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American Directional Boring, Inc., d/b/a ADB Utility Contractors, Inc. *and* Local 2, International Brotherhood of Electrical Workers, AFL–CIO. Cases 14–CA–27386, 14–CA–27570, and 14–CA–27677

September 30, 2008

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On May 10, 2005, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel and the Charging Party filed separate answering briefs; and the Respondent filed a reply brief. On September 30, 2006, the National Labor Relations Board remanded the case to the judge for further consideration in light of the Board's decisions in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), *Croft Metals, Inc.*, 348 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006).[1]

On August 23, 2007, Administrative Law Judge Paul Buxbaum issued the attached supplemental decision.[2] The Respondent filed exceptions and a supporting brief, a motion to reopen the record, and a motion to dismiss part of the complaint for lack of jurisdiction.[3] The General Counsel and the Charging Party filed separate answering briefs and separate briefs in opposition to the Respondent's motion to reopen the record; the Charging Party also filed a brief in opposition to the Respondent's motion to dismiss part of the complaint. The Respondent filed a reply brief in support of its exceptions and its motion to reopen the record.

The National Labor Relations Board has considered the decisions and the record in light of the exceptions,[4] motions, and briefs and has decided to affirm the judges' rulings, findings,[5] and conclusions and to adopt the recommended Order.[6]

I. THE 8(A)(3) ALLEGATIONS

For the reasons stated by Judge Schlesinger, we agree that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Jeremy Farris, Nathan Schaffer, Edgar Schreit, Rodney Hanephin, Matt Sutton, Ryan Adams, Clarence Williams, Jason Lohman, Matt Bridges, Adam Williams, Steve Mack, John Shipp, and Wayne Schaffer.

Under *Wright Line*,[7] the General Counsel must first show, by a preponderance of the evidence, that protected conduct was a motivating factor in the employer's adverse action. Once the General Counsel makes that showing by demonstrating protected activity, employer knowledge of that activity, and animus against protected activity, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity. *United Rentals*, 350 NLRB 951 (2007) (citing *Donaldson Bros.*

[1] 348 NLRB 895 (2006).

[2] Prior to the Board's remand, Judge Schlesinger retired. The case was reassigned to Judge Buxbaum on February 26, 2007.

[3] The Respondent has also requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[4] The Respondent did not except to the findings that in opposition to the Union's organizing campaign it committed multiple violations of Sec. 8(a)(1), which included impliedly threatening employees with job loss, futility, and closure, soliciting union supporters to quit their employment, impliedly threatening discipline for wearing union pins, impliedly threatening reduction or loss of their bonus, threatening loss of insurance and retirement plan, threatening to subcontract more work, interrogating employees about their union activities and threatening unspecified reprisals because of their union activities, and creating an impression of surveillance.

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

We find no merit in the Respondent's exceptions to the judges' findings that Jeremy Farris, John Shipp, Nathan Schaffer, Adam Williams, Matt Bridges, Matt Sutton, Rodney Hanephin, and Jason Lohman are not statutory supervisors.

The Respondent's contention that Nathan Schaffer was a supervisor rests on Schaffer's testimony that on "a few" occasions "when his usual operator was absent" he informed his supervisor, Project Manager Rich Robinson, that he wanted a "specific operator" to replace him and there was "only a single occasion" in which he was not assigned the operator he requested. We reject this argument. Robinson did not testify and thus there is no evidence to establish that Schaffer's input constituted an effective recommendation. Additionally, the Respondent did not prove that in any instance in which Schaffer requested a "specific operator" he was exercising independent judgment. The Respondent states only that Schaffer typically requests operators that he had worked with before, without explaining why he sought a particular operator on any occasion.

[6] 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 National Labor Relations 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 Schaumber and Member Liebman 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.

[7] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

Ready Mix, Inc., 341 NLRB 958, 961 (2004)).[8] If, however, the evidence establishes that the reasons given for the employer's action are pretextual—that is, either false or not in fact relied upon—the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the *Wright Line* analysis. *United Rentals*, supra at 951–952 (citing *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)).

We agree with Judge Schlesinger that the General Counsel carried his initial *Wright Line* burden and established that union activity was a motivating factor in the discharge of all 13 employees. We also agree that every one of the reasons proffered by the Respondent in defense of the discharges was pretextual. Accordingly, we affirm all of his findings with regard to the Respondent's violations of Section 8(a)(3) and (1).

II. THE *GISSEL* BARGAINING ORDER

We also agree with the judges that a bargaining order is necessary and warranted under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), in light of the egregiousness and pervasiveness of the Respondent's unlawful activity.[9]

Under *Gissel*, the Board will issue a remedial bargaining order, absent an election, in two categories of cases. Category I cases are "exceptional" cases, those marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase the coercive effects, thus rendering a fair election impossible. Id. at 613–614. Category II cases are "less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes." Id. at 614. In the latter category of cases, the Board will issue a bargaining order if it finds "that the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order[.]" Id. at 614–615.

