

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

5

10 **NORTHEAST IOWA
TELEPHONE COMPANY**

and

**CASES 18-CA-17200
18-CA-17334
18-RC-17190**

15 **TEAMSTERS 421, affiliated with the
INTERNATIONAL BROTHERHOOD
OF TEAMSTERS**

20 **Michael C. Duff, Esq.,**
for the General Counsel.
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25 for the Charging Party.
Alan I. Model, Esq. (Grotta, Glassman
& Hoffman, P.C.), of Roseland, NJ,
for the Respondent.

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BENCH DECISION AND CERTIFICATION

Statement of the Case

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40 **KELTNER W. LOCKE, Administrative Law Judge:** I heard this case on
September 13 and 14, 2004 in Decorah, Iowa. After the parties rested, I heard oral
argument, and on September 16, 2004, issued a bench decision pursuant to Section
102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and
conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I
certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript
containing this decision.¹

¹ The bench decision appears in uncorrected form at pages 387 through 414 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as Appendix A to this Certification.

Further Discussion Concerning Case 18–RC–17190

On December 3, 2003, the Board conducted an election in Case 18–RC–17190.
5 The Union received a majority of the valid votes and challenges were not sufficient in number to affect the outcome. The Employer timely filed three objections.

In the bench decision, I concluded that the Board already had considered
Respondent’s first and third objections and had rejected them in a published order.
10 *Northeast Iowa Telephone Co.*, 341 NLRB No. 97 (April 30, 2004). Because these objections were not before me, I did not consider them further. However, I did consider Respondent’s second objection, which stated as follows:

Petitioner’s use of said statutory supervisors to actively obtain support for
15 Petitioner in the December 3, 2003 election destroyed the laboratory conditions necessary for a free and fair election.

The words “said statutory supervisors” refer to Dennis Landt and Tom Hahn,
whose job titles were plant manager and wireless manager, respectively. Landt testified
20 during the hearing but Hahn did not.

In the bench decision, I concluded that Respondent had failed to carry its burden
of proving that the putative supervisors met the definition of “supervisor” set forth in
Section 2(11) of the Act. Therefore, I recommended that Respondent’s second
25 objection be overruled. The following discussion explains in greater detail my conclusion that neither Landt nor Hahn was a statutory supervisor.

The evidence established that sometime around the year 2000, Landt’s job title
changed to “plant manager.” Before that time, Landt received an hourly wage rate and
30 could earn overtime pay for overtime work. When Landt’s title changed to plant manager, he began receiving a salary and no longer drew overtime pay.

The evidence established that Landt oversaw the work of two technicians, Stan
Dull and Scott Chase. Unlike Landt, Dull and Chase are paid by the hour and receive
35 overtime pay.

Landt testified that he spends 80 percent of his work time doing the same type of
technical duties which Dull and Chase perform. The remaining 20 percent of his work
40 time, Landt performs administrative tasks.

Landt does not have a private office but works out of a downstairs conference
room which he shares with a number of other individuals. Each weekday morning,
Landt arrives at work before Dull and Chase and reviews the work orders and trouble
tickets which he has received from office employees. Landt then tells Dull and Chase
45 about the work orders when they arrive. The record does not establish that Landt uses independent judgment to make work assignments, as contrasted to discussing the available work with the two men and then collectively deciding who should do which job.

Landt testified that he “probably” had authority to require an employee to work overtime. However, the record falls short of establishing that Landt uses independent judgment in the assignment of overtime. Similarly, Landt has authority to grant employees’ vacation requests or, presumably, to deny them. However, Landt has never denied a vacation request.

Landt prepares annual performance appraisals for Dull and Chase, but shows these draft appraisals to General Manager Quandahl before giving them to the employees. On occasion, Quandahl instructs Landt to change the performance evaluations in some way.

Landt can make a recommendation that management grant a wage increase to Dull and Chase, but the record fails to establish that such recommendations are effective. To the contrary, when Landt most recently recommended wage increases for these employees, management did not follow those recommendations.

Landt does not have access to the employees’ personnel files. He may possess authority to issue an employee an oral warning but the record does not indicate that he has ever used this authority.

Landt has recommended that management hire certain individuals who were, in fact, hired. However, General Manager Quandahl participated in the interview process.

The Act defines “supervisor” to mean “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.” See 29 U.S.C. § 152(11).

Thus, to warrant a conclusion that a particular person meets the statutory definition of supervisor, the evidence must establish three elements: (1) That the individual had authority to perform one of the functions listed in the statute; (2) that the individual exercised this authority in the interest of the Employer, and (3) that the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

The burden of proving supervisory status rests with the party asserting such status. *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999); *Alois Box Co., Inc.*, 326 NLRB 1177 (1998). In this case, that party is the Employer, Northeast Iowa Telephone Company.

The evidence, summarized above, indicates that Landt had some authority to direct, assign, reward and discipline employees in the interest of the Employer. However, the record does not establish that Landt’s exercise of such authority went beyond the routine or required the use of independent judgment.

Landt's authority to reward employees consisted of filling out annual performance appraisals and recommending wage increases. As noted above, the General Manager sometimes tells Landt to modify the performance appraisal before giving it to the employee and does not always follow the recommendations. Therefore, I conclude that Landt's authority to reward employees falls short of that required to establish supervisory status under Section 2(11).

