he agreed or disagreed with it. A review of the form clearly shows that the recipient's signature is simply an acknowledgment of receipt of the written warning. (R. Exh. 1.) However, Schmidt struggled on cross examination with following the Respondent's questions about why he insisted his signature on the document instead would indicate whether he agreed or disagreed with the discipline. (Tr. 38–44.) While I may find it odd that Schmidt had difficulty understanding the form and counsel's questions about it on cross examination, one must be reminded that everyone does not have the same level of comprehension skills. The other alternative is to find that Schmidt was being deliberatively obtuse. Considering the overall facts, I decline to question Schmidt's veracity on this point. Second, the General Counsel's and the Union's charge that Becker lacked credibility because of his single word answers and "blanket denials of statements attributed to him" is a subjective opinion. I find that his denials were appropriate responses to the questions asked by both counsel for the Union and Respondent's counsel; and the conciseness of his answers do not indicate to me a lack of credibility. (Tr. 50–60.) The General Counsel and the Union charge that Becker's testimony lacks credibility because he used "blanket denials of statements attributed to him" but I discern nothing from his testimony to support this charge. Becker answered the questions asked without flowery language or exaggeration, which are not reasons to find him lacking in truthfulness. The General Counsel and the Union had an opportunity on cross examination to elicit more detailed and narrative driven responses but did not. Consequently, I do not find that the above referenced factors weigh significantly against Becker's believability.

Becker denied that Schmidt requested a union steward and insists he called for a "witness." I credit his testimony on this point. As previously discussed, I found nothing in his demeanor or testimony to cast doubt on his veracity. I find that Schmidt and Lower's testimony and overall demeanor were no more credible than Becker's denials of the content of their conversations. Although, Schmidt and Lower were slightly more detailed in their description of the location, length, and approximate time of the conversation, I do not find that it is so significant as to overcome the other factors which weigh in favor of Becker's credibility. Therefore, considering the overall context and my personal observations, I find Becker equally as credible a witness as Schmidt and Lower. Becker's testimony was equally as thoughtful and consistent as Schmidt and, or Lower.

IV. Discussion and Analysis

The General Counsel argues that the Respondent, through Becker, unlawfully interrogated its employees about their union sentiments in violation of Section 8(a)(1) of the Act. Specifically, the General Counsel alleges Becker's questioning of Schmidt was unlawful when he allegedly asked "[y[ou're supporting the union?" and added "if you ask for the union steward, that means you're union." (Tr. 27.) The General Counsel also charges that the Respondent violated the Act when through its manager, Becker, the Respondent questioned Lower about Schmidt's stance on the union. (Tr. 17–18.)

The Board has adopted a totality-of-the-circumstances test to determine if management interrogating employees violates Section 8(a)(1) of the Act. *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964) (established criteria that may be used to determine indicia of coercive interrogation); *Temecula Mechanical, Inc.*, 358 NLRB No. 137 (2012) (totality-of-the-

circumstances test is an objective one). Factors set out in *Bourne* to evaluate indicia of coercive questioning include (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; (4) the place and method of questioning; and (5) the truthfulness of the reply. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). In applying these factors, the Board assesses whether, based on the facts of the specific case, the questioning at issue would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights. *Rossmore House*, 269 NLRB 1176, 1177 (1984). The totality-of-the-circumstances test is flexible, and therefore, these factors should not be rigidly applied but rather used as a guide in evaluating the lawfulness of management questioning. In *Perdue Farms*,[9] the court stated the "flexibility and deliberately broad focus of this test make clear that the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather uses indicia that serve as a starting point for assessing the 'totality of the circumstance.'

Even assuming *arguendo* that Becker made the statements attributed to him, I find that the following factors weigh against a finding of coercive interrogation. The record establishes that on or about May 30, Becker had discussions with Lower and Schmidt about written discipline he was issuing them for safety violations. Becker's discussions with them occurred separately but in an informal area near the entrance to the shop next to Becker's truck and in a separate discussion near the shop entrance next to Lower's truck. Consequently, all of the conversations Becker had with Schmidt and Lower occurred in informal, casual settings. Next, it is undisputed that Becker informed Schmidt that he wanted to address Schmidt's failure to follow proper safety "lockout/tag out" procedures and issue discipline. Likewise, Lower knew almost immediately that Becker wanted to issue him a written discipline. The evidence, therefore, shows that the primary purpose of Becker's talks with Lower and Schmidt were to specifically issue them discipline and the alleged questions about their support for the union was secondary if it had occurred. It is clear that Becker gave Lower and Schmidt a legitimate reason for their discussions, which they both acknowledge. Even assuming arguendo that Schmidt responded to Becker's questions about his union sympathies with he "guess" he was a union supporter and wanted a "union" representative because he was in danger of being fired, weighs in favor of a finding of no unlawful coercive questioning because he did not attempt to conceal from Becker his support for the Union. Likewise, Lower's truthful statements to Becker that he was unaware of Schmidt's stance on the union; and voicing to Becker his own support of the Union's representative status in disciplinary proceedings against him weigh in favor of finding Becker's questioning lawful. See *Bourne v. NLRB* 332 F.2d at 48 (employees truthful responses weigh in favor of a finding no unlawful coercive questioning of employees). There is no evidence about the Respondent's history of its interaction with the Union.

There are several factors in favor of finding that the Respondent subjected Schmidt and Lower to unlawful coercive interrogation. Assuming arguendo that Becker made the statements Lower attributed to him, it must be concluded that he questioned Lower in an attempt to learn about the strength and depth of his and Schmidt's union support.[10] There is no evidence that

[9] 144 F.3d 830, 835 (D.C. Cir. 1998) (quoting *Timsco Inc*. v. NLRB, 819 F.2d 1173, 1178 (D.C.Cir. 1987)).

[10] As a reminder, the General Counsel alleges that, in response to Lower demanding the union steward witness their discussion, Becker asked Lower if Schmidt was also going to want the union steward. It is also charged that Becker said to Lower, "you really don't know where Travis [Schmidt] stands with the Union and River Stone?" (Tr. 17–18.)

Becker gave Lower or Schmidt any assurances that they could speak freely about their union sympathies or activities without reprisal. Regardless, neither Lower nor Schmidt felt that it was necessary to lie to Becker about their union sentiments. Finally, it should be noted that as the superintendent of the Troy Grove quarry, Becker is presumably a high-level supervisor; and it is undisputed that Lower and Schmidt were aware of his position at the time of the discussions.

Since, however, I have found credible Becker's denial of the statements attributed to him, I find that the General Counsel has failed to prove that the Respondent violated Section 8(a)(1) of the Act. Even assuming arguendo the facts as alleged by Schmidt and Lower, based the totality-of-circumstances analysis, I find that the Respondent did not unlawfully interrogate or in any other manner unlawfully interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. Accordingly, I recommend dismissal of the complaint.

Dated: December 23, 2021

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Christine E. Dibble (CED)
Administrative Law Judge