In determining the propriety of a bargaining order, the Board examines the seriousness of the violations and the pervasive nature of the conduct, considering such factors as the number of employees directly affected by the violations, the size of the unit, the extent of the dissemination among employees, and the identity and position of the individuals committing the unfair labor practices. *Garvey Marine, Inc.*, 328 NLRB 991, 993 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001). Accord: *Holly Farms Corp.*, 311 NLRB 273, 281 (1993), enfd. 48 F.3d 1360 (4th Cir. 1995), cert. denied in pertinent part 516 U.S. 963 (1995).

We affirm Judge Buxbaum's determination that the violations here are sufficiently outrageous and pervasive that this case falls within category I. The Respondent's response to the Union's campaign was swift and severe, beginning only days after the initial organizational meetings on March 29 and April 7, 2003.[10] On April 15, Chris Eirvin, the Respondent's general manager, delivered a plantwide speech in which he committed several serious unfair labor practices. Eirvin stated that the Respondent would lose its "biggest customer"[11] and declared that the company would "shut [its] doors" if the Union was successful in its organizing effort. Threats of job loss constitute "hallmark" violations of the Act, "which are highly coercive because of their potentially long-lasting impact." *National Steel Supply, Inc.,* 344 NLRB 973, 976 (2005), enfd. 207 Fed. Appx. 9 (2d Cir. 2006). Threats of plant closure are also "hallmark" violations of the Act. *Intermet Stevensville*, 350 NLRB 1350, 1360–1361 (2007); *Indiana Cal-Pro, Inc. v. NLRB*, 863 F.2d 1292, 1296–1297 (6th Cir. 1988).

Eirvin also committed other serious nonhallmark violations of Section 8(a)(1) during his speech on April 15, by encouraging union supporters to seek employment with unionized drilling companies, repeatedly emphasizing that the Respondent would never recognize a union, impliedly threatening employees with discipline for wearing union pins, and creating an impression of surveillance. See *Climatrol, Inc.*, 329 NLRB 946, 947–948 (1999) (bargaining order imposed where respondent held mandatory meeting of employees in which it threatened

[8] Chairman Schaumber notes that the Board and the 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 standard, Chairman Schaumber agrees with this addition to the formulation. In this case, he finds a causal nexus between the Respondent's union animus and the discharges of the discriminatees.

[9] As Judge Schlesinger found, the record shows that the Union had the support of the majority of the bargaining unit. As of April 15, 2003, the Union had obtained signed authorization cards from approximately 33 of the 59 employees in the unit. The Respondent has not excepted to this finding.

[10] All dates are in 2003, unless otherwise indicated.

[11] The Respondent did not except to Judge Schlesinger's finding that there was "no factual basis" for Eirvin's comment that its work with Ameren UE, which constituted approximately 40 percent of its business, "would disappear" if the Union successfully organized its work force. *NLRB v. Gissel Packing Co.*, 395 U.S. at 618–620.

loss of work and jobs and that it would close the business before it would "go union").

The Respondent committed additional hallmark and nonhallmark violations in a April 18 letter signed by Eirvin, which was distributed to all employees and read aloud to a significant number of employees by Project Manager Rich Robinson. The letter threatened that some or all of the Respondent's employees would lose their jobs and that the Respondent would subcontract more work if employees organized successfully. The letter also stated that "[p]utting a union in our company may kill it" and that the Union "could destroy ADB and our jobs!!" In context, such statements would convey to employees that the company would go out of business as a result of organization, a contention for which there is no support. As discussed by Judge Schlesinger, Eirvin's letter also violated Section 8(a)(1) by unlawfully soliciting the resignation of union supporters, repeatedly stating that unionization would be futile, and warning that money spent by the Respondent in resisting the Union would be deducted from employees' bonus payments. See *Evergreen America Corp.*, 348 NLRB 178, 180 (2006), enfd. 531 F.3d 321 (4th Cir. 2008) (imposing a bargaining order where employer's letter to all employees included unlawful threats). Overall, the Respondent committed approximately 15 serious violations of Section 8(a)(1) during the month of April, nearly all of which were directed against the entire unit. See *NLRB v. General Fabrications Corp.*, 222 F.3d 218, 233 (6th Cir. 2000) (enforcing bargaining order where the employer committed "violations that affected the entire workforce").

The Respondent's discharge of 13 union supporters, many of whom were prominent leaders of the organizing campaign, decimated approximately 22 percent of the bargaining unit, and illustrated to employees that the Respondent's oral and written threats were to be taken literally. "The discharge of employees because of union activity is one of the most flagrant means by which an employer can hope to dissuade employees from selecting a bargaining representative because no event can have more crippling consequences to the exercise of Section 7 rights than the loss of work." *Mid-East Consolidation Warehouse*, 247 NLRB 552, 560 (1980). As discussed by the judges, the Respondent began firing union supporters within hours of Eirvin's April 15 speech, when, using pretextual grounds, it discharged Jeremy Farris and Edgar Schreit, both of whom had assumed leadership roles during the Union's initial meetings, and Nathan Schaffer. As Judge Schlesinger found, Eirvin had "complete knowledge of the union drive."

