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Loparex LLC and Teamsters Local 662. Cases 18–CA–18436, 18–CA–18448, and 18–CA–18671

March 31, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On November 12, 2008, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief and cross-exceptions, and the Respondent filed a reply brief and an answering brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions and to adopt the recommended Order.²

¹ There are no exceptions to the judge’s finding that the Respondent violated Sec. 8(a)(1) by forbidding employees to talk about the Union. Assuming, arguendo, that the Respondent’s exceptions could be construed to cover this finding, the Respondent fails to allege with any degree of particularity, either in its exceptions or its brief in support thereof, the error the judge purportedly committed, or on what grounds the judge’s decision as to this violation should be overturned. In these circumstances, in accordance with Sec. 102.46(b)(2) of the Board’s Rules and Regulations, we find that any exception on this point should be disregarded. We therefore adopt the judge’s finding and conclusions on this violation, pro forma, without addressing their merits. *Conley Trucking*, 349 NLRB 308, 308 fn. 2 (2007).

We adopt the judge’s recommended dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(3) and (1) when it disciplined employee Jody Schillinger. There are no exceptions to the judge’s finding that the General Counsel satisfied his initial burden of proof under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). We affirm the finding that the Respondent met its *Wright Line* rebuttal burden for the reasons stated by the judge.

In affirming the judge, Member Schaumber notes that the Board and circuit courts of appeals have variously described the evidentiary elements of the General Counsel’s initial burden of proof under *Wright Line*, sometimes adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action. See, e.g., *American Gardens Management Co.*, 338 NLRB 644, 645 (2002). As stated in *Shearer’s Foods*, 340 NLRB 1093, 1094 fn. 4 (2003), since *Wright Line* is a causation analysis, Member Schaumber agrees with this addition to the formulation.

² Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board’s powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

In late June or early July 2007, the Respondent told all individuals designated as “shift leaders” at its Hammond, Wisconsin facility that they were statutory supervisors and were not allowed to sign union cards or engage in other prounion activities. In October 2007, the Respondent communicated the same prohibition to Chris Meeker after it designated him a shift leader. The complaint alleged and the judge found that this prohibition violated Section 8(a)(1) because these individuals are not supervisors under Section 2(11) of the Act. See, e.g., *Shelby Memorial Home*, 305 NLRB 910, 910 fn. 2 (1991). As described more fully below, we affirm the judge’s finding that the Respondent’s shift leaders are not statutory supervisors because, contrary to the Respondent’s assertion, they do not possess the authority to transfer,³ assign, responsibly to direct,⁴ or to effectively recommend rewards.⁵ We therefore affirm the judge’s 8(a)(1) finding.

The judge found the shift leaders do not have the authority to assign, but did not address the issue of independent judgment. Assuming, arguendo, that shift leaders assign work to their crew members, we find that the Respondent failed to prove that the shift leaders at issue exercise such authority with independent judgment and thus failed to prove their supervisory status.⁶

Pursuant to Section 2(11), individuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. The burden to prove supervisory authority is on the party asserting it. *Oakwood Healthcare*, 348 NLRB at 687; see also *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711–713

³ In affirming the judge, we rely solely on his finding that shift leaders do not exercise independent judgment regarding the transfer authority.

⁴ In affirming the judge, we rely solely on his finding that shift leaders do not have the requisite “authority to take corrective action, if necessary.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 692 (2006).

⁵ In discussing the authority to effectively recommend rewards, the judge stated, “The Board declines to find supervisory status based on alleged authority that the putative supervisors were not notified they possessed.” JD sec. III.A.5.a (citing *Golden Crest Healthcare Center*, 348 NLRB 727, 730 fn. 9 (2006)). To clarify, the opinion in *Golden Crest Healthcare Center* states, “The Board has declined to find individuals to be supervisors based on alleged authority that they were never notified they possessed, where its exercise is sporadic and infrequent.” 348 NLRB at 730 fn. 9. We otherwise adopt the judge’s decision regarding the authority to effectively recommend rewards.

There are no exceptions to the judge’s finding that the Respondent’s shift leaders do not have the authority to discipline.

⁶ For the reasons set forth below, we need not pass on the supervisory status of former shift leader Tim Monicken.

(2001). “Explaining the definition of independent judgment in relation to the authority to assign,” the Board has stated that the authority to effect an assignment must be independent, i.e., free of the control of others, it must involve a judgment, i.e., forming an opinion or evaluation by discerning and comparing data, and the judgment must involve a degree of discretion that rises above the “routine or clerical.” *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006).

At the beginning of a shift, the Respondent’s shift leaders receive a priority sheet, which lists the jobs to be run on each machine in order of importance and when those jobs are due. From that priority sheet, shift leaders tell each crew member which machine he or she will operate during that shift. While all the shift leaders have these job responsibilities, there is no evidence that they carry out these responsibilities in the same manner. When assigning crew members to a machine, shift leader Chris Meeker stated:

I just—I usually try and mix it up between so that not every person is working on the same thing from day in and day out. Otherwise, if there’s something that one person ran before that’s still running, I may put them on that machine since they already know how to run it and then they had experience running it the day before. Otherwise, I just kind of randomly assign ‘em for that list.

Thus, Meeker did not take into account the relative skills of his crew members as he shifted them from one task to another. Instead, he either assigned crew members to machines randomly or assigned them to stay on a machine to complete their previously assigned task. These assignments do not reflect the exercise of independent judgment. See *Rockspring Development, Inc.*, 353 NLRB No. 105, slip op. at 2 (2009) (no independent judgment shown absent evidence that putative supervisor assessed the relative skills of employees in shifting them from one crew to another); *Oakwood Healthcare*, 348 NLRB at 698 (no independent judgment shown where putative supervisors did not assess individual professional and personal attributes when making assignments). Accordingly, the Respondent’s instruction to Meeker forbidding him to engage in pronoun activity violated Section 8(a)(1).

That same prohibition directed at the other shift leaders at issue in this case was likewise a violation of Section 8(a)(1). While shift leader Monicken testified that he considered his crew members’ productivity and experience when making assignments, by the time of the hearing, Monicken had been transferred to the scheduling department and was no longer a shift leader. In these circumstances, we need not pass on his supervisory

status at the time the Respondent instructed him not to engage in union activity, as any such finding would not materially affect the remedy. As to the remaining shift leaders, there is no evidence how they carried out their job responsibilities. Monicken did not testify that other shift leaders considered crew member productivity and experience. Meeker’s testimony affirmatively shows that he—at the least—did not. There is no other evidence concerning the factors considered by the remaining shift leaders. Accordingly, the Respondent has not met its burden of proving that the remaining shift leaders exercised independent judgment when making assignments. Thus, the Respondent’s prohibition against their participation in union activity violated the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Loparex LLC, Hammond, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. March 31, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Joseph H. Bornong, Esq., for the General Counsel.
Richard L. Marcus, Esq. (Sonnenschein, Nath & Rosenthal, LLP), of Chicago, Illinois, for the Respondent.
Tim Wentz, of Eau Claire, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. I heard this case in Minneapolis, Minnesota, on May 14, 2008. Teamsters Local 662 (the Union) filed the initial charge on July 19, 2007, the second charge on July 30, 2007, and the third charge on February 27, 2008. On September 11, 2007, the Union amended the second of those charges. The Regional Director for Region 18 of the National Labor Relations Board (the Board) issued the order consolidating cases and the consolidated complaint on March 27, 2008. The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by, inter alia, interfering with employees’ rights to: post noncompany information on bulletin boards at the facility, distribute union literature and buttons, and discuss the Union. The complaint also alleges that the Respondent violated Section 8(a)(1) by telling individuals classified as “shift leaders” that they were supervisors and could not sign union cards or other-

wise engage in union activities. The complaint further alleges that the Respondent discriminated against employee Jody Schillinger in violation of Section 8(a)(3) and (1) by issuing him a disciplinary warning because of his activities on behalf of the Union. The Respondent filed a timely answer in which it denied committing any of the alleged violations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Union and the Respondent,¹ I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures siliconized release liners and specialty papers at its facility in Hammond, Wisconsin, from which it annually sells goods and materials valued in excess of \$50,000 directly to customers outside the State of Wisconsin, and annually purchases goods and materials valued in excess of \$50,000 directly from suppliers outside the State of Wisconsin. The 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 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Respondent is in the business of treating paper and films with silicone and plastic coatings. Its products are used as peel-away backing for such items as self-adhesive band-aids and roofing shingles. The Respondent operates multiple production facilities, including the Hammond, Wisconsin, location (the Hammond facility) that is involved in the instant case. As of early 2007, the Respondent had approximately 200 production employees at the Hammond facility. The production employees operate machines that cut rolls of paper or film to specified sizes and apply the coatings. There are two complexes at the Hammond facility—referred to as the “east side” and the “west side” of the plant. These complexes are separated by a distance

of 150 to 200 yards. The Respondent operates the Hammond facility 24 hours a day, 7 days a week.

The Respondent acquired the Hammond facility from a competitor, Douglas-Hanson Company, in June 2006. The record indicates that some, but not all, of the Respondent’s Hammond officials were working at that facility for Douglas-Hanson at the time the Respondent took over the facility. Among the officials of the Respondent who had also been employed at the Hammond facility under Douglas-Hanson are Todd Bloom (production manager), Pete Riehle (technical director), Rich Larsen (supervisor/team manager), and Jason Carlson (plant supervisor/team manager).

B. Union Activity Commences

Employees at the Hammond plant are not represented by a union, nor were they at the time the Respondent acquired the facility. Shortly before the Respondent acquired the Hammond plant, employees there engaged in a union campaign. Jody Schillinger, the alleged discriminatee in the instant case, was active in that campaign. Schillinger has been employed at the Hammond facility for over 6 years and at the time of trial he was working there as a production operator. He had been terminated by Douglas-Hanson during the union campaign, but obtained reinstatement and backpay pursuant to the settlement of an unfair labor practices charge. Although the previous charge was filed against Douglas-Hanson, compliance with the settlement was completed at a time when the Respondent was operating the facility.

