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Network Dynamics Cabling, Inc. and International Brotherhood of Electrical Workers, Local 98, AFL-CIO. Cases 4-CA-30474, 4-CA-31007, 4-CA-31194, 4-CA-31198, and 4-CA-31472

December 31, 2007

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND
KIRSANOW

On April 10, 2003, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

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

The Board has considered the decision and record in light of the exceptions and briefs, and has decided to adopt the judge's rulings, findings¹ and conclusions only to the extent consistent with this Decision and Order.

For the reasons stated by the judge, we affirm the judge's findings that the Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees David Hughey in June 2001,² Brian Tandarich on January 8 and 15,

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

² We correct the judge's apparently inadvertent dismissal, in footnote 10 of the judge's decision, of paragraph 5(a) of the complaint in Case 4-CA-30474. Footnote 10 incorrectly states that paragraph 5(a) alleges as unlawful a remark that Respondent's Director of Operations Todd Stevenson made to Hughey about Union Business Agent Raymond Della Vella. In fact, paragraph 5(a) alleges as unlawful the inter-

rogation of Hughey (affirmed above) and a promise of benefits to Hughey (discussed below).

2002, and James Korejko on May 14, 2002.³ We resolve the remaining issues in this case as set forth below.

The Respondent, Network Dynamics Cabling, Inc. (NDC), installs low-voltage cabling at its customers' places of business. In 2001 and 2002, the Union, IBEW Local 98, undertook an effort to persuade employees of the Respondent to join Local 98. In connection with the Union's effort, some of the Respondent's employees engaged in union activity. The allegations in this case flow from the Respondent's actions relative to its employees' Section 7 conduct.

I. ALLEGATIONS INVOLVING DAVID HUGHEY

A. Facts

In May and June 2001, the Respondent's crew working at a United Parcel Service (UPS) facility—including, as relevant here, David Hughey and Brian Tandarich—met twice with Union Business Agent and organizer Raymond Della Vella. Hughey telephoned Della Vella after the second meeting and told him that he wanted to become involved with the Union as an organizer. On or about June 16, Hughey began wearing a Local 98 cap to work, and the Union notified the Respondent that Hughey was a volunteer organizer. On or about June 20, Hughey placed union handbills on the tables in a cafeteria/break room that was used by employees of both NDC and UPS. The next day, Hughey showed union handbills to Tandarich and three other employees as they drove to work. When they arrived at the UPS site, Tandarich took some of the handbills to the UPS security office. A UPS security employee told Tandarich that UPS did not want Hughey to work on its property. Tandarich called Director

rogation of Hughey (affirmed above) and a promise of benefits to Hughey (discussed below).

³ Member Schaumber finds it unnecessary to pass on this allegation as it is cumulative of similar findings of unlawful interrogation here, and finding this additional violation would not materially affect the remedy.

of Operations Todd Stevenson and told him what had happened. Stevenson told Tandarich to bring Hughey to the Respondent's West Chester office.

When Hughey arrived at the office, he saw one of his handbills on Stevenson's desk. Stevenson asked him, "Why are you doing this?" Hughey replied that the Union provided better benefits and pay rates, and that he wanted to advance quickly. Stevenson told Hughey that the Respondent was willing to put Hughey on the fast track to a supervisory position. Stevenson produced a list of qualifications for such positions and went over the list with Hughey. He told Hughey he was going to let him run small projects to see how he was with the crews, and that he would move up Hughey's reviews. He then offered Hughey a pay increase of two dollars per hour. Hughey said he needed to discuss the matter with his wife, and Stevenson replied that with a commitment from Hughey, he (Stevenson) would commit to Hughey's becoming a supervisor and would put the promise in writing.

The next day, Hughey returned to and worked at the UPS site. The following day, the Respondent transferred Hughey to a job in Allentown, and subsequently, to a job in Wilkes-Barre. Hughey's commute to the Allentown and Wilkes-Barre jobsites took more than 2 hours. His commute to the UPS jobsite took 45 minutes.

On July 16, Stevenson and Operations Manager Mark Bianco asked employee James Korejko⁴ to keep an eye on Hughey and to report to them if anyone from the Union showed up at the jobsite.⁵ That same month, Hughey approached Stevenson with a handful of union handbills and threw them in the trash. Steven-

son said, "I guess you made your decision," and Hughey responded that he had. Stevenson told Hughey he would talk to Respondent's accountant to process Hughey's raise.⁶

B. Discussion

1. Offer of wage increase and promotion

The complaint alleged that the Respondent's offer to Hughey of a wage increase and promotion violated Section 8(a)(1). The judge dismissed this allegation, finding that the Respondent had established "a legitimate reason for offering Hughey a wage increase, i.e., retaining him as an employee." The General Counsel excepts. We reverse.

An allegation that an employer has violated Section 8(a)(1) by making a promise of benefits in response to union organizational activity is analyzed under *NLRB v. Exchange Parts*, 375 U.S. 405 (1964), regardless of whether the union has filed a petition for an election. See, e.g., *Hampton Inn NY—JFK Airport*, 348 NLRB No. 2, slip op. at 2 (2006). We conclude that *Exchange Parts* properly applies here as well, even though the Union's immediate goal apparently was to enlist individual employees of the Respondent rather than to secure recognition from NDC.⁷ Although 8(a)(1) allegations are typically analyzed under an objective standard, and motive is irrelevant, see *American Freightways Co.*, 124 NLRB 146, 147 (1959), the 8(a)(1) analysis under *Exchange Parts* is motive-based. See *Hampton Inn NY—JFK Airport*, supra, slip op. at 3 fn. 6. Thus, we must determine whether the record evidence as a whole, including any proffered legitimate

⁶ Hughey resigned his employment with NDC before his raise could be processed. He testified that he resigned because of the travel time involved in commuting to his new assignments, coupled with the fact that he was constantly moving between sites.

⁷ These goals are certainly not incompatible. A union effort to persuade individual employees of a nonsignatory employer in the construction industry to join the union, quit, and take employment with a union employer exerts economic pressure on the nonunion employer to recognize the union and sign an 8(f) agreement.

⁴ Korejko's title was "Supervisor." The parties stipulated that NDC employees with the title of "Supervisor" are not statutory supervisors.

⁵ The judge found that this instruction to spy on and report Hughey's union activity violated the Act. There are no exceptions to this finding.

reason for the wage increase and promotion offer to Hughey, supports an inference that the offer was motivated by an unlawful purpose to coerce or interfere with Hughey's protected union activity. See, e.g., *Royal Manor Convalescent Hospital*, 322 NLRB 354, 361 (1996), enfd. mem. 141 F.3d 1178 (9th Cir. 1998).

We find that the record does support such an inference. The immediate occasion of the meeting at which the offer was extended was the Respondent's discovery that Hughey was distributing union handbills. Stevenson started the meeting by asking Hughey why he was doing so.⁸ Hughey responded that the Union provided better benefits and pay rates, and that he wanted to advance quickly. The judge found that this response informed Stevenson that Hughey intended to quit his job with NDC, and that Stevenson's subsequent offer of a promotion and wage increase was motivated by the legitimate reason of seeking to induce Hughey to stay with NDC. But Hughey did not expressly threaten to quit. He stated a desire to work under union terms. That desire could be fulfilled by NDC becoming a signatory contractor as well as by Hughey quitting NDC and going to work at a union shop.⁹ Therefore, we reverse the judge's finding that Hughey either expressly or impliedly informed Stevenson that Hughey intended to quit his job with the Respondent.

Moreover, 2 days later, the Respondent imposed on Hughey a burdensome commute by transferring him to a distant jobsite. That is not what one would expect of an employer seeking to induce an employee to stay with the com-

pany. Subsequently, the Respondent instructed employee Korejko to spy on Hughey and report whether anyone from the Union showed up at Hughey's jobsite. In sum, the totality of the Respondent's conduct toward Hughey suggests a classic carrot-and-stick effort to coerce him to abandon his union activities and sympathies, coupled with surveillance to determine whether its effort was succeeding. Based on the record as a whole, we infer that the Respondent's offer to Hughey of a wage increase and promotion was coercively motivated and violated Section 8(a)(1).

2. Transfer of Hughey from the UPS jobsite

The judge found that the Respondent violated Section 8(a)(3) by transferring Hughey from the UPS site because of Hughey's union activity. In so finding, the judge assumed that, as the Respondent claimed, Hughey was transferred at the demand of UPS; but even assuming that was so, the judge found that the transfer was unlawful under *Southern Services*, 300 NLRB 1154 (1990), enfd. 954 F.2d 700 (11th Cir. 1992).¹⁰ We agree with the judge's conclusion that the transfer was unlawful, but we disagree with his assumption that NDC was merely carrying out the wishes of UPS.

First, to the extent that UPS expressed a desire that Hughey be removed from the jobsite, it was NDC that instigated UPS to do so: Tandarrich, who was in charge of the NDC crew at the UPS site, took some of Hughey's union hand-

⁸ We have adopted the judge's finding that, under the totality of the circumstances, this question violated Sec. 8(a)(1). For the reasons discussed in his partial dissent, Member Schaumber disagrees.

⁹ The judge found that the Union was not seeking to make NDC a signatory contractor, but simply to convince NDC employees to leave NDC, join the Union, and take employment with a union contractor. As stated above, however, even assuming that was the Union's immediate goal, it was consistent with a goal of pressuring NDC to become a signatory contractor.

