

Pro/Tech Security Network and International Union, United Plant Guard Workers of America (UPGWA). Cases 11-CA-14209 and 11-RC-5740

August 31, 1992

DECISION, ORDER, AND DIRECTION OF
SECOND ELECTION

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On September 24, 1991, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief.¹

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 brief and has decided to affirm the judge's rulings, findings, and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Pro/Tech Security Network, Elizabeth City, North Carolina, its officers,

¹ On December 2, 1991, the Union filed a letter in response to the Respondent's exceptions and brief, which stated that the Union opposed the exceptions and relied on any brief filed by the General Counsel. The Respondent filed a motion to strike the letter, arguing that it did not comply with the Board's Rules for filing exceptions, cross-exceptions, and briefs. On December 23, 1991, the Union filed a second letter indicating that the prior letter may be understood as a notification that the Union would not be filing an answer or brief. Based on this understanding of the Union's letter, we deny the Respondent's motion to strike.

² We agree with the judge that the Respondent did not demonstrate that it would have demoted and subsequently discharged employee Reynolds in the absence of his union activities. In his December 12, 1990 letter to Site Supervisor Simons, Owner Rhodes clearly stated that he was demoting Reynolds "[s]o that he can perform his duties for the union." We note that Reynolds' discharge was based on the same events as his demotion, suggesting that it was prompted by the same unlawful motivation. Moreover, the Respondent did not show that Reynolds violated established rules by allowing the union representatives into the main gate guardhouse, where members of the public wait for authorization or an escort before proceeding onto the Coast Guard base. As the judge found, Watch Commander Foreman and patrol person Evans, who were on duty prior to Reynolds' shift, invited the union representatives to wait for Reynolds in the guardhouse, although the union representatives declined. Foreman and Evans were not disciplined. The Respondent also asserts that it disciplined Reynolds for arranging the union meeting without authorization and attending the meeting on duty time, but it did not provide those reasons at the time of the discharge, nor did it discipline the other employees who attended part or all of the session on duty time. Based on the Respondent's disparate treatment of Reynolds and its shifting reasons for the actions against him, we conclude that the Respondent unlawfully demoted and discharged Reynolds as a result of his protected union activities.

agents, successors, and assigns, shall take the action set forth in the Order.

IT IS FURTHER ORDERED that Case 11-RC-5740 is severed and remanded to the Regional Director for Region 11 for the purpose of conducting a second election at such time as the Regional Director deems appropriate.

[Direction of Second Election omitted from publication.]

Paris Favors, Esq., for the General Counsel.
Brinkley A. Faulcon, Esq. (Penny & Barnes), of Elizabeth City, North Carolina, for the Company.
Lisa Lane, Esq. (Gregory, Moore, Jeakle, Heinen, Ellison & Brooks), of Detroit, Michigan, for the Union.

DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. International Union, United Plant Guard Workers of America (UPGWA) (Union), filed an unfair labor practice charge¹ against Pro/Tech Security Network (Company) on December 24, 1990.² After investigating, the Regional Director for Region 11 of the National Labor Relations Board (Board), as an agent of the Board's General Counsel, issued a complaint and notice of hearing (complaint) against the Company on February 7, 1991. I heard the case in trial at Elizabeth City, North Carolina, on May 20 and 21, 1991.

In substance, the complaint alleges the Company interrogated its employees concerning their union activities, sympathies, and desires, and that on or about December 16, it demoted its employees Hassie Reynolds (Reynolds) and Edwin Desiderio (Desiderio); and on or about December 31, terminated Reynolds' employment and has thereafter failed and refused to reinstate him. The actions of the Company are alleged to have violated Section 8(a)(1) and (3) of the National Labor Relations Act (Act). An issue in deciding the allegations is whether Reynolds and Desiderio were, at relevant times, supervisors within the meaning of Section 2(11) of the Act.

The Company, in its timely filed answer, denied the commission of any unfair labor practices.

In a Supplemental Decision, Direction, and Order Consolidating Cases, the Regional Director for Region 11 of the Board on February 22, 1991, consolidated certain of the Union's (Petitioner's) objections to conduct affecting the results of the election (held on February 5, 1991) in Case 11-RC-5740 with the above-referenced unfair labor practices in Case 11-CA-14209.

I have carefully considered the trial record and posttrial briefs of counsel for the General Counsel and the Company. I observed the demeanor of the eight witnesses as they testified. Based on the above, and as explained below, I conclude that at relevant times Reynolds and Desiderio were not supervisors within the meaning of the Act and that the Company violated the Act substantially as outlined in the complaint. Accordingly, I have recommended certain remedial

¹ The charge was twice amended.

² All dates are 1990 unless I indicate otherwise.

action including the reinstatement of Reynolds and that he along with Desiderio be made whole for any losses they might have suffered as a result of the Company's unlawful actions and that the Company post a notice, and that the election held on February 5, 1991, be set aside and a new election held.