Landt's authority to impose discipline also is limited. Although Landt believed he had authority to give an oral warning, the record does not indicate that such a warning would be an "official" action within a disciplinary system rather than merely cautionary remarks offered by one employee to another. Moreover, in practice, Landt did not give such warnings.

It is true that the Employer paid Landt a salary rather than an hourly wage. However, the form of compensation is not one of the indicia listed in Section 2(11). Such a "secondary indication" is not dispositive. *General Security Services Corp.*, 326 NLRB 312 (1998). Similarly, it is not dispositive that Landt sometimes attended management meetings.

Landt was also a shareholder in Respondent but that fact does not confer supervisory status. Employees at many companies own stock in their employers, and sometimes buy those shares through payroll deductions under an employee stock purchase plan. Needless to say, this ownership interest does not turn the employees into statutory supervisors.

In sum, I conclude that Landt's "supervisory" duties did not require the exercise of independent judgment but instead were the routine actions typical of a leadman. *Byers Engineering Corp.*, 324 NLRB 740 (1997); *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996). Therefore, I also conclude that Landt was not a supervisor within the meaning of Section 2(11) of the Act.

The Employer also asserts that Wireless Manager Tom Hahn is a statutory supervisor. However, Hahn did not testify and the record otherwise does not establish that he possessed any more authority than Landt, whom I have concluded is not a supervisor. Similarly, the evidence fails to demonstrate that Hahn's "supervisory" duties were any less routine, or required any greater exercise of independent judgment, than Landt's. Accordingly, I conclude that the Employer has not met its burden of proving either Landt or Hahn to be a statutory supervisor.

Because Landt and Hahn are not supervisors, even if they had engaged in Union activities, it would not provide a basis for setting aside the election. Therefore, I recommended that the Employer's second objection be overruled.

Even should the Board disagree with my conclusion that Landt and Hahn are not supervisors, I would still recommend that the Employer's objection be overruled because the record does not establish that either Landt or Hahn engaged in any

conduct which would compromise the laboratory conditions necessary for a free and fair election.

5 My observations of the witnesses lead me to conclude that the testimony of Dennis Landt is reliable and I credit it. Based on that testimony, I find that Landt signed a Union authorization card which he obtained from Union Business Agent John Rosenthal. However, Landt never solicited any employee to sign an authorization card.

10 Landt attended Union meetings, where he expressed his opinions during informal group discussions, but he did not speak more than others attending the meeting and never delivered a formal speech. Landt never told employees that they had to come to Union meetings.

15 The Employer has not asserted that Hahn, who did not testify, possessed or exercised a greater amount of supervisory authority than Landt, and the record would not support such a conclusion. I find that Hahn's authority to perform the supervisory functions listed in Section 2(11) does not exceed that of Landt. Likewise, the record does not establish that Hahn engaged in Union activities to any greater extent than Landt, and I conclude that he did not.

20 A supervisor's union activities do not invariably disturb the laboratory conditions necessary for a free and fair election, and do not necessarily require that an election be set aside. However, the Board will sustain an objection based upon a supervisor's prounion conduct in either of two situations: (1) When the employer takes no stand contrary to the supervisors' prounion conduct, thus leading the employees to believe that the employer favors the union, or (2) when the supervisors' prounion conduct coerces employees into supporting the union out of fear of retaliation by, or expectation of rewards from the supervisors. *Sutter Roseville Medical Center*, 324 NLRB 218 (1997).

30 The record does not establish that the Employer had taken a stand contrary to the union before the December 3, 2003 election. It is true that General Manager Quandahl made a violative statement which reasonably would convey to an employee the impression that her telephone calls to the Union were under surveillance. However, 35 Quandahl made this statement in late May 2004, almost 6 months after the December 3, 2003 election. Credited evidence does not demonstrate that, before the election, management made statements which took a stand against the Union.

40 In these circumstances, if a supervisor engaged in certain prounion conduct before the election, the conduct could constitute a basis for overturning the election. Nonetheless, I do not conclude that Landt's prounion conduct was sufficient to disturb the necessary laboratory convictions. Likewise, the record does not establish that Hahn engaged in any prounion conduct which would warrant setting the election aside.

45 Landt did not solicit any employee to sign a Union authorization card. There is no evidence that he expressed prounion views in the workplace. Even when he attended a Union meeting at a private home, Landt did not take any leadership role but

simply expressed his views as part of a group discussion. There is no evidence either that employees regarded Landt as speaking for the Employer or that they reasonably would consider him to be expressing the viewpoint of management.

5 In sum, the Employer has not established that either Landt or Hahn made
prounion statements in the workplace or otherwise expressed their views in a manner
which reasonably would convey to employees that they were voicing the Employer's
position. Therefore, notwithstanding the lack of evidence that the Employer had taken
10 any stand against the Union, I conclude that the conduct of Landt and Hahn does not
warrant setting the election aside.

15 In *Sutter Roseville Medical Center*, above, the Board also noted that an election
would be set aside when a supervisor's prounion conduct coerced employees into
supporting the union out of fear of retaliation by, or expectation of rewards from the
supervisor. The record does not establish that either Landt or Hahn engaged in such
coercive conduct and I find that they did not.