In early 2007, about 8 months after the Respondent acquired the Hammond facility, Schillinger resumed his union activity. In January or February 2007, Schillinger had a conversation with a coworker, Randy Risler, about a new attendance policy implemented by the Respondent. It was Schillinger’s view that the new attendance policy had “infuriated a lot of the employees.” In February, a week after the conversation with Risler, Schillinger was called into the office of Bloom—the production manager for the east side of the Hammond facility. Bloom and team manager Carlson were present. Bloom asked Schillinger what he had said to Risler about the attendance policy. Schillinger replied that he could not remember. Then Bloom brought Lisa Koats—the Hammond facility’s human resources manager—and Risler into the meeting. Like Bloom, Koats asked Schillinger what he had said to Risler about the attendance policy. Schillinger stated that he did not remember, and Koats challenged him, stating that Schillinger remembered “everything in detail.” Schillinger made a comment indicating that he believed he was being questioned because of his prior union activity. Koats stated, “That’s all water under the bridge.” Schillinger asked what he should do if someone asked him about union organizing, and Koats told him that if anyone did that, he was “to just work and not talk about the Union.”

On the day of the meeting with Bloom and Koats, or shortly thereafter, Schillinger contacted a representative of the Union about organizational activities. Around the same time in early February 2007, Schillinger began to openly show support for the Union by wearing union buttons and union hats whenever he was at work. On about half of his workdays, he also wore a shirt with a union insignia on it. Another union supporter,

¹ The General Counsel filed a motion to strike the Respondent’s posthearing brief as untimely. I deny that motion. The parties’ briefs were due on or before June 27, 2008. The Respondent submitted its brief to the Division of Judges electronically on June 27. On that day, the Respondent served the General Counsel by United States mail, and the General Counsel actually received the Respondent’s brief no later than the next business day. It does not appear that the service on the General Counsel technically complied with the regulation requiring a party that files its brief electronically on the due date to notify the General Counsel “by telephone of the substance of the transmitted document” and serve the General Counsel “by personal service no later than the next day, by overnight delivery service, or, with the permission of the party receiving the document, by facsimile transmission.” NLRB Rules and Regulations, Sec. 102.114(i). On the other hand, the General Counsel received the Respondent’s brief on the day it was entitled to it under the regulations, and the motion to strike does not identify any prejudice to the General Counsel from the improper method of service, nor is any such prejudice apparent. Under these circumstances, I exercise my discretion to accept the Respondent’s brief. See *Total Property Services*, 317 NLRB 975 fn. 3 (1995).

Chris Meeker, publicly showed support for the Union by wearing a shirt that had “Local Teamsters 662” printed on it and buttons that had “Local Union 662 Teamsters 2007 IBT” printed on them.

C. Respondent Promulgates New Rule Requiring Employees to Obtain Approval before Posting Information on Bulletin Boards

The Respondent maintained a number of bulletin boards around the Hammond facility on which it posted company information. The evidence showed that, prior to April 2007, employees used these bulletin boards to post non-work information—or example, sports schedules and for-sale announcements. On March 9, Schillinger, along with coworker Meeker, posted a union organizing flyer on one or more of the bulletin boards at the Hammond facility. The union organizers subsequently discovered that the organizing flyer had been removed. They reposted the flyer, but it was removed again. This cycle of posting and removal was repeated several times. There was no evidence identifying the person or persons who removed the flyer, or showing over how many hours, days or weeks the cycle of posting and removal was repeated. At the same time that the union flyer was being removed, other non-work postings by employees remained on the bulletin boards. One of these employee postings, regarding birds an employee was offering for sale, was on a bulletin board where the union flyer had been posted, during the same period when the union flyer was repeatedly removed.

On April 16, 2007—approximately 5 weeks after Schillinger and Meeker had first posted Union material—the Respondent announced a new rule that prohibited employees from posting anything on the company bulletin boards without the Respondent’s prior approval. The rule was set forth in a memorandum that read:

April 16, 2007

To: All Employees
From: Management Staff
Subject: Bulletin Boards

The company has placed several bulletin boards around the plant as a way of communicating more effectively with all of you. The bulletin boards are for the exclusive use of company for its postings. Accordingly, any employee who wants to post anything on a Company bulletin board must first get the approval of Human Resources.

Additionally, please do not write or put any markings on company posted notices.

Your cooperation in this matter is appreciated.

The Respondent did not offer any testimony or other evidence revealing who made the decision to promulgate this new rule, or explaining the motivation for the rule or the timing of the rule’s promulgation.

The complaint also alleges that later, on about July 20, 2007, the Respondent published a new, stricter, version of the rule. This version prohibited employees from posting anything on the bulletin boards and made no exception for items posted with prior approval. The new policy also threatened to dis-

charge or otherwise discipline employees who violated the posting prohibition. The Respondent produced a memorandum setting forth this rule in response to a subpoena request for: “Any document that includes instructions to employees that could be considered rules of conduct or disciplinary rules, specifically including, but not limited to, any rules concerning . . . use of bulletin boards.” This memorandum reads as follows:

July 20, 2007

To: All Employees
From: Management Staff
Subject: Bulletin Boards

The company has placed several bulletin boards around the plant as a way of communicating more effectively with all of you. The bulletin boards are for company postings only. Additionally, please do not write or put any markings on company posted notices.

Employees who do not follow this policy will be subject to disciplinary actions up to and including discharge.

Your cooperation in this matter is appreciated.

At trial, none of the Respondent’s officials testified about the July 20 memorandum, or made any claim that it was a draft that was not put into effect. On the other hand, no witness for either side testified that the July 20 memorandum was actually posted or that the rule it sets forth was communicated to employees. Indeed, union activist Schillinger testified that he did not know whether the July 20 memorandum was posted. Meeker did not testify that the Respondent had ever made the rule set forth in the July 20 memorandum known to him or anyone else.

Under the circumstances, I conclude that the General Counsel has failed to show that the July 20 policy was actually published to employees. I note that Schillinger and Meeker were careful to retain information regarding many of the Respondent’s actions relevant to alleged unfair labor practices,² but that, as noted above, neither testified that the Respondent had published the rule set forth in the July 20 memorandum. Therefore, although the Respondent’s production of the memorandum in response to a subpoena request for “instructions to employees,” and the format of the memorandum, suggest that employees were instructed about the new rule, I find that, on balance, the record evidence fails to establish by a preponderance of the evidence that the stricter, July 20, policy was published at the Hammond facility.

D. Respondent Prohibits Employees from Distributing Union Flyers in Parking Lot

During their non-work hours, Schillinger, Meeker, and two other employees—Rick Toufar and Harlan Rott—distributed pro-union flyers in the Hammond facility’s parking lot. On an occasion in late May or early June 2007, company officials confronted the employees in the parking lot and directed them to cease these activities. Meeker had been handing union flyers to employees who he encountered in the parking lot and also

² For example, they tape recorded meetings with officials of the Respondent and kept copies of nonunion materials that were openly posted or distributed at the facility.

placing the flyers on the windshields of cars. He was walking through the parking lot when production manager Todd Dennison approached in a car and asked what Meeker was doing. Meeker replied that he was “putting out flyers.” Dennison told Meeker that he “couldn’t do that on company property.” Meeker responded, “I [am] well within my rights to hand out the flyers.” Dennison said that Meeker could do it, “just not on company property.”

After the exchange with Dennison, Meeker joined Schillinger and the other employees who had been distributing the flyers. Riehle, the plant’s technical director, approached Schillinger with one of the flyers in his hand and said “You know you can’t be doing this. This is what you got fired for before.” Schillinger replied that he was within his rights to handbill. Riehle left, and then returned with Koats, who told the employees that what they were doing “violated company policy.” Meeker asked what policy they were violating, but no one from the Respondent answered. Koats told Schillinger that “You can’t do it on company property. You have to do it out on the street.” When Schillinger disputed this, Koats stated “No. I want you to stop right now.” Schillinger stated that the employees were acting within their rights, and suggested that Koats and Riehle “contact a lawyer.” Shortly after this exchange concluded, Meeker saw Larsen (supervisor/team manager) removing the prounion flyers from car windshields.

Some days or weeks later, on about June 22, Meeker returned to the plant and began distributing prounion flyers and pamphlets. Ryan Murtha, an individual who works in the scheduling department of the Hammond facility, approached Meeker and told him that he could not hand out flyers on company property. Murtha told Meeker to leave the area, and Meeker complied. Approximately 15 minutes later, Murtha approached Meeker again. Murtha apologized, and stated that Meeker was within his rights to hand out the flyers.³

Subsequently, in February 2008, flyers regarding a judicial election were placed on the windshields of cars in the same parking lot where the union supporters had been stopped from distributing flyers. There was no evidence showing whether the Respondent was aware of, or intentionally allowed, this distribution.

E. Respondent Prohibits Employees from Distributing Union Buttons or Discussing the Union inside the Hammond Facility

In June 2007, Meeker left prounion buttons near one of the timeclocks at the Hammond facility. On June 20, the Respondent called Meeker, Schillinger, and Toufar to a meeting with Dennison and Koats in the Hammond facility’s packing room. Dennison showed the employees prounion buttons that had been found near the time clock, and stated: “That is not acceptable. Okay. You’re not allowed to pass them out while you’re here.”⁴ Dennison continued:

I don’t want to catch you passing them out, okay, I don’t want

³ The record does not show that Murtha was a supervisor or agent of the Respondent.

⁴ Meeker recorded this conversation, and the parties stipulated to the accuracy of a transcript of that recording. General Counsel Exhibit Number (GC Exh.) 2(c).

to see them laying around. You’re more than welcome to wear them. You have that right. Okay? You can pass them out when you’re outside, on your own time, but when you’re here working, you, you need to be working. . . . Your organizing conversations, you know, can’t take place while you’re in here working.

Schillinger asked whether Dennison meant that “we can’t talk about anything.” Dennison answered:

No, I didn’t say that. While you guys are working, in idle conversation, you can, whatever, but you can’t be conducting organizing meetings.

[D]on’t organize during working hours, okay? I’m just saying, do your job, you’re not paid to organize, okay? Don’t pass out buttons while you’re working. If you want to stand at the door and pass them out all you want. . . . I know that you guys are kind of the driving force behind this organization, which is fine.

Schillinger disputed the legitimacy of the restriction being stated by Dennison. He told Dennison: “I’ll just fill you in a little bit—according to the National Labor Relations Board, if, let’s say, one of us, or anybody, wanted to lay something around, perfectly legal according to them.” Dennison replied, “Not while you’re working.” Koats put a finer point on it, stating that such distribution was permitted, “[d]uring nonworking hours.” Schillinger countered that the union buttons “can be laying in the lunch room.” Dennison, answered “No it can’t,” but that “[w]hen you’re outside off the clock, you can pass out anything you want.”