FINDINGS OF FACT

I. JURISDICTION

The Company is a sole proprietorship licensed to do business in the State of North Carolina with an operation located at the United States Coast Guard Base Support Center at Elizabeth City, North Carolina, where it is engaged in providing security services. During the 12 months preceding issuance of the complaint, the Company performed services valued in excess of \$5000 for various enterprises located in States other than the State of North Carolina. Based on a projection of its operations since on or about August 16, the Company, in the course and conduct of its operations, will annually perform security services valued in excess of \$50,000 for the Coast Guard at its Elizabeth City, North Carolina facility. The operations of the Company have a substantial impact on the national defense of the United States. The complaint alleges, the parties admit, and I find, the Company is, and at material times has been, an employer engaged in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the parties admit, the evidence establishes, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The following factual overview has for the greater part been set forth in chronological order.

Pursuant to a bidding process, the Company commenced providing security guard service at the Coast Guard facility located at Elizabeth City, North Carolina, on August 16. Prior to that time (at least since 1981), security has been provided by S & C Security of Charlottesville, Virginia. As had its predecessor, the Company employs approximately 14 employees. The Company is owned and managed by Isaiah Rhodes (Rhodes). At times material, there was 1 site supervisor, Captain Howard Simons (Simons); 1 lieutenant watch commander, Lieutenant Reynolds (an alleged discriminatee); 2 sergeant watch commanders, Sergeant Desiderio (an alleged discriminatee) and Sergeant Joanne Foreman; and approximately 10 patrol persons.³

The Company provides security for the Coast Guard 24 hours per day, 7 days per week. The Company accomplishes its task with three 8-hour shifts per day with three persons per shift, namely a watch commander, a main gate patrol person, and a roving patrol person. All company personnel wear uniforms⁴ and carry side arms.

³At some point, the Company ceased referring to its watch commanders by rank and title and simply started calling them watch commanders.

⁴All employees on each shift wear identical uniforms (black trousers with white shirts), however, the watch commanders wear white

Watch Commander Reynolds testified that after the Company assumed the task of providing security for the Coast Guard, that employees, around the latter part of September or the early part of October, started talking about the possibility of union representation. Reynolds testified that around November 1, approximately six employees⁵ talked during shift change about whether there was sufficient interest in union representation to pursue the matter. Reynolds said employees became interested in possibly seeking union help after the Company ceased paying 59 cents per hour for benefits and 67 cents per day for uniform maintenance. Reynolds testified certain employees felt Owner Rhodes had misrepresented the Company's role in attempting to obtain a better wage rate for the employees than they actually received. During discussions on these matters, patrol person Carver volunteered to obtain a list of union representatives if Watch Commander Reynolds would contact one or all the representatives. Reynolds testified that within a day or so, Carver provided him a list of three or four union representatives. Thereafter, a representative of the Union contacted Reynolds and also mailed him pamphlets and union cards for distribution.⁶ Reynolds and others distributed the literature and union cards to the employees. Reynolds testified he received a second telephone call from the same union representative on November 21, in which the Union's representative asked if he could arrange a meeting of the employees for November 24, so the representative could ascertain if there was sufficient support for the Union to file a representation petition with the Board on behalf of the employees.

A meeting took place on November 24, at the main gate guardhouse between approximately 1:30 and 3:15 p.m. According to Reynolds, the guardhouse is only large enough for 10 to 12 adults to stand in and is the main point of entry on or off the Coast Guard facility.

Reynolds said no one is allowed to enter the Coast Guard facility without identification or clearance. Reynolds explained Coast Guard personnel are provided decals for their automobiles or they are asked to show military identification when entering the facility. If anyone from the general public visits the facility, they must, according to Reynolds, proceed to the main gate guardhouse and contact the person they wish to visit. That person must then escort or voucher the guest onto the facility.

Reynolds testified the two union representatives that came to the facility on November 24 followed the above-outline procedure for guests at the facility in that they came to the main gate guardhouse.⁷

Relief Watch Commander Foreman as well as patrol person Evans both testified they observed the two waiting in an automobile at the gate. Both asked them what they wanted.

baseball type hats while the patrol persons wear black ones. Watch commanders wear gold badges whereas patrol persons wear silver badges.

⁵According to Reynolds, he and Desiderio along with employees Overton, Gordon, Carver, and Roberts were the ones who participated in the discussion.

⁶Reynolds testified the union representative mailed him two different pamphlets describing the Union and what it could do for the employees.

⁷Reynolds testified he did not clear the two union representatives' visit to the facility with anyone from either the Company or the Coast Guard.

Both testified the representatives told them they were from the Union and were waiting for Watch Commander Reynolds. Foreman and Evans each invited the two union representatives into the main gate guardhouse to wait for Reynolds⁸ but both declined to do so.

Reynolds was the watch commander on duty during the time the employees met with the two union representatives. Gordon was the main gate patrol and Overton the roving patrol during the guardhouse meeting. Gordon remained at his duty station during the entire meeting except for a brief period when Overton relieved him so that he (Gordon) could participate in the meeting.⁹ Overton did not commence his roving patrol duties until the meeting ended. Reynolds attended the entire meeting. Nine employees, in addition to the two union representatives, attended the meeting.

Patrol person Evans testified "everybody said a little something" at the meeting and "asked questions." Reynolds testified the meeting was "basically an information type meeting" with "numerous questions." Desiderio, who was off duty and attended the meeting in civilian dress, testified:

Well, there were—they were just talking about what we can do to—the whole Union meeting was—the meeting was so we could see what we could do to get our uniform pay and holiday pay and everybody, I mean—everybody was dissatisfied with what was going on up there and I made the comment of, let's screw the bastard, I think—I'm not sure that's exactly what I said.

