

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 07-60685

CGLM, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND
APPELLATE JURISDICTION**

This case is before the Court upon the petition of CGLM, Inc. (“the Company”) to review an order of the National Labor Relations Board (“the Board”). The Board filed a cross-application for enforcement of its Order. The Board’s Decision and Order issued on August 27, 2007, and is reported at 350

NLRB No. 77.¹ The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (“the Act”) (29 U.S.C. §§ 151, 160(a)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act, the unfair labor practices having occurred in Jefferson, Louisiana, where the Company’s warehouse facility is located. (29 U.S.C. § 160(e) and (f)). The Board’s Order is final with respect to all parties under Section 10(f) of the Act.

The Company filed its petition for review on September 6, 2007; the Board filed its cross-application for enforcement on October 9, 2007. Both were timely filed because the Act places no time limit on such filings.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by discharging five African-American employees because they engaged in a brief strike to formulate and present grievances regarding racial favoritism or discrimination.

¹ Record references are to the original record. “D&O” refers to the Board’s Decision and Order, which includes the decision of the administrative law judge. “Tr” refers to the transcript of the hearing before the administrative law judge. “GCX” refers to the trial exhibits offered by the Board’s General Counsel. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

Acting on a charge filed by an attorney representing the discharged employees, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging five warehouse employees because of their protected concerted activity. The Company filed an answer, denying the commission of unfair labor practices, and alleging that one of the discharged employees, Bobbie Marshall Jr. ("Marshall"), was a supervisor, and, thus, not entitled to the Act's protection. A hearing was held before an administrative law judge, who found that the Company violated the Act as alleged in the complaint. In so finding, the judge rejected, among other contentions, the Company's claim that Marshall was a supervisor. The Company filed exceptions to the judge's decision. The Board considered those exceptions and decided to remand the case to the administrative law judge solely for reconsideration of Marshall's supervisory status in light of intervening Board decisions on that issue. (D&O 1, 3-5.)

Pursuant to the Board's remand order, the administrative law judge conferred with the parties, who agreed that the matter could be decided upon additional briefing and without further hearing. Thereafter, the judge issued a supplemental decision, affirming his conclusion that Marshall was not a supervisor, and the Company excepted to that determination. The Board

considered the Company's exceptions and the entire record and affirmed the judge's original decision regarding the five discharged employees, as well as the judge's finding that the fifth discharged employee, Marshall, was not a supervisor. Accordingly, the Board found that the Company violated Section 8(a)(1) of the Act by discharging five warehouse employees because of their protected concerted activity. (D&O 1, 9-12.)

STATEMENT OF FACTS

A. Background

CGLM, Inc. is engaged in the retail sale and delivery of furniture in the New Orleans area as a franchisee of the La-Z-Boy brand. It operates three showrooms and has a warehouse and office in Jefferson, Louisiana. Larry Marquez, the Company's president and 50 percent owner, manages daily operations from his Jefferson office. Crystal Cloutre is the Company's service manager and has an office adjoining the warehouse floor. She is responsible for handling all customer calls, and preparing the delivery tickets, which, in turn, are passed on to the drivers according to their preassigned routes. Cloutre has one assistant, Tiffany Meliet. Marquez and the other office workers are white. (D&O 2; Tr 20, 35-36.)

The Company employs six warehouse and delivery employees. They are Bobbie Marshall Jr., classified as a warehouse manager, and four employees who work in driver/helper teams, including driver Lionel Robinson and helper William

Norton, driver Derrick Thornton and helper Bobbie Marshall III (Marshall's son). A sixth employee, Reginald Austin, worked exclusively inside the warehouse. A seventh employee, Freddie Hughes, principally performed furniture repair, often at the customer's home. Except for Norton, all of the warehouse workers are African-American. (D&O 2; Tr 41-45.)

Marshall's role in warehouse operations consisted of assuring that furniture received at the warehouse was properly stored and that furniture items from inventory were loaded onto the delivery trucks that carried them to customers or showrooms. The delivery slips were prepared by Service Manager Clouatre, who turned them over to Marshall. Marshall then passed them on to the appropriate driver/helper team, based on the geographic area and route preassigned to the team. Marshall also physically moved furniture and, when required, made deliveries. (D&O 3; Tr 86, 88, 89, 114-15, 117-18.)