"Obviously the discharge of a leading union advocate is a most effective method of undermining a union organizational effort." *NLRB v. Longhorn Transfer Service*, 346 F.2d 1003, 1006 (5th Cir. 1965). See also *NLRB v. Jamaica Towing*, 632 F.2d 208, 212–213 (2d Cir. 1980) (concluding that an employer's discharge of an active union adherent would likely "have a lasting inhibitive effect on a substantial percentage of the work force" and remain in employees' memories for a long period). In all, the Respondent fired 9 of 11 employees who attended the first union meeting on March 29, all 4 employees who sat at the head table during the union meeting on April 7, and 13 of the 33 employees who signed authorization cards. The succession of discharges continued through November, striking at the core of the Union's organizing efforts and spreading fear among those who remained employed.[12] "[M]ass discharges leave no doubt as to the response that the employees will reasonably fear from their employer if, after reinstatement, they persist in their support for a union." *National Steel Supply*, 344 NLRB at 977 (citations omitted). See also *General Fabrications Corp.*, 328 NLRB 1114, 1115 (1999) (finding, in case falling at least within *Gissel* category II, that unlawful discharge, layoff, or suspension of 7 of 31 unit employees "goes to the very heart of the Act and is not likely to be forgotten," as it reinforces employees' fear that they will lose employment if they persist in union activity) (citations omitted).

Even the issuance of a complaint by the General Counsel did not thwart the Respondent's antiunion campaign. See *Climatrol*, supra at 948. Indeed, the Respondent unlawfully discharged employees John Shipp and Wayne Schaffer after the unfair labor practice hearing had already commenced in August.

Finally, the Respondent's proffer of fraudulent documentary evidence further supports a bargaining order. In an attempt to corroborate the testimony of its witnesses, particularly Eirvin, the Respondent proffered several fake disciplinary reports and photographs created to falsely charge union supporters with critical mistakes while on the job. See *Parts Depot, Inc.*, 332 NLRB 670, 675 (2000), enfd. 24 Fed. Appx. 1 (D.C. Cir. 2001) (imposing bargaining order, in part, because the employer, "prepared and issued a fraudulent performance evaluation and used that evaluation to lay off the most prominent union supporter"). This conduct demonstrated to employees that all union supporters, even those with flawless work records, were vulnerable to the Respondent's retaliatory actions.

The severity of the foregoing unlawful conduct is exacerbated by the involvement of General Manager Eir-

[12] Eleven of the 13 unlawful discharges occurred by the end of May 2003.

vin. *M. J. Metal Products*, 328 NLRB 1184, 1185 (1999). As the Board observed in *Consec Security*, 325 NLRB 453, 455 (1998), enfd. 185 F.3d 862 (3d Cir. 1999), "[w]hen the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten."

In light of the Respondent's numerous, widely communicated threats of plant closure and job loss, its unlawful discharge of 22 percent of the bargaining unit, its fabrication of evidence against union supporters, the involvement of the Respondent's general manager, and its pervasive wrongdoing in violation of Section 8(a)(1), we find that "the Respondent's conduct places it in the realm of those exceptional cases warranting a bargaining order under category I of the *Gissel* standard, such that traditional remedies cannot erase the coercive effects of the conduct, making the holding of a fair election impossible." *Allied General Services,* 329 NLRB 568, 570 (1999). See also *National Steel Supply*, supra at 977; *Climatrol*, supra at 947–948; *U.S.A. Polymer Corp.*, 328 NLRB 1242, 1243 (1999), enfd. 272 F.3d 289 (5th Cir. 2001).

The Respondent asserts that a bargaining order would be inappropriate due to turnover in management and the bargaining unit since the close of the hearing, and seeks to reopen the record for the purpose of presenting evidence on this point.[13] The Respondent also argues that a bargaining order is no longer a viable remedy based on the passage of time since the violations were committed.

We reject these contentions. As Judge Buxbaum explained, the Board's established practice is to evaluate the appropriateness of a *Gissel* bargaining order as of the time that the unfair labor practices occurred; changed circumstances following the commission of the violations generally are not considered. See *Garvey Marine*, supra at 995–996.[14] Although we adhere to that policy,[15] nevertheless, in light of the criticism the Board has received from some courts, particularly the District of Columbia Circuit, we have considered the factors urged by the Respondent and, in agreement with the judges, we conclude that a bargaining order is still warranted.

As Judge Buxbaum more fully describes, the management and employee turnover argued by the Respondent does not render a bargaining order inappropriate. Regarding management turnover, both judges acknowledged that General Manager Eirvin, the management official that spearheaded the antiunion campaign, is no longer in the Respondent's employ, having departed from the company by "mutual agreement" sometime during the course of the trial in this matter.