Site Supervisor Simons testified that a couple of employees telephoned him at home after the meeting and "more or less" filled him in on what had taken place. He said Owner Rhodes called him on Monday, November 26 and that Rhodes "had already been advised of [the union meeting] just like I had." Simons said Rhodes was "upset" because the meeting had taken place on company time. Rhodes testified "I was more or less pretty well vexed because of the fact they did it on Company time. Not only was I vexed because of this—because I knew it was a breach of the contract between me and the government and it could reflect that I could lose the contract."

Owner Rhodes testified he already had an inspector in Elizabeth City, North Carolina, so he instituted an investigation to ascertain what had taken place. Rhodes also went to Elizabeth City and helped investigate the matter. He said he determined that no unusual occurrences had been reflected in the front gate log book for November 24. He stated all unusual occurrences should be reflected in the front gate log book.¹⁰

Reynolds testified that after the November 24 union meeting, he worked November 25 and 26 but was off from work November 27. Reynolds said nothing unusual happened on those days but that when he returned to work on November 28, Site Supervisor Simons told him "be careful what you say, Mr. Rhodes knows all about your meeting, who was

there, and what took place." Reynolds further testified, "Captain Simons told me that Mr. Rhodes had told him that the employees are going union or either have gone union and that let them go ahead and have their fucking union, that he could bargain with it."

On December 10, the Union filed a representation petition with the Board in Case 12-RC-7393.¹¹

On December 12, Owner Rhodes wrote Site Supervisor Simons the following letter which was posted at the Company that day and was personally given to Reynolds by Simons on December 14. The letter reads:

Captain W. H. Simons
Main Gate
USCG
Elizabeth City, N.C.

Enclosed you will find documents forwarded to this office by the National Labor Relations Board. As noted in the petition filed, Section 6a there are thirteen (13) employees who have signed with the union.¹²

The employees have a right to have representation by a union, if they feel that no one in the organization can properly represent them and as a group do not know how to bargain themselves. However, since there are only 14 employees at the site and four are in a Supervisory position, there is definitely a conflict of interest and INTIMIDATION for or against the union will not be tolerated. please note page 2 (two) of enclosed.

It is my understanding that Supervisory personnel cannot engage in union activities and be a part of management. *Therefore effective December 16, 1990 and pending further investigation.*

Lt. Reynolds will be reduced to patrolman grade. So that he can perform his duties for the union.

Sgt Desidero will also be reduced to patrolman.

Sgt Foreman will be elevated to Lieutenant directly under your supervision and will act as Site Supervisor in your absence.

Patrolman Jack Gordon with your approval will be elevated to Sgt. Watch Commander as he have the experience.

Patrolman Williams with your approval will be elevated to Sgt. Watch Commander as he have the education and experience.

The promotions in no way is to influence them or persuade them in any manner and they are to be instructed of this. They are free to decline the promotions without prejudice by PRO/TECH. Although Patrolman Gordon and Williams might have participated in the Union activities they were not Supervisors at the time. If they decline to accept the position, PRO/TECH will assign some one qualified & familiar with PRO/TECH'S POLICIES.

⁸Foreman said there was nothing unusual about allowing visitors to wait in the guardhouse.

⁹The meeting took place on Saturday following the Thanksgiving holiday. Reynolds testified the base was practically deserted resulting in little, if any, traffic through the main gate.

¹⁰Rhodes testified the visit to the base by the two union representatives would have been an "unusual occurrence."

¹¹The petition was originally filed with Region 12 of the Board in Tampa, Florida, inasmuch as the Company has an office in Orange Park, Florida. The petition was, however, processed by Region 11 of the Board and designated as Case 11-RC-5740.

¹²It is noted that par. 6a of the petition reads "Number of Employees in the Unit" not the number of employees that have signed with the Union.

Effective January 1, 1991:

PRO/TECH SECURITY NETWORK will have an office in Elizabeth City to conduct business a District Manager will be assigned. This will in no way affect your position as Site SUPERVISOR.

/s/ I. R. Rhodes

As reflected in the letter, Reynolds was reduced to a patrol person¹³ as of December 16, and served in that capacity until late December. In that regard, Reynolds testified he worked December 29, but was not scheduled to work December 30 or 31. Reynolds said he was to have reported for work on January 1, 1991, but did not because of a telephone call he received from Site Supervisor Simons on December 31. Reynolds testified, without contradiction, that Simons told him "I do not know how to begin this conversation, but you're suspended until I recall you." Reynolds asked why and was told it was for a failure to perform supervisory duties. Reynolds testified he was not given any documentation at any time regarding his suspension.

Desiderio said Site Supervisor Simons told him on December 12 to post Owner Rhodes' letter on the bulletin board. Desiderio said he asked Simons if Rhodes could do what was outlined in the letter and that Simons said he didn't know.

As reflected in Owner Rhodes' letter, Desiderio was demoted from sergeant to patrol person effective December 16.