B. Employees Protest their Pay and Perceived Discriminatory Treatment

In May 2005, Marquez individually told each warehouse employee that he would not be receiving a pay increase. That news upset employees Austin and Marshall III because they believed that their current wage rate was \$1.50 to \$2.00 per hour less than the starting wage of a former, white warehouse employee, who had briefly worked at the Company for \$8.00 per hour. (D&O 2; Tr 179-80, 184, 218-19, 224.)

Austin also believed that Clouatre would sometimes impose assignments on him, while permitting Norton, the white employee, to malingering. He complained to Marquez about one such incident and Marquez said, “Reg, are you sure you weren’t seeing things?” Austin answered, “[I]t wasn’t what I saw, [i]t was what I heard.” (D&O 2; Tr 180, 183-84, 218-19.)

Another employee, Thornton, also complained about Clouatre because she would report customer complaints directly to Marquez, without first speaking with the driver. Thornton observed that if Marquez “thought the warehouse employees were doing something wrong he was ready to punish us . . . [but] [a]s soon as he found out it was Crystal [Clouatre], everything was fine and dandy.” (D&O 2; Tr 122-23.)

On July 26, Clouatre directed Marshall to throw out a chair that had been repaired but which the customer failed to pick up. After expressing an objection, Marshall complied. Shortly thereafter, Marquez came looking for the chair because the customer had called for it. Marshall explained that Clouatre had directed that it be thrown out. Marquez said that he did not believe that, and told Marshall that if he found that “any one of you guys threw that chair away, you all are going to pay for it.” (D&O 2; Tr 58-61, 187-88, 191-93.)

Austin was present during the conversation between Marshall and Marquez. Later, after Clouatre admitted her responsibility for throwing out the chair,

Marquez said nothing about anyone having to pay. Austin concluded that Marquez was prepared to hold African-American employees financially responsible for throwing out the chair, but not Service Manager Clouatre. (D&O 3; Tr 194.)

The next day, July 27, Clouatre's assistant, Meliet, called Marshall regarding a "pouch" that contained orders from one of the showrooms. Marshall checked the trucks but did not find the pouch, and reported that to Meliet and Clouatre. Marshall told Clouatre that he could not help her look for the pouch because he and Austin were storing furniture and that it was her responsibility anyway. Marquez heard Marshall and Clouatre arguing and went to inquire. Marquez asked Marshall what was "going on with [his] attitude." (D&O 3; Tr 196.) Marshall replied that he was trying to put up furniture. Marshall stated that it "looks like this Company is becoming one-sided." (D&O 3; Tr 197.) Austin interjected, "Yes, Bobbie, you're right." Clouatre said, "Reggie, you shut up." (D&O 3; Tr 198.) Marquez asked Marshall what he meant, and Marshall referred to the incident the previous day, telling Marquez: "[When you] thought it was one of us that threw the chair away, you were ready to make one of us pay for it, [but] [w]hen you found out it was Crystal [Clouatre], you immediately covered up for her . . . [and] you weren't man enough to apologize." (D&O 3; Tr 59-67, 191-93.)

Marquez then told Marshall, "[W]e've got to work together, but you need to start listening to them," referring to Clouatre and Meliet. Marshall responded that

he was just going to do what he had to do. Marquez asked, "What do you have to do?" Marshall answered, "That's my business." (D&O 3; Tr 66-67.)

That evening Marshall telephoned the warehouse employees and asked that they meet with him behind the warehouse the next morning. They agreed, and all of the warehouse employees met behind the warehouse at about 7:30 a.m. on the morning of July 28. At the meeting, Marshall and Austin informed employees about the confrontation over the chair and the lost pouch. Other employees shared their concerns about displays of racial favoritism. (D&O 7; Tr 200-03.) When the one white employee, Norton, joined the meeting, he asked Marshall what was going on, and Marshall replied, "We're going on strike." Norton stated that the employees were crazy, and Marshall replied that they were "fed up with all this." Hughes agreed. Norton repeated that the employees were crazy, stated that he had bills to pay, and left. (D&O 5; Tr 68-70.)

After Norton left, Cloutre arrived in her car and parked where she could observe the employees. She called employee Thornton, who carried a two-way radio, and asked what he was doing. Thornton replied, "[W]e [are] sitting back here waiting to talk to Larry." (D&O 5; Tr 130-31.)