Eirvin's apparently voluntary departure does not dissipate the effects of the Respondent's unfair labor practices. As found by Judge Buxbaum, "while Eirvin was the most visible official in the employer's antiunion effort, his behavior was entirely consistent with the desires and attitudes of the owner, [Rusty] Keeley." During the period at issue, Keeley and Eirvin were the top two officials at the Company. The judge found, and we agree, that the Respondent's antiunion campaign was in accordance with Keeley's antiunion sentiment. Keeley remains the owner of the company and there is no evidence that by word or deed he ever repudiated the unlawful activities detailed herein.[16] See *Consec Security*, supra at 455.

On the issue of management turnover, we also note that in its brief the Respondent concedes that three of the eight individuals who participated in the unfair labor practices remain in its employ. Cf. *Audubon Regional Medical Center*, 331 NLRB 374, 377 (2000) (declining to issue bargaining order due, in part, to 100-percent turnover in management).

We also find that employee turnover since the Respondent's commission of the unfair labor practices does

[13] We reject the Respondent's motion to dismiss, for lack of jurisdiction, the part of the complaint requesting a *Gissel* bargaining order. Contrary to the Respondent, a pending representation petition is not a necessary predicate for a *Gissel* order. See *NLRB v. Gissel Packing Co.*, supra at 580 (1969) (observing that the Union at Gissel did not seek an election, but instead filed unfair labor practice charges against the employer).

[14] Accordingly, we deny the Respondent's second motion to reopen the record. In any event, the Respondent's second motion to reopen the record is procedurally invalid. Judge Buxbaum denied the Respondent's first motion to reopen the record in his supplemental decision. The Respondent has not specifically excepted to Judge Buxbaum's ruling; instead it has filed a second motion to reopen the record before the Board. See Sec. 102.46(b)(2) of the Board's Rules and Regulations ("Any exception to a ruling . . . which is not specifically urged shall be deemed to have been waived."). Furthermore, its second motion before the Board includes only a bare recitation of its argument, neglecting even to mention the nature of the evidence being offered. Sec. 102.48(d)(1) of the Board's Rules provides that a motion to reopen the record must state "the additional evidence sought to be adduced [and] why it was not presented previously." As the Respondent's motion does not fulfill either of these requirements, we conclude that the Respondent's motion does not comply with the Board's Rules, and we reject it for that reason as well.

[15] Chairman Schaumber does so for institutional reasons.

[16] The Respondent argues that its recall of two of the discriminatees, Ryan Adams and Clarence Williams, shows that it "has made progress." We disagree. In its brief, the Respondent asserts that "we can assume" that Adams and Williams "were union supporters." The Respondent, however, does not argue they were ever leaders in the organizing campaign and the judges made no such finding. Their recall thus stands in stark contrast to the Respondent's failure to recall any other discriminatee, including the four employees who sat at the head table during the union meeting on April 7—Schreit, Bridges, Farris, and Adam Williams.

not militate against a bargaining order. As an initial matter, a substantial percentage of the turnover is attributable to the Respondent's unlawful discharge of 11 union supporters, excluding Ryan Adams and Clarence Williams, all of whom are entitled to reinstatement pursuant to the terms of our Order herein. For all current employees, the Respondent's unfair labor practices are the type that will "live on in the lore of the shop and continue to repress employee sentiment long after most, or even all, original participants have departed." *Bandag, Inc. v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978).

We also find that the passage of time—not quite 5 years since the Respondent's last unfair labor practice, a little over 5 years since most of the unfair labor practices occurred—will not dissipate the coercive effects of the Respondent's unlawful coercive conduct. Rather, the detrimental effects of the unfair practices—including the Respondent's widespread threats of closing and job loss, interrogations, impression of surveillance, and the like, combined with its discharge of 13 employees, including prominent union supporters—will persist over time. Indeed, the violations committed by the Respondent "are precisely the types of unfair labor practices that endure in the memories of those employed at the time and are most likely to be described in cautionary tales to later hires." *Garvey Marine*, supra at 996.

The Board has repeatedly found, with court approval, that comparable administrative delay, particularly where consistent with the normal course of litigation, is not inconsistent with a valid *Gissel* order in cases involving egregious and pervasive conduct of the sort at issue here.

Thus, in *Power, Inc.*, 311 NLRB 599, 600 (1993), enfd. 40 F.3d 409 (D.C. Cir. 1994), responding to an organizing campaign, the employer repeatedly threatened plant closure and unlawfully laid off 13 employees, or about 18 percent of the bargaining unit. 311 NLRB at 600. The respondent's threats were made by numerous management officials to nearly all unit employees. Id. In light of the employer's extensive record of unlawful activity, the Board imposed a category I *Gissel* bargaining order. Rejecting the employer's argument that a *Gissel* order was no longer appropriate based on the passage of time (over 4 years had passed since the respondent's most serious violations), the Board found that "the [employer's] misconduct involves the type of severe and pervasive coercion that has lingering effects and that is not readily dispelled by time." Id. The Board further observed that "[p]assage of time, by itself, does not necessarily erase the lingering effects of such egregious and widespread unfair labor practices." Id. The court enforced the Board's *Gissel* order. *Power, Inc. v. NLRB*, supra, 40 F.3d at 423 ("When the unfair labor practice rises to [the] prominence [of a *Gissel* category I case], the only additional element needed to rationally support a bargaining order is a finding that the detrimental effects of the unfair practices will persist over time, so as to continue the need for a bargaining order even after months or years have elapsed.").[17]