Desiderio was given a written warning by Site Supervisor Simons on December 31 on which it was checked the warning was for his having engaged in "abusive and/or threatening language and/or behavior." More specifically, the warning reflected "abusive language in regard to statement made towards Gen. Manager (let's screw the bastard)." On the warning Desiderio was demoted from sergeant to patrol person. Desiderio testified that patrol person McCoy handed him a copy of the warning at the main gate and that Watch Commander Williams thereafter spoke with him about it.

On or about December 30, Owner Rhodes personally distributed the following survey to his employees:

TO: PRO/TECH SECURITY NETWORK
ATTN: I. R. RHODES/GEN MGR

In regards to the meeting held on November 24, 1990, between the hours of 1:30pm-3:10pm.

PLEASE NOTE THAT THE CARD THAT YOU SIGNED WAS TO JOIN A UNION!!!

I was not misinformed about the Union, When I signed [sic] the card. to the best of my knowledge
YES _____ NO _____

I was misinformed when I signed the card and did not at that time intend to join the Union.
YES _____ NO _____

I understood that by signing the card that it was just to listen to a representative from the Union.
YES _____ NO _____

I would rather not comment.
YES _____ NO _____

I did not sign the card.

YES _____ NO _____

Signed: _____ Dated _____

Watch Commander Foreman testified Owner Rhodes asked the employees to read and sign the survey.¹⁴

Owner Rhodes testified he prepared and distributed the survey after receiving a copy of the representation petition from the Board. He said that based on the petition he thought 13 employees had already joined the Union. He testified he felt "it was almost impossible for 13 people to have signed with the Union." Rhodes said he simply wanted to find out the truth and see if that number of employees had already joined the Union.

On January 3, 1991, the Board conducted a hearing in the representation case in Elizabeth City, North Carolina. Reynolds and Desiderio were among those testifying at that proceeding. On January 11, 1991, the Regional Director for Region 11 issued his Decision and Direction of Election in the representation case in which he concluded that sergeant and lieutenant watch commanders were not supervisors within the meaning of the Act.¹⁵ The unit found appropriate by the Regional Director follows:

All full time and regular part-time security officers, including the assistant site supervisor and watch commander performing guard duties and employed by the Employer at the United States Coast Guard Base Support Center, Elizabeth City, North Carolina; but excluding all other employees, office clerical employees, and supervisors as defined in the Act.

At the January 3, 1991 representation hearing, Site Supervisor Simons issued Reynolds a written disciplinary warning that reflected he was "suspended indefinitely" for "unsatisfactory work performance," "falsification or improper handling of records," "improper conduct," and "allowing unauthorized persons on base." More specifically, Simons noted Reynolds had failed to perform his duties as a supervisor by allowing a patrol person to remain at the gate and by allowing unauthorized persons on the base on November 24.

On February 5, 1991, the Board conducted a secret ballot election among the Company's 15 eligible voters that resulted in 7 votes for and 7 votes against union representation. There were no challenged or void ballots. On February 12, 1991, the Union filed timely objections to conduct affecting the results of the election. As noted elsewhere in this decision, the Regional Director ordered certain conduct related thereto be considered with the unfair labor practice allegations.

Desiderio testified that on February 20, 1991, he received a telephone call from Owner Rhodes. Desiderio testified:

[Rhodes] . . . asked how I was doing and I asked how he was doing. He said that, I was wondering would you want your job back? That kind of stunned

¹³The reduction resulted in Reynolds' pay being cut 95 cents per hour.

¹⁴Various signed copies of the survey were received in evidence.
¹⁵No request for review of the Regional Director's decision was ever filed.

me, because I mean—I don't know, but I asked him why. He said, "Because I think you're capable of doing the job." And he says, you know, you've got your job back and that was it.

Desiderio said no mention was made about what had taken place at the November 24 meeting. Desiderio said he became a watch commander effective the next day (February 22, 1991) and that his pay was restored to the scale he enjoyed before his demotion.¹⁶

Owner Rhodes testified he demoted Desiderio because what Desiderio had said "was a reflection on my parents that I'm a bastard." Rhodes said it was against company policy to use abusive language. Rhodes testified he reinstated Desiderio as a watch commander because it had been reported to him that Desiderio was a good worker. Rhodes said Desiderio promised he would not use profanity any more.

In deciding whether the questionnaire Owner Rhodes prepared and distributed to his employees constituted unlawful interrogation,¹⁷ I shall be governed by the Board's decision in *Rossmore House*, 269 NLRB 1176 (1984), enf. sub nom. *Hotel Employees & Restaurant Employees v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In *Rossmore House*, the Board held the lawfulness of questioning by employer agents about union sympathies and activities turns on the question of whether "under all circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act." The Board in *Rossmore House* noted the *Bourne*¹⁸ test was helpful in making such an analysis. The *Bourne* test factors are as follows:

- (1) The background, i.e. is there a history of employer hostility and discrimination?
- (2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
- (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
- (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of 'unnatural formality'?
- (5) Truthfulness of the reply.¹⁹

First, I note that Rhodes, as owner and general manager of the Company, was at the time and continues to be the highest official of the Company. In his survey, Rhodes specifically asked employees to indicate whether or not they signed a union card. Rhodes implies in his survey that he knows or at least learns about union meetings of his employees when such meetings take place. Although Rhodes in his survey allowed employees to indicate that they would rather not comment, he did not, however, provide assurances against reprisals if they exercised that or any other options with respect to the survey and he wanted the surveys signed.