¹⁰ In *Southern Services*, supra, the Board held that employees who regularly and exclusively work on the premises of an employer other than their own, and who distribute union literature to fellow employees on those premises when they are on the property pursuant to their employment relationship, enjoy rights under *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), and thus have a protected right to engage in such distribution on nonworking time in nonworking areas unless the distribution is shown to interfere with production or discipline. *Southern Services* has been called into question by the Court of Appeals for the District of Columbia Circuit. See *New York New York, LLC v. NLRB*, 313 F.3d 585 (D.C. Cir. 2002). As explained below, we reject as pretextual the Respondent's claim that it transferred Hughey at UPS's direction. Accordingly, we find it unnecessary to pass on the judge's application of *Southern Services* or to address the D.C. Circuit's critique of that decision.

bills to the UPS security office. Second, the request to remove Hughey came from an employee in the security office; there is no evidence that anyone in UPS management, or even a UPS supervisor, ever instructed NDC to remove Hughey from the jobsite. Third, when Stevenson met with Hughey (and, as we have found, unlawfully interrogated him and promised him a wage increase and promotion), he said nothing about removing him from the UPS site, let alone removing him at the insistence of UPS. Fourth, and most significantly, the day after the UPS security employee told Tandarich that UPS did not want Hughey working on the property, the Respondent nonetheless returned Hughey to the UPS jobsite. The *following* day, it transferred Hughey to the Allentown job; but there is no evidence that it did so in response to a reiterated demand from UPS.

Based on all of these circumstances, we find pretextual the Respondent's claim that it transferred Hughey because UPS told it to do so. We find, on the contrary, that NDC itself decided to transfer Hughey, and that it did so as part of its carrot-and-stick effort, discussed above, to induce Hughey to abandon the Union. Thus, the General Counsel demonstrated that Hughey's union activity was a motivating factor in the transfer decision by showing that Hughey engaged in such activity, the Respondent knew as much, and the Respondent harbored animus against that activity; and the Respondent failed to show that it would have transferred Hughey even in the absence of his union activity. Accordingly, on this basis, we affirm the judge's finding that Hughey's transfer violated Section 8(a)(3).

II. ALLEGATIONS INVOLVING BRIAN TANDARICH

At the time of the events at issue here, Brian Tandarich held the position of Senior Supervisor. In that position, he was in charge of the Respondent's crew at the UPS site. He at-

tended the meetings with Della Vella in May and June 2001, referenced above.

A. Tandarich's Alleged Supervisory Status

In his role as crew chief, Tandarich directed employees to some extent. Because the judge's decision predated the Board's decision in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (2006), the judge did not apply the accountability test the Board adopted in *Oakwood* to determine whether Tandarich possessed the authority *responsibly* to direct. See *Oakwood*, *supra*, slip op. at 5-7. We find it unnecessary, however, to remand for a determination on that issue because, even assuming Tandarich possessed such authority, the Respondent failed to show that his direction of employees entailed the exercise of independent judgment. The judge found that there was no evidence that Tandarich considered the relative skills of employees in shifting them from one task or crew to another. We affirm that finding, and accordingly conclude that Respondent did not meet its burden to prove that Tandarich's direction of employees "r[ose] above the merely routine or clerical." *Id.*, slip op. at 8; see also *Croft Metals, Inc.*, 348 NLRB No. 38, slip op. at 6 (2006) (finding that employer failed to meet its burden of proof as to independent judgment where it "adduced almost no evidence regarding the factors weighed or balanced by the lead persons in making production decisions and directing employees"). Thus, we affirm the judge's finding that Tandarich was not a supervisor under Section 2(11) of the Act.¹¹

¹¹ In *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), the Supreme Court rejected the Board's then-extant interpretation of "independent judgment" to exclude the exercise of "ordinary professional or technical judgment in directing less skilled employees to deliver services." The Court held that it is the *degree* and not the *kind* of discretion involved in exercising a Sec. 2(11) supervisory authority that determines whether it has been exercised with independent judgment. 532 U.S. at 714. We are concerned that the judge may have committed the error that the Supreme Court corrected in *Kentucky River* when he stated that "an individual does not necessarily become a supervisor in situations in which his authority to direct employees emanates solely from his skill or experience." Thus, in finding that the

B. Tandarich's Discharge

We have affirmed, above, the judge's findings that the Respondent violated Section 8(a)(1) by coercively interrogating Tandarich on January 8 and 15, 2002. Those interrogations form the backdrop of the Respondent's discharge of Tandarich on January 16. Thus, we review them briefly here.

After the Union filed a charge with the Region concerning the transfer of David Hughey from the UPS jobsite, the Respondent's attorney, Christopher Murphy, interviewed Tandarich on October 15, 2001, in connection with the charge and secured an affidavit from him. The following month, Tandarich contacted Union Business Agent Della Vella and asked if he could join the Union. On January 8, 2002, Murphy met again with Tandarich and sought his cooperation in executing a supplemental affidavit concerning the Hughey matter. Tandarich protested that he did not want to be involved, but to no avail.¹² Tandarich requested

Respondent failed to show that Tandarich exercised independent judgment in directing employees, we place no reliance on the judge's statement.

¹² In finding Murphy's January 8 interrogation of Tandarich lawful, our dissenting colleague relies in part on the affidavit's recitation of the safeguards required under *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964). But reciting the safeguards is not enough where, as here, the evidence shows that one of them was not, in fact, provided. *Johnnie's Poultry* requires, among other things, that the employer obtain the interviewed employee's participation on a voluntary basis. Our colleague says that there is no record evidence of Tandarich's protests. Murphy himself testified, however, that early in the interview, Tandarich "expressed his unwillingness to be involved in the case." Murphy brushed aside Tandarich's protestations because he believed that Tandarich was a supervisor. Indeed, Murphy tacitly acknowledged that the lawfulness of his questioning depended on Tandarich's supervisory status, telling Tandarich that he (Murphy) would not be able to speak to Tandarich if Tandarich were a technician. Our colleague also disagrees with the judge's finding that Murphy "continued to seek [Tandarich's] signature on an affidavit" because Tandarich testified that he had no recollection that Murphy tried to force him to sign the affidavit on January 8. Our colleague reads the judge's finding too literally. There was no affidavit for Tandarich to sign on January 8; Murphy told Tandarich that it would be put together within a few days. But we agree with the judge that Murphy continued to seek Tandarich's signature, in the sense that Murphy continued to question him with a view to preparing a supplemental affidavit for Tandarich's signature, despite Tandarich's expressed unwillingness to be involved. In doing so, the Respondent violated Sec. 8(a)(1).

that he be permitted to review the affidavit when it was completed, and Murphy agreed.

On January 15, Murphy's associate, attorney Michael Lignowski, met with Tandarich and Tandarich's father at a Bob Evans restaurant. Lignowski gave Tandarich and his father a copy of the draft supplemental affidavit. After some discussion, Tandarich got up and left the table, affidavit in hand. He returned without the affidavit, wearing a Local 98 cap. Lignowski asked him where the affidavit was, and Tandarich replied that Local 98 had it. In fact, Tandarich had given it to Della Vella, who was waiting in the restaurant lobby.

The next day, Director of Operations Stevenson called Tandarich into his office. Stevenson told him that he had heard about "the little incident you did last night," and said that the company had been loyal to him and that there were witnesses who saw Tandarich talking to Della Vella on company time. Stevenson then told Tandarich he was fired. Stevenson added, "Don't be surprised if you see something in the mail," and that the Union and the NLRB could not protect him.

We affirm the judge's finding that Tandarich's discharge violated Section 8(a)(3). In so finding, the judge apparently analyzed the discharge under *Wright Line*.¹³ *Wright Line* applies where the employer's motivation for taking an adverse employment action is in dispute. Here, however, there is no dispute that the reason Tandarich was discharged was, as Stevenson put it, "the little incident you did last night," i.e., giving the affidavit to Della Vella. Thus, the sole issue is whether Tandarich, in doing so, enjoyed the protection of the Act. See, e.g., *Felix Industries*, 331 NLRB 144, 146

¹³ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The judge did not cite *Wright Line*. However, his finding that the General Counsel "satisf[ie]d [his] initial burden of showing antiunion animus and discriminatory motive" indicates that he was applying the *Wright Line* standard.

(2000), enf. denied on other grounds and remanded 251 F.3d 1051 (D.C. Cir. 2001).

We find that he did. Tandarich was entitled to a copy of his affidavit, and to share it with any individual he wished, including representatives of the Union. See *Gerbes Super Markets, Inc.*, 176 NLRB 11 (1969), enf. 436 F.2d 19 (8th Cir. 1971). In *Gerbes*, as here, an employee was discharged for giving an affidavit prepared for him by the employer's attorney to a union representative. The Board found that the termination was unlawful, as the employee was entitled to refrain from assisting the employer's defense if he so wished. *Gerbes* is directly on point. Moreover, giving the affidavit to Della Vella plainly constituted union assistance, which is expressly protected by Section 7 of the Act.

We are not persuaded by the Respondent's assertion that the statement was confidential. The affidavit purported to be Tandarich's statement. What Tandarich had to say about the Hughey matter could not have been confidential to the Respondent, as Tandarich had it in his power to disclose what he knew about that incident to anyone he wished. In addition, Lignowski gave the affidavit to Tandarich *and Tandarich's father*. Thus, even assuming the affidavit was confidential up to that point, the Respondent waived any confidentiality.

We are also unpersuaded by the Respondent's comparison of Tandarich's act to handing over the team's playbook to the opposing team. The comparison is based on the Respondent's view, which we have rejected, that Tandarich was a statutory supervisor. As an employee protected under Section 7, Tandarich was entitled to choose not to assist the Respondent's defense against the Union's charge, and instead to assist the Union if he so desired. Although the Respondent may well have been displeased by Tandarich's decision to share the draft affidavit with the Union, his doing so was protected un-

der the Act. See *Gerbes*, supra at 14 ("Even assuming that [the employee] . . . engaged in misconduct by his refusal to surrender the document, this 'misconduct' was the outgrowth of a protected right and we do not view it as an impropriety of sufficient magnitude to place [the employee] beyond the protective shield of the Act.") (internal quotations omitted). Consequently, we affirm the judge's finding that the Respondent violated Section 8(a)(3) of the Act by discharging Tandarich.