Between 8:30 and 8:45 a.m., Cloutre telephoned Marquez and informed him that "the warehouse employees . . . [are] behind the warehouse sitting in the back of Bobbie's [Marshall's] truck." Marquez told Norton, who had joined him

inside the facility after having left the other warehouse workers, what Clouatre had said, and Norton reported that Marshall had called him the previous evening about attending a meeting, that he had been at the meeting and “[the employees] were all going on strike.” Norton added that he was not going on strike—“they [the employees] were going on strike, but he wasn’t doing it.” (D&O 5; Tr 28-30, 32, 284.)

Marquez asked if Norton knew why. Before Norton responded, Marquez stated, “it was probably about the fight that [Marshall] and [Clouatre] had gotten into.” (D&O 5; Tr 28-32.)

After learning of the strike, Marquez began loading the trucks. At about 9:45, Marquez returned to his office and, without making any effort to talk to the workers behind the warehouse or talk to Marshall by calling his phone, wrote out termination slips for all of the warehouse employees except Norton. (D&O 5; Tr 32-33, 346.) Each termination slip stated: “Did not call or show up for work on 7-28-05.” (D&O 5; GCX 4-8.) Hughes, the African-American furniture repairman, was terminated on the same basis, even though he “had no regular starting time and was [only scheduled] to . . . report[] [that day] at noon.” (D&O 7.)

During this time, the employees continued to discuss their concerns behind the warehouse and Marshall sought to get them organized so that when they talked to Marquez, they would “know what to say, not to get hostile or anything like that

. . . because basically some of them were really kind of teed off about [events].”

(D&O 5; Tr 74.)

Employee Robinson left the meeting at some point about 10 a.m., and went to the warehouse office alone. He spoke with Marquez, who informed him that he was giving him a pink slip and that the remaining warehouse employees had also been terminated. Robinson returned to the group and informed them that they had been terminated. Marshall and the remaining employees went to the warehouse office and retrieved their termination notices. Employees Thornton and Marshall III sought to speak with Marquez, but were denied entry to his upstairs office by his secretary. (D&O 6; Tr 34-35, 75-76, 136.)

II. THE BOARD’S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Battista, Members Kirsanow and Walsh) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging employees Bobbie Marshall Jr., Freddie Hughes, Reginald Austin, Derrick Thornton and Bobbie Marshall III because they engaged in a lawful strike to protest their working conditions.² (D&O 8.)

² Lionel Robinson was rehired by the Company and is not part of this case. (D&O 6; Tr 356-57.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights (29 U.S.C. § 157). Affirmatively, the Board's Order requires the Company to offer the employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent ones, without prejudice to their seniority or any other rights, to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, and to expunge from its files any reference to the unlawful discharges of the employees. In addition, the Board's Order requires the posting of an appropriate notice. (D&O 8.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company discharged five African-American employees, who were collectively discussing their grievances behind the Company's warehouse, because they were participating in strike activity that is protected by Section 7 of the Act (29 U.S.C. § 157). The evidence supporting that finding is for the most part undisputed. That is, it is undisputed that employees discussed their concerns about perceived racial favoritism or discrimination. Those concerns ultimately led to those employees' meeting at the start of the work day outside the Company's warehouse on July 28. Instead of timely reporting to work, the African-American warehouse employees

discussed how to present their concerted complaint about racial favoritism or discrimination to Marquez, the president of the Company.

The Company's lone white warehouse employee declined to join the African-American employees in their strike. Instead, he reported their strike to Marquez. Upon receiving this information, Marquez immediately ordered that termination slips be prepared for the striking employees, each of which stated that the employee was discharged because of his failure to "call or show up for work on 7-28-05." Thus, Marquez terminated them because he learned they were on strike.

Because the activity which prompted the Company to discharge the employees was protected concerted activity, and because that was the reason the Company discharged the employees, the Board properly found that the discharges violated the Act. This is so without regard to whether the Company had specific intent to discriminate against the employees because of their protected concerted activity. Moreover, the law is also settled that employees are not required to seek prior redress of their grievances before resorting to a strike.