¹⁶ Desiderio said he was not made whole for the wages he lost between December 16 and February 22, 1991.

¹⁷ It is of no moment that the questions under consideration were presented to the employees in written form as opposed to oral questions.

¹⁸ *Bourne Co. v. NLRB*, 332 F.2d 47 (2d Cir. 1964).

¹⁹ The *Bourne* test has been cited with approval by various circuits. For a partial listing of those circuits, see *Teamsters Local 633 v. NLRB*, 509 F.2d 490 fn. 15 (D.C. Cir. 1974).

Rhodes' stated reason for the survey—that he felt it was impossible for the number of employees to have signed up with the Union that had done so—does not constitute legal justification for his survey.²⁰ The record does not reflect which employees responding to the survey had openly expressed their sentiments toward the Union prior to the survey.

In light of all the circumstances, I find the Company, through Owner Rhodes' survey, violated Section 8(a)(1) of the Act as alleged at paragraph 9 of the complaint.

Before addressing the issue of whether Reynolds and Desiderio were, at material times, supervisors within the meaning of the Act, it is helpful to review Section 2(11) of the Act and examine certain Board principles related thereto.

Section 2(11) of the Act reads:

The term "supervisor" means 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 responsibility 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 outlined above in Section 2(11) of the Act are in the disjunctive and only one need exist to confer supervisory status on an individual. See, e.g., *Miller Electric Co.*, 301 NLRB 294 (1991), and *Opelika Foundry*, 281 NLRB 897 at 899 (1986). However, in order for supervisory status to exist, the exercise of one or more of the above-outlined powers must be accomplished with independent judgment on behalf of management in other than a routine or clerical manner. As noted in *Hydro Conduit Corp.*, 254 NLRB 433 (1981), the statute insists that a supervisor (1) have authority, (2) to use independent judgment, (3) in performing such supervisory functions, (4) in the interest of management. These latter requirements are conjunctive. The burden of proving supervisory status rests on the party alleging that such status exists. See, e.g., *California Beverage Co.*, 283 NLRB 328 (1987). An employer's holding out an individual to employees as a supervisor is not necessarily dispositive of supervisory status. *Polynesian Hospitality Tours*, 297 NLRB 228 (1989). An individual's status as a supervisor is not determined by the individual's title or job classification but rather is determined by the individual's functions and authority. See, e.g., *Mack's Super Markets*, 283 NLRB 1082 (1988). Isolated or sporadic exercise of 2(11) authority is insufficient to predicate a supervisory finding on. Likewise, employees who are merely conduits for relaying management information to other employees are not true supervisors. *California Beverage Co.*, supra. However, supervision of even one employee is sufficient if one or more of the supervisory indicia are met. *Opelika Foundry*, supra.

²⁰ I am not unmindful that Site Supervisor Simons testified Rhodes told him he surveyed the employees because two or three of them had indicated they did not realize they had joined the Union when they signed their union card. Such does not alter the outcome. First, Rhodes did not give that as his reason for the survey. Second, I note, Simons had no input with respect to the survey and testified no one had complained to him they had been misled with respect to the union cards.

As noted in *Passavant Health Center*, 284 NLRB 887 (1987), “[i]t is well established that merely issuing verbal reprimands is too minor a disciplinary function to be statutory authority” and “the mere factual reporting of oral reprimands and the issuance of warnings that do not alone affect job status or tenure do not constitute supervisory authority.” Additionally, being able to keep things running smoothly is insufficient to confer supervisory status on an individual. *California Beverage Co.*, supra. In summary, the proper consideration is whether the functions, duties, and authority of an individual, regardless of the title given the individual, meet any of the criteria for supervisory status set out in Section 2(11) of the Act. See, e.g., *Waterbed World*, 286 NLRB 425 (1987). Finally, as was noted in *McDonnell-Douglas Corp. v. NLRB*, 655 F.2d 932 at 936 (9th Cir. 1981), it is important for the Board not to construe supervisory status too broadly for a worker who is deemed a supervisor loses his/her organizational rights.

In agreement with counsel for the General Counsel, and in harmony with the Regional Director’s determination in the underlying representation case, I find Reynolds and Desiderio as watch commanders were not at material times supervisors within the meaning of the Act. The fact the Company’s contract with the Coast Guard refers to watch commanders as supervisors is not controlling. In the contract, it is stated watch commanders shall “supervisor main gate patrolman and the roving patrolman,” however, the evidence clearly establishes the patrol persons’ duties are simple and routine and are based on detailed schedules prepared by the site supervisor (Simons) without input from the watch commanders. In this regard, Site Supervisor Simons testified “90%” of the watch commander’s duties are “repetitious” and even on the other 10 percent the watch commanders contact the Coast Guard’s officer of the day to ascertain how things should be handled. Watch commander’s duties do not involve the exercise of any independent judgment. Watch commanders do not even assign work in that the patrol persons simply follow the work schedules posted by the site supervisor. Each patrol person has a written description of his or her duties and he or she performs such duties without guidance or input from the watch commanders. Watch commanders cannot grant employees time off or permission to leave work early. A watch commander may prevent an out of uniform patrol person from assuming his or her duties by having the patrol person already on duty remain on the job until the patrol person reporting for work is in proper uniform or a replacement has been located. However, even with respect to this limit authority, there is no evidence that such occurs with any frequency. Such limited and sporadic exercise of authority does not point to an important indicator of supervisory authority.