The record shows that the Respondent permitted machine operators to engage in non-work conversations regarding a variety of nonunion subjects during worktime, as long as the operators continued to perform their duties. The evidence also showed that the Respondent permitted a solicitation unrelated to the Union to be left inside the Hammond facility. More specifically, in July 2007, a stack of discount coupons for a fast food restaurant was left at the ordering counter in the Respondent’s main lunchroom. These coupons remained in the lunchroom for several days.

F. Respondent Disciplines Schillinger for Talking to a Coworker

In early July 2007, Schillinger was at work operating a machine. A coworker, Donna Gotzman, who was assigned to a machine 15 to 20 feet away, asked Schillinger for assistance with a task at her machine. It was common for employees to help one another with a number of the tasks associated with operating the machines. Schillinger went over to help Gotzman, leaving his own machine to operate unattended. Tim Monicken, shift leader, observed Schillinger with Gotzman and asked “What are you doing?” Schillinger answered that he “was helping Donna [Gotzman].” Then Schillinger returned to work on his own machine. Approximately 45 minutes to 2 hours later, Gotzman again asked Schillinger to assist her with a work-related task at her machine. Schillinger left his machine, which in this instance was idle, to help Gotzman. While

Schillinger was providing assistance to Gotzman, she asked him a question about employee benefits and Schillinger stayed to answer it. At this time, Monicken approached Schillinger and asked "What's your excuse this time?" Schillinger did not answer Monicken, but rather shrugged his shoulders and went back to his own machine. Monicken reported the incident to his superior, plant supervisor Carlson.⁵

Approximately a week later, on July 16, Schillinger was called to a meeting with Carlson and Monicken. They asked Schillinger about the two occasions when Monicken had spoken to him about talking to Gotzman. Schillinger said he was helping Gotzman. Carlson stated that he had seen "two or three of you guys standing around talking in the middle of the floor," and that it was "just hard to believe it's talk about work." Schillinger asked to see the rule that he could only talk about work, and Carlson responded, "I didn't say you have to be talking about work, you gotta be by your machine." Carlson went on to say that lately there had been quality control problems at the facility and he opined that "a lot of it is people not paying attention to their machines." In reference to Schillinger's conversation with Gotzman, Monicken stated "That sure doesn't look very good, you know, your machine is sitting there, nothing's going on and you're standing over there by her machine, you know, like I said before, if your machine is running it looks a lot different." Schillinger said, "All right, it won't happen again." He also said that he was sorry if, at the time, he had failed to inform Monicken that he was helping Gotzman. Monicken stated that it appeared to him as if Schillinger was not helping Gotzman, because "you guys weren't doing nothing you must have already helped her." Later in the same meeting, Carlson stated:

If I come walking through there and you got two people standing around talking, it looks kind of fishy. You know? I don't know what the heck you're talking about. And I know, if the machine, again, if the machine, it's either not running, or it's not getting watched.

Then Carlson gave Schillinger a written warning. Carlson and Monicken made statements indicating that the written warning resulted from the fact that Monicken had confronted Schillinger about leaving his machine to talk to Gotzman, and shortly thereafter Monicken found Schillinger away from his machine and talking to Gotzman again.

Schillinger and Monicken walked together after the meeting. Schillinger made a statement indicating that he thought the meeting and/or the written warning were motivated by his union activity. Monicken replied, "that's not the reason." During this conversation, Monicken also told Schillinger, "You know they're watching you, so gotta be careful."

At trial, both Schillinger and Monicken testified that it was not acceptable for an employee to talk to coworkers when the machine that the employee was responsible for operating was idle. Schillinger gave general testimony that if his machine was not running, and a coworker (as opposed to a shift leader or a

plant supervisor) wanted to talk to him, he would start his machine before engaging in the conversation. However, Schillinger did not contradict the testimony that on the specific occasions in question, he had left his machine idle while he talked to Gotzman.

G. Shift Leaders

1. Respondent prohibits shift leaders from engaging in union activities

In late June or early July 2007, the Respondent told all individuals designated as "shift leaders" at the Hammond facility that they were "supervisors" and were not allowed to sign union cards or engage in other prounion activities. Later, in October 2007, the Respondent communicated the same prohibition to Meeker. Meeker was called to a meeting with Dennison, Bloom, and Carlson, at which Dennison stated that Meeker was being granted a promotion to shift leader and could no longer be part of the Union, take part in union activities, or have any contact with union representatives.

2. Production operation and shift leaders

In order to understand the position of shift leader at the Hammond facility, it is helpful to have an overview of certain aspects of how the production operation there is organized. The Respondent operates the Hammond facility 24 hours a day, 7 days a week. It staffs this continuous operation using four teams of employees, each of which works a 12-hour shift and has approximately 50 employees. Generally, only one of the four teams is present during any particular 12-hour shift. Two of the teams are scheduled to work the day shifts, and the other two teams are scheduled to work night shifts. Each night shift team will work three or four of the seven night shifts during a week, and each day shift team will work three or four of the seven days shifts. The teams take turns working on weekends. The day shift starts at 5 am and ends at 5 pm and the night shift starts at 5 pm and ends at 5 am.

The regular production employees spend most of their work time operating machines that cut rolls of paper or film to specified sizes and apply silicone or plastic coatings. This work does not require prior training or experience. New employees learn how to operate the machines on-the-job. As discussed above, the production employees are divided into four teams based on the shift schedule they will be working. Most of the approximately 50 production employees on a team are further divided into smaller units that are sometimes referred to as "crews."

A shift leader is a member of a crew, who leads the work of the crew, and works the same 12-hour shift as the other crew members. The number of employees that a shift leader oversees varies from crew to crew. For example: shift leader Dave Nogal leads a crew with just one other employee; shift leader Jeff Nelson has one or two other employees on his crew; shift leader Tracy Pelzel has three other employees on his crew; Meeker (who became a shift leader in October 2007) has between four and six other employees on his crew. On the west side of the facility, most crews consist of a shift leader plus three others individuals. Monicken testified that when he was a shift leader in 2007 he led between 12 and 16 employees, but

⁵ Monicken testified that Schillinger's union activity had no bearing on his decision to bring the conduct to Carlson's attention. Carlson did not testify.

the record indicates that it was an anomaly for so many crew members to work under a single shift leader. Some rank-and-file production workers do not report to shift leader at all, but rather report directly to a manager.

The shift leaders are generally supervised by team managers. Since mid to late 2007, there have been eight team managers at the Hammond facility. The team managers work the same 12-hour shifts as the shift leaders—with one team manager present on the east side of the facility and one on the west side of the facility for the entirety of any given shift. The Respondent had previously referred to at least some of the team managers as “shift supervisors,”⁶ but in 2007 it changed the title for these individuals to “team manager.” The record regarding this change is thin, but what evidence there is does not suggest that the change in title was attended by any meaningful change in the types of duties involved. At the time when the Respondent changed the job title to “team manager,” there were less than eight team managers. During some shifts, the Respondent had a single shift supervisor/team manager overseeing both sides of the facility, rather than having one such individual on each side of the plant. By November 2007, the Respondent added additional team managers to reach a total of eight, so that there would be one team manager on each side of the plant for the 12 hours of each shift.

Although it is clear that, since late 2007, there have been two team managers assigned to work during the entirety of each 12-hour shift, there is some question about whether, prior to that time, a shift supervisor/team manager was scheduled to be present at all times. Production manager Dennison testified that the team managers work the same 12-hour shifts as the shift leaders. He did not testify that this was a new schedule, but he was not asked whether the same schedule had been in effect at all times relevant to this litigation. On the other hand, Monicken stated that when he was working as a shift leader from January to September 2007, his supervisor did not begin work until 8 am—that is, until 3 hours after the start of the crew members’ shift. The record does not make clear whether the individual Monicken referred to as his “supervisor” was a shift supervisor/team manager or some other type of official. Nor does the record show that any possible deviation from the general practice of having a shift supervisor/team manager on-site to supervise shift leaders at all times extended to any shift leader other than Monicken.⁷ The evidence did not show that prior to when the shift supervisors were re-designated as team managers, they generally had been working shorter or different schedules than the crew members.

The team managers each report to one of two production

⁶ The record indicates that shift supervisors were also sometimes referred to using other titles, including “plant supervisor” and “night supervisor.”

⁷ Indeed, the evidence showed that Monicken’s situation was unusual in certain other respects. For example, Monicken stated that as shift leader he led between 12 and 16 employees, whereas most shift leaders had about 3 crew members reporting to them. Moreover, Monicken testified that as shift leader his duties extended to both the east side and the west side of the Hammond facility, whereas the evidence suggests that other shift leaders’ duties were generally confined to one side of the plant or even to a single machine.

managers. During the relevant time period, those production managers were Bloom (who managed the east side of the facility) and Dennison (who managed the west side of the facility). The production managers do not work the same schedule of 12-hour shifts as the production employees, shift leaders, and team managers. Rather, the production managers are scheduled to work from 8 am to approximately 5 pm, Monday through Friday, and work at other times on an as-needed basis. The two production managers report to the operations manager. The operations manager is the highest on-site official at the Hammond facility.

3. Duties and responsibilities of shift leaders

The evidence shows that shift leaders, like other members of a crew, operate equipment at the Hammond facility. However, the shift leaders also have a variety of additional duties and responsibilities that are not shared by other crew members. As a general matter, these include answering crew members’ questions, solving problems, and walking from machine to machine to oversee the work. In addition, shift leaders have a number of specific duties. At the start of a shift, the shift leader receives a job priority sheet for the machine or machines that the crew operates. This sheet lists the jobs to be run on each machine in order of importance, and also tells when the jobs are due. The shift leader reviews the priority sheet and tells each crew member which machine he or she will be operating. The testimony indicated that shift leaders use various approaches for deciding which crew member will perform each job. Meeker testified that in some instances this is done “just kind of randomly” from the priority sheet. In other instances, the shift leader will take into account an employee’s experience or skill level with a particular machine or with the job being run on it. In addition, when the list includes a high priority job, the shift leader may pick a particularly productive crew member to perform it. Sometimes the shift leaders follow the preferences of crew members, sometimes they rotate crew members through various jobs, and sometimes they keep a crew member on the same machine day after day.