20 Therefore, even if the evidence had established that Landt and Hahn were
supervisors, I would still recommend that the Board overrule the Employer's second
objection.

REMEDY

25 Having found that the Respondent has engaged in certain unfair labor practices, I
find that it must be ordered to cease and desist and to post the notice to employees
attached hereto as Appendix B.

30 Further, I recommend that the Board overrule the Employer's objection in Case
18-RC-17190, severe this case from the unfair labor practice cases, and remand it to
the Regional Director for the appropriate certification.

CONCLUSIONS OF LAW

35 1. The Respondent, Northeast Iowa Telephone Company, is an employer
engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

40 2. The Charging Party, Teamsters 421, affiliated with the International
Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of
the Act.

3. The Respondent violated Section 8(a)(1) of the Act by threatening an
employee that management was monitoring that employee's cellular telephone calls to
the Charging Party.

45 4. The aforesaid unfair labor practice is an unfair labor practice affecting
commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent did not engage in any unfair labor practices not specifically found herein.

5 On the findings of fact and conclusions of law herein, and on the entire record in this case, I issue the following recommended²

ORDER

10 The Respondent, Northeast Iowa Telephone Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

15 (a) Creating the impression that it has placed its employees' union activities under surveillance by monitoring their cellular telephone calls.

20 (b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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

30 (a) Within 14 days after service by the Region, post at its facility in Monona, Iowa, copies of the attached notice marked "Appendix B."³ Copies of the notice, on forms provided by the Regional Director for Region 18, 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 May 27, 2004.

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

3 If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "**POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD**" shall read "**POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD.**"

(b) 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 Regional Director attesting to the steps that the Respondent has taken to comply.

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Dated Washington, D.C.

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Keltner W. Locke
Administrative Law Judge

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APPENDIX A

5 This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I conclude that Respondent's general manager violated Section 8(a)(1) by making one unlawful statement, but I recommend that the Board dismiss the other allegations raised by the Complaint. Additionally, I conclude that the Board already has rejected two of Respondent's objections in the representation case and recommend that the Board overrule the third.

Procedural History

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15 On October 10, 2003, the Union, Teamsters 421, affiliated with the International Brotherhood of Teamsters, filed a petition with the National Labor Relations Board in Case 18–RC–17190. The Union sought to represent certain employees of the Respondent, Northeast Iowa Telephone Company.

20 On December 3, 2003, pursuant to a Decision and Direction of Election dated November 7, 2003, the Board conducted a secret ballot election in which two units of Respondent's employees had the opportunity to vote. One of these units consisted of office clerical employees and is not at issue in this proceeding. The other unit consisted of the following employees:

25 All full-time and regular part-time technicians employed by the Employer at its Monona and Decorah, Iowa facilities; excluding office clerical employees, and guards and supervisors as defined in the National Labor Relations Act, as amended.

30 After the election, the Board impounded the ballots because of a pending request for review of the Decision and Direction of Election.

On February 25, 2004, the Union filed an unfair labor practice charge against Respondent in Case 18–CA–17200.

35 In an April 30, 2004 Order, the Board denied Respondent's Request for Review of the Decision and Direction of Election in the representation case. This action resulted in the ballots being counted on May 5, 2004. The Tally of Ballots showed that in the technicians unit, there were approximately 8 eligible voters, no void ballots, 4 votes cast for the Union, 2 votes cast against the Union, and 1 challenged ballot.

40 On May 11, 2004, Respondent filed timely objections to conduct affecting the results of the election.

45 On June 14, 2004, the Union amended the unfair labor practice charge it had filed in Case 14–CA–17200. On June 18, 2004, the Union filed another unfair labor practice charge against Respondent, which was docketed as Case 18–CA–17334.

APPENDIX A

On June 28, 2004, the Regional Director for Region 18 of the Board issued a Complaint and Notice of Hearing in Case 18–CA–17200.

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On July 1, 2004, the Regional Director issued a Report on Objections, Order Directing Hearing, Order Consolidating Cases and Notice of Hearing. This document consolidated the representation case with the unfair labor practice case then pending hearing.

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On July 23, 2004, the Regional Director issued an Order Further Consolidating Cases, Amended Consolidated Complaint and Notice of Rescheduled Hearing. This document consolidated the second unfair labor practice charge, in Case 18–CA–17334 with the first, Case 18–CA–17200, and both unfair labor practice charges with the objections in Case 18–RC–17190. For brevity, I will refer to it simply as the “Complaint.”

15

On September 13, 2004, a hearing opened before me in Decorah, Iowa. At the beginning of the hearing, I granted the General Counsel’s motion to correct some apparent typographical errors in the Complaint. This decision will quote the Complaint as it has been corrected by the amendment.

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On September 13 and 14, the parties presented evidence. On September 14, 2004, after all sides had rested, counsel presented oral argument concerning both the unfair labor practice and representation issues.

25

Today, September 16, 2004, I am issuing this bench decision, which first will address the unfair labor practice issues.

30

Cases 18–CA–17200 and 18–CA–17334

Undisputed Matters

In its Answer to the Complaint, Respondent admitted a number of allegations. Based on those admissions, I find that the General Counsel has proven that the Union filed and served the unfair labor practice charges as alleged in Complaint paragraphs 1(a), 1(b) and 1(c).