Similarly, in *Intersweet, Inc.*, 321 NLRB 1 (1996), enfd. 125 F.3d 1064, 1068 (7th Cir. 1997), the Board imposed a *Gissel* order where the employer had responded to a union organizing campaign by abruptly terminating the entire bargaining unit and refusing to recall most of the union supporters. The Seventh Circuit enforced the Board's order even though just over 3 years had elapsed between the unfair labor practices and the imposition of the order. The court accepted the Board's determination that the passage of time would not have erased the residual effect of the violations at the plant and found that the delay in that case, where the Board issued its decision 1 year after the ALJ had done so, was "more consistent" with the "ordinary course" of litigation than cases involving considerably longer delays. *NLRB v. Intersweet, Inc.* supra at 1068.

And in *Evergreen America Corp.*, 348 NLRB 178 (2006), enfd. 531 F.3d 321 (4th Cir. 2008), the Board issued a category II *Gissel* order where the employer had committed a host of serious 8(a)(1) and (3) violations, including threats of plant closing and job loss, as well as grants of wage increases and promotions, affecting most or all members of the bargaining unit. The Fourth Circuit enforced the Board's order although 4 years had passed since the commission of Evergreen's unfair labor practices, and more than 1 year had passed since the date of the judge's decision. In doing so, the court deferred to the Board's conclusion that the passage of time did not make the *Gissel* order unacceptable. *Evergreen America Corp. v. NLRB*, 531 F.3d 321, 332–333 (4th Cir. 2008).[18]

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[17] The court of appeals also emphasized that "[t]he NLRB, with its special expertise in these matters, is entitled to a high degree of deference when it makes the threshold determination that a pattern of such egregious violations falls into Category I[.]" *Power, Inc. v. NLRB*, supra at 422–423. The court further held that, in a category I case, the Board "need not make detailed findings of the type required for Category II cases, but instead must only make 'minimal findings' of the lasting effect of unfair labor practices to support a bargaining order." 40 F.3d at 422.

[18] The District of Columbia Circuit has enforced *Gissel* orders in cases involving similar violations, despite delays of more than 4 years between the unlawful conduct and the issuance of the Board's orders. See, e.g., *Aldworth Corp.*, 338 NLRB 137, (2002), enfd. sub nom. *Dunkin Donuts Mid-Atlantic v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004), and *Garvey Marine, Inc.*, supra.

The Respondent's brief relies heavily on *Cogburn Healthcare Center v. NLRB*, 437 F.3d 1266 (D.C. Cir. 2006), in which the court refused to enforce the Board's *Gissel* order following a 5-year interval between the unfair labor practices and the Board's decision. That case, however,

Here, although almost 5 years have elapsed since the commission of the last of the Respondent's unfair labor practices, the length of time the case has been with the Board is consistent with the ordinary course of litigation.

In its exceptions to Judge Schlesinger's May 2005 decision, the Respondent vigorously argued that 8 of the 13 discriminatees were statutory supervisors. The Board's *Oakwood* trilogy, issued in September 2006, "refine[d] the analysis to be applied in assessing supervisory status" following the Supreme Court's decision in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). *Oakwood Healthcare*, supra at 686 (majority opinion). The Board's September 2006 remand, therefore, afforded the Respondent an opportunity to justify its claims of supervisory status in accordance with the governing standard. On remand, Judge Buxbaum was required to review the lengthy record in its entirety and issue a detailed supplemental decision evaluating the evidence under the *Oakwood* standard. Despite the length and complexity of the case, Judge Buxbaum issued his decision in August 2007, less than a year after the remand. The parties were then afforded a second opportunity to file exceptions and briefs. The Respondent initially filed new exceptions and a supporting brief in October 2007, and both parties continued to file briefs well into December 2007. Accordingly, the case was not fully briefed to the Board until late last year.

Moreover, the Respondent is at least partially responsible for the delay in this case. The Respondent's posture on the supervisory issue at the unfair labor practice hearing—i.e., that its crew leaders were supervisors—was a complete turnaround from its position during the near-contemporaneous representation hearing, where it argued that its crew leaders were *not* supervisors. Consequently, a substantial amount of time was spent litigating these supervisory issues during the unfair labor practice hearing. Even more significantly, but for the Respondent's abrupt reversal, the Board's subsequent remand order, for further consideration of the supervisory issue, would have been unnecessary and this decision could have issued 2 years earlier.

In these circumstances, and in view of the authorities cited above, we do not consider the passage of time since the Respondent's violations unacceptable for *Gissel* purposes in this *Gissel* category I case. See *Evergreen America Corp.*, supra at 182.

involved a category II bargaining order and the employer's 8(a)(3) misconduct, though serious, was less pervasive than the Respondent's. In addition, the court found that the Board failed to thoroughly consider the respondent's changed circumstances evidence, as the court requires in category II *Gissel* cases. See *Power, Inc. v. NLRB*, supra at 424.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judges and orders that the Respondent, American Directional Boring, Inc., d/b/a ADB Utility Contractors, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns shall take the action set forth in the Order.