As for the Company's contention that one of the discharged employees, Bobbie Marshall, Jr., was not entitled to the protections of Section 7 of the Act because he was a supervisor, the Board disagreed. The Board concluded, mostly on credibility and burden of proof grounds, that the Company had not established that Marshall was a supervisor. In particular, the Board did not credit any of the

evidence that the Company relied on to support its claim that Marshall had the power to hire, fire or discipline employees. And because the Company did not challenge those credibility findings before the Board, it is not entitled to have this Court consider the issue.

The only remaining issue regarding Marshall's supervisory powers concerns his alleged power to assign employees. However, the evidence showed that, at most, Marshall had the power to make isolated, *ad hoc* assignments of employees to discrete tasks. Even in this regard, Marshall did not exercise independent judgment with regard to those assignments. Rather, those assignments were dictated by the volume of deliveries that the warehouse was required to handle that day. Under *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), 2006 WL 2842124—and the Company does not dispute that *Oakwood* sets forth the appropriate test—this does not constitute exercise of a supervisory authority to assign.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING FIVE AFRICAN-AMERICAN EMPLOYEES BECAUSE THEY ENGAGED IN A BRIEF STRIKE TO FORMULATE AND PRESENT GRIEVANCES REGARDING RACIAL FAVORITISM OR DISCRIMINATION

A. Applicable Principles and Standard of Review

Section 7 of the Act (29 U.S.C. § 157) guarantees employees the right to engage in “concerted activities” not only for self-organization, but also “for the purpose of . . . mutual aid or protection” That right is protected by Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” Accordingly, an employer violates Section 8(a)(1) of the Act by discharging employees for engaging in concerted activities protected by the Act. *Reef Indus., Inc. v. NLRB*, 952 F.2d 830, 835-36 (5th Cir. 1991); *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 263-64 (D.C. Cir. 1993).

The Supreme Court has stated that the statutory term “mutual aid or protection” should be liberally construed to protect concerted activities directed at a broad range of employee concerns. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563, 563-68, and 567 n.17 (1978). Concerted activities by employees are protected by

Section 7 “if they might reasonably be expected to affect terms or conditions of employment.” *Brown & Root, Inc. v. NLRB*, 634 F.2d 816, 818 (5th Cir. 1981).

The courts have long recognized that concerted activities directed toward changing or protesting supervisory conduct or racially discriminatory conditions are protected by the Act. *See NLRB v. Leslie Metal Arts Co., Inc.*, 509 F.2d 811, 813-14, 816 (6th Cir. 1975) (walkout in protest of supervisor’s failure to control threats and harassment protected); *NLRB v. Vought Corporation-MLRS Sys. Div.*, 788 F.2d 1378, 1382-83 (8th Cir. 1986) (and cases cited) (employee’s remarks proposing concerted activity over perceived racial discrimination were protected).

It is well-settled that the Act gives organized and unorganized employees alike the right to strike. *See NLRB v. Washington Aluminum*, 370 U.S. 9, 14 (1962). That right is expressly embodied in Section 13 of the Act (29 U.S.C. § 163), which provides that: “Nothing in this Act . . . , except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.” Indeed, strikes by employees to effect a change in their working conditions are “objective manifestation[s] of group will” (*JMC Transport, Inc. v. NLRB*, 776 F.2d 612, 618 (6th Cir. 1985)) and represent concerted activity in its “classic” form. *Sutherland v. NLRB*, 646 F.2d 1273, 1274 (8th Cir. 1981). Unless a strike is unlawful, violent, in breach of contract, or “indefensible,” it is entitled to

the protection of the Act. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 17 (1962). *Accord Johnnie Johnson Tire Co., Inc.*, 271 NLRB 293, 294-96 (1984) (brief work stoppage by unorganized employees to challenge a pay cut was protected), *enforced*, 767 F.2d 916 (5th Cir. 1985).

An employer that discharges employees for participating in a lawful strike violates Section 8(a)(1) of the Act, regardless of its motive, because “the very conduct for which employees are disciplined is itself protected concerted activity.” *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981). *Accord Johnnie Johnson Tire Co., Inc.*, 271 NLRB 293 at 296 (noting that intent to interfere with protected concerted activities is not an element of a Section 8(a)(1) violation). *See also Salt River Water User’s Assn. v. NLRB*, 206 F.2d 325, 329 (9th Cir. 1953) (employer’s good-faith belief in legitimate cause for discharge that was in violation of Section 8(a)(1) of the Act was “not material where the activity for which [the employee] was discharged was actually protected by the Act[.]”).