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Additionally, based on Respondent’s admissions, I find that it is an Iowa corporation with places of business located in Monona and Decorah, Iowa, and that at all material times, it has been engaged in providing telephone services and products, cable television service, internet service, and wireless service to various communities in northeast Iowa.

40

Respondent also has admitted facts establishing that it meets both the Board’s statutory and discretionary standards for the assertion of jurisdiction. I so find. Further,

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APPENDIX A

I conclude that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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Respondent admits, and I find, that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

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Additionally, based on the admissions in Respondent’s Answer, I find that at all material times, General Manager Arlan Quandahl and Office Manager Julie Hemmersbach have been supervisors of Respondent within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act.

Disputed Matters

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Respondent has denied other allegations, which I will discuss in the order they appear in the Complaint.

Complaint Paragraphs 5(a) through 5(g)

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Complaint paragraphs 5(a) through 5(g) allege that Respondent’s general manager, Arlan Quandahl, made a number of unlawful statements during a meeting which took place on February 17, 2004. It is appropriate to begin the discussion of these allegations with an overview of the meeting and an assessment of the credibility of the persons who testified about it.

25

Office Manager Julie Hemmersbach supervised employees Ann Marie Kirkestrue, whose title was administrative assistant, and Audrey Tschirgi, whose title was customer service administrator. Notwithstanding the word “administrator” in Tschirgi’s title, no party asserts that either Kirkestrue or Tschirgi was a supervisor and the record would not support such a finding.

30

The working relationships between Hemmersbach and Kirkestrue and between Hemmersbach and Tschirgi had deteriorated. It appears that these employees and their supervisor were still on speaking terms but hostility had become manifest. According to General Manager Quandahl, the tension could be discerned by someone who walked into the office. “It was an adversarial place out there,” he said.

35

The lack of communication took its toll on the work. Because of inconsistencies and inaccuracies, Quandahl began to doubt the accuracy of the data in the status reports the office staff produced.

40

It appears that the communication problems also slowed the speed of production. After the office staff had been working on a report for 2 to 3 weeks, Quandahl called a meeting to discuss the matter with Office Manager Hemmersbach and her two employees, Kirkestrue and Tschirgi. Complaint paragraphs 5(a) through 5(g) allege that Quandahl made unlawful statements at this February 27, 2004 meeting.

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APPENDIX A

Complaint Paragraph 5(a)

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Complaint paragraph 5(a) alleges that on or about February 17, 2004, Respondent threatened employees that job duties of one employee had been taken away due to the employee's support of the Union. Respondent denies this allegation.

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No witness testified that Quandahl made the statement attributed to him in Complaint paragraph 5(a). However, to the extent that the testimony of Kirkestrue and Tschirgi contradicts that of Quandahl and Hemmersbach, my observations of the witnesses lead me to credit Quandahl and Hemmersbach.

15

Moreover, other evidence is consistent with the conclusions I draw from the demeanor of the witnesses. The record suggests that both Kirkestrue and Tschirgi harbored some ill feelings which may have colored their testimony.

20

On cross-examination, Kirkestrue admitted that during the February 17 meeting, she either called Hemmersbach a "bitch" or said that Hemmersbach was acting like one in her dealings with employees. Further, Kirkestrue sometimes testified in a somewhat halting manner which raised a question concerning how much her words mirrored something she had rehearsed rather than her original memories of the meeting.

25

Tschirgi admitted that her relationship with Hemmersbach was strained and that had always been the case. Moreover, Tschirgi admitted that a conflict involving her husband and Quandahl's wife (who worked together for a county department) had created tensions.

30

This animosity did not help Kirkestrue and Tschirgi to be dispassionate and disinterested witnesses. But nonetheless, neither Kirkestrue's testimony nor Tschirgi's testimony about the February 17 meeting quoted Quandahl as saying that any employee's job duties had been taken away because of that employee's support for the Union.

35

No other evidence supports this allegation. Finding that Quandahl did not make the statement attributed to him in Complaint paragraph 5(a), I recommend that the Board dismiss this allegation.

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Complaint Paragraph 5(b)

45

Complaint paragraph 5(b) alleges that during this same February 17, 2004 conversation, General Manager Quandahl "threatened employees that he would sell Respondent or move it if employees did not support Respondent." Read literally, these words do not allege a violation of the Act. Therefore, I recommend that the Board dismiss this allegation.

APPENDIX A

5 Possibly, the drafter of the language in Complaint paragraph 5(b) intended it to say “if employees did not support Respondent *against the Union*.” However, no credited evidence establishes that Quandahl made any statement of this kind during the February 17, 2004 meeting.

10 Moreover, even *discredited* testimony does not support a finding that Quandahl threatened to sell or move Respondent because employees supported, or continued to support, the Union. Kirkestrue did testify that Quandahl made a comment about moving the company, but her testimony does not link moving the company to any employee’s union sympathies or activities.

15 Kirkestrue’s testimony clearly indicates that Quandahl’s comments focused on the communication problem in the front office. Quandahl wanted Kirkestrue and Tschirgi to begin their work days by writing down what work they intended to do and then to close their work days by writing down what they had accomplished. Quandahl directed them to give these notes to their supervisor so that she would be aware of the work and its progress.