During the period since Meeker became a shift leader, his team manager (Carlson) will sometimes direct him to send a crew member to work elsewhere in the facility on a temporary basis. The record does not show how often this occurs, but the impression given by Meeker’s testimony is that it is not an unusual occurrence. When Carlson makes such a request, Meeker must send whichever crew member Carlson specifies. If Carlson does not specify an employee, Meeker is free to send any crew member. During one period he picked the employees based on experience, but more recently he has sent employees on a rotating basis or because of their own preferences. It is not Meeker, but someone at a level above his, who decides whether it is necessary to make these temporarily transfers, and where the employee will be taken from and transferred to. The evidence does not show that Meeker has any input at all into the decision about whether such temporary transfers are necessary, how many employees are transferred, where those employees will work during the period of the temporary transfer, or whether his own crew will be provided with a transferee on a temporary basis. The evidence did not establish that any shift

leader other than Meeker chooses crew members for temporary assignments.

Many of the machines at the Hammond facility have to be “set-up” for particular jobs. The crew members obtain the set-up specifications from the facility’s computer system and typically set-up the machines themselves. After a crew member finishes setting up a machine for a particular job, it is the responsibility of the shift leader to check that the set up is correct before production begins. The shift leader will also sometimes help a crew member who has questions about how to set up the machine for a job.

The shift leaders are expected to make sure that the crew members have the supplies they need to keep the machines operating. Meeker testified that as a shift leader he personally cuts needed supplies to size, brings the supplies from the warehouse to the crew members, and unloads the supplies. Although the shift leaders try to make sure that their crews meet production deadlines, there was no evidence showing that a shift leader is subject to actual consequences if his or her crew fails to complete a job on time or meet production goals.

Shift leaders have a role in quality control, but the extent of that role is not clear. The evidence showed that shift leaders are responsible for checking the quality of products before allowing those products to be shipped to customers, and shows that if a shift leader allows unacceptable product to be shipped to a customer there are actual consequences for the shift leader.⁸ The record does not show, however, whether a shift leader will be held responsible for the production of defective product even if the shift leader detects the problem before it is shipped. Meeker, a witness for the General Counsel, stated that, as shift leader, if he “okayed” product to be shipped out, and that product turned out to be defective, he would be the one written up for the mistake, not the crew member who produced the defective product. Michael Baker stated that, as a shift leader, he was once suspended when “I didn’t check” the quality of “outgoing material” “good enough.”⁹ Monicken, a witness for the Respondent, testified that if defective product was produced, both the shift leader and the crew member who produced it would be “held responsible” even if the shift leader had not been the one responsible for the mistake. However, Monicken was unaware of any instance when being “held responsible” translated into actual consequences for a shift leader.

If a crew member refuses direction from a shift leader, the shift leader has no authority to issue any form of discipline to the employee. The shift leader may make a report to the team manager regarding the crew member’s conduct, but does not decide on, or make a recommendation regarding, discipline. Similarly, if an employee fails to show up or is late for work, the shift leader informs the team manager, but has no role in deciding upon any resulting attendance-based discipline.

⁸ At one time, the Hammond facility had employees classified as “quality checkers,” but when the Respondent acquired the facility in 2006 it eliminated that position. The shift leaders took over responsibility for checking the quality of the crew’s product before permitting it to be shipped to customers.

⁹ Baker worked as a shift leader primarily under Douglas-Hanson, and was transferred out of that position only 2 days after the Respondent took over the Hammond facility.

The shift leaders’ duties include filling out performance reviews for members of the crews. Reviews are completed annually for experienced employees and at 30 days, 60 days, and 90 days for new employees. The shift leader signs the performance review and discusses it with the employee. In the case of the annual reviews, the team manager also signs off on the document. The evidence indicated that the team managers do not alter the ratings given by the shift leaders. Team managers will, however, sometimes discuss ratings with the shift leaders if they believe those ratings should be higher or lower.

There was evidence that the Respondent has a number of uses for the performance reviews. They alert crew members to areas where their performance is unsatisfactory and can be improved. The performance reviews are used to some extent in deciding on yearly merit increases for crew members. Exactly what part the performance reviews play in the merit increase process is not clear. Dennison testified that the performance reviews are “associated with” the merit increases, but he did not explain how they were associated, whether anything else is considered, or how the decisional process works. Dennison testified that the performance reviews are also used in deciding which employees to promote, but, here too, evidence on the specifics of that usage was not provided. A team manager who testified for the Respondent stated that performance appraisals “can be” used in determining merit increases, but not that they were used for that purpose, and certainly not they were used in that fashion with any regularity. The testimony of Mitchell Stewart casts some doubt on the notion that shift managers, or the performance reviews they complete, have a significant role in the granting of merit increases. Stewart, a witness for the Respondent, testified that he was a shift leader for a period of over 3 years ending in March 2008, and during that time was not aware that the performance reviews he was completing had any bearing at all on crew members’ merit increases.

Despite the fact that they have significant duties beyond those of other crew members, shift leaders are in certain respects treated more like the crew members who they oversee, than like recognized supervisors such as team managers.¹⁰ For example, team managers, but not shift leaders, participate in the frequent meetings that production managers Bloom and Dennison hold to discuss safety, quality control, production, and general business news.¹¹ In addition, the form the Respondent uses to review the performance of the shift leaders is the same form used to rate the performance of the crew members working under shift leaders. The Respondent uses a different form to evaluate the performance of recognized supervisors such as team managers and production managers. Moreover, the forms the Respondent uses to evaluate the shift leaders’ performance call for ratings on 33 separate factors, but not one of those factors rates the shift leaders on their success directing, assigning work to, disciplining, or otherwise supervising crew members.

¹⁰ The Respondent admitted the complaint allegation that Jason Carlson, who is identified in the record as a team manager, has been a supervisor for purposes of Sec. 2(11) at all material times.

¹¹ An exception to the general exclusion of shift leaders may occur when a team manager is absent from work and a shift leader acts in the team manager’s position.

In addition, shift leaders, like the crew members they oversee, are paid an hourly wage, whereas team managers are salaried employees. A crew member who assumes the responsibilities of shift leader receives a \$2-per-hour raise, but the evidence does not show whether that raise lifts the shift leaders' pay above that of all the crew members who they lead. Lastly, crew members and shift leaders are subject to the same rigid attendance policy. This is a system under which employees accumulate points (called "occurrences") for time missed, and then receive predetermined progressive discipline when they reach certain point levels. On the other hand, team managers, and other recognized supervisors, are not disciplined using the point system, but rather are subject to a less rigid "rule of reason" attendance policy.

H. Complaint Allegations

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act: on about April 16, 2007, when the Respondent published a new policy requiring employees to obtain management permission before posting anything on plant bulletin boards; on about July 20, 2007, when the Respondent published a new policy prohibiting employees from posting non-company materials on bulletin boards and explicitly threatening to discharge or otherwise discipline employees who violated this policy; in about the first week of June 2007 when Dennison prohibited employees from distributing union flyers on company property; in late May or early June 2007, when Riehle and Coats prohibited employees from distributing union flyers on company property and threatened that employees could distribute those materials only on public property; on about June 22, 2007, when Dennison and Coats prohibited employees from distributing or leaving union buttons or literature anywhere in the Respondent's facility or at anytime when employees were on the clock; on about June 22, 2007, when Dennison and Coats prohibited employees from talking about the Union anywhere in the Respondent's facility or at anytime employees were on the clock; since late June, when agents of the Respondent prohibited shift leaders from signing union cards or otherwise engaging in union activities and told shift leaders that they were supervisors when, in fact, at all material times such individuals have been employees within the meaning of Section 2(3); and, on about July 16, 2007, when Carlson threatened an employee that anytime two employees were talking he would assume they were discussing the Union. The complaint further alleges that on about July 16, 2007, the Respondent discriminated against Schillinger in violation of Section 8(a)(3) and (1) of the Act by issuing a disciplinary warning to him because he engaged in protected union and concerted activities.¹²

¹² At the start of the hearing, I granted the General Counsel's unopposed motion to make a number of amendments to the complaint. Those amendments are incorporated in the statement of complaint allegations set forth above. See GC Exh. 1(i) and GC Exh. 1(o).

III. ANALYSIS AND DISCUSSION

A. Section 8(a)(1)

1. April 16, 2007, memorandum regarding use of bulletin boards

The Board has held that an employer may restrict employees' use of its bulletin boards for Section 7 communications unless those restrictions are promulgated with an antiunion motivation or are discriminatorily enforced. *Register Guard*, 351 NLRB 1110, 1114 and 1118 fn.18 (2007); see also *Roadway Express*, 279 NLRB 302, 304 (1986) (removal of bulletin board a violation of Section 8(a)(1) when action was motivated by posting of union material), *enfd.* 831 F.2d 1285 (6th Cir. 1987). Based on the record in the instant case, I find that the Respondent had an antiunion motivation when, on April 16, it announced a new rule that prohibited employees from posting anything on company bulletin boards unless the company approved in advance. Prior to that time, the Respondent had imposed no such restriction on employees who used company bulletin boards to communicate non-work information—including sports schedules and offers to sell personal items. The Respondent initiated the restriction in the wake of employees' repeated postings of prounion material on one or more of the bulletin boards at the Hammond facility. This timing is suspicious and supports an inference of unlawful motivation. See *Jordan Marsh Stores Corp.*, 317 NLRB 460, 462 (1995) (finding a violation of Section 8(a)(1) where employer promulgated a rule requiring employees to obtain approval for personal postings on bulletin boards after advent of union campaign when such approval was not required prior to union campaign) and *Roadway Express*, *supra* (timing shows unlawful motivation where, *inter alia*, the employer removed bulletin boards shortly after employees posted union materials); see also *Detroit Paneling Systems, Inc.*, 330 NLRB 1170 (2000) (timing is an important factor in assessing whether an employer's action was motivated by union or protected activity), *enfd.* sub nom. *Carolina Holdings, Inc. v. NLRB*, 5 Fed. Appx. 236 (4th Cir. 2001); *Bethlehem Temple Learning Center*, 330 NLRB 1177, 1178 (2000) (same); *American Wire Products*, 313 NLRB 989, 994 (1994) (same). Moreover, the Respondent has not offered, much less substantiated, any lawful explanation for its decision to restrict employees' use of the bulletin boards after the union activity started, even though the company had not found it necessary to restrict such usage prior to the union activity. Under these circumstances, it is evident that the Respondent's promulgation of the new restriction on employee use of bulletin boards was motivated by employees' protected union activity. See *Jordan Marsh Stores*, 317 NLRB at 462.