The issue before this Court is whether substantial evidence supports the Board’s findings. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Dynasteel Corp. v. NLRB*, 476 F.3d 253, 257 (5th Cir. 2007). This Court does “not make credibility determinations or reweigh the evidence.” *NLRB v. Allied Aviation Fueling*, 490 F.3d 374, 378 (5th Cir. 2007). It will overturn the Board’s credibility findings only if they are “self-contradictory.” *Reef Indus., Inc. v. NLRB*, 952 F.2d

830, 837 (5th Cir. 1991). We show below that the Board's finding that the employee strike was protected concerted activity is supported by substantial evidence and that the Company's defenses are without merit.

B. Substantial Evidence Supports the Board's Finding that the Company Discharged Employees Because of their Protected Concerted Activities

In this case, the Board found that the employees' meeting outside the Company's warehouse on July 28 to discuss a concerted presentation of their grievances to Marquez—instead of timely reporting to work—was a protected concerted strike. The Board also found that the Company discharged employees for that activity. Substantial evidence supports those findings, given that the underlying facts are basically undisputed.

Thus, the credited evidence shows, and it is undisputed, that the African-American warehouse employees perceived unfavorable or discriminatory treatment regarding working conditions from the Company's white management, and relative to white coworkers. For example, employees Marshall III and Austin were concerned about their lower wage rate relative to the starting wage of a former white employee. Austin also believed that Service Manager Clouatre discriminatorily assigned work to him and not to Norton, his white coworker.

The record shows that such concerns led directly to the employees' July 28 strike. Thus, employees' concerns about discriminatory treatment crested on July

26 and 27, the day before their strike. On the former date, Marshall and Austin became upset because Marquez threatened to hold the warehouse employees, but not Clouatre, financially responsible for a chair that she had ordered discarded. The following day, the issue of favoritism arose again over a lost pouch of orders from a showroom. An argument between Marshall and Clouatre ensued, in which Marquez intervened on Clouatre's side. Marquez' intervention on behalf of Clouatre prompted Marshall to recall Marquez' threat from the day before. Marshall commented that it "looks like this Company is becoming one-sided." (D&O 3: Tr 197.) Austin agreed.³

Against this background, the African-American employees went out on strike on the morning of July 28. Instead of reporting for work, they met outside the warehouse to decide how to present their complaints regarding the Company's "one-sided" management. There is no dispute that the employees agreed that they

³ The Company incorrectly argues (Br 22-23) that the employees could not have been engaged in protected activity because any complaints they had concerned their dislike for Clouatre and she was not their supervisor. That argument simply ignores the uncontested, credited evidence of the employees' abiding concern with management's perceived display of racial favoritism. The Company's argument also ignores that Clouatre was in a position to, and did, affect warehouse employee working conditions. After all, she gave assignments to Marshall and Austin and dealt with employees about customer complaints. Thus, even assuming she was not a supervisor of warehouse employees, they nonetheless had a right to protest, and did protest, the effect of her conduct on their working conditions.

had to present their concerns about favoritism and discriminatory treatment to Marquez.

It is also undisputed that prior to the employees' planned presentation of grievances, Marquez learned from Norton of the African-American employees' strike, and believed that the employees' action was in part due to the confrontation he and Clouatre had with Marshall and Austin the day before. (D&O 5; Tr 284.) In immediate response to that news, Marquez directed the preparation of termination slips for each of the strikers for "not call[ing] or show[ing] up for work on 7-28-05." (D&O 5; GCX 4-8.)

In these circumstances, the Board was fully warranted in finding that "the very conduct for which employees [were] disciplined is itself protected concerted activity." (D&O 1 n.2 (citation omitted).) That finding, as the Board reasonably concluded (D&O 1 n.2), dispenses with any need to inquire into the Company's motive for the discharges. Moreover, as the Board also found (D&O 1 n.2), the Company has not alleged, nor does the record support, any claim that the employees did anything to lose the protection of the Act when they briefly withheld their services in order to discuss the presentation of grievances.⁴ *See*

⁴ Thus, this case cannot be compared to such cases as *Vemco, Inc. v. NLRB*, 79 F.3d 526, 530 (6th Cir. 1996)—cited by the Company (Br 21)—in which the employees actually engaged in an unprotected work stoppage.