Dated, Washington, D.C. September 30, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Paula B. Givens, Esq., for the General Counsel.

Lawrence P. Kaplan, Esq. and *Joshua M. Avigad, Esq. (Kaplan Associates, LLC*), of St. Louis, Missouri, for the Respondent.

Christopher N. Grant, Esq. (Schuchat, Cook & Werner), of St. Louis, Missouri, for the Charging Party.

DECISION

Findings of Fact and Conclusions of Law

BENJAMIN SCHLESINGER, Administrative Law Judge. This is a *Gissel*[1] case involving, among other alleged unfair labor practices, the discharges of 13 persons, many of whom were leaders in the attempts to organize on behalf of Local 2, International Brotherhood of Electrical Workers, AFL–CIO (Union), the employees of Respondent ADB Utility Contractors, Inc. Respondent denies that it violated the Act in any manner and particularly contends that of the 13 persons discharged, 8 were supervisors within the meaning of *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001).[2]

Respondent, a Missouri corporation, has its principal office and a place of business in St. Louis, Missouri, and other facilities located in Jacksonville, Florida, and Kansas City, Missouri, where it has been engaged in aerial and underground installation and maintenance of cable and fiber optics. During the 12-month period ending November 30, 2003, Respondent purchased and received at its St. Louis facility goods valued in excess of $50,000 directly from points outside the State of Missouri. I conclude, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also conclude, as Respondent also admits, that the Union has been a labor organization within the mean-

[1] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[2] The relevant docket entries are as follows: The Union filed its unfair labor practice charge in Case 14–CA–27386 on April 16, 2003, and amended it on June 19, 2003. It filed its charge in Cases 14–CA–27570 and 14–CA–27677 on September 16, 2003, and December 2, 2003, respectively. Complaints issued on June 26, October 9, and December 9, 2003; and hearings were held in St. Louis, Missouri, on 16 days between August 4, 2003, and February 5, 2004.

ing of Section 2(5) of the Act.

The Union unsuccessfully attempted to organize Respondent in 2001, and engaged in a prevailing wage protest against Respondent at its Parkton subdivision job commencing in August 2002. It ceased picketing in November 2002, but its business agent, John Atchison, continued to speak to Respondent's employees at Parkton and nearby jobsites until about Christmas 2002; and the Union referred several out-of-work employees to Respondent, including alleged discriminatees Ed Schreit and Matt Bridges, with the object of organizing Respondent from the inside. On March 29, 2003,[3] the Union held its first meeting with 11 of Respondent's employees; and at the end of that meeting, the employees agreed to talk to their fellow employees, with the hopes of obtaining greater interest, and to meet again on April 7, when 30 attended. Schreit, Bridges, Jeremy Farris, and Adam Williams (all of them were subsequently fired) sat at the head table at this meeting, helped employees to complete authorization cards, collected authorization cards (all of the employees signed), took notes, and answered employees' questions. The Union gave employees American flag pins at this meeting to see if Respondent would make them take them off, with the plan to later wear union pins. Once again, the employees agreed to talk to other employees in an effort to gain even more support, and to meet again on April 15.

In the morning of the day that the next union meeting was to be held, Chris Eirvin, Respondent's general manager, held a meeting of all his employees and delivered the following speech, which was, unknown to him, tape recorded:

> Good morning guys. You have to bear with me, gotta little bit of a head cold. It must sound like I'm havin' a hard go here. I'm gonna keep this real short and sweet. I'm gettin pretty good at this one—this is my fifth attempt at the same subject. There's been some talk about some of the folks in here have been wantin' go union—either Local 1 or Local 2. I wanna say a couple of comments on that—and make sure everybody's on the same page with us. First off, I want everybody in here to understand that this place is not gonna go union and I'm gonna tell you why.
>
> First off is, our biggest customer, that's involved with the electric here in Missouri, is not gonna tolerate them being put over a barrel again on having this issue of crossing picket lines because a union will respect a picket and will not cross the line. They did this once with Sachs Electric, and they got theirselves in a hell of a jam, and since then, we've had the damn thing ever since and they won't get in that same position again.
>
> Item number 2—if we go union, the union agreements with Ameren UE state that, and I'm sure that for those that've been in a *couple of meetings, uh that the union have had*, the union hasn't brought this up. The agreements that Ameren UE had with the union is that if the work is to be subcontracted out, and the contractor is a union contractor, according to the contract, guess who gets first shot at the work? Anybody wanna take a stab at this? The Ameren UE union employee. Does anybody in here believe that they would bypass the union gentleman who paid his dues for 20 years, and hand it to a union subcontractor first? Does anybody in here believe that? I'm here to tell you, it ain't gonna happen. They're not gonna put theirself out there and get the shit sued out of them by, by bypassing over union people to give you guys the work. Flat out if this shop votes union, the Ameren UE work goes away. We don't have a choice in the matter—it's that simple really gentlemen.
>
> But I can tell you because some of you all aren't up for this, when it comes to vote, I wanna share some wisdom [two words inaudible] you feel a little bit at ease. We're not gonna become union. Those of us that don't want to [be]come union are not gonna be out of a job—alright. I'm not gonna get creative and let the cat out of the bag, but the bottom line is, legislation is passed to keep the unions from ruining guys like us. We're gonna keep going—if this union is voted in—yes we will shut the doors. We'll be, we'll be done—no—we're gonna keep going—we're not gonna have some internal big friction thing going on between the union and non-union guys. I don't want nobody harassing anybody. I'm not up for that—I've got a lot of good guys in here that for some reason—you know what—hell all of us went to church once in a while—this is sorta the same kinda deal . . . you give me a lot of shit for so long I start buying it . . . reality is gentlemen, I don't bullshit anybody, but I don't want each other and you guys getting into it—givin' each other a hard time—that ain't what it's about. This place is not gonna go union. I bullshit none of you. We're not gonna single people out here that are sized up to the program, but it's not gonna be voted through either. I want everybody in here to know, we are not even gonna recognize any union attempts at all.
>
> So for those that think they got this effort figured out, we're not even gonna recognize it. Have the union attorneys figure that one out. For those of you guys that are just so adamant about being union—that's your right, absolutely, I've got a few arguments for you guys—so don't no animosity towards anybody. There's two companies that do this work—take you and your abilities over to Sachs or Perkins. They're both looking for qualified individuals, especially on a directional drilling rig. These guys are union shops. They'll give you a real good taste of what it's all about on the other side. Uh, one more thing—Mike—there ya are, I need this documented that we're having this meeting as soon as we're done here give me an e-mail as well.
>
> One more thing gentlemen, uh, I want everybody to understand, that according to the ADB employee handbook, there's a protocol for the ADB uniform if you will, with the ADB shirts. If anybody decides to pull any shit with any pin or anything else, I'm gonna help you understand what that handbook stands for, okay? So feel free to do what you need to with that.
>
> Bottom line is we're not gonna go union, guys. The first quarter kicked us right in the ass—I really don't look forward to dedicating a lot of my time to this cause—I

[3] All dates are in 2003, unless otherwise indicated.

> look forward to making the next quarter back on track. It's gonna be a good year for all of us, you know, regardless. Any questions? [Exhale] High winds today gentlemen, be careful, have a good day. [Emphasis supplied.]

That speech was important to this proceeding in a variety of ways. First, it unquestionably demonstrates Respondent's animus regarding the union activities of its employees. Second, Eirvin's testimonial description of his speech, before being confronted with the fact that the speech was recorded, demonstrates that he has no regard for the truth. Although much will be written below about his fabrications—and I add to this that he was frequently evasive and argumentative—I found particularly outrageous his denial of any knowledge that the employees had attended two union meetings, particularly when his speech referred to "a couple of meetings . . . that the union . . . had." His attempt to explain that his speech resulted from "[l]ittle group gatherings" and the facts that some employees were talking about the Union and that a few employees had conducted "little meetings" at the Parkton subdivision was utterly improbable. There is a sense of urgency in Eirvin's speech. It was not caused by something that occurred in November, 5 months before. There was something recent that caused him to spew forth his threats of closure; and his denial of knowledge of the union meetings is particularly belied by his own acknowledgement of the "couple of meetings," two, being exactly the number of union meetings held, not picketing at Parkton. His reference to the employees' wearing of pins was particularly telling. He had seen the American flag pins, but that is not what he was referring to. He was referring to the union pins that were to follow—"If anybody decides to pull any shit with any pin"—which he could have known about only if someone told him what had transpired at the April 8 Union meeting. Furthermore, his threats came at a particularly appropriate time, the morning of the Union's next intended meeting. Finally, the fact that Respondent fired the 4 employees who sat at the head table during the April 8 meeting and 9 of the 11 employees who attended the first meeting on March 29 was no mere coincidence. Eirvin knew exactly who headed the union drive, and his testimony about his lack of knowledge of the union meetings was patently false.

In addition, Eirvin, who was called to testify by the counsel for the General Counsel as her first witness, stated that he had almost no knowledge of any union adherents, despite the fact that Respondent was presented with a demand for recognition on April 16, and a list of union supporters on April 23 and despite the fact that Williams read the names on the list aloud in the hallway on April 23, well within the range of Eirvin's hearing. Both Project Managers Ernie Nanney and Rich Robinson denied seeing the list, despite the fact that copies of the list were left in conspicuous places. Nanney and Robinson were aware of Eirvin's feelings about the Union, yet neither, nor Eirvin, according to their testimony, was at all interested in the names of the employees who were organizing, a threat to Respondent's existence. Even without the fact that so many Union activists and adherents were fired or transferred, I find that improbable and do not believe any of them.