The Respondent argues that the record does not show that the new restriction on employee usage of the bulletin boards was motivated by prounion activity since there was no evidence that it had knowledge of such activity at the time it promulgated the restriction on April 16. This contention is contrary to the weight of the evidence. First, it is probable that the Respondent was aware of the prounion literature that had been repeatedly posted, and removed, from one or more bulletin boards at the Hammond facility. Even assuming that this had escaped the Respondent's notice, the record demonstrates that there was

other prouion and protected activity of which the Respondent clearly was aware. In approximately February 2007, Schillinger started to wear a union shirt, hat, and button to work on a daily basis. That month Koats—the facility’s human resources manager—told Schillinger “to just work and not talk about the Union.” Officials of the Respondent repeatedly pressed Schillinger to reveal what he had said during a discussion with a coworker about a new attendance policy that some employees were upset about. This all happened shortly before the Respondent promulgated the April 16 restriction on employees’ usage of the bulletin boards. The Respondent’s statement that Schillinger was not to talk about the Union, and its reaction to his discussions about the attendance policy, reveal the Respondent’s knowledge of, and hostility towards, such activity find that the Respondent violated Section 8(a)(1) when, on April 16, 2007, it promulgated a new restriction on employees’ use of company bulletin boards and did so for the purpose of interfering with the posting of union materials.¹³

2. Prohibition on distribution of union flyers in the parking lot at Hammond facility

In late May or early June 2007, company officials Dennison, Riehle and Koats, told off-duty employees that they were prohibited from distributing union literature in the Hammond facility’s parking lot. The Board has held that “[t]he distribution by off-duty employees of union literature in company parking lots is clearly protected by Section 7 of the Act” and that an employer violates Section 8(a)(1) by prohibiting such activity unless the prohibition is justified by business reasons. *St. Luke’s Hospital*, 300 NLRB 836, 837 (1990); see also *PPG Industries*, 351 NLRB 1049, 1051 (2007) (same).

The Respondent contends that its action was lawful because the company officials did not prohibit off-duty employees from handing the literature directly to others, but only prohibited the placement of literature on car windshields. According to the Respondent’s brief, distribution on car windshields created “the prospect for wholesale littering of the company’s property . . . because the materials can become loose and fall on the ground, or because employees and others . . . may discard them on the ground rather than in a trash receptacle.” This argument is frivolous. First, it misrepresents the facts. The Respondent prohibited the off-duty employees from handing out union literature in the parking lot, not only from placing the literature on car windshields. More specifically, during the incident in question, Meeker stated that he was within his rights to “hand out” flyers in the parking lot, and Dennison said that Meeker could not do it on company property. In addition, when Koats approached the off-duty employees in the parking lot and prohibited them from doing “it” on company property, what those employees had been doing was placing union literature on windshields *and* handing the flyers directly to persons passing by. Neither Dennison, Koats, nor Riehle ever said anything to

¹³ The complaint also alleges that the Respondent violated Sec. 8(a)(1) when, on about July 20, 2007, it promulgated a second, stricter, limitation on employees’ use of bulletin boards. For the reasons discussed above, the evidence did not establish that the stricter policy was ever actually placed into effect. Therefore, the allegation based on the July 20 policy should be dismissed.

the employees indicating that the prohibition was limited to the placement of the literature on car windshields. Even at trial, none of the Respondent’s officials denied that the prohibition extended generally to distribution in the parking lot.

If one assumes, contrary to the evidence, that the only activity the Respondent prohibited was the distribution of union literature on car windshields, the Respondent has still failed to establish the necessary business justification for such a prohibition. The purported concern with “wholesale littering” that is raised in the Respondent’s brief appears to be wholly the invention of counsel. No official of the Respondent testified that concern about litter had anything to do with the decision to prohibit distribution of union materials in the parking lot. Nor did the Respondent establish that its officials had reason to believe that employees’ placement of literature on car windshields had resulted in “wholesale littering” in the past, or would do so in this instance. On this record, the Respondent has completely failed to meet its burden of showing that it had concerns about littering that were serious enough to outweigh employees’ Section 7 right to distribute union literature.

In *St. Luke’s Hospital*, supra, the Board found a violation based on facts very similar to those present here. There, as here, the employer claimed that its prohibition on distribution in the company parking lot was lawful because that prohibition only covered the placement of literature on car windshields and was justified based on concerns about increased litter. The Board rejected the employer’s argument in that case for essentially the same reasons that I reject them here. First, the Board stated that, since the company did not inform employees that the prohibition only covered placing literature on car windshields, the prohibition constituted “an absolute prohibition against any form of distribution on the employees’ parking lot” and violated the Act. *St. Luke’s Hospital*, 300 NLRB at 837; see also *Bigg’s Foods*, 347 NLRB 425 fn. 7 (2006) (where employer did not clearly communicate the scope of its no-distribution rule, the rule is ambiguously overbroad and a violation). If anything, the argument that the Respondent’s prohibition was absolute is stronger here since that prohibition, as communicated by Dennison, extended to “handing out” union literature on company property, not just to placing such literature on car windshields in the parking lot. Second, in *St. Luke’s Hospital*, the Board stated that even assuming the prohibition only covered distribution on car windshields, the prohibition was unlawful because the employer had failed to show that its claimed concerns regarding excessive litter were legitimate. The Board made that determination despite the testimony of a company official that such concerns were the reason for the prohibition. Once again, the defense is even weaker in the instant case since the Respondent not only failed to show that distribution on car windshields led to excessive litter, but also failed to present testimony that company officials were motivated by concerns about littering.

For the reasons discussed above, I conclude that the Respondent violated Section 8(a)(1) when, in late May or early June 2007, officials of the company prohibited off-duty employees from distributing union literature in the Hammond facility’s parking lot or elsewhere on company property.

3. Prohibitions on Distribution of Union Buttons or Literature

and Union Discussions during Working Hours

Under Board law, “[a] no-distribution rule which is not restricted to working time and to work areas is overly broad and presumptively unlawful.” *Teletech Holdings, Inc.*, 333 NLRB 402, 403 (2001). The governing principle is that a rule is presumptively invalid if it prohibits distribution on the employees’ own time. See *Our Way, Inc.*, 268 NLRB 394 (1983). On June 20, the Respondent called union supporters Meeker, Schillinger, and Toufar to a meeting and prohibited them from distributing union materials “while you’re here.” Dennison told the employees that he did not want to “catch you passing [union materials] out” and “don’t want to see them laying around.” Schillinger protested that it was employees’ right to leave materials in the lunch room, to which Dennison responded “Not while you’re working,” and Koats added “during nonworking hours.” Dennison stated that the employees could pass out the union materials “when you’re outside, on your own time.” At approximately the same time that the Respondent announced these prohibitions on the distribution of union materials, it was permitting the distribution in its lunchroom of promotional materials for a fast food restaurant.

Under Board law, the restrictions on distribution articulated by Dennison and Koats are presumptively invalid for at least two reasons. First, the Respondent limited distribution to “nonworking hours.” The Board has held that such a restriction is invalid because it does not permit distribution during periods of the workday that are the employees’ own time such as meal times and break periods. *Grimmway Farms*, 314 NLRB 73, 90 (1994), *enfd.*, in part 85 F.3d 637 (9th Cir. 1996) *mem*; *Wellstream Corp.* 313 NLRB 698, 703 (1994); *Keco Industries*, 306 NLRB 15, 19 (1992). The Respondent, in prohibiting distribution, did not clearly convey to employees that they could distribute union materials during such periods that are employees’ “own time,” and, in fact, indicated the contrary. *Id.*; see also *Laidlaw Transit Inc.*, 315 NLRB 79, 82 (1994) (rule prohibiting solicitation during “company time” is presumptively invalid because “it does not clearly convey to employees that they may solicit on breaks, lunch, and before and after work.”)

Second, the prohibition violated the Act because Dennison and Koats did not state that they were only disallowing distribution in work areas of the facility. A prohibition is invalid as “overbroad” if it can be interpreted to “to restrict solicitation and distribution in breakrooms or cafeterias, places where employees do not perform work activities but technically are ‘company property.’” *Winkle Bus Co.*, 347 NLRB 1203, 1216 (2006), quoting *Laidlaw Transit Inc.*, 315 NLRB at 82. In this case, the Respondent interfered unlawfully with employees’ rights by explicitly prohibiting the employees from distributing union materials in the facility’s lunch room—a nonwork area—and indicating that distribution was allowed only “outside” the facility.

For the reasons discussed above, I conclude that the Respondent violated Section 8(a)(1) on June 20, 2007, by prohibiting employees from distributing union materials during nonworking time and in nonworking areas of the Hammond facility.

During the conversation on June 20, Dennison also told the employees that while they were working it was permissible to engage in “idle conversation . . . whatever,” but that they could

not have “organizing conversations.” The Board has held that an employer violates the Act by discriminatorily prohibiting employees from talking about a union at any time of day when employees are free to discuss other subjects unrelated to work. *BCE Construction*, 350 NLRB 1047, 1047 and 1052 (2007); *Novartis Nutrition Corp.*, 331 NLRB 1519, 1524 (2000), *enfd.* 23 Fed. Appx. 1 (D.C. Cir. 2001), *Willamette Industries*, 306 NLRB 1010, 1017 (1992); *Orval Kent Food Co.*, 278 NLRB 402, 407 (1986). In the instant case, Dennison was singling out union organizing conversations—explicitly stating that such conversations were prohibited even though “idle conversation” would be permitted.

I conclude that the Respondent violated Section 8(a)(1) on June 20, 2007, by discriminatorily prohibiting employees from talking about union organizing.

4. Respondent talks to Schillinger about his conversations with Gotzman

On July 16, the Respondent’s officials Carlson and Monicken had a lengthy discussion with Schillinger. The officials chastised Schillinger regarding two occasions, about a week earlier, when Monicken had seen him away from his machine talking to a Gotzman, a coworker. Carlson also alluded to another incident when he had seen Schillinger and other employees “standing around talking in the middle of the floor.” Carlson stated that he found it “hard to believe” they were talking about work. He opined: “[I]t looks kind of fishy. You know? I don’t know what the heck you’re talking about. And I know . . . the machine, it’s either not running, or it’s not getting watched.” Schillinger told Carlson and Monicken “it won’t happen again.” Carlson gave Schillinger a written warning regarding the conversations with Gotzman.