NLRB v. Washington Aluminum Co., 370 U.S. 9, 17 (1962). *Accord Johnnie Johnson Tire Co., Inc.*, 271 NLRB 293, 294-96 (1984), *enforced* 767 F.2d 916 (5th Cir. 1985). *But cf. Columbia Portland Cement Co. v. NLRB*, 915 F.2d 253, 258-59 (6th Cir. 1990) (employee who attacked nonstriking employee with baseball bat lost protection of Act).

The cases cited by the Company (Br 24) do not support its argument that motive is an essential element of the violation in the circumstances of this case. Both of those cases—*NLRB v. Brown*, 380 U.S. 278, 283 (1965) and *Edgewood Nursing Center, Inc. v. NLRB*, 581 F.2d 363, 368 (3d Cir. 1978)—recognized that an employer’s motive can be a central issue in other circumstances. Here, however, the Company admits that it discharged the employees for their activity on July 28. As just shown, the Board had ample reason to find that the employees’ activity on July 28 constituted a protected strike. Accordingly, the Company violated Section 8(a)(1) of the Act by discharging the employees for engaging in that protected strike.

The Company fares no better in arguing (Br 25) that Marquez had no knowledge of the “protected nature of the meeting.” As the Board pointed out (D&O 7 (some internal citations omitted)): “Marquez knew that employees were behind the warehouse, and he had been told that they were going on strike[,]” that the employees “were back there waiting to talk to [him,]” and that “the employees’

action related to the argument the previous day.” Indeed, had Marquez not been acting in response to the employees’ protected concerted activity behind the warehouse, there is no way his terminations for failure to report for duty would have included Hughes who, as the Board noted (D&O 7), was not required to report until noon. In short, substantial evidence supports the Board’s finding that the Company knew about the employees’ protected concerted activity and the law does not require more. *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14-15 (1962).

Finally, the Company does not advance its case by arguing (Br 27-30) that the employees sought to conceal their activity from management. As the Board noted (D&O 7), “it is clear that, even if the purpose of the [strike] is not clearly communicated to the employer at the time, if from surrounding circumstances the employer should reasonably see that improvement of working conditions was behind the [strike], it may not penalize employees involved without running afoul of Section 8(a)(1).” *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962) (noting “We cannot agree that employees necessarily lose their right to engage in concerted activities under §7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of §7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is

made[.]”). In any event, as the facts of this case plainly show, the employees were not attempting to conceal their activity or their goals.

C. The Company Did Not Show that Marshall Was a Supervisor

1. Applicable principles

Section 2(3) of the Act (29 U.S.C. § 152(3)) excludes from the definition of “employee” “any individual employed as a supervisor.” In turn, Section 2(11) of the Act (29 U.S.C. § 152(11)) defines the term supervisor as:

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

Accordingly, individuals are statutory supervisors “if (1) they have the authority to engage in any 1 of the 12 listed supervisory functions, (2) their ‘exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,’ and (3) their authority is held ‘in the interest of the employer.’” *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001) (citation omitted). In *Kentucky River*, the Supreme Court held that, with respect to independent judgment, “[i]t falls clearly within the Board’s discretion to determine, within reason, what scope of discretion qualifies.” *Id.* The burden of demonstrating employees’ Section 2(11) supervisory status rests with the

party asserting it. *Id.* at 711. *Accord Dynasteel Corp. v. NLRB*, 476 F.3d 253, 257-58 (5th Cir. 2007). As with other fact-specific issues, the Court upholds the Board's supervisory determination if it is supported by substantial evidence. *See NLRB v. Big Three Indus. Equip. Co.*, 579 F.2d 304, 309 (5th Cir. 1978) (acknowledging the Board's expertise in evaluating "the infinite gradations of authority within a particular industry"). *Accord NLRB v. McEver Engineering, Inc.*, 784 F.2d 634, 643 (5th Cir. 1986).

The Supreme Court observed that, in enacting Section 2(11) of the Act, Congress sought to distinguish between truly supervisory personnel, who are vested with "genuine management prerogatives," and employees, such as "straw bosses, leadmen, and set-up men, and other minor supervisory employees," who are to enjoy the Act's protections even though they perform "minor supervisory duties." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (citation omitted). The Board and courts decline to construe Section 2(11) "too broadly because the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect." *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985), *enforced in relevant part*, 794 F.2d 527 (9th Cir. 1986). *See also Beverly Ent.-Mass. v. NLRB*, 165 F.3d 960, 963 (D.C. Cir. 1999). As shown below, judged by these principles, the Company failed to meet its burden of showing that Marshall possessed any genuine supervisory powers.