Our dissenting colleague finds that Tandarich was lawfully discharged because his act of walking off with the affidavit was an act of insubordination. That finding misses the point. Tandarich was not discharged for walking off with the affidavit. He was discharged for giving the affidavit to Della Vella. Although Stevenson's allusion to "the little incident you did last night" was somewhat ambiguous in this regard, his added statements that the company had been "loyal" to Tandarich and that there were witnesses to Tandarich talking to Della Vella on company time leave no doubt that it was the protected act of giving the affidavit to the Union that resulted in Tandarich's discharge—and our colleague does not contend that the Respondent could have lawfully discharged Tandarich for that act of union assistance. We agree.

C. Respondent's Threat to Prosecute Tandarich

On March 20, 2003, the Respondent sent Tandarich a letter threatening to prosecute him if he failed to return certain items of company property, including a rotary hammer, cabling, and a sawzall. The letter arrived at a time when Tandarich was preparing to participate in a Board hearing regarding the Hughey matter. Tandarich did not have any of the demanded items in his possession. Tandarich did, however, discover in his garage a ladder owned by the Respondent, about which he had forgotten. Through the Union, Tandarich contacted the

Respondent and offered to arrange a time for the return of the ladder. The Respondent did not respond to this offer.

The judge found no credible evidence that Tandarich had the items in question, and therefore inferred that the letter was motivated by animus against Tandarich's union activities. He concluded, however, that because Tandarich "had . . . quit his employment" with the Respondent, the letter was unlikely to have any effect on his exercise of Section 7 rights. Accordingly, the judge dismissed the allegation that the threat of prosecution violated Section 8(a)(1).

We reverse the judge's dismissal. Preliminarily, Tandarich had not quit his employment. He was unlawfully discharged, and thus retained the Section 7 rights of an employee. Moreover, contrary to the judge, the test is not the subjective one of whether the threat was likely to affect *Tandarich*. It is the objective one of whether the threat would reasonably tend to interfere with, restrain, or coerce an employee in the exercise of his Section 7 rights. See *Postal Service*, 350 NLRB No. 12 (2007).¹⁴ We find that it would. An employee in Tandarich's position, preparing to assist the Union and the General Counsel in an upcoming Board hearing in which the Respondent was the adverse party, might reasonably decide to withhold that assistance for fear of triggering the threatened prosecution. Even assuming that the Respondent could not persuade the authorities to undertake such a meritless prosecution, and that an employee in Tandarich's position would suspect as much, the employee may still decide

that it is not worth becoming the target of a police investigation and therefore withdraw his union support. Thus, we find that the threat of prosecution violated Section 8(a)(1).

We reject the Respondent's argument that Tandarich is not fit for reinstatement because he continues to possess the Respondent's ladder. There is no evidence that Tandarich stole the ladder. To the contrary, the judge credited Tandarich's testimony that he had used the ladder to paint a stairway in his home and had subsequently left it in his garage and simply forgotten about it. When the Respondent demanded the return of other items that he did not possess, Tandarich volunteered that he had the ladder; and the Union contacted the Respondent on Tandarich's behalf to arrange for its return. The Respondent never took the Union up on its offer. Therefore, we reject the Respondent's contention that Tandarich is unfit for reinstatement.

III. ALLEGATIONS INVOLVING THOMAS MOORE

A. Facts

Thomas Moore was employed by the Respondent in the position of "Supervisor."¹⁵ On March 20, 2002, Respondent assigned Moore to its Arcadia University project, under the supervision of Operations Manager Mark Bianco. On April 2, during nonworking time, Moore distributed union flyers at the site to coworkers and passersby.¹⁶ Security personnel from the university told him to stop handbilling and threatened to call the police, and Moore eventually stopped. That afternoon, Bianco told Moore that he would be working on another jobsite the next day.

The next day, April 3, Moore was assigned to work with James Korejko at the Norwood Construction Company jobsite. Project Manager

¹⁴ Assuming arguendo that the principles of *BE & K Construction Co.*, 351 NLRB No. 29 (2007), apply to a situation where a threat to prosecute is "incidental" to a prosecution, there is no basis for a finding that the Respondent's threat was thus "incidental." See *Postal Service*, supra. The Respondent never pressed charges, Tandarich did not have the items he was accused of taking, and the Union's conciliatory answer to the threatening letter informed the Respondent that Tandarich did not have those items and that he was prepared to return a different item that he did have.

¹⁵ As mentioned supra, the parties stipulated that "Supervisors" are not statutory supervisors.

¹⁶ Stevenson acknowledged that he was aware of Moore's handbilling at the Arcadia site.

Jason Ellmore told Korejko to keep an eye on Moore and an eye out for anyone from the Union. Della Vella followed Korejko and Moore to the Norwood site. Upon arriving at the site, Della Vella tried to persuade Korejko to join the Union. Korejko called Stevenson and reported that Della Vella had followed them to the site. That afternoon, Moore called Bianco to ask where he would be working the next morning. Bianco told him he didn't know yet, and that Moore should report to the NDC office. Moore asked about returning to the Arcadia job, and Bianco told him that the two other employees at that site could handle the work there.

On April 4, Moore arrived at NDC's West Chester office at 7 a.m. and placed union handbills in employee mailboxes, in the presence of the warehouse manager. At about 8 a.m., Moore asked Bianco where he would be working that day. Bianco told him he did not have anywhere to send him, and that Moore would have to take the day off. Moore protested, saying he had taken days off in January and March, and that it was someone else's turn to take a day off. Stevenson joined the conversation, telling Moore that he was not the only employee being forced to take days off. Moore asked Bianco if he would be working the next day, and Bianco said he would call him later in the day.

Moore and Stevenson then engaged in a heated discussion. According to Moore, he asked Stevenson what he was so upset about, and whether it was the fact that Moore had been seen talking to Local 98. Stevenson replied that it was the fact that Moore was "acting childish and pledging the Union." Stevenson told Moore that he "couldn't continue . . . breaking the law by telling Ray Della Vella where [the Respondent] was going." Stevenson added that Moore "could continue filing charges with the NLRB because he [Stevenson]

knew for a fact that his employees didn't want to join the Union." Moore asked if Stevenson was keeping an eye on him and following him, and if he was being fired. Stevenson said he was not firing Moore and told him to leave. Stevenson telephoned Moore that afternoon and told him to take the next day off because he didn't have any work for him.¹⁷

The next day, Moore and Della Vella went to the Arcadia site and handbilled. That afternoon, Moore received a phone call from Stevenson, who told him that he was fired for insubordination.

B. Discussion

1. Transfer from Arcadia University

We affirm the judge's finding that the Respondent did not violate Section 8(a)(3) of the Act when it transferred Moore from the Arcadia University work site. Assuming arguendo that the General Counsel established an initial case under *Wright Line*, supra, that Moore's union activity was a motivating factor in the transfer, the Respondent demonstrated that it would have transferred Moore from the Arcadia site regardless of Moore's protected activity. The record establishes that work was slow at the Arcadia site at the time of Moore's transfer. Moore's last day of work at the Arcadia site was April 2. From April 3 to April 18, only two of the Respondent's employees were working at the Arcadia site. Thus, we affirm the judge's finding that the Respondent did not violate the Act by transferring Moore.

2. Failure to assign further work

We reverse the judge's finding that the Respondent did not violate the Act when it failed to assign further work to Moore beginning April 4. The General Counsel clearly established an initial case under *Wright Line*, supra. The Respondent obviously knew of Moore's

¹⁷ The judge declined to credit Stevenson's testimony that Moore cursed at him or refused to leave the premises.

union activity and, just as obviously, harbored animus towards that activity. Further, the denial of work occurred immediately following Moore's union activity of handbilling at Arcadia on April 2 and at NDC's office on April 4, and of informing Della Vella of his whereabouts on April 3. The Respondent failed to rebut the General Counsel's case. Although some other employees were also not assigned work on April 4 and 5, other employees were; and the Respondent failed to establish that, when work was short, it had any Section 7-neutral procedure for deciding which employees would and which would not work on any given day, and that under that system, Moore would not have worked on April 4 and 5. Thus, at best, the Respondent showed that it had a legitimate reason—shortage of work—for not assigning Moore, but it failed to show that this reason would have resulted in Moore's nonassignment even in the absence of his union activity. See, e.g., *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989), enf'd. 942 F.2d 1140 (7th Cir. 1991). We therefore find that the Respondent violated Section 8(a)(3) by refusing to assign work to Moore on April 4 and 5.¹⁸

3. Discharge of Moore

We affirm the judge's finding that the Respondent violated Section 8(a)(3) of the Act by discharging Moore. In so finding, the judge applied an amalgamation of theories, part *Wright Line*, supra, and part *Atlantic Steel*.¹⁹ It is apparent that the Respondent discharged Moore as a result of the argument between Moore and Stevenson on April 4. Although that argument began over Respondent's refusal

to assign Moore work, it quickly moved on to the subject of Moore's union activity. Moore's defense of his protected activity was itself protected. Thus, we conclude that Moore's discharge is properly analyzed under *Atlantic Steel*; and the issue is whether, in defending his union activity, Moore crossed the line so as to lose the Act's protection. We find that he did not. The judge discredited testimony that Moore cursed at Stevenson. Moreover, to the extent that Moore raised his voice at Stevenson, his outburst was provoked by comments such as Stevenson's assertion that Moore "couldn't continue . . . breaking the law by telling Ray Della Vella where [the Respondent] was going." Although that statement was not alleged as an unfair labor practice, it clearly sought to interfere with Moore's protected right to assist Della Vella's organizational efforts.