The complaint alleges that this exchange constituted a threat “that anytime Carlson saw two employees talking to one another, Carlson thought that employees were discussing the Union.” The evidence is insufficient to support this allegation. Neither Carlson nor Monicken made any reference to the Union or protected activity. In its brief, the General Counsel focuses on Carlson’s statement that the conversations employees were having away from their machines “look[] kind of fishy,” but the record does not show that this was an obscure reference to conversations about union activity, as opposed to a reference to any conversations that were non-work related and a distraction from employees’ job duties. Indeed, Carlson specifically told Schillinger that he did not know what the employees were talking about. The General Counsel does not cite any authority where, under similar circumstances, statements such as those involved here were found to constitute an unlawful threat.

I conclude that the allegation that Carlson threatened employees in violation of Section 8(a)(1) should be dismissed.

5. Shift leaders

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act in June or early July 2007 by telling shift leaders at the Hammond facility that they were supervisors who were prohibited from signing union cards or engaging in other union activities protected by Section 7 of the Act. The Respondent does not dispute that it engaged in this conduct, but argues that the shift leaders are, in fact, “supervisors” who are

excluded from the definition of “employee” and therefore are not entitled to the protections set forth by Section 7. For the reasons discussed below, I find that shift leaders at the Hammond facility are not supervisors for purposes of the Act and that the Respondent violated Section 8(a)(1) of the Act by telling those individuals that they were supervisors who were prohibited from signing union cards or engaging in other pro-union activity. *Shelby Memorial Home*, 305 NLRB 910, 910 fn. 2 and 918–919 (1991), enfd. 1 F.3d 550 (7th Cir. 1993).

a. Supervisory status under the Act

Section 7 of the Act provides that “employees” have the right, inter alia, to “join, or assist labor organizations.” Section 7, 29 U.S.C. Sec. 157. The definition of “employee” in the Act excludes from coverage “any individual employed as a supervisor,” Section 2(3), 29 U.S.C. Sec. 152(3), and thus the Act does not extend the rights described in Section 7 to “supervisors.” Section 2(11) of the Act defines a supervisor as:

[A]ny individual having the 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.

Section 2(11), 29 U.S.C. Sec. 152(11). The supervisory authorities are listed in the disjunctive, meaning that an individual may qualify as a supervisor based on any one of the twelve listed types of authority. However, Section 2(11) also contains the conjunctive requirement that the power be exercised with “independent judgment”—meaning that the judgment must be free from control by another authority and the exercise of judgment must involve a degree of discretion rising above the “routine or clerical.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006). “[T]he ‘burden of proving supervisory status rests on the party asserting that such status exists.’” *Id.* at 694, quoting *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003). “The party seeking to prove supervisory status must establish it by a preponderance of the evidence.” *Oakwood Healthcare*, 348 NLRB at 694.

In the instant case, the Respondents contend that the shift leaders exercise five of the types of supervisory authority listed in Section 2(11)—authority to transfer, to assign, to responsibly direct, to discipline, and to effectively recommend rewards.

Transfer: The Respondent appears to base its contention that shift leaders transfer employees on the evidence showing that Meeker has sometimes been directed by Carlson to send a crew member to a temporary assignment elsewhere in the facility. In some instances Carlson specifies a particular crew member for the temporary assignment, and sometimes Meeker is free to choose the crew member who will go.

Based on the record here, I conclude that the Respondent has failed to show that shift leaders were supervisors by dint of a role in temporary transfers. First of all, the evidence did not establish that any shift leader besides Meeker had a role in the temporary transfers of crew members. This deficiency in the

Respondent’s evidence is particularly significant since Meeker was not yet a shift leader in June/July 2007 when the Respondent declared that shift leaders were supervisors.

Even assuming that Meeker’s involvement in temporary transfers is representative of that of shift leaders in general, such involvement would not confer supervisory status for at least two reasons: (1) Meeker’s limited involvement with temporary transfers does not rise to the level of the authority to “transfer employees,” and (2) Meeker does not exercise what authority he does have with discretion that is more than “routine or clerical.” Regarding the first reason, the evidence shows that Meeker is not the one who decides whether a transfer will take place, where the individual will be transferred from and to, or how long the re-allocation of personnel will last. Those decisions, which presumably reflect an assessment of the Respondent’s production and staffing needs, are made above Meeker’s level and presented to Meeker by Carlson. In other words, Meeker does not decide to temporarily transfer a crew member, he is *told* to do so. What Meeker has the authority to do is decide which member of the crew will be used for the temporary transfer after someone else decides that the transfer will occur and only if Carlson does not designate someone. The type of narrow *selection* authority for *temporary* transfers that is exercised by Meeker here is not the authority to “transfer employees” for purposes of Section 2(11), and the Respondent cites to no precedent suggesting otherwise. See *Craft Metals, Inc.*, 348 NLRB 717, 718 (2006) (leadperson a nonsupervisor where, inter alia, the lead person’s supervisor is the one who decides whether it is necessary to temporarily transfer an employee to the crew from another part of the plant); *Children’s Farm Home*, 324 NLRB 61, 67 (1997) (Board affirms finding of no supervisory status where purported supervisors can arrange temporary transfers of employees, but have no authority to permanently transfer employees); *Greenpark Care Center*, 231 NLRB 753 (1977) (no supervisory status where putative supervisor transfers employees but “transfer is temporary in nature, its duration being only the time needed to assist during the emergency or absence”); see also *PPG Aerospace Industries*, 353 NLRB No. 23, slip op. at 1 (2008) (authority is not supervisory “[w]here the putative supervisor serves as a conduit relaying assignments from management”).

Second, even assuming that Meeker’s involvement in the selection of temporary transferees could be viewed as the authority to transfer employees, the evidence shows that authority was not exercised with the “independent judgment” necessary to elevate it above the merely “routine or clerical.” This was revealed by Meeker’s testimony about how he makes the selection. Meeker testified that he used to select the crew member based on relevant experience, but that he abandoned that practice some time ago and since then had sent crew members either on a rotation basis or based on the preferences expressed by crew members. The Board has held that selecting employees based on a rotation or on employee preferences does not involve a degree of judgment rising above the “routine or clerical.” *Shaw, Inc.*, 350 NLRB 354, 356 (2007) (rotating “essentially unskilled and routine duties among available crewmembers” in order to avoid burnout does not involve the use of independent judgment and is not supervisory); *Children’s Farm*

Home, 324 NLRB at 64 (Assigning employees does not involve independent judgment when “[m]ost such decisions are based on the expressed preferences of the employees involved or are reached by a consensus of the employees on the shift.”). Thus, to the extent that Meeker may be seen as having authority to transfer employees, his exercise of that authority does not require the level of independent judgment required to confer supervisory status.

Assign: In *Oakwood Healthcare, Inc.*, the Board stated that “assigning” for purposes of Section 2(11) *does not* include “choosing the order in which the employee will perform discrete tasks,” or giving an “ad hoc instruction that the employee perform a discrete task.” 348 NLRB at 689. Rather the authority to assign “refers to the ‘act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks to an employee. . . . In sum to ‘assign’ for purposes of Section 2(11) refers to the . . . designation of significant overall duties to an employee.” *Croft Metals, Inc.*, 348 NLRB at 721, quoting *Oakwood Healthcare*, 348 NLRB at 689.

The record shows that shift leaders at the Hammond facility do not have the authority to designate the crew members’ “significant overall duties.” They do not decide which “place” or “time” the employee will work. They do not decide, for example, whether the overall duties of an employee will be in production or some other aspect of the Hammond operation, or whether employees will be on the day shift or the night shift. Nor do the shift leaders determine which jobs will be run on particular day or which machines will be operated. Those decisions are all made at a level above that of the shift leaders. At the beginning of each shift, the shift leader is given a “job priority sheet,” which informs him or her of the jobs to be run on each machine in order of importance. The shift leader uses that form and directs a crew member to start work on the first job scheduled for a particular machine. To decide which employee will work on a particular machine, the shift leader sometimes considers the capabilities of the crew members, but other times the shift leader makes the decisions randomly, or simply leaves the crew members on the same machine day after day.

Considering these facts under the standards announced by the Board, I conclude that the shift leaders’ authority to direct employees to work on a particular machine does not amount to “assigning,” but rather is limited to “ad hoc instruction that the employee perform a discrete task.” Recently, the Board reached the same conclusion under the very similar facts presented in *Alstyle Apparel*, 351 NLRB 1287 (2007). There, as here, at the beginning of each shift the company provided its “shift leaders” with forms listing the machines that were to be operated. The shift leaders then “utilized the form and their knowledge of the capabilities of each worker to assign the machines.” *Id.* at 1305. The administrative law judge found that these activities by the shift leaders were not “assigning” for purpose of Section 2(11), but rather were “ad hoc instructions” that the employees “perform a discrete task.” *Id.* The Board agreed with the judge’s conclusion that the shift leaders did not assign work, and added that “even assuming that the shift leaders assign work to the employees, such assignments do not

involve the exercise of independent judgment” necessary to show supervisory authority. *Id.*, at 1287. In the instant case, as in *Alstyle Apparel*, the Respondent has only succeeded in showing that shift leaders direct employees to perform discrete tasks within an assignment, not that they possess assignment authority for purposes of Section 2(11).

Responsibly to Direct: In *Oakwood Healthcare*, the Board stated that an individual has supervisory authority “responsibly to direct” employees when that individual decides “what job shall be undertaken next or who shall do it,” . . . provided that the direction is both ‘responsible’ . . . and carried out with independent judgment.” 348 NLRB at 691. Direction is “responsible” only if “the person directing and performing the oversight of the employee” is “accountable for the performance of the tasks by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly.” *Id.* at 691–692. In order to meet the burden of showing that direction by the shift leaders is “responsible,” the Respondent “must present evidence of ‘actual accountability.’” *Alstyle Apparel*, 351 NLRB 1287. Moreover, the level of accountability necessary to show that direction is “responsible” is not established unless it is “shown that the employer delegated to the putative supervisor the authority . . . to take corrective action if necessary.” *Oakwood Healthcare*, 348 NLRB at 692. The purpose of this “accountability” requirement is to create a clear distinction between those employees who are directing employees in the interests of management (and therefore are acting as supervisors) and those whose interest in directing other employees “is simply the completion of a certain task” (and therefore are not acting as supervisors). *Id.* The standard is not met unless the putative supervisor “will have, if and to the extent necessary, an adversarial relationship with those he is directing.” *Id.* The further requirement that authority to direct be exercised with “independent judgment” imposes on the party arguing for supervisory status the additional burden of showing that the putative supervisor “act[s] or effectively recommend[s] action, free of the control of others and forms[s] an opinion or evaluation by discerning and comparing data.” *Id.* at 693.