2. Marshall did not possess any genuine supervisory powers

In this case, the Company contends (Br 20) that Marshall should be deemed a supervisor assertedly because “[h]e had the authority to hire, fire, assign, and discipline the warehouse workers.” However, based on the credited evidence, the administrative law judge, in his initial decision, found (D&O 10) that the Company failed to show that “Marshall possessed or exercised the authority to hire, discharge, or discipline employees.” The Company did not file any exception to the judge’s credibility findings with the Board. That failure is particularly noteworthy in this case because the judge reaffirmed his credibility findings in his supplemental decision (D&O 10 n.2) and the Company again neglected to file any exception to those findings.⁵ Moreover, it elected to proceed on remand of the supervisory issue without further hearing. In these circumstances, the Company’s failure to except to the judge’s credibility findings deprives this Court of

⁵ Thus, the judge explicitly observed (D&O 10 n.2) that he “did not credit the testimony of either President Larry Marquez or employee Pierre Jones [regarding Marshall’s alleged authority to hire or discipline].” The judge supported that finding by noting that “[Marquez] produced no documentation in support of that testimony [that Marshall hired employees], and he named no employee purportedly hired by Marshall.” The judge also did not credit “the bare assertion of employee Pierre Jones that Marshall hired him [. . . because] [h]is assertion was unaccompanied by any details, and he did not state who informed him of his pay rate.” As the judge further found (*id.*) “although the Company ‘purported to issue discipline in Marshall’s name . . . Marshall was unaware of that fact and did not issue the discipline.’ All discipline since 2003 was issued under the signature of Service Manager Crystal Cloutre.”

jurisdiction to consider any challenge to them in this proceeding. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)); *Raven Services Corp. v. NLRB*, 315 F.3d 499, 508 (5th Cir. 2002); *Gulf States Mfg. Inc. v. NLRB*, 704 F.2d 1390, 1396 (5th Cir. 1983).

In any event, even before this Court, the Company does not directly challenge those credibility findings. It merely advances the same evidence that the Board discredited. Thus, even apart from Section 10(e), this Court should reject the Company's back door effort to overturn the Board's credibility findings because it does not even attempt to meet the high standards this Court has set for rejection of such findings—that is, proof that those findings are “self-contradictory.” *See Reef Indus., Inc. v. NLRB*, 952 F.2d 830, 837 (5th Cir. 1991).

Against this background, the only 1 of the 12 supervisory authorities that the Company has preserved for Court review is its allegation (Br 14-17) that Marshall used independent judgment in assigning employees. In *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), 2006 WL 2842124, the Board spelled out what the supervisory authority to assign entails. Specifically, the Board held that the authority to assign refers to: “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant over-all duties, i.e., tasks, to an employee[.]” 2006 WL 2842124 at *4. The Board emphasized that “to ‘assign’

for purposes of Section 2(11) refers to the . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task.” *Id.* at *5. The Company acknowledges (Br 14) that *Oakwood* sets forth the appropriate test for determining whether an individual exercises the supervisory authority to assign employees.

The Company’s claim that Marshall had the authority to assign employees is predicated on Marshall’s purported authority to schedule employees, to assign them to breaks, and to assign them to different jobs. As shown below, the evidence in support of each of these assertions is thin.

Initially, it is clear, as the Board found (D&O 11), that “[t]he evidence does not support” the argument that Marshall had scheduling authority. Rather, the record shows only one instance of a schedule change, when the Company temporarily scheduled all Thursday deliveries for the afternoon. However, as the

Board observed (D&O 11; Tr 101-02) Marquez made that schedule change, so it hardly supports Marshall's possession of the scheduling power.⁶

In any event, as the Board further found (D&O 11), even assuming that Marshall had some scheduling authority, the Company did not show that such a decision would have required the exercise of "independent judgment." Rather, as the Board noted (D&O 11), such decisions would have been "predicated upon the 'amount of deliveries[.]'" It is settled that the assignment of tasks in accordance with "such obvious factors as whether an employee's workload is light, does not require sufficient exercise of independent judgment to satisfy the statutory definition." *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002) and cases cited therein.