Alternatively, even assuming that *Wright Line* is applicable, we find the discharge unlawful under that framework as well. For the reasons stated by the judge, we agree that the General Counsel established a compelling case that Moore's union activity was a motivating factor in Respondent's decision to discharge Moore. Turning to the Respondent's rebuttal case, the Respondent claims that it discharged Moore for his conduct on April 4, which it characterizes as insubordination. But the Respondent introduced no evidence that it has similarly discharged other employees for like conduct. Thus, again, at best the Respondent has done no more than articulate a legitimate reason for its action; it has not shown that it would have discharged Moore for that reason even in the absence of his union activity. *Hicks Oils & Hicksgas*, supra.

In sum, under either *Atlantic Steel* or *Wright Line*, we affirm the judge's conclusion that Moore's discharge violated Section 8(a)(3).

¹⁸ The complaint alleged an implied threat in Stevenson's statement to Moore that he was "acting childish and pledging the Union." The judge's decision did not address that allegation, and the General Counsel excepts. We have found, above, that the Respondent unlawfully threatened Tandarich. The finding of an additional threat would not materially affect the remedy and therefore would be merely cumulative. Accordingly, we find it unnecessary to pass on the General Counsel's exception.

¹⁹ *Atlantic Steel Co.*, 245 NLRB 814 (1979).

IV. APRIL 2002 ALLEGED INTERROGATION OF
JAMES KOREJKO

We have affirmed, above, the judge's finding that the Respondent violated Section 8(a)(1) by coercively interrogating employee James Korejko on May 14, 2002. The General Counsel additionally alleged that the Respondent coercively interrogated Korejko sometime during the week of April 6. The judge did not address this allegation. We do so here.

Sometime during the week following the incident in which Della Vella followed Korejko and Moore to the Norwood work site, Stevenson called Korejko into his office. Stevenson asked him what he remembered about the encounter with Della Vella. Korejko recounted what had happened. Stevenson said that it was illegal for Della Vella to have followed them, and he asked Korejko to think about talking to the Respondent's attorneys about the incident and said that it may help the Respondent with its case. Korejko told Stevenson that he would think about it, and the conversation ended there. The General Counsel argues that, under the totality of the circumstances, this conversation was coercive, citing the Respondent's history of hostility toward the Union, Stevenson's high rank in the company, the fact that the conversation took place in Stevenson's office, and Korejko's less than candid response. See *Rossmore House*, 269 NLRB 1176 (1984), *affd.* sub nom. *Hotel Employees & Restaurant Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). We are persuaded by the General Counsel's analysis, and we find the 8(a)(1) violation as alleged.

ORDER

The National Labor Relations Board orders that the Respondent, Network Dynamics Cabling, Inc., West Chester, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against any employee for supporting IBEW Local 98 or any other union.

(b) Coercively interrogating employees about their union support or union activities, or the union support or activities of fellow employees.

(c) Engaging in surveillance of employees' union or other protected concerted activities.

(d) Making threats to employees that reasonably tend to interfere with, restrain, or coerce them in the exercise of their Section 7 rights.

(e) Offering or promising wage increases, promotions, or other benefits to employees to discourage union activity.

(f) Transferring employees to other work sites because they have engaged in union activity.

(g) Refusing to assign work to employees because of their union activity.

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

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

(a) Within 14 days from the date of this Order, offer Brian Tandarich and Thomas Moore full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Brian Tandarich and Thomas Moore whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, expunge from its files any references to the unlawful transfer of David Hughey and the unlawful discharges of Brian Tandarich and Thomas Moore, and, within 3 days thereafter, notify them in writing that this has been done

and that the transfer and discharges will not be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its West Chester, Pennsylvania office copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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 June 16, 2001.

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

²⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. December 31, 2007

Wilma B. Liebman,
Member

Peter N. Kirsanow,
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part.

Although I join my colleagues in the disposition of many of the allegations involved in this case, I disagree with their decision in the following respects. Contrary to my colleagues, I find that the Respondent (1) did not violate Section 8(a)(1) by interrogating Brian Tandarch on January 8 and January 15, 2002; (2) did not violate Section 8(a)(3) by discharging Tandarch on January 16, 2002; and (3) did not violate Section 8(a)(1) by interrogating David Hughey in June 2001. Finally, as noted above, I find it unnecessary to pass on whether the Respondent unlawfully interrogated James Korejko on May 14, 2002, because such a finding is cumulative and would not materially affect the remedy.

I. ALLEGATIONS INVOLVING BRIAN TANDARCH

A. Interrogations on January 8 and 15, 2002

On October 15, 2001, employee Brian Tandarch met with Company attorney Christopher Murphy and executed an affidavit concerning a charge filed by Local 98. The affidavit contained the required *Johnnie's Poultry* safe-

guards.¹ On January 8, 2002, Murphy met again with Tandarich and requested that he supplement his previous affidavit with additional information. The judge found that Murphy told Tandarich that his participation would not result in any benefit or punishment from the Respondent, and Tandarich signed and dated a statement on the October 15 affidavit affirming that he read the document and that its contents were true. Thus, Tandarich was fully apprised of the *Johnnie's Poultry* safeguards at the January 8 interview.

Murphy took notes during the interview to add to the affidavit, and he asked Tandarich to come into the Company office the next day to review the document and make any changes. Tandarich returned and reviewed the affidavit, but he refused to sign it without having it reviewed by his father or another attorney. Murphy agreed, and he arranged to meet with Tandarich and his father the following week, as Tandarich requested.

On January 15, the day of the scheduled meeting, Murphy was unavailable, so attorney Michael Lignowski met with Tandarich and his father. They reviewed the document, and Tandarich made certain changes. Tandarich specifically testified that Lignowski did not pressure him to sign the document; rather, Lignowski stated that he would bring the proposed changes back to Murphy. Sometime during the interview, Tandarich got up unannounced, walked into the lobby with the draft affidavit, and gave it to a union representative.

The record does not support the judge's findings that the Respondent's actions at these meetings were coercive and unlawful. Tandarich received *Johnnie's Poultry* assurances on January 8. Although the judge found that Tandarich protested that he did not want to be in-

involved, such protests are not in the record.² The judge further stated that Murphy "continued to seek [Tandarich's] signature on an affidavit," but Tandarich testified that he had no recollection that Murphy tried to force him to sign the affidavit on January 8, and he stated that Lignowski did not pressure him to sign it on January 15. Although the judge found that Murphy refused to allow Tandarich to review the draft with persons of his choosing, Murphy agreed to Tandarich's request and allowed Tandarich's father to review the document on January 15. As I disagree with the judge's underlying findings, I disagree with his conclusion that these interviews were unlawful.

I further disagree with the judge that Lignowski was required to repeat the *Johnnie's Poultry* assurances at the January 15 meeting. Tandarich specifically requested the meeting, a continuation of the January 8 interview, to review the affidavit with his father. The affidavit they reviewed included the *Johnnie's Poultry* language that Tandarich heard and read at the January 8 meeting. Moreover, Tandarich stated that he was not forced or coerced to sign the affidavit at the meeting. In my view, requiring Lignowski to reiterate the *Johnnie's Poultry* language would elevate form over substance.

In short, the record does not support the judge's and the majority's findings that the Respondent coercively interrogated Tandarich on January 8 and 15, 2002. I find the interviews lawful, and thus I would dismiss this allegation.

² Murphy testified that Tandarich's "only concern arose early in the—in the interview, when he said—he expressed his—his unwillingness to be involved in the case." In my view, Tandarich's generalized desire not to be involved in litigation is not a protest or an indication that he was unlawfully coerced into cooperating with the Respondent. Murphy testified, immediately before the above statement, that Tandarich "never objected or expressed any concern with respect [to] the issues I was asking him about." Moreover, Tandarich voluntarily returned to the Respondent's office to review and edit the affidavit, and he voluntarily appeared a few days later, with his father, to review the corrected document. I find that Tandarich's actions reflect voluntary cooperation, not coercion.

¹ *Johnnie's Poultry Co.*, 146 NLRB 770 (1964).

B. Tandarich's Discharge

The day after Tandarich gave the Union the draft affidavit, he was called into the Respondent's office and discharged for insubordination. I would find that the Respondent acted with just cause in response to Tandarich's defiant act, and thus I would dismiss the allegation that the Respondent's decision violated Section 8(a)(3).

At the January 15 meeting, Tandarich never requested a copy of the affidavit or requested that he be allowed to review it with a Union representative. I do not find that Tandarich had an absolute right to retain a copy of the unfinished draft affidavit, and Murphy specifically told him that he could not have a copy of the unsigned draft. Thus, I find that his decision to walk off with the document without even raising the issue with the Respondent was an act of insubordination.

Nor do I find *Gerbes Super Markets*, 176 NLRB 11 (1969), on which the judge and the majority rely, to the contrary. *Gerbes* stands for the general proposition that an employee may place reasonable conditions on his willingness to cooperate with an employer's investigation. In that case, the *only* condition the employee made was a specific request for a copy of notes taken during his interview, a request that the employer flatly denied. The request came on advice from counsel that the employee protect himself from anything the employer might use against him or the union, and it reflected "a sustained effort" by the employer to coerce employees into giving up the union. *Id.* at 13. Under those circumstances, where the employee sought to protect himself from the employer's coercion, the Board found that the employee's "misconduct," i.e., keeping a copy of the interview notes, was justified.