In this case, the Respondent has established that shift leaders direct the work of crew members. Although the shift leaders spend some of their time operating machines, the evidence shows that they also spend significant amounts of time telling individual crew members which jobs to perform next and overseeing the work of the crew. The Respondent has, however, not overcome the hurdle of establishing that this direction is “responsible” because it has failed to show that shift leaders have the authority to take “corrective action” and that they are subject to “actual accountability” for the work of crew members. Regarding the question of corrective action, the Respondent did not show that shift leaders are empowered to impose any type of consequences on crew members who refuse their directions. To the contrary, in the event that a crew member refuses a direction, the shift leader’s only demonstrated recourse is to make a factual report of what occurred to the team manager. That report does not include a recommendation regarding consequences and does not constitute corrective action.

The Respondent presented at least some evidence on the

question of shift leaders' "actual accountability." Monicken and Baker, two current company officials, gave testimony that shift leaders are "held responsible" if a crew's productivity or product quality are inadequate. However, when Monicken was questioned further about this he admitted to being unaware of any instance when being "held responsible" meant that the shift leader was subjected to consequences for his or her failure. For his part, Baker stated that shift leaders were "responsible" for the quality and quantity of production, but he made no claim that this meant that a shift leader could face the prospect of material consequences based on the quality or quantity of the crew's output. Nor did the Respondent introduce evidence of a policy or rule that authorized imposing adverse consequences on a shift leader based on deficiencies in the quality or quantity of production by a crew member. "Purely conclusory" evidence, such as that provided by Monicken and Baker, is insufficient to show that shift leaders' are actually held accountable for their direction of employees. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). "In the absence . . . of any evidence of actual or prospective consequences to . . . terms and conditions" of the putative supervisors, such consequences are "merely speculative and insufficient to establish accountability." *Id.*; cf. *Croft Metals, Inc.*, 348 NLRB at 722 (where an employer showed that the purported supervisors received written warnings based on the shortcomings of their crews, the actual accountability standard is met). In the instant case, the Respondent relies on "purely conclusory," and therefore insufficient, evidence of accountability.

My conclusion is consistent with Board decisions presenting similar facts. In *Lynwood Manor*, the Board found that accountability was not demonstrated despite the fact that the employer had presented testimony that the putative supervisors were held accountable and that any mistakes fell "back on [the putative supervisor's] shoulders." 350 NLRB 489, 490-491 (2007). The Board explained that such testimony was not sufficient given that the employer failed to present "any specific evidence, that [the putative supervisors] may be disciplined, receive a poor performance rating, or suffer any adverse consequences with respect to their terms and conditions of employment" due to the failures of the individuals whose work they directed. *Id.* Similarly, in *Golden Crest Healthcare Center*, the Board found that the employer failed to establish actual accountability because, even though the purported supervisors were evaluated on their performance directing others, the evidence did not show that they actually faced the prospect of material consequences based on how they performed in that respect. 348 NLRB at 731. If anything, the evidence in favor of finding "responsible direction" is weaker here than in *Golden Crest*, *supra*, since in this case none of the factors on which the performance of shift leaders is evaluated mention directing work or otherwise supervising crew members. I conclude that the Respondent fell short of demonstrating that shift leaders at the Hammond facility actually faced the prospect of material consequences as a result of the performance of the crew members working under them.¹⁴

¹⁴ The record does contain evidence that shift leaders have taken over the responsibilities of "quality checker" employees, and are sub-

Even were I to assume, contrary to the above, that the shift leaders responsibly direct crew members, the Respondent would still have to show that the shift leaders use "independent judgment" when providing the responsible direction. The Respondent has not done that. The evidence does not show that it is necessary for the shift leaders to "form an opinion or evaluation by discerning and comparing data" as required by *Oakwood*, 248 NLRB at 693. Rather, the record reveals that in deciding which job a crew member will be directed to perform, shift leaders sometimes choose on a rotation basis, or even randomly. One shift leader simply leaves each crew member on the same machine day after day. A responsibility that can be discharged in this manner does not rise above the level of the merely routine or clerical, and does not entail the exercise of "independent judgment." Moreover, even in a case where shift leaders at a manufacturing plant sometimes considered "the capabilities of each worker" when assigning crew members to work on particular machines, the Board has found that the shift leaders did not exercise independent judgment for purposes of Section 2(11). *Alstyle Apparel*, 351 NLRB 1287, 1287 and 1305; see also *Croft Metals, Inc.*, 348 NLRB 717, 722 (employer did not meet burden of proof regarding independent judgment where it "adduced almost no evidence regarding the factors weighed or balanced by the lead persons in . . . directing employees). The same conclusion would be particularly appropriate here given that the work involved is essentially unskilled and routine. See *Shaw, Inc.*, 350 NLRB 354, 356 (direction of crew members' work does not involve independent judgment where, *inter alia*, that work is "essentially unskilled and routine").

Discipline: The Respondent argues that shift leaders have the authority to discipline for purposes of Section 2(11). However, in the fact section of its brief, the Respondent itself admits that shift leaders "do not mete out discipline to their employees," but only "report performance related problems." If a crew member refuses a shift leader's direction, the shift leader's only demonstrated recourse is to make a report of the refusal to the team manager. The shift leaders also inform the team managers when crew members are not present for scheduled work. The record does not show, however, that shift leader make any recommendation regarding discipline, or have any further involvement in the decision about what, if any, discipline will be imposed. The Board has held that "[a]n employee does not become a supervisor if his or her participation in personnel

ject to material consequences if they fail to detect a quality defect before allowing product to be packed for shipment to a customer. That, however, only shows that shift leaders are held responsible for their own failure as quality checkers, not that they are held responsible for the crew member's production of defective product. See *Oakwood Healthcare*, 348 NLRB at 695. The Board has held that quality control is not a supervisory function. *Brown & Root, Inc.*, 314 NLRB 19, 21 fn.6 (1994). To establish that shift leaders were held responsible for the quality of crew members' work product, the Respondent would have had to show that even if a shift leader detected a crew member's mistake in time to stop the defective product from being shipped, the shift leader would still be subject to material adverse consequences because of the crew member's mistake. The Respondent did not present such evidence.

actions is limited to a reporting function and there is no showing that it amounts to an effective recommendation that will affect employees' job status." *Chevron U.S.A.*, 309 NLRB 59, 61 (1992). Factual accounts that do not include any recommendation are not supervisory. *Ohio Masonic Home*, 295 NLRB 390, 393–394 (1989). Since, in the instant case, the shift leaders' only demonstrated involvement in discipline is to report factual information, that involvement does not render them supervisors.

Effectively Recommend Rewards: The Respondent contends that shift leaders effectively recommend employee rewards for purposes of Section 2(11). In support of this, the Respondent relies on: (1) the fact that shift leaders complete performance review forms for crew members and (2) testimony that those performance reviews can play a part in the granting of merit wage increases and promotions. I reject the Respondent's contention for several reasons. The most important and most obvious reason is that the performance reviews *contain no recommendation* from the shift leaders regarding raises, promotions, or any other type of employee reward. Rather the shift leaders rate each crew member on 33 indicia of performance and comment on those ratings. The performance review forms do not call for the shift leaders to make recommendations about raises or promotions and there was no evidence that shift leaders injected such recommendations into the review process. Moreover, the evidence did not show that the Respondent would give any weight to such a recommendation if a shift leader volunteered it. The shift leaders' completion of appraisal forms is "primarily a reporting function" regarding the performance of crew members and therefore does not constitute the power to reward, or effectively recommend rewards, for employees. *Beverly Enterprises v. NLRB*, 148 F.3d 1042, 1046–1047 (8th Cir. 1998); *Chevron U.S.A.*, supra; *Ohio Masonic Home*, supra; see also *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000) (the ability to evaluate employees is not listed as a supervisory attribute).

Second, even assuming that the performance ratings could somehow be seen as recommendations regarding raises or promotions, the evidence does not show that such recommendations were "effective." The Respondent did not establish who at the company was responsible for deciding whether crew members would receive wage increases or promotions, or by what process that decision was made. No one who was shown to make such decisions testified that they gave the performance reviews decisive weight when granting raises or promotions. Moreover, the Respondent did not show that performance review scores consistently correlated with the granting rewards to employees. The record does not reveal whether or not others factors such as profitability, general business conditions, productivity, or the state of the labor market play a part in the granting of increases and promotions. Instead, the Respondent relies on imprecise testimony of its witnesses that performance reviews are "associated with" rewards and "can be," or were, "used" in granting rewards. The burden is on the Respondent to show that the shift leaders effectively recommended rewards. Even assuming that the performance ratings could be seen as reward recommendations, the conclusory, imprecise, and incomplete evidence the Respondent relies on here would not be

sufficient to meet the burden of showing that those recommendations were "effective."

Third, the Respondent did not show that it informed shift leaders that the performance reviews they were completing were used by the Respondent as effective recommendations for raises or promotions. To the contrary, Stewart, one of the Respondent's own witnesses, testified that during the 3 years he was a shift leader he was not aware that the performance reviews he completed for crew members had any bearing on raises. The Board declines to find supervisory status based on alleged authority that the putative supervisors were not notified they possessed. *Golden Crest Healthcare Center*, 348 NLRB at 730 fn.9. For this reason, as well as those discussed, above, the Respondent has failed to establish that shift leaders effectively recommend rewards.

Secondary Indicia: The Respondent claims that, until November 2007, the shift leaders were the highest ranking individuals on site for approximately two thirds of each working day, and argues that shift leaders therefore must be seen as supervisors. This argument is unpersuasive both as a matter of law and fact. The Board has held that "[t]he status of being the highest ranking employee on site falls within the category of secondary indicia of supervisory authority" and that such status does not establish supervisory status absent a showing of one of the primary indicia of supervisory status enumerated in Section 2(11). *Golden Crest Healthcare Center*, 348 NLRB at 730 fn.10. Thus even assuming that the Respondent's assertion was supported by evidence, it would not render the shift leaders supervisors because, as discussed above, the Respondent has not shown that shift leaders possess any of the types of authority set forth in Section 2(11).