20 Reading “between the lines” of Kirkestrue’s testimony, I infer that she and Tschirgi vigorously opposed this instruction. Kirkestrue claimed that the supervisor already knew what Kirkestrue was doing because the supervisor’s desk was nearby. Tschirgi admitted the she did not respect the supervisor.

25 Both Kirkestrue and Tschirgi testified that this meeting lasted several hours, which would seem to be a long time to discuss the communication problem, at least if the employees agreed there was, in fact, a problem. But extended argument about whether the problem existed, and if so, who bore responsibility for it, could well prolong the meeting and frustrate Manager Quandahl as well.

30 Cutting through the colloquy, Quandahl instituted a remedy which appeared to be both simple and effective: At the start of each workday, the employees would write down what they were going to do and give the notes to the supervisor; at the end of the day, they would follow up with notes summarizing what they actually had accomplished.

35 It isn’t surprising that Kirkestrue and Tschirgi would resent this instruction. At this same meeting, Kirkestrue had told Quandahl that the supervisor was a “bitch” (or acting like one), and, as previously noted, Tschirgi admitted in her testimony that she did not respect the supervisor. Logically, employees with such attitudes about their supervisor would not be enthusiastic about this supervisor exercising greater oversight.

40 However, Quandahl insisted that they follow the instruction for two weeks and, according to Kirkestrue, threatened disciplinary action if they did not. Kirkestrue testified that during this February 17, 2003 meeting, Quandahl said “that if we weren’t going to be team players for the company, that he would sell the company, be better off located in Houston, Minnesota.”

APPENDIX A

5 For the reasons discussed above, I do not credit this testimony. However, even if I had credited it, the testimony does not constitute a threat to move the company *in retaliation for Union activity*.

10 The government would read the phrase “team player” to be synonymous with “antiunion.” In context, however, Quandahl clearly was not using the words “team player” as a veiled or coded reference to union or antiunion sentiments. Kirkestrue’s own testimony establishes that Quandahl had called the February 17, 2003 meeting to find out why the office staff was not working as a team: “He wanted to know why we were not communicating and being team players.”

15 Kirkestrue’s further testimony does attribute to Quandahl a reference to the Union but even this testimony, which I specifically discredit, fails to provide a basis for equating the phrase “team player” with “antiunion.” After testifying that Quandahl wanted to know why they were not communicating and being team players, Kirkestrue continued as follows:

25 I told Arlan Quandahl that Julie was not communicating to us also. He also stated that we needed to be team players and to work together, that no matter how much money it took, he was not going to let the Union come in. He also stated that we needed to report to Julie Hemmersbach morning and evening on what we did during the day. That he had known what I was doing since a lot of my job responsibilities were taken away since my involvement with the Union. And he was giving us two weeks and if we didn’t comply to this we would be reprimanded if we didn’t report to Julie morning and evening that our jobs would be terminated.

30 The words Kirkestrue attributes to Quandahl – “that no matter how much money it took, he was not going to let the Union come in” – seem unrelated to what came before and to what came afterwards. They come from “out of the blue.” I suspect that they are an interpolation added by Kirkestrue as she rehearsed her testimony.

35 Kirkestrue’s other reference to the Union in the testimony quoted above also sounds uncomfortably out of place. According to Kirkestrue, Quandahl said “that he had known what I was doing since a lot of my job responsibilities were taken away since my involvement with the Union.”

40 Quandahl had no reason to interject that he knew what work Kirkestrue was doing. Indeed, his major point was that the supervisor, Hemmersbach, did *not* know what Kirkestrue or Tschirgi was doing. Quandahl would have undermined this point if he had said that *he* knew what the employees were doing (even though the supervisor did not).

APPENDIX A

Moreover, Quandahl had no particular reason to bring up the Union at all during this meeting. The Board had conducted the representation election on December 3, 2003, more than 2 months earlier, and Respondent's request for review remained pending.

For these reasons, I discredit Kirkestrue's testimony. But even assuming for the sake of argument that Quandahl had, in fact, spoken the words attributed to him by Kirkestrue, these words do not constitute a threat to close or move the facility in retaliation for Union activity.

In sum, I find that the government has failed to prove the allegations raised in Complaint paragraph 5(b). Therefore, I recommend that the Board dismiss them.

Complaint Paragraph 5(c)

Complaint paragraph 5(c) alleges that during this same conversation, Quandahl "prohibited employees from socializing with other employees and managers because of their activities on behalf of the Union." Respondent denies this allegation.

In response to the question, "What, if anything, do you recall about socializing," Kirkestrue testified as follows:

We were not to socialize, Audrey Tschirgi and myself were not to socialize with Tracy Smith 'cause he would fill our head with nonsense about joining the Union would be the best thing that we could do.

Quandahl denied, clearly and unequivocally, that he told employees that they should not socialize with other employees because they supported the Union. Quandahl testified that he did not remember saying anything at all about not socializing with Tracy Smith, but he specifically denied instructing employees that they should not associate with Smith because of the Union.

For the reasons already discussed, I do not credit Kirkestrue's testimony. Therefore, I find that Quandahl did not make the statement she attributed to him, quoted above. Accordingly, I recommend that the Board dismiss the allegations in Complaint paragraph 5(c).