In contrast to *Gerbes*, the Respondent here agreed to all of Tandarich's reasonable requests regarding the affidavit. As discussed above,

Tandarich did not feel coerced or threatened at the January 15 meeting; indeed, the meeting occurred at his request. Under these circumstances, Tandarich's decision to walk off with the draft affidavit, without requesting a copy or discussing such a request with the Respondent, was unwarranted and unprotected. Thus, I would find that he was lawfully discharged for just cause.

II. ALLEGED INTERROGATION OF DAVID HUGHEY

On or about June 16, 2001, the Union notified the Respondent that Hughey was a volunteer organizer. Hughey began wearing a Local 98 hat to work, and he distributed handbills at several nonwork locations at the worksite. A few days later, when Hughey met with Todd Stevenson, the Respondent's Director of Operations, Stevenson testified that Hughey raised the issue of union support, and Stevenson responded by asking him why he supported the Union. Although my colleagues adopt the judge's finding that Stevenson's question was violative, I cannot.

In *Rossmore House*, 266 NLRB 1176 (1984), cited by the judge, the Board explicitly rejected a per se rule regarding an employer's questioning open and active union supporters about their union sentiments. *Id.* at 1177. The Board found no violation where, as here, the employer received news of an employee's union support and responded by asking him why. Hughey was a known union supporter, and he openly discussed his support with Stevenson during their meeting. Under these circumstances, I do not find that Stevenson coerced or intimidated Hughey simply by asking him to explain why he supported the Union. Thus, I would dismiss this allegation.

In conclusion, for the reasons stated above, I disagree with my colleagues' findings of the foregoing violations. Thus, I respectfully dissent in part.

Dated, Washington, D.C. December 31,
2007

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any employee for supporting IBEW Local 98 or any other union.

WE WILL NOT coercively interrogate employees about their union support or union activities, or the union support or activities of fellow employees.

WE WILL NOT engage in surveillance of employees' union or other protected concerted activities.

WE WILL NOT make threats to employees that reasonably tend to interfere with, restrain, or

coerce them in the exercise of their Section 7 rights, stated above.

WE WILL NOT offer or promise wage increases, promotions, or other benefits to employees to discourage union activity.

WE WILL NOT transfer employees to other work sites because they have engaged in union activity.

WE WILL NOT refuse to assign work to employees because of their union activity.

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

WE WILL, within 14 days from the date of the Board's Order, offer Brian Tandarich and Thomas Moore full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Brian Tandarich and Thomas Moore whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, expunge from our files any references to the unlawful transfer of David Hughey and the unlawful discharges of Brian Tandarich and Thomas Moore, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the transfer and discharges will not be used against them in any way.

NETWORK DYNAMICS CABLING, INC.

Bruce G. Conley and Noelle M. Reese, Esqs., for the General Counsel.

Christopher J. Murphy and Robert C. Nagle, Esqs., (*Harvey, Pennington, Cabot, Griffith and Renneisen, Ltd.*), of Philadelphia, Pennsylvania, for the Respondent.

Richard C. McNeill, Jr., Esq., (*Sagot, Jennings and Sigmond*), of Philadelphia, Pennsylvania, for Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania on January 21-23 and February 3, 2003. The charges were filed between June 27, 2001 and July 23, 2002 and complaints were issued as a result. These cases were consolidated for hearing in October 2002.

The Union, IBEW Local 98, tried to organize Respondent Networks Dynamics Cabling (NDC) in 1996 and unsuccessfully tried to convince NDC to sign a collective bargaining agreement with it. This case, however, centers around the Union's successful efforts in 2001 and 2002 in persuading several NDC employees to join Local 98 and NDC's discharge of two of these individuals, Brian Tandarich, who it contends was a statutory supervisor, and Thomas Moore. The case also involves the removal of union supporter David Hughey from a jobsite and other efforts NDC allegedly made to discourage its employees from supporting the Union, such as interrogations, surveillance and the granting of wage increases.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, Network Dynamics Cabling, Inc. (NDC) installs low voltage cabling, such as telephone and computer lines, at its customers' places of business. It has an office in West Chester Pennsylvania, from which it annually performs services valued in excess of \$50,000 outside the Commonwealth of Pennsylvania. Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Local 98 of the IBEW, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's transfer of David Hughey from the UPS Philadelphia Airport project to jobsites more remote from his residence (Docket 4-CA-30474)

From May 2001 through early 2002, Respondent was engaged in installing low voltage cables at a United Parcel Service facility at the Philadelphia Airport. Initially, the highest ranking NDC employee on this project on a daily basis was John Czyzewski, whose title was "senior supervisor."² In May and June 2001, the members of the NDC crew at this site, Czyzewski, Brian Tandarich, also a "senior supervisor," Tim

¹ The General Counsel's motion to correct the transcript, which is attached to his post-hearing brief, is granted. [Errors have been noted and corrected.]

² The parties agree that NDC employees with the title of "supervisor" are employees, not supervisors within the meaning of Section 2(11) of the Act. The parties disagree as to whether a "senior supervisor" is an employee or statutory supervisor, or at least as to the status of Brian Tandarich between June 2001 and January 2002.

Faddis and David Hughey, technicians, met twice with Raymond Della Vella, a business agent and organizer for the Union. On the second occasion Bobby Morone, owner of Enterprise Cable Group, a signatory contractor, also met these employees.

Shortly thereafter, Czyzewski placed several union handbills on NDC equipment at the site and on the back window of NDC's van. He quit his employment and went to work for Enterprise Cable.

On or about June 16, David Hughey began wearing a Local 98 cap to work. The Union notified NDC that Hughey was a volunteer organizer for it the same day. The next day Hughey placed union handbills on the tables in the cafeteria/break room that was used by both NDC and UPS employees. Brian Tandarich, now the ranking onsite NDC employee, took some of the handbills to the UPS security office. An UPS security employee told Tandarich that UPS did not want Hughey to work on its property. Tandarich called Todd Stevenson, NDC's Director of Operations, to inform Stevenson about what had transpired and Stevenson directed Tandarich to bring Hughey back to the company's West Chester office.

When Hughey returned to NDC's office, Stevenson asked him why he was joining the Union. Hughey explained to Stevenson that he was joining the Union to obtain a higher wage. I find that Hughey either expressly or impliedly informed Stevenson that by joining the Union he intended to quit his job with NDC and take a job with a signatory contractor. Afterwards, Stevenson offered to promote Hughey to supervisor and give him a two-dollar an hour wage increase.

Hughey returned to work at the Airport site the next day, but the following day NDC assigned him to different site and on the third day sent Hughey to a UPS facility in Allentown, Pennsylvania to work with supervisor Jim Korejko. After Allentown, NDC assigned Hughey and Korejko to a UPS project in Wilkes-Barre. NDC concedes that it transferred Hughey from the Airport site because he distributed union literature at the project and contends that it did so at the request of UPS security personnel. Hughey had a 45-minute commute to the Airport site and over a two-hour commute to the NDC projects he worked on after his transfer. Other NDC employees also routinely commuted two hours or more to get to projects outside of the Philadelphia metropolitan area.

On July 16, before Hughey and Korejko left Respondent's shop to go to Wilkes-Barre, Todd Stevenson and Mark Bianco, Respondent's Operations Manager, asked Korejko to keep an eye on Hughey and report to them if anyone from the Union showed up at the jobsite. On their way from the Philadelphia area to the Wilkes-Barre project, Korejko and Hughey pulled into a rest stop on the Pennsylvania Turnpike. There they encountered Union Business Agent Della Vella, who went inside the rest stop and tried to convince Korejko to join the Union. Korejko reported this encounter to Todd Stevenson. On July 18, Hughey resigned his employment at NDC. Three days later Hughey began working for Enterprise Cable.

B. Analysis

Section 7 of the Act protects David Hughey's right to distribute union literature on UPS property, *Southern Services*,

300 NLRB 1154 (1990) enfd. 954 F.2d 700 (11th Cir. 1992). This right is not extinguished by objections to such distribution by UPS's security personnel, *Virginia Electric & Power Co.*, 260 NLRB 408, 409 (1982); *Mauka, Inc.*, 327 NLRB 803 (1999). Therefore, NDC violated Section 8(a)(3) and (1) in removing Hughey from the UPS airport jobsite—even assuming that it did so merely to placate UPS.

Moreover, the violation is neither negated nor mitigated by the fact that other NDC employees also were required to work several hours from Philadelphia. The UPS jobsite was desirable to Hughey and other employees precisely due to its proximity to their residences. Respondent concedes that it removed Hughey from the UPS airport project because of his distribution of union literature. In so doing it clearly discriminated against Hughey for his union activities.

Whether interrogation by a supervisor violates Section 8(a)(1) depends upon whether under the circumstances, it reasonably tends to restrain, coerce or interfere with rights guaranteed by the Act, *Rossmore House*, 269 NLRB 1176 (1984). I find that Stevenson violated the Act by asking Hughey why he supported the Union. Even though Hughey was an open union supporter, the question was coercive in that it was asked in conjunction with Respondent's illegal removal of Hughey from the UPS airport jobsite.

On the other hand, I conclude that NDC did not violate Section 8(a)(1) in offering David Hughey a \$2 per hour wage increase. In evaluating such an increase the Board applies the test in *Wright Line*, 251 NLRB 1083 (1980) enfd. 662 F. 2d 899 (1st Cir. 1981). The General Counsel must show the increase was motivated by the employer's anti-union animus, i.e., its desire to interfere, restrain or coerce employees in the exercise of their Section 7 rights. Once the General Counsel has proved its prima facie case, an employer may establish as an affirmative defense, i. e., a legitimate business reason for the timing of the increase, *Holly Farms Corp.*, 311 NLRB 273, 274 (1993); *Clock Electric, Inc.*, 338 NLRB No. 110 (2003).