At any rate, the Respondent has failed to substantiate its claim that shift leaders were the highest ranking individuals on site for two thirds of each working day during any period relevant to this case. The Respondent's own production manager, Dennison, testified that team managers (who supervise the shift leaders) work the same 12 hour shifts as the shift leaders they supervise. It is true that another witness for the Respondent, Monicken, stated that, during the period he was a shift leader in 2007, his supervisor was not present for the first 3 hours of the 12-hour shift—i.e., for 25 percent of his shift. Not only is this a much less substantial period of supervisor-less time than that claimed by the Respondent, but the Respondent failed to show that Monicken's experience was shared by any of the other shift leaders. Indeed, the evidence indicated that in at least some significant respects Monicken experience as a shift leader was unusual. See, supra, footnote 7.

To the extent that secondary indicia of supervisory status are considered here, those indicia generally show that the shift leaders were treated more like regular production workers than like supervisors. For example, shift leaders, like the crew members they lead, are paid an hourly rate, whereas acknowledged supervisory personnel, such as the team managers, are paid a salary. See *Croft Metals, Inc.*, 348 NLRB at 717–718 (Lead persons are nonsupervisory where, inter alia, they are paid on an hourly basis "just like regular rank-and-file" employees, whereas "admitted supervisors are salaried."). Similarly, the Respondent evaluates the performance of shift leaders

using the same review form that is used for the rank-and-file crew members, whereas acknowledged supervisors such as the team managers are evaluated using a different performance review form. In addition, shift leaders are subject to discipline for attendance based on the strict point system that is used for ordinary crew members, not the more flexible “rule of reason” system that is used for team managers. Finally, the shift leaders are not included in the frequent meetings that the facility’s production managers hold to discuss safety, quality control, production, and general business news with team managers.¹⁵

In addition, acceptance of the Respondent’s contention that shift leaders were supervisors would result in an improbable supervisory ratio. The record shows that shift leaders Nogal and Nelson each usually oversaw the work of only one other crew member. In general, the evidence indicates that most shift leaders have approximately three other individuals on their crews. Given that the work of the crew members is unskilled, the fact that holding shift leaders to be supervisors would result in such a low supervisory ratio weighs against viewing the shift leaders as supervisors. See *Wilson Tree Co.*, 312 NLRB 883, 893 (1993) (crew leaders who oversee crews of three to four employees are not supervisors, in part because holding otherwise would mean the employer “would have an inordinately low supervisory ratio”); *Valley Mart Supermarkets*, 264 NLRB 156,163 (1983) (rejecting argument that individual was a supervisor where holding otherwise “would result in an unrealistic and excessively high ratio of one supervisor for every five employees at a facility where the employee’s work has not been shown to have been other than routine”); *NLRB v. GranCare*, 170 F.3d 662, 667 (7th Cir. 1999) (en banc) (where finding of supervisory status would result in ratio of 59 supervisors to 90 nonsupervisors, “[s]uch a highly improbable ratio of bosses to drones ‘raises a warning flag’”).

b. Conclusion regarding shift leaders

Starting in June or early July 2007, the Respondent informed shift leaders that they were supervisors and were prohibited from signing union cards or engaging in other union activities. As discussed above, the Respondent has failed to meet its burden of proving that shift leaders were supervisors pursuant to Section 2(11) of the Act. Therefore, by announcing that the shift leaders were supervisors and prohibiting them from engaging in protected union activities, the Respondent has violated Section 8(1) of the Act. *Shelby Memorial Home*, supra.

B. Section 8(a)(3) and Warning to Schillinger

Twice on the same day in July 2007, Monicken discovered that Schillinger had left his machine in order to talk to Gotzman. The first time Schillinger’s machine was running unattended and the second time Schillinger’s machine was idle. In each instance, Schillinger had responded to Gotzman’s request for assistance with a task at her machine, although in the second instance Schillinger remained to talk afterwards. On July

¹⁵ To the extent that the shift leaders may occasionally fill-in for absent team managers at these meetings, such substitution was not shown to be more than sporadic. See *Oakwood Healthcare, Inc.*, 348 NLRB at 694 (an employee’s “sporadic substitution” for a supervisor does not confer supervisory status).

16, Carlson issued a disciplinary warning to Schillinger for this conduct. The complaint alleges that the Respondent issued the warning because of Schillinger’s union and other protected activities, and therefore discriminated against Schillinger in violation of Section 8(a)(3) and (1) of the Act.

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983), the Board set forth the standards for determining whether an employer has discriminated against an employee on the basis of union or other protected activity in violation of Section 8(a)(3) and (1). Under the *Wright Line* standards, the General Counsel bears the initial burden of showing that the Respondent’s actions were motivated, at least in part, by anti-union considerations. The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or union activity. *Intermet Stevensville*, 350 NLRB 1271, 1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Intermet Stevensville*, supra; *Senior Citizens*, supra.

The General Counsel has met its initial burden with respect to Schillinger. The evidence shows that Schillinger engaged in a variety of prounion activities and that the Respondent was aware of those activities. The evidence also establishes that the Respondent harbored antiunion animus. As found above, the Respondent repeatedly interfered with employees’ legitimate exercise of their Section 7 rights to engage in protected union activities. The Respondent unlawfully prohibited prounion employees, including Schillinger, from posting union literature, distributing union literature and union buttons, and talking with coworkers about union organizing. After the meeting at which Schillinger was disciplined, Monicken warned Schillinger, “You know they’re watching you, so gotta be careful.”

The Respondent, however, has satisfied its responsive burden by showing that the company would have issued the disciplinary warning to Schillinger even absent his union support and activities. The evidence showed that within a period of several hours Schillinger had twice been observed away from his own work station, talking to a coworker. In the second instance, Schillinger’s machine was idle and he offered no explanation to Monicken when challenged about this lapse. At trial, both Schillinger and Monicken testified that it was not acceptable for employees to leave their machines idle while they talked to coworkers.¹⁶ The record does not show that the Respondent had observed other employees repeatedly engaging in such conduct without issuing comparable discipline to them. According to the General Counsel, I should conclude that Schillinger was treated disparately because the evidence did not show that the Respondent disciplined Gotzman—the other par-

¹⁶ Schillinger testified that he could leave his machine idle if a shift leader wished to talk to him, but not that it was permissible to do so in order to talk to a coworker who did not have “lead” authority.

ticipant in the conversations for which Schillinger was disciplined. I disagree. Gotzman was not shown to have left her machine idle while she talked with Schillinger. Indeed, the evidence indicated that Gotzman remained at the machine to which she was assigned. Thus, Gotzman was not guilty of the same misconduct as Schillinger. In reaching my conclusion that the Respondent would have issued the warning even absent Schillinger's union activity, I considered that the discipline imposed was relatively mild and not facially disproportionate to the offense.

The allegation that the Respondent violated Section 8(a)(3) and (1) when it issued a disciplinary warning to Schillinger on about July 16, 2007, should be dismissed.

CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent interfered with employees' exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act: on April 16, 2007, by promulgating a restriction on employees' use of company bulletin boards for the purpose of interfering with the posting of union materials; in late May or early June 2007, by prohibiting off-duty employees from distributing union literature in the Hammond facility's parking lot or elsewhere on company property; on June 20, 2007, by prohibiting employees from distributing union buttons and other union materials during nonworking time and in nonworking areas of the Hammond facility; on June 20, 2007, by discriminatorily prohibiting employees from talking about union organizing at times when employees are free to discuss other subjects unrelated to work; since June or early July 2007, by informing employees classified as shift leaders that they are supervisors and prohibiting those employees from signing union cards or otherwise engaging in union activities.

4. The Respondent was not shown to have violated Section 8(a)(1) of the Act on about July 20, 2007, by publishing a new policy regarding the use of bulletin boards.

5. The Respondent was not shown to have violated Section 8(a)(1) of the Act on or about July 16, 2007, by threatening employees that anytime team manager/plant supervisor Jason Carlson saw two employees talking with one another, he thought that the employees were discussing the Union.

6. The Respondent was not shown to have violated Section 8(a)(3) and (1) of the Act on about July 16, 2007, when it issued a disciplinary warning to employee Jody Schillinger.

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. I will recommend that the Respondent be ordered to rescind the policy, dated April 16, 2007, that imposed new restrictions on employees' use of company bulletin boards. In addition, I will recommend that the Respondent be ordered to inform shift leaders that they are not supervisors and may, if they so choose, sign union cards or engage in other

union activities.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.¹⁷

ORDER

The Respondent, Loparex LLC, Hammond, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating or maintaining any restriction on employee posting of materials on company bulletin boards or elsewhere at the Hammond facility for the purpose of interfering with the employees' dissemination of union information or materials.

(b) Prohibiting off-duty employees from placing union literature on vehicle windshields or otherwise distributing union materials in the Hammond facility's parking lot.

(c) Prohibiting employees from distributing union buttons and other union materials during nonworking time and in nonworking areas of the Hammond facility.

(d) Prohibiting employees from talking about the Union or union activities at times when employees are free to discuss other subjects unrelated to work.

(e) Telling employees classified as shift leaders that they are supervisors.

(f) Prohibiting employees classified as shift leaders from signing union cards or otherwise engaging in union activities.

(g) 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) Rescind the policy, dated April 16, 2007, that restricted employees' use of company bulletin boards.

(b) Inform all shift leaders at the Hammond facility that they are not supervisors and are entitled as employees within the meaning of Section 2(3) of the Act to sign union cards or otherwise engage in protected union activities if they so choose.

(c) Within 14 days after service by the Region, post at its facility in Hammond, Wisconsin, copies of the attached notice marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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,

¹⁷ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁸ 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."

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 April 16, 2007.

(d) 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.

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

Dated, Washington, D.C. November 12, 2008

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 restrict you from posting materials on company bulletin boards or elsewhere at the Hammond facility for the purpose of interfering with your dissemination of union information or materials.

WE WILL NOT prohibit you from placing union literature on vehicle windshields or otherwise distributing union materials in the Hammond facility's parking lot when you are off-duty.

WE WILL NOT prohibit you from distributing union buttons and other union materials during nonworking time and in non-working areas of the Hammond facility.

WE WILL NOT prohibit you from talking about the Union or union activities at times when you are free to discuss other subjects unrelated to work.

WE WILL NOT tell you that shift leaders are supervisors.

WE WILL NOT prohibit shift leaders from signing union cards or otherwise engaging in protected union activities.

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

WE WILL rescind the policy, dated April 16, 2007, that imposed restrictions on your use of company bulletin boards.

WE WILL inform all shift leaders that they are not supervisors and are entitled as employees within the meaning of Section 2(3) of the Act to, if they so choose, sign union cards or otherwise engage in protected union activities.

LOPAREX LLC