Complaint Paragraph 5(d)

Complaint paragraph 5(d) alleges that during this same February 17, 2004 conversation, Quandahl accused employees of not being team players because they supported the Union. During the hearing, I granted Respondent's motion to dismiss these allegations. However, some further discussion of my conclusions may be helpful.

APPENDIX A

Because of Section 8(c) of the Act, I have serious reservations that such a statement, even if proven, would violate Section 8(a)(1) of the Act.

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Section 8(c) of the Act provides that “The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.”

10

Arguably, in some circumstances, accusing someone of not being a “team player” might convey a threat of reprisal. However, I need not explore that issue because the credited evidence in this case does not establish that Quandahl accused employees of not being team players because they supported the Union.

15

To the extent that Quandahl stated, or even implied, that Kirkestrue and Tschirgi were not team players, he associated that conclusion with their failure to communicate effectively with their supervisor about their work. No credited evidence indicates that Quandahl told Kirkestrue and Tschirgi that they were not team players because of their Union sympathies or activities.

20

Therefore, I recommend that the Board dismiss the allegations raised by Complaint paragraph 5(d).

25

Complaint Paragraph 5(e)

Complaint paragraph 5(e) alleges that during this same February 17, 2004 conversation, Quandahl “threatened to fire employees because of their support for the Union, and that employees had two weeks to get their act together.” Respondent denies this allegation.

30

No credited evidence establishes that Quandahl made such a threat, and I find that he did not. To the contrary, Quandahl told Kirkestrue and Tschirgi that they must keep their supervisor informed about their work by writing daily notes, and had to do so for two weeks or else face disciplinary action.

35

Such a statement has nothing to do with employees’ Union activities. Therefore, I recommend that the Board dismiss the allegations raised by Complaint paragraph 5(e).

40

Complaint Paragraph 5(f)

Complaint paragraph 5(f) alleges that during this same February 17, 2004 conversation, Quandahl “threatened to spend whatever was needed to fight the Union organizing campaign.” Respondent denies this allegation.

45

APPENDIX A

Respondent contends that this Complaint paragraph does not allege violative conduct because the alleged statement falls within the protection of Section 8(c). I need not address this argument because I conclude that no credited evidence establishes that Quandahl made such a statement.

Kirkestrue did testify that Quandahl “stated that we needed to be team players and to work together, that no matter how much money it took, he was not going to let the Union come in.” Quandahl denied making this statement and I credit his denial.

Because I conclude that the government has not proven the allegations in Complaint paragraph 5(f), I recommend that the Board dismiss these allegations.

Complaint Paragraph 5(g)

Complaint paragraph 5(g) alleges that during this same February 17, 2004 conversation, Quandahl threatened employees that they should find other jobs because they supported the Union. Respondent denies this allegation.

No credited evidence establishes that Quandahl made such a statement. Therefore, I recommend that the Board dismiss the allegations raised in Complaint paragraph 5(g).

Complaint Paragraph 5(h)

Complaint paragraph 5(h) alleges that during the same February 17, 2004 meeting, Quandahl “threatened an employee that the employee has not been a team player because the employee supported the Union.” At hearing, I granted Respondent’s motion to dismiss this allegation.

No credited evidence establishes that Quandahl made such a statement. Rather, for reasons already discussed, I conclude that Quandahl implied that Kirkestrue and Tschirgi needed to become better team players because of their problems communicating with their supervisor.

I recommend that the Board dismiss the allegations raised by Complaint paragraph 5(h).

Complaint Paragraph 5(i)

Complaint paragraph 5(i) alleges that on about May 27, 2004, Respondent, by General Manager Quandahl, created the impression of surveillance by threatening an employee that he (Quandahl) was monitoring that employee’s cellular telephone calls to the Union. Respondent denies this allegation.

APPENDIX A

For reasons already discussed, to the extent that the testimony of Kirkestrue and Tschirgi conflicts with that of other witnesses, I do not credit it. Instead, I credit
5 Quandahl's testimony concerning this matter.

Respondent provides certain of its employees, including Kirkestrue, with cell phones that they can use for personal matters as well as business. Up to a certain monthly limit, Respondent pays the charges for these cell phones. Respondent's staff
10 reviews the employee's monthly statement to determine whether cellphone use has exceeded the specified amount. Such monthly statements include a list showing the telephone numbers called from that phone.

Quandahl testified that he routinely reviews such cellphone bills, in part as a way
15 of controlling expenses: "When I see a pattern of numbers that I don't relate to business activities it's not uncommon for us that we do a reverse directory check on those numbers and see where they come from."

Quandahl further testified that he "happened to do that" on a particular bill for the
20 cellphone provided to Kirkestrue, "and, frankly, made a decision to go and say something to Marie [Kirkestrue] that I had checked it. . .I was just doing normal business and I wanted to let Marie know that 'Hey, look, I just want you to know that I saw this. You have the right to make the calls. It's an employee perk, I don't have an issue with that. . ."

Quandahl is not the only manager who examines employee cell phone bills. Sometimes, the office manager and the controller also reviews such bills. Quandahl explained that he did not want Kirkestrue to hear from one of these individuals, "or at
25 the water cooler, that I had looked at her phone bill and saw this call to the Union. I wanted her to hear it from me because I had indeed looked at her phone bill and identified several calls that having been made to the Union."