I find that Respondent established that it had a legitimate reason for offering Hughey a wage increase, i.e., retaining him as an employee. At the time that Stevenson offered Hughey a raise, there is no evidence that the Union was seeking to make NDC a signatory contractor. All of its efforts were focused on convincing NDC employees leave NDC, join the Union and work for another contractor that had a collective bargaining relationship with it. Under these circumstances, I conclude that NDC had a legitimate reason to induce Hughey to continue working for it by offering him a raise.

Finally, I find that Respondent violated Section 8(a)(1) in asking James Korejko on or about July 16, 2001 to report any contact with the Union at the Wilkes-Barre project. I credit Korejko's uncontroverted testimony and find that Respondent violated the Act by asking him to spy on Hughey's union activities, *Alliance Rubber Co.*, 286 NLRB 645, 658 (1987). NDC contends that this allegation is barred by Section 10(b) of the Act in that it was first raised in an amended complaint filed on September 25, 2002, over a year after the event in question.

The General Counsel argues that the allegation is not barred by Section 10(b) in that it is closely related to the charge filed December 11, 2001, which alleged that Respondent violated the

Act by transferring Hughey from the airport site, offering him a raise and interrogating employees about their union activities. The Board has allowed litigation of untimely allegations if they are closely related to the allegations of a timely-filed charge, *Columbia Textile Services, Inc.*, 293 NLRB 1034, 1036, fn. 13 (1989); *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). I conclude that the complaint allegation is sufficiently related to the charge to withstand a challenge on the Section 10(b) grounds. It is sufficiently related in that all these allegations concern NDC's response to Hughey's union activities in June and July 2001.

C. Allegations relating to Brian Tandarich including unlawful wage increase, interrogation and his January 16 2002 discharge (Docket 4-CA-31007)

NDC hired Brian Tandarich in February 1997 and concedes that he was an excellent worker throughout his employment. In May 1998, Tandarich was promoted from technician to "supervisor." In February 2001, the anniversary date of his hiring, NDC gave Tandarich his annual performance evaluation. He was given a wage increase from \$16.25 per hour to \$17.75 per hour and was given the title "senior supervisor."

Respondent did not give Tandarich a written position description when it promoted him to "supervisor" or "senior supervisor." The company did not give him any additional oral instructions or training upon his promotion to senior supervisor. In this capacity, Tandarich performed essentially the same tasks that he performed as a "supervisor." Ninety percent of his day was spent performing manual labor and ten percent performing administrative functions, such as filling out employees' time sheets.

Both as a "supervisor" and a senior supervisor, Tandarich was often the highest-ranking NDC employee on the jobsite. At these sites he often told employees what particular tasks they would be performing after receiving instructions from either his project manager or a customer's representative as to the sequence in which work should be performed. Tandarich also filled out written evaluations regarding the performance of employees on these jobsites.

When John Czyzewski resigned his employment with NDC, Tandarich became the ranking NDC employee on the UPS Airport project. In this capacity he was generally in charge of a crew of four, but at times was in charge of as many as 12 employees. Prior to Czyzewski's departure, Tandarich, although a "senior supervisor," had no administrative or supervisory responsibilities on the project. On June 13, 2001, just after Czyzewski's departure, NDC gave Tandarich a raise from \$17.75 to \$19 per hour.³

³ Tim Faddis, another NDC employee at the UPS Airport site was also given a wage increase of \$1.25 per hour on June 28, 2002, and promoted to "supervisor." This was within a month of Czyzewski's departure and Hughey's overt union activity. The General Counsel sought to amend the complaint on the last day of hearing to allege that Faddis' wage increase violated Section 8(a)(1). I denied that motion but allowed the General Counsel to argue that Faddis' raise, which did not correspond to the anniversary of his date of hire, or a performance evaluation, supported the complaint allegation that Tandarich's June 13 wage increase violated the Act.

On October 15, 2001, Christopher Murphy, NDC's counsel, interviewed Tandarich concerning an unfair labor practice charge filed by the Union in connection with David Hughey's transfer. Tandarich executed an affidavit (R. Exh. 2). In late November 2001, Tandarich renewed his contacts with the Union. He asked Business Agent Ray Della Vella if he could still join. Della Vella told Tandarich he could if he would pass out union handbills and wear a Local 98 hat.

Murphy met with Tandarich again at NDC's office on January 8, 2002, with a view to having Tandarich sign another affidavit regarding his knowledge regarding the charge in case 4-CA-30474 (the Hughey matter). Murphy told Tandarich that there would be neither any benefit nor punishment resulting from the interview. Although Murphy stated that Tandarich's participation in the interview was voluntary, he conveyed precisely the opposite impression.⁴ Despite Tandarich's protestations that he didn't want to be involved in the case, Murphy continued to seek his signature on an affidavit and asked Tandarich about his contacts with Ray Della Vella. He responded to Tandarich's concerns by telling him that "you know, you've been injected in it, or your name's been brought into it; and it's really not us who's bringing you into it. It's not the Company... (Tr. 546-47)."

Moreover, Tandarich tried to condition his participation in the preparation of the affidavit upon his being given the opportunity to review it with a third party; Murphy and NDC refused to allow him to take a copy of the draft. At this January 8, meeting, Tandarich reaffirmed his October statement and Murphy began working on a supplemental and more detailed affidavit. At Tandarich's request, Murphy agreed to meet Tandarich and his father at a Bob Evans restaurant. Due to a conflict in Murphy's schedule, attorney Michael Lignowski met Brian and Bernard Tandarich at Bob Evans on January 15, 2002.

Lignowski explained that he was investigating a charge filed by the Union against NDC. Lignowski did not indicate to Brian Tandarich that he could refuse to co-operate with him if he so desired. He then gave Brian and Bernard a copy of an affidavit stamped "draft." Lignowski's copy was not stamped "draft." Lignowski discussed concerns that one or both had with certain portions of the affidavit. After awhile, Brian Tandarich got up from the table with his copy of the affidavit and went out to the restaurant lobby. He returned wearing a Local 98 hat and without the document, which he had given to Ray Della Vella. Lignowski left the restaurant.

The next day, Todd Stevenson, then NDC's director of operations, fired Brian Tandarich ostensibly for giving a copy of the affidavit to the Union. Tandarich began working for a signatory contractor the following day. On or about March 20, 2002, NDC sent Tandarich a letter threatening to prosecute him if he failed to return certain items of company property, including a rotary hammer and power saw. There is no credible evidence that Tandarich possessed any of these items. The Union responded by letter informing Todd Stevenson that Tandarich

⁴ Respondent contends that Tandarich was a statutory supervisor and that therefore it was entitled to insist upon his co-operation in its investigation of the Union's charges.

had possession of one NDC ladder and that Stevenson could make arrangements with the Union for its return.⁵

D. Analysis of Allegations relating to Brian Tandarich

Respondent has not established that Brian Tandarich was a supervisor within the meaning of Section 2(11) of the Act.

I would dismiss most, if not all, of the General Counsel's allegations regarding Brian Tandarich, if, I were to find, as Respondent contends, that Tandarich was a supervisor within the meaning of Section 2(11) of the Act. Thus, I address this issue before addressing the specific violations alleged with regards to Tandarich. Pursuant to section 2(3) of the Act, "supervisors" are not employees and are generally not protected by the Act. However, an employee's title is not controlling and often is only marginally relevant in determining whether one is a statutory supervisor.

Section 2(11) of the Act, defines "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."

While some of the testimony related to the duties of an NDC "senior supervisor", I conclude that the issue of Tandarich's status must be analyzed with regard to the authority invested in him, rather than in "senior supervisors" generally. It may be that some "senior supervisors" were statutory supervisors and others were not. In this regard, the record establishes that some NDC "senior supervisors" received a written job description and others, including Tandarich, did not. Some "senior supervisors" may have received oral instructions regarding their authority, but Tandarich did not.

There is no evidence that Tandarich had the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward or discipline other employees, or adjust their grievances. He did direct employees at the UPS airport jobsite to some extent. There is also no credible evidence that Tandarich had the authority to effectively recommend discipline or any of the other statutory factors. Indeed, the record indicates that when Tandarich was unhappy with the punctuality of several employees at the airport jobsite, he had to go to Todd Stevenson to get anything done about this problem.

The only distinction that Respondent has established between Tandarich and other non-supervisors is that he was the senior NDC onsite representative on a relatively large project. The size of the project does not make Tandarich a supervisor unless he had the type of authority that is delineated in the statute.

A party seeking to exclude an individual from the category of an "employee" has the burden of establishing supervisory authority. The exercise of independent judgment with respect to any one of the factors set forth in section 2(11) establishes

⁵ Complaint paragraph 5 in Docket 4-CA-31194 & 31198 (G.C. Exhibit 1 (bb) alleges that NDC's letter violated Section 8(a)(1).

that an individual is a supervisor. However, not all decision-making constitutes the independent judgment necessary to establish that an individual is a statutory supervisor. The fact that an individual gives direction to other employees without first checking with a higher authority, does not necessarily make one a supervisor. For example, an individual does not necessarily become a supervisor in situations in which his authority to direct employees emanates solely from his skill or experience, *Southern Bleachery and Print Works, Inc.*, 115 NLRB 787, 791 (1956), *enfd.* 257 F. 2d 235, 239 (4th Cir. 1958). Moreover, the exercise of supervisory authority of an irregular and sporadic basis is not sufficient to establish supervisory status, *Browne of Houston*, 280 NLRB 1222, 1225 (1986).