The evidence is quite clear that watch commanders do not have or exercise any authority with respect to hiring, transferring, suspending, laying off, recalling, promoting, discharging, or rewarding employees nor do the watch commanders effectively recommend such. There is no showing that watch commanders have or exercise any authority with respect to adjusting employee grievances.

There is evidence that a watch commander can direct the roving patrol person to, as was the example, the site of an aircraft crash at the base. However, the base fire chief assumes overall control of a crash site after the fire chief arrives on the scene. This isolated exercise of 2(11) authority

in a truly emergency situation is insufficient to predicate a supervisory finding on. Likewise, in those *possible* situations where there *might* be a fight at a base club and the watch commander on duty might direct the roving patrol person to the scene until the Coast Guard officer of the day could be summoned is insufficient authority to confer supervisory status on watch commanders.

With respect to disciplining employees, the record establishes that Watch Commander Reynolds on one occasion orally admonished a patrol person not to engage in or continue speaking on matters about which the patrol person had no knowledge. The issuing of a verbal warning, such as this, is simply too minor a disciplinary function to confer supervisory authority on Reynolds or the other watch commanders.

The fact that things may run smoothly at the base with two patrol persons and a watch commander on each shift does not establish that the watch commanders are supervisors within the meaning of the Act.

Finally, I note the watch commanders are hourly paid and have similar benefits as other patrol persons.

In summary, I conclude and find watch commanders are not supervisors within the meaning of the Act.

Having determined that Reynolds and Desiderio were not supervisors within the meaning of the Act, I shall now consider whether their demotions and Reynolds’ discharge violated Section 8(a)(3) and (1) of the Act.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) and (1) of the Act turning, as does the instant case, on employer motivation. First, counsel for the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a “motivating factor” in the employer’s decision.

On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct.

That Reynolds’ and Desiderio’s demotions grew out of the November 24 meeting is not disputed. It is helpful in deciding the issues to make a preliminary determination as to whether the meeting on November 24, constituted concerted protected activity. The employees sought the meeting with representatives of the Union based on, among other considerations, the fact certain of their benefits had been eliminated which impacted their overall wages.²¹ Thus, based on the above, and absent other considerations discussed below, I am in agreement with counsel for the General Counsel that those attending the November 24 meeting (including Reynolds and Desiderio) were engaging in protected conduct.

Having concluded the employees’ conduct on November 24 was protected only addresses part of the overall concerns regarding that meeting. It must also be decided whether the meeting lost its protected status in that it was held on Coast Guard property during working time without permission from the Company or the Coast Guard. I am, for the reasons that follow, persuaded the meeting did not lose its protected sta-

²¹ The Company had ceased paying 69 cents per hour as a benefits allowance and 67 cents per day per employee for uniform maintenance.

tus simply because it took place on Coast Guard property without permission during working time. First, the meeting was held at the main gate guardhouse which is open to the general public in that members of the general public may come to and wait in that area until they are escorted or vouchered onto the base itself. Thus, the representatives from the Union were treated as other members of the general public would have been. In that regard, I note the Coast Guard hosts or permits many events on base that are attended by members of the general public. Such events include "weddings, banquets, [and] parties." Additionally, the Chief Petty Officer's Association of the Coast Guard sponsors bingo games each Wednesday at the base and the general public is invited and encouraged to attend and/or participate in the games. Thus facilities of the Coast Guard are utilized by members of the general public in much the same way as the union representatives did when they met with the employees. Additionally, it has not been shown that the employees' meeting at the main gate guardhouse interrupted the operations of the Coast Guard in any manner. The meeting took place on Saturday following the Thanksgiving holiday. It is undisputed that traffic and/or movement on the base was at a very minimum that day. Furthermore, the gate guard patrol person remained at his duty station (except for a brief time when the roving patrol person relieved him) during the time of the employees' meeting with the union representatives. Site Supervisor Simons testified, that to his knowledge, no unusual occurrences took place at the base as a result of the employees attending the meeting in question. I note that although Owner Rhodes learned of the meeting shortly after it took place, he did not notify the Coast Guard until sometime well after that date. Coast Guard Chief Petty Officer Piner, the Coast Guard's contracting officer technical representative, testified the Company's contract was not jeopardized in any manner as a result of the employees' November 24 meeting with the union representatives. To summarize this concern, I find the November 24 employees' meeting with the representatives of the Union did not lose its otherwise protected status simply because it was held without permission during working time on Coast Guard premises.