Crediting Quandahl's testimony, I find that he did tell Kirkestrue that he had examined her cellphone bill and found that she had made several calls to the Union.
35 Further, I find that he told her that she had the right to make the calls, which was an employee "perk."

Ordinarily, in determining whether a particular statement interferes with the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act, the Board does not
40 take into account the speaker's motivation. Rather, the Board, applying an objective standard, considers what effect the statement reasonably would have on an employee's exercise of such rights.

Based on the present facts, I conclude that Quandahl's statement to Kirkestrue
45 reasonably would create the impression that her Union activities were under surveillance by Respondent. Therefore, I recommend that the Board find that this statement violated Section 8(a)(1) of the Act.

APPENDIX A

The Section 8(a)(3) Allegations

5 **Complaint Paragraph 6(a)**

Complaint paragraph 6(a) alleges that on or about November 7, 2003, Respondent took away job duties assigned to employee Ann Marie Kirkestrue. Respondent's Answer denies this allegation. However, uncontradicted testimony
10 establishes that Respondent did modify Kirkestrue's job duties on about that date.

On November 7, 2003, Quandahl memorialized the change in an email message to Kirkestrue. That message stated as follows:

15 In confirmation of our discussions today, you have been advised the [sic] effective immediately, you will not be allowed access to our UNIX accounts payable files. The AP section of our systems contains confidential and critical financial information that is accessible for management only. As you are aware, you have been relieved of all administrative responsibilities regarding corporate
20 and board files and you have not had access to the General Manager's office, files, information, mail or other such information that may be of a confidential nature.

25 Your supervisor, Julie Hemmersbach, will provide additional direction to provide you with work on a daily basis.

Uncontradicted evidence establishes that in making this change, Quandahl took into consideration the ongoing Union authorization drive. "I didn't know who was active in the Union," he testified, "and didn't know what was being said or done."
30

Additionally, someone had broken into Quandahl's office several weeks earlier, and this fact may also have influenced his decision.

35 The evidence is undisputed that Kirkestrue did not suffer any loss of pay, reduction in hours, or change of employment location because she no longer performed certain duties. Instead, the office manager arranged for her to perform other duties. The record does not indicate that these new duties were unpleasant, demeaning, or otherwise less desirable than the duties Kirkestrue no longer performed.

40 In evaluating whether this action violated Section 8(a)(3) of the Act, I will follow the framework the Board established in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second,
45 the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must

APPENDIX A

establish a link, or nexus, between the employees’ protected activity and the adverse employment action.

5

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 at fn. 12 (1996).

10

The General Counsel clearly has established the existence of protected activity. Kirkestrue participated in the Union organizing campaign and signed an authorization card.

15

Additionally, the record establishes that Respondent was aware of the Union organizing campaign. In fact, it had received the Union’s petition about one month before the change in Kirkestrue’s duties.

20

Third, the government must establish that Kirkestrue suffered an adverse employment action. Deciding that issue should begin with a definition of the term.

25

The dictionary defines “adverse” as “acting against” or “in a contrary direction.” The discharge of an employee is certainly contrary to employment and clearly constitutes an adverse employment action. A disciplinary warning may affect an employee’s tenure with a company and therefore is adverse to the employee’s interest in continued employment.

30

Certain other employment actions are “adverse” because they change the terms and conditions of employment in an unfavorable way and thus make the job less desirable. A reduction in pay certainly constitutes a change for the worse. Transferring an employee from an air-conditioned office to a loading dock in Death Valley likewise constitutes an adverse change in working conditions.

35

To meet its burden of proving that an adverse employment action has taken place, the government must establish by a preponderance of the evidence that the individual’s prospects for employment or continued employment have been diminished or that some legally cognizable term or condition of employment has changed for the worse.

40

In the present case, Kirkestrue suffered no change in hours of employment, no change in pay, and no change in location of employment. Additionally, the government has not demonstrated that Kirkestrue’s job duties changed in any way which reasonably would make the work less desirable to her. Indeed, Kirkestrue did not testify that the job had become any less pleasant or any more onerous.

45

APPENDIX A

5 It is difficult for me to understand how Kirkestrue’s terms and conditions have worsened when her pay hasn’t changed, her benefits haven’t changed, her hours of employment haven’t changed, her work environment hasn’t change, and she has not claimed that her work has become more difficult or less rewarding in any way.

10 Kirkestrue has not asserted that she took some kind of pleasure in reading the Respondent’s confidential financial reports. Even if she had made such a strange claim, I would hesitate to find that an employee’s secret reading of confidential financial reports constitutes a term or condition of employment which the law should protect. Indeed, Kirkestrue could derive no benefit from her access to these documents that would be consistent with her duty to guard their confidentiality.

15 Therefore, I conclude that, for purposes of *Wright Line* analysis, Kirkestrue suffered no adverse employment action. Because the government has failed to establish all four *Wright Line* elements, it has not proven that the change in Kirkestrue’s job duties violated Section 8(a)(3) of the Act.

20 As the Union’s attorney pointed out during oral argument, even if such a change did not violate Section 8(a)(3), it might still interfere with the exercise of employee rights in violation of Section 8(a)(1) of the Act. In the present case, however, I conclude that there has been no such interference.