In *John N. Hansen Co.*, 293 NLRB 63-64 (1989), the Board found that David Gillespie was not a supervisor. Gillespie monitored employees' attendance and signed their timecards. He exercised authority to adjust employees' work assignments within the limits of instructions from his employer. Gillespie interviewed job applicants that his employer had tentatively decided to hire. However, the Board found that Gillespie's direction and assignment of routine work did not entail the exercise of independent judgment within the meaning of section 2(11).

In *Chicago Metallic Corp.*, 273 NLRB 1677 (1985) *enfd.* in relevant part 794 F. 2d 527 (9th Cir. 1986), the Board similarly found that Ralph Picazzo was not a supervisor. Picazzo reviewed the performance of other machine operators and graded them on an evaluation form. He made overtime assignments at his discretion from a list of eligible employees. Likewise, in *Browne of Houston*, *supra*, the Board found that Doyle Womack was not a supervisor. Womack exercised the authority to transfer employees to different tasks for short periods of time. In this respect, his authority was not unlike that of Tandarich. Womack had the authority to shift employees from one production line to another if the line they were working on was slow or shutting down. Womack also interviewed job applicants and advised his superiors with regard to the applicants' experience.

More recently, the Board in *Azusa Ranch Market*, 321 NLRB 811 (1996) found that Steve Virgen was not a supervisor. Virgen, who worked in a grocery store, assigned other employees to the tasks of filling the milk cooler, stocking shelves, sweeping and cleaning. He would at times take employees off a cash register to do other tasks. Virgen was in charge of the store for several hours each day after the general manager went home. When the general manager left, Virgen could decide to let employees leave early and use their leave. He was consulted about the job performance of other employees. Finally, although employees were entitled to a break every 2 hours, Virgen decided when, within that time period, an individual employee would take his or her break. Also see *Green Acres Country Care Center*, 327 NLRB No. 57 (November 30, 1998).

There is no evidence that Tandarich considers the relative skills of employees in shifting them from one task or crew to another. This is another indication that his authority is so routine that it cannot be relied upon to deem him a statutory supervisor, *J.C. Brock Corp.*, 314 NLRB 157, 158 (1994). Simi-

larly, the fact that Tandarich is solicited for his opinion regarding the work performance of other employees does not establish his supervisory status, particularly since there is no indication that his opinion is determinative regarding any personnel action, *Adco Electric*, 307 NLRB 1113 at 1125 (1992). Tandarich's primary function involved physical participation in the production or operating processes of NDC's business. He incidentally directed the movements and operations of less skilled employees. He had a close community of interest with these less experienced coworkers and thus, I find that Respondent has not established that Tandarich was a supervisor, *Southern Bleachery and Print Works*, *supra*.

E. Specific Allegations relating to Tandarich

The June 13, 2001 wage increase

Whether Tandarich's June 13, 2001 raise was unlawful turns on proof of Respondent's motivation. Under the Wright Line causation test, the General Counsel bears the initial burden of showing that the raise was motivated, at least in part, by anti-union considerations. The General Counsel can meet this burden by showing that employees were engaged in union activity, that the employer was aware of the activity, that the employer harbored animus towards the union or union activity and that the allegedly violative personnel action was caused by anti-union animus. Once this showing is made, the burden shifts to the respondent to demonstrate that the same action would have taken place even in the absence of protected conduct, *Clock Electric, Inc.*, 338 NLRB No. 10 (2003). The employer must show a legitimate nondiscriminatory reason for the timing of the increase, *Holly Farms Corp.*, 311 NLRB 273, 274 (1993).

In the instant matter, there is no evidence that Respondent was aware that Tandarich had engaged in any union activity when it gave him the wage increase. It was aware that John Czyzewski had engaged in union activity at the UPS airport jobsite. From this record, I conclude that NDC gave Tandarich his raise before it was aware of David Hughey's union activities. Given Respondent's removal of Hughey from the airport site, I conclude that Respondent harbored animus against the Union and employees who supported the Union. However, in the absence of any evidence that it was aware of Tandarich's interest in the Union, I find that the General Counsel has failed to prove that the June 13 raise was motivated by anti-union animus and I credit Respondent's explanation that the raise was given to compensate Tandarich for the fact that he had just become the ranking onsite NDC employee on a large jobsite. I therefore dismiss this allegation of the complaint.

F. Respondent, by counsel, violated Section 8(a)(1) in interrogating Tandarich on January 8 and 15, 2002.

An employer or its agent may interrogate an employee to respond to an unfair labor practice charge, or prepare for litigation of a charge only if affords the employee specific safeguards against coercion. The employer must communicate to the employee the purpose of the questioning, assure him that no reprisal will take place and obtain his participation on a voluntary basis. The questioning must occur in a context free from hostility to union organization and must not be itself coercive in nature. The questions must not pry into other union matters,

elicit information concerning an employee's subjective state or mind or otherwise interfere with the statutory rights, *Johnnie's Poultry Co.*, 146 NLRB 770 (1964). If these safeguards are not afforded to the employee, the interrogation violates Section 8(a)(1).

I find that Respondent's counsel Christopher Murphy violated Section 8(a)(1) by insisting that Brian Tandarich continue in the preparation of an affidavit or certification after Tandarich made it clear that he did not want to continue doing so. I also find that Tandarich's participation in the affidavit process was no longer voluntary when Respondent and Murphy refused to allow him to review a draft with persons of his choosing, including the Union. I find that Tandarich's insistence of reviewing the draft with persons of his choosing was not unreasonable and that he had a right to refrain from assisting Respondent if this condition was not met, *Gerbes Super Markets*, 176 NLRB 11 (1969).

Lignowski also failed provide Tandarich with the required safeguards at the Bob Evans Restaurant meeting of January 15. Lignowski did not assure Tandarich that he could choose not to discuss the charge or provide the affidavit if he did not want to do so. Since Murphy had by his conduct on January 8 effectively insisted on Tandarich's cooperation, it was incumbent on Lignowski to wipe the slate clean insofar as the Johnnie's Poultry requirements were concerned.

G. Respondent violated Section 8(a)(3) and (1) by discharging Brian Tandarich on January 16, 2002.

Respondent fired Brian Tandarich the day after it discovered that he joined the Union. The circumstances of his discharge satisfy the General Counsel's initial burden of showing anti-union animus and discriminatory motive. However, Respondent argues that it has an affirmative defense in that Tandarich disclosed confidential information and attorney work product (Respondent's brief at page 11).

First of all, the affidavit, GC Exhibit 14, does not contain any confidential information. It consists solely of a recitation of facts allegedly provided to Respondent's counsel by Tandarich himself regarding Tandarich's knowledge of facts relating to an unfair labor practice charge by the Union. Since the affidavit is purely factual its status as "attorney work product" is questionable. The work product doctrine protects "against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning litigation," *Mervin v. FTC*, 591 F.2d 821, 825-6 (D.C. Cir. 1978); *Powell v. U. S. Department of Justice*, 584 F. Supp. 1508 (N. D. Cal. 1984). Nothing in the draft affidavit Tandarich gave to the Union fits within the description above. While some courts regard any statement taken by an attorney to be work product, *In re: Convergent Technologies*, 122 FRD 555 (N.D. Cal. 1988), others take a contrary view. In 1994, the District Court in Alaska opined, "what a witness knows is not the work of counsel," *Dobbs v. Lamonts Apparel, Inc.*, 155 FRD 650 (D. Alaska 1994).

Regardless of whether the draft affidavit can be properly characterized as attorney work product, I find that Tandarich's sharing it with the Union does not establish an affirmative defense for Respondent. He divulged to the Union either what he

knew about the charge in question or what Respondent wanted him to say about the charge. He did not divulge any confidential business information or any of its attorney's mental impressions. I therefore conclude that NDC violated the Act in discharging Tandarich on January 16, 2002.

H. Respondent did not violate the Act in sending Tandarich a letter threatening to prosecute him if he did not return its equipment.

Respondent failed to establish that Tandarich possessed any of the equipment it demanded that he return in its March 2002 letter. Its threat of prosecution therefore appears to be largely motivated by its animus towards his union activities. However, I find that the letter was not reasonably likely to interfere with, restrain or coerce Tandarich in the exercise of his Section 7 rights. Tandarich had already quit his employment and was working with a signatory contractor. The letter was unlikely to have any impact on his continued support for the Union or his assistance to the Union and General Counsel in pursuing unfair labor practice charges. The only impact it was likely to have is to motivate him to return any equipment he did possess or respond by informing NDC that their information was incorrect.

NDC's alleged removal of Thomas Moore from the Arcadia University jobsite; NDC's alleged refusal to assign Moore work on April 4 and 5, 2002; and NDC's April 5, 2002 discharge of Thomas Moore (Dockets 4-CA-31194 and 31198)

NDC hired Thomas Moore in May 2000. Moore was promoted to "supervisor" in August 2001 and given a wage increase to \$15 per hour. On February 21, 2002, Moore signed a union authorization card.

On March 20, 2002, NDC assigned Moore and fellow "supervisors" Tim Faddis, Kirk Moore and Kevin Harris to the Arcadia University project. Harris was reassigned to another jobsite on April 1. On Tuesday, April 2, Thomas Moore distributed union flyers at the Arcadia worksite. Respondent's operations manager, Todd Stevenson, was aware that Moore had done so. That afternoon Respondent's operations manager, Mark Bianco, called Moore and told him he would be working on another jobsite the next day.

On Wednesday, April 3, Moore was assigned to work with Jim Korejko on the Norwood Construction Company's offices in Cherry Hill, New Jersey. Moore contacted union business agent Ray Della Vella, who observed Korejko's company van on the Benjamin Franklin Bridge and followed Korejko and Moore, who were in separate vehicles, to the Norwood jobsite. Korejko notified Todd Stevenson, that he was being followed. Upon arriving at the site, Della Vella tried to convince Korejko to join the Union.