The other evidence of Marshall's assignment authority that the Company relies on consists of a single incident when Marshall told Austin to take a break and another when Marshall told Norton, normally a driver helper, that he was

⁶ As to other alleged evidence of Marshall's power to schedule employees, the Board gave that testimony no credence. (D&O 11.) That credibility determination applies to Marquez' direct testimony and Jones' indirect testimony that Marshall could schedule employees' "without checking with Marquez first." (Br 15, Tr 253.) With respect to the latter's testimony, as the judge found (D&O 11), "Jones was in no position to know whether it was Marshall's 'call' or whether he was simply relaying instructions." As noted the Company did not except to the judge's credibility findings, so it has no business trying to relitigate those findings before this Court.

assigned to the warehouse. (Tr 56, 186, 269.) In addition, the Company seeks to rely on the testimony of former employee Pierre Jones, who was rehired prior to the hearing, concerning Marshall's purported supervisory authority. The Board considered those instances of Marshall's alleged exercise of supervisory assignment power under the *Oakwood* standard and reasonably found that those instances did not demonstrate the exercise of genuine supervisory power.⁷

As the Board noted (D&O 11), even assuming that Marshall made such assignments, they were isolated, *ad hoc* designations. As such, those assignments do not reflect Marshall's "designation of significant overall duties to an employee . . . [rather than an] ad hoc instruction that the employee perform a discreet task." *Oakwood*, 2006 WL 2842124 at *4. The record fully supports that finding.

Thus, the record shows that, despite Austin's working with Marshall on a daily basis from Austin's hiring in 2001 (Tr 178), the Company can only point to a single incident—when Marshall told Austin to take a break—as evidence of Marshall's alleged assignment of him. Similarly, the Company points to only one assignment of Norton. In that one incident, Marshall told Norton that he was assigned to work in the warehouse rather than assist on a truck. As the Board

⁷ The Company contends (Br 16) that Marshall "admitted" that he had the authority to assign employees to breaks. However, that testimony (Tr 56, 101) refers to the single incident involving Austin, which is discussed below.

noted (D&O 11), however, the Company did not show “the circumstances surrounding this ad hoc assignment.” In particular, the Company failed to show “whether the driver whom Norton regularly assisted had any deliveries to make that day or whether the deliveries required an assistant.” (D&O 11.)

Similarly, the Company failed to show that Marshall had any genuine assignment power over driver Jones. Although Marshall may have given Jones a “one time assignment in 2004 . . . to sweep up . . . in the warehouse before leaving on his route[,]” Jones refused to carry it out, and instead “chose to go home.” (D&O 11; Tr 254-55, 259, 261-62.) As the Board found (D&O 11), Jones did not suffer any adverse consequences for abandoning his job. And, more important in terms of Marshall’s possession of alleged supervisory responsibilities, Marshall was not held accountable for Jones’ failure to carry out the assignment. *See Oakwood*, 2006 WL 2842124 at *8 (“[T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.”). *Accord Golden Crest Healthcare Center*, 348 NLRB No. 38 (2006), 2006 WL 2842125 at *7. Here, as the Board reasonably found (D&O 12), “there is no

evidence that Marshall was held accountable for the actions of the employees that he purportedly supervised.”

In these circumstances, the Board was warranted in finding that (D&O 10) “there is no evidence that Marshall, other than in the context of an ad hoc assignment [one to Austin, another to Norton, and a third to Jones], designated an employee to a place, appointed an employee to a time such as a shift or overtime period, or gave significant overall duties.” Absent such evidence, the Board correctly concluded that Marshall was not a supervisor. *See Dynasteel Corp. v. NLRB*, 476 F.3d 253, 258 (5th Cir. 2007) (noting that such instructions are “routine or clerical in nature” and not sufficient indicia of supervisory power). *Accord NLRB v. McEver Engineering, Inc.*, 784 F.2d 634, 643 (5th Cir. 1986) (same).

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full and denying the Company's petition for review.

ROBERT J. ENGLEHART
Supervisory Attorney

CHRISTOPHER W. YOUNG
Attorney
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2978
(202) 273-2988

RONALD MEISBURG
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

JOHN H. FERGUSON
Associate General Counsel

LINDA DREEBEN
Deputy Associate General Counsel

National Labor Relations Board
January 2008