25 Kirkestrue’s job did not get worse in any appreciable way. Such a benign change would have little potential to chill the exercise of protected rights. Therefore, I recommend that the Board find that the actions alleged in Complaint paragraph 6(a) do not violate either Section 8(a)(3) or (1) of the Act.

30 **Complaint Paragraph 6(b)**

35 Complaint paragraph 6(b) alleges that on about February 17, 2004, Respondent required employees Ann Marie Kirkestrue and Audrey Tschirgi to write down all jobs they expected to do each day at the beginning of each day and to give those written reports to Office Manager Julie Hammersbach, and then to write down what they had done at the end of each day and to give those written reports to Office Manager Julie Hammersbach. For reasons already discussed, I conclude that credited evidence establishes that Respondent did require Kirkestrue and Tschirgi to take these actions.

40 Complaint paragraph 6(c) alleges that Respondent engaged in this action because the employees formed, joined or assisted the Union, and engaged in concerted activities, and to discourage employees from engaging in these activities. The evidence fails to support this allegation.

45 Following the *Wright Line* framework, I conclude that the government has established both the existence of protected activity and Respondent’s knowledge of it.

APPENDIX A

5 However, the General Counsel has not proven the third necessary element, that of an adverse employment action.

10 Kirkestrue and Tschirgi complied with Respondent’s requirement by writing a few sentences on a sheet of a “mini” sized legal pad, one about half the size of a standard 8–1/2 by 11 inch sheet of paper. They testified that this activity took between 5 and 10 minutes a day. That amount of time seems implausibly long for the completion of such a simple and limited task, but even assuming that the employees did take 10 minutes in the morning and 10 minutes in the afternoon to do this duty, it did not affect their employment adversely.

15 This action did not change their pay, hours of employment, benefits, or working conditions. It reasonably would not make their work less pleasant in any appreciable way.

20 In oral argument, the General Counsel contended that requiring the employees to write these notes constituted an onerous requirement. Because the notes only entailed a few sentences, I asked whether it would be onerous to require the employees to write a note consisting of only one sentence. The General Counsel replied that “it is onerous precisely because it is not a big deal.”

25 However, that argument strikes me as pernicious. Should the same argument be raised in a case of constructive discharge, it would point to the conclusion that an employer could make an employee’s work intolerable simply by imposing a requirement which is “no big deal.” That is a kind of “homeopathic” reasoning which would turn the law on its head.

30 I conclude that the government has not satisfied the third *Wright Line* requirement. Additionally, the record does not establish the fourth criterion, a nexus between the action and the protected activity. Clearly, the record establishes that Respondent imposed this requirement not in retaliation for Union activities but to remedy the problem of poor communications between the employees and their supervisor.

40 Therefore, I recommend that the Board dismiss the allegations raised by Complaint paragraph 6(b).

The Objections

45 The Employer has raised three objections to the conduct of the election. The first objection is as follows:

APPENDIX A

5 Petitioner’s inclusion of statutory supervisors, Plant Manager Dennis Landt and
Wireless Manager Tom Hahn, in the petitioned–for unit destroyed the laboratory
conditions necessary for a free and fair election.

The Employer’s third objection is as follows:

10 By failing to render a determination as to the supervisory status of Plant Manager
Dennis Landt and Wireless Manager Tom Hahn and directing that such
individuals “vote under challenge,” Region 18 of the Board, by and through its
authorized agents and representatives, engaged in conduct which destroyed the
laboratory conditions necessary for a free and fair election.

15 I conclude that the Board’s April 30, 2004 order, reported at 341 NLRB No. 97,
addresses and rejects these objections. In accordance with the Board’s Order, I also
reject them.

20 Respondent’s second objection states as follows:

 Petitioner’s use of said statutory supervisors to actively obtain support for
Petitioner in the December 3, 2003 election destroyed the laboratory conditions
necessary for a free and fair election.

25 Respondent has failed to carry its burden of proving that the alleged supervisors
are actually supervisors within the meaning of Section 2(11) of the Act. That section
defines “supervisor” to mean “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
30 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.” See 29 U.S.C. § 152(11).

35 However, the evidence fails to establish that the individuals in question exercise
any authority that is not of a merely routine nature. Additionally, the evidence fails to
establish that the asserted supervisors have the authority to effectively recommend any
of the employment–related actions enumerated in Section 2(11).

40 Therefore, I recommend that this objection be overruled.

45 When the transcript of this proceeding has been prepared, I will issue a
Certification which attaches as an appendix the portion of the transcript reporting this
bench decision. This Certification also will include provisions relating to the Findings of
Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served
upon the parties, the time period for filing an appeal will begin to run.

 Throughout this proceeding, all counsel have displayed the highest standards of
civility and professionalism, which I truly appreciate. The hearing is closed.

APPENDIX B

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 Federal labor law and has ordered us to post and abide by 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 we have placed our employees' union activities under surveillance by monitoring their cellular telephone calls.

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

NORTHEAST IOWA TELEPHONE COMPANY
(Respondent)

Dated: _____ By: _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

330 South Second Avenue, Suite 790, Minneapolis, MN 55401-2221
(612) 348-1757, Hours: 9:00 a.m. to 5:30 p.m.

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (612) 348-1770.