On the afternoon of April 3, Moore called Bianco to inquire as to where he would be working the next morning.⁶ Bianco told Moore he didn't know yet and that Moore should report to the NDC office. Moore asked about going back to the Arcadia

⁶ Jim Korejko, now a union member, testified that there was not enough work for two employees at Norwood on April 4, and that he so advised Todd Stevenson.

job. Bianco told him that Kirk Moore and Tim Faddis could handle all the work that was available at Arcadia.⁷

On Thursday morning, April 4, 2002, Moore reported to Bianco. Bianco told Moore that he did not have any work for him that day and that he would have to take the day off. Moore protested, saying that he had already had to take a day off in January and another in March and that it was somebody else's turn to take a day off.⁸

At some point Todd Stevenson joined in the conversation. Stevenson told Moore that he was not the only employee being forced to take days off due to lack of work. They then discussed several other employees' work schedules. Moore asked Bianco if he would be working on Friday, April 5. Bianco told Moore he would have to call him later in the day. Moore and Stevenson then had a very heated discussion. Stevenson referred to the call he had received from Jim Korejko the day before about being followed to the Norwood site. He told Moore that he could not keep telling Ray Della Vella where NDC was working. Moore alleged that he was not being assigned work due to his union activities and asked Stevenson several times whether he was being fired. At the end of the discussion Moore left.⁹ Stevenson fired Moore the next day. On Thursday, April 11, Moore began working for Newon Communications, a signatory contractor.

I. Analysis of allegations regarding Thomas Moore

The General Counsel has not established a prima facie case that the removal of Thomas Moore from the Arcadia worksite or the Norwood worksite was discriminatory.

The record shows that although the Arcadia University project was one of NDC's larger project in March 2002, the manpower requirements for the project were decreasing towards the end of the month. Kevin Harris, one of the four "supervisors" working on the project during the week of March 25, 2002, was reassigned to another job on April 1. After Thomas Moore was removed from the job on April 2, only two employees, both senior to Moore, worked at Arcadia until April 18, GC Exh. 28.

The General Counsel argues that I should draw an adverse inference from Respondent's failure to call Operations Manager Mark Bianco as a witness. Bianco made the decision to remove Moore from the Arcadia project and apparently still works for NDC. I decline to infer that Bianco, if he had testified, would have admitted that Thomas Moore was transferred from Arcadia for discriminatory reasons. Not only does Respondent's schedule indicate that this not the case, but the General Counsel and/or Charging Party could have called David Maston, the

⁷ Kirk Moore and Tim Faddis had greater seniority with NDC than did Thomas Moore.

⁸ Moore used paid vacation or personal days on these occasions.

⁹ Moore's account and Stevenson's account of the conversation differ significantly. Stevenson contends that Moore was screaming and cursing him. Jason Ellmore, an NDC project manager who was laid off in November 2002 testified that he heard the last five minutes of the conversation. He observed that both Moore and Stevenson were upset and that Moore kept asking Stevenson if he was being fired. Ellmore did not hear Moore scream at Stevenson or curse at him. I credit Ellmore's testimony and decline to credit Stevenson's testimony that Moore cursed at him or refused to leave NDC's premises.

Arcadia project manager as a witness. Maston now works one of the Union's signatory contractors. In sum, I find that the General Counsel has failed to establish that Thomas Moore's removal from the Arcadia jobsite was discriminatory.

The General Counsel has likewise failed to prove that Moore's removal from the Norwood project after one day of work on April 3 was discriminatorily motivated. Testimony from the General Counsel's witness, James Korejko, confirms that there was insufficient work at Norwood for two employees on April 4.

Finally, the General Counsel has not established that Respondent's failure to assign Moore to a job on Thursday, April 4, or Friday, April 5, was discriminatory. Respondent's schedule, GC Exh. 28 corroborates Jason Ellmore's testimony that NDC was having difficulty finding work for all its employees in early April 2002. Moore was one of several employees who were apparently not assigned work on April 4 and 5, including supervisor John McCuollough, whose seniority was greater than Moore's.

J. NDC violated Section 8(a)(3) and (1) by terminating Thomas Moore on April 5, 2002.

The General Counsel has made a prima facie showing that NDC's termination of Thomas Moore was discriminatory. NDC was aware of his union activity and harbored animus towards any activity of its employees on behalf of Local 98. Todd Stevenson was particularly upset at Moore because he correctly deduced that Moore had told Ray Della Vella where he and Korejko were going the day before. I also find that Respondent's disparate treatment of Moore, as compared to Nick Leydet in November 1999 establishes discriminatory motivation with regards to Moore's discharge. Despite the fact that Leydet's use of profanity had caused a customer to remove an entire NDC crew from a jobsite, Stevenson, retained Leydet as an employee. The timing of Moore's discharge and the pretextual nature of Respondent's explanation for the discharge satisfy the General Counsel's burden of proving discriminatory motive. Respondent has not established an affirmative defense that it fired Moore for nondiscriminatory reasons.

The only rationale that NDC offers for Moore's discharge is that his conduct on April 4, 2002 towards Stevenson was sufficiently insubordinate to lose the protection of the NLRA. Respondent has not shown this to be the case. All it has established is that Moore had a 5-10 minute heated argument with Stevenson about his lack of work assignments. Giving consideration to the factors set forth in *Felix Industries*, 331 NLRB 144 (2000) I conclude that the nature of Moore's outburst did not forfeit the protection of the Act. This is particularly so given his not unreasonable, although unproven, belief that he was not being assigned work due to his union activity.

K. Alleged Coercive Interrogation of James Korejko by Respondent's counsel (Docket 4-CA-31472)

On May 14, 2002, one of NDC's attorneys in this case, Robert Nagle, called James Korejko on the telephone. Todd Stevenson had told Korejko that Nagle would be calling and asked if he would speak to him; Korejko replied affirmatively. Nagle told Korejko that he did not have to talk to him if he did

not want to do so. He also stated that Korejko would not be rewarded or punished on account of his conversation with Nagle. Korejko agree to talk to Nagle.

Nagle asked Korejko about his encounter with Ray Della Vella on the way to the Norwood jobsite on April 3. He also asked Korejko what they had discussed and whether Korejko had felt harassed. Nagle then asked Korejko whether he had talked to Della Vella since April 3. On July 19, 2002, Korejko went on strike and started work a week later for a signatory contractor.

L. Analysis of allegations regarding Korejko

I find that Respondent, by counsel, violated Section 8(a)(1) during the May 14, 2002 interview with Korejko. While, NDC was perfectly justified in interrogating Korejko about the circumstances surrounding his phone call to Todd Stevenson and Della Vella's conduct on April 3, 2002, Respondent exceeded the permissible bounds of inquiry set forth in Johnnie's Poultry, supra. It did so when Nagle inquired into the subject matter of Korejko's conversation with Ray Della Vella and when it asked Korejko whether he had any contact with Della Vella after April 3, 2002.

CONCLUSIONS OF LAW

Respondent, Network Dynamics Cabling, Inc., violated:

1. Section 8(a)(3) and (1) by transferring David Hughey from the UPS Philadelphia Airport project on or about June 20, 2001, to restrain and interfere with his union activities;
2. Section 8(a)(1) by asking Hughey why he supported the Union on or about June 20, 2001.
3. Section 8(a)(1) by asking James Korejko to report on the union activities of David Hughey on or about July 16, 2001.
4. Section 8(a)(1) by interrogating Brian Tandarich about his union activities on January 8 and 15, 2002.
5. Section 8(a)(3) and (1) by discharging Brian Tandarich on January 16, 2002.
6. Section 8(a)(3) and (1) by discharging Thomas Moore on April 5, 2002.
7. Section 8(a)(1) by interrogating James Korejko on May 14, 2002.¹⁰

¹⁰ I dismiss the complaint allegations with regard to the following Section 8(a)(1) allegations:

Paragraph 5(a) in Docket 4-CA-30474—I find that Todd Stevenson's remark to David Hughey in June 2002, that he'd heard that Ray Della Vella had been at one of NDC's worksites does not constitute a coercive interrogation under the criteria set forth in *Rossmore House*, supra.

Paragraph 5(b) of Case 4-CA-31194 & 31198: Stevenson's remark to Thomas Moore in March 2002 that he'd heard that Ray Della Vella had been at one of Respondent's jobsites does not rise to the level of a coercive interrogation.

Paragraphs 5(a) and 5(b) in 4-CA-31472: I credit Jason Ellmore's testimony that he never discussed any other employee's union activities with James Korejko in dismissing 5(a). With regard to 5(b), I find that Stevenson's discussions with Korejko on April 3, were not coercive given the fact that they were in response to Korejko's call to Stevenson regarding an unidentified person following him.

REMEDY

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 take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, Network Dynamics Cabling, Inc., West Chester, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Discharging or otherwise discriminating against any employee for supporting IBEW Local 98 or any other union.
 - (b) Coercively interrogating any employee about union support or union activities.
 - (c) Spying on, or placing under surveillance the union activities of any employee.
 - (d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days from the date of this Order, offer Brian Tandarich and Thomas Moore full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
 - (b) Make Brian Tandarich and Thomas Moore whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.
 - (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.
 - (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored

(b) Make Brian Tandarich and Thomas Moore whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its West Chester, Pennsylvania office copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 4, 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 June 16, 2001.

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

Dated, Washington, D.C. April 10, 2003.

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

¹² 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."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.
- Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting IBEW Local 98 or any other union.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT spy on, or place under surveillance your union activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Brian Tandarich and Thomas Moore full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Brian Tandarich and Thomas Moore whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Brian Tandarich and Thomas Moore and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.