Having concluded that the employees attending the meeting were engaging in protected conduct which did not thereafter lose its protected status, I shall consider whether counsel for the General Counsel established a prima facie showing that protected conduct was a motivating factor in the Company's decision to demote Reynolds and Desiderio and to thereafter discharge Reynolds. I find counsel for the General Counsel made such a showing. The General Counsel, as shown below, demonstrated that Reynolds and Desiderio each engaged in protected conduct which was known to the Company and that the Company thereafter took action against the two at least in part as a result of their participation in the protected conduct. First, Reynolds was the employee who contacted the Union. It was through Reynolds that the Union's representatives made their arrangements for the November 24 meeting. Reynolds was the employee who contacted other employees about attending the November 24 meeting. The union officials, on arrival at the main gate guardhouse on November 24, told at least two employees they were there to meet Reynolds and they thereafter conducted a meeting attended by Reynolds and other interested employees. Owner Rhodes and Site Supervisor Simons were

informed of the meeting shortly after it occurred. Site Supervisor Simons even warned Reynolds on the next working day following the weekend meeting that "Mr. Rhodes knows all about *your* meeting, who was there, and what took place." (Emphasis added.) Thus, it is clear the Company was well aware of Reynolds' involvement with and attendance at the meeting. Owner Rhodes knew Desiderio's sentiments in that Desiderio stated at the meeting, with respect to the employees dissatisfaction with the Company and Owner Rhodes in particular, "let's screw the bastard." Counsel for the General Counsel established the Company's animus toward the employees' protected activities through Owner Rhodes' December 12 letter to the employees in which Rhodes demoted Reynolds from lieutenant watch commander to patrol person because of Reynolds' union activities. Specifically, Owner Rhodes wrote "Lieutenant Reynolds will be reduced [effective December 16] to patrol grade so that he can perform his duties for the union." Rhodes also wrote that "Sergeant Desiderio will also be reduced to patrolman." Rhodes' overall animosity toward the employees' union activities is further demonstrated by the survey he prepared, provided to and asked the employees to sign in which he unlawfully interrogated them about their union sentiments. In light of all the above, I am fully persuaded counsel for the General Counsel demonstrated protected conduct was a motivating factor in the Company's decision to demote Reynolds and Desiderio and to thereafter discharge Reynolds.²²

I am persuaded the Company failed to meet its burden of demonstrating it would have demoted Desiderio even in the absence of any protected conduct on his or the other employees' part. Owner Rhodes testified he demoted Desiderio based on what Desiderio said about him at the November 24 union meeting. Rhodes explained Desiderio's comments were "a reflection on [his] parents" and added he was not a "bastard." Rhodes said it was against company policy for employees to use abusive language. A careful review of the evidence convinces me those were not the real reasons for Desiderio's demotion but rather were simply matters seized on by Rhodes to punish Desiderio for his support of the Union and the concerns related thereto. While the Company did have a published rule against the use of abusive language, such had never been enforced prior to the Company's disciplining Desiderio. Site Supervisor Simons specifically testified he had never issued a warning or reprimand to anyone for using abusive language since the Company assumed its contractual duties for the Coast Guard. Desiderio, patrol person Evans, and Watch Commander Foreman all testified they had cursed on the job and had heard others do so. Patrol person Evans testified simply, "we all cuss." Watch Commander Foreman testified she had heard Desiderio use language similar to that used at the November 24 meeting and that he had done so in the presence of Site Supervisor Simons. Foreman recited an example where Desiderio referred to a person entering the main gate as "that bitch" and that Site Supervisor Simons, who was standing there, simply said "Desi, one of these days I'm going to wash your mouth out with some soap." Site Supervisor Simons admitted making such comments to Desiderio. Simons also testified about meetings he had held with employees and stated "[v]ery few

²² The Company acknowledged Reynolds' discharge was for the same reasons he was demoted.

meetings would we have that somebody won't say a cuss word at one time or another." Simons added "very few of us haven't thrown out a damn or something at one time or another." That Rhodes' true motivation or concern was not the language Desiderio admittedly used is further demonstrated by the language Site Supervisor Simons attributed to Rhodes in Rhodes' description of the employees' union activities. In that regard, Reynolds testified, without contradiction, that Simons related Rhodes' feelings about the Union as the employees could "go ahead and have their fucking union." In light of all the above, the evidence is overwhelming that Owner Rhodes' concern was not about abusive language but rather was about the Union and the concerted protected activities of the employees and specifically Desiderio's participation therein. If Owner Rhodes' true concern had been the language used by one of his employees, he would have sought Site Supervisor Simons' input before deciding to discipline Desiderio. In summary, I find the Company failed to demonstrate it would have demoted Desiderio in the absence of protected conduct on his and other employees' part.

The Company also failed to demonstrate it would have demoted Reynolds from lieutenant to patrol person even in the absence of protected conduct on his part. That fact is most clearly demonstrated by Owner Rhodes' December 12 letter to all employees in which he wrote "Lieutenant Reynolds will be reduced to patrolman grade so that he can perform his duties for the union." It is clear that Reynolds was, as the Company perceived him to be, the moving force behind the Union's efforts at the Company. It is just as clear the Company demoted him for just that reason.

The Company further failed to demonstrate it would have discharged Reynolds, as it did on December 31, in the absence of protected conduct on his part. First, I note the Company informed Reynolds of his discharge while he was present to testify at the Board conducted hearing in the underlying representation case. The timing and location of the notification suggests an unlawful motive. The impact of the Company's timing and place of notification could not have gone unnoticed by the employees. Reynolds' discharge, which ostensibly was for a failure to perform the duties of a supervisor and for allowing unauthorized persons on the base, does not withstand close scrutiny. First, Reynolds was not a supervisor within the meaning of the Act. Second, if the Company's motivation for disciplining Reynolds had been his allowing unauthorized persons on the base, a question arises as to why the Company did not also discipline Relief Watch Commander Foreman and patrol person Evans as well. They both observed and spoke with the two "unauthorized" union representatives while still on duty and both invited the "unauthorized" union representatives to wait in the main gate guardhouse. The inference is clear Foreman and Evans were not employee leaders (as Reynolds and Desiderio were perceived to be) in the movement to bring the Union in at the Company. If the Company's motivation for disciplining Reynolds had been for his failure to perform his duties, then a question is raised as to why the Company did not also discipline roving patrol person Overton who admittedly did not perform his assigned duties until the conclusion of the union meeting. Again, an inference is warranted that the two were treated differently because Reynolds was the leader of the efforts on behalf of the Union at the Com-

pany. Further, if the Company's overall concern was that the meeting somehow jeopardized its contractual relationship with the Coast Guard, why did it only discipline two of the nine employees attending the meeting. Again it appears the Company was interested in disciplining those responsible for bringing the Union to the Company. In summary, the evidence warrants the finding, which I make, that it was not the fact that a meeting was held at the main gate guardhouse that might could have jeopardized the Company's relationship with the Coast Guard that motivated it to take the action it did with respect to Reynolds, but rather its actions were based on the fact Reynolds was the leader in the employees' efforts to seek assistance from the Union in dealing with the Company.

I find the Company failed to demonstrate it would have demoted and discharged Reynolds even in the absence of protected conduct on his and the other employees' part.

The Regional Director addressed the Union's (Petitioner's) three numbered objections to conduct affecting the results of the election in his Supplemental Decision, Direction and Order Consolidating Cases 11-RC-5740 and 11-CA-14209. In his decision, the Regional Director allowed the Union (Petitioner) to withdraw its Objections 1 and 2 and noted the Union (Petitioner) had not presented any evidence in support of its Objection 3. He accordingly dismissed that objection. The Regional Director did, however, conclude that the unfair labor practice allegations set forth in the complaint, if proven, would constitute objectionable conduct sufficient to warrant setting the election aside. Accordingly, he ordered that the complaint allegations be considered as conduct not specifically alleged to have interfered with the election but that if proven would form a basis for setting the election aside. Having concluded that the unfair labor practice allegations of the complaint have been established, I find the Company has interfered with the exercise of employee free choice in the election conducted on February 5, 1991. Accordingly, I recommend the election held on that date be set aside and a second election be directed.

CONCLUSIONS OF LAW

1. Pro/Tech Security Network is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union, United Plant Guard Workers of America (UPGWA) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Company violated Section 8(a)(1) of the Act by coercively interrogating its employees concerning their union activities, sympathies, and desires.

4. The Company violated Section 8(a)(3) and (1) of the Act by demoting its employees Hassie Reynolds and Edwin Desiderio on December 16, and by thereafter discharging Reynolds on December 31.

5. By the unfair labor practices found, the Company has interfered with the freedom of choice of employees and it is recommended that the election in Case 11-RC-5740 be set aside and that a second election be directed.

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

THE REMEDY

Having found that the Company has violated Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Company unlawfully demoted its employees Reynolds and Desiderio and thereafter unlawfully discharged Reynolds, I shall recommend Reynolds be offered immediate and full reinstatement to his former position of employment, which he held prior to his demotion, or if his former position no longer exists to a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed and that Reynolds and Desiderio both be made whole for any loss of earnings they may have suffered by reason of their demotion and discharge, with interest. I note Desiderio was reinstated to his original position on or about February 21, 1991.

Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).²³ I also recommend the Company be ordered to expunge from its files any reference to Reynolds' and Desiderio's demotion and Reynolds' discharge and notify them in writing this has been done and that evidence of these unlawful actions will not be used as a basis for any future personnel actions against them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁴

ORDER

The Respondent, Pro/Tech Security Network, Elizabeth City, North Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, demoting, or otherwise discriminating against employees because of their membership in or activities on behalf of the Union or because they engage in other protected concerted activities.

(b) Coercively interrogating employees as to their union activities, sympathies, and desires.

(c) 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) Offer Hassie Reynolds immediate and full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision

²³ Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendments to 26 U.S.C. § 6621.

²⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and expunge any reference to his demotion or discharge from his work record.

(b) Make Edwin Desiderio whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of this decision and expunge any reference to his demotion from his work record.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Elizabeth City, North Carolina facility copies of the attached notice marked "Appendix."²⁵ Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER RECOMMENDED that the results of the election held on February 5, 1991, in Case 11-RC-5740 be set aside and that the representation matter be remanded to the Regional Director for Region 11 for the purpose of conducting a new election at such time as he deems the circumstances permit the free choice of a bargaining representative.

²⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate our employees as to their union activities, sympathies, and desires.

WE WILL NOT discharge or demote employees because of their activities on behalf of International Union, United Plant

Guard Workers of America (UPGWA), or any other labor organization.

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

WE WILL offer Hassie Reynolds immediate and full reinstatement to his former (before demotion) job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, with interest.

WE WILL make Edwin Desiderio whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, with interest. WE HAVE already reinstated Edwin Desiderio to his former (before demotion) job.

WE WILL notify Hassie Reynolds and Edward Desiderio that we have removed from our files any reference to their demotion or discharge and that such will not be used against them in any way.

PRO/TECH SECURITY NETWORK