Rather, many of Respondent's actions against the organizers were purposely fabricated in order to rid Respondent of the union threat. The prime example involved Jason Lohman, who was ultimately discharged as a result of alleged complaints by Ameren UE, a St. Louis area electric company that provides Respondent with approximately 40 percent of its business, and various homeowners. The various customers, all of whom testified that they did not make the complaints that would have caused Respondent to investigate, and take copious photographs of, Lohman's malfeasance, as well as the testimony of Ray Pour, Ameren UE's construction supervisor, who denied having complained of Lohman's work, persuade me that Respondent was out to get Lohman. There is nothing that Lohman did that would so infuriate Respondent, other than his union activities, knowledge of which Respondent's representatives refused to admit. They were not telling the truth when they testified that they had no knowledge. They were similarly not telling the truth when they refused to admit seeing any of the union pins worn by their employees. Strangely, they admitted seeing their employees wearing smaller American flag pins. But anything to do with the Union, which Eirvin so abhorred that he threatened that he would close Respondent rather than deal with the Union, was somehow purposefully ignored and paid no attention to, which is utterly improbable, because Respondent fired or transferred only those who attempted to support the Union.

Perhaps Eirvin's most outrageous misstatement of fact occurred on the fourth day of the hearing. The counsel for the General Counsel had subpoenaed Pour to testify that day. At the beginning of that hearing, Respondent's counsel represented that Eirvin had told him the day before that he wished to correct the testimony he gave on the first day of the hearing that Pour's complaint about employee Rodney Hanephin's putting a 90-degree bend on the wrong side of an electrical pole, not directly under the transformer, caused Eirvin to terminate Hanephin. Instead, Eirvin wanted to amend that testimony to make clear that Respondent had found the mistake itself. Counsel's offer to enter into a stipulation was rejected by the counsel for the General Counsel, and Eirvin was then recalled to testify about his new recollection.

Witnesses can make mistakes, and I could certainly excuse Eirvin's error; but his new testimony resulted from the fact that he learned from a conversation that he had with Pour earlier that morning that Pour was going to testify that day. He must have suspected that Pour was being called to testify about something that was unfavorable to Respondent's cause. So Eirvin attempted to conceal that he had spoken to Pour that morning and denied under oath that he had. Pour, who had no reason to fabricate, testified that Eirvin had indeed called him on his Nextel radio; and they had spoken, and Pour told Eirvin that he was going to testify that morning.

Not only did Eirvin blatantly lie about this fact: his memorandum supporting the discharge of Hanephin, containing the lie about Pour calling him to inform of Hanephin's error and dated before Hanephin's discharge—"on 4/24 Ray Pour called me complaining of a 90% bend" put on the wrong side of a utility pole—was a document that Eirvin fabricated, undoubtedly for this proceeding. Similarly, Eirvin's testimony on the first day of the hearing—that it was Pour who called, that it was

Pour who was irate, that Pour "was pissed because they [Ameren UE] had sent a crew out there and they couldn't energize it because it was on the wrong side of the pole," that the photographs that Respondent took had to be dated correctly (April 24) and, as a result, that Pour had called him on April 23—all of this was false, a carefully fabricated, fictitious scenario to support the sinful, treasonous conduct of Hanephin and justify Respondent's reaction (discharge) to it. Eirvin's testimony was no mistake or inadvertent error. It was deliberate, calculated lying, which Robinson joined in by corroborating Eirvin's initial fabricated testimony that Respondent was notified of Hanephin's alleged mistake by Pour.

Even after Eirvin had supposedly corrected the record, he lied. He placed the date of his memo as a week after Hanephin's discharge, which could not possibly be accurate, because the memo states: "it's a very serious issue and I believe we will have to release him." The difficulty with that is that Hanephin had already been discharged. Eirvin also testified that Nanney first told Pour of the alleged mistake, while Pour testified he first learned of Hanephin's alleged mistake from Eirvin while at Respondent's facility. In either event, Eirvin could not have had a telephone conversation with Pour remotely similar to the one about which he originally testified. Therefore, the much-testified-about telephone conversation never happened. Eirvin further compounded his lies by claiming that, when he spoke to Pour on the telephone about Hanephin's alleged mistake, Pour said he had already spoken to Nanney. This testimony is also false. Pour denied speaking to anyone at Respondent about this issue before Eirvin showed him the pictures at Respondent's facility, and he specifically denied speaking to Nanney about the matter. Most importantly, Nanney, contrary to Eirvin, denied speaking to Pour about Hanephin's mistake and denied telling Eirvin of such a discussion. The result is that I do not credit Eirvin at all, about anything, unless corroborated by an impartial, credible witness. Robinson is complicit in attempting to mislead me, and I do not trust him either. As to both Robinson and Nanney, I found them beholden to Eirvin, who appeared to dominate their testimony; and I trust neither of them.

Turning to the alleged unfair labor practices, I conclude that Eirvin's April 15 speech contains numerous violations of Section 8(a)(1). Eirvin created an impression among its employees that their union activities were under surveillance by telling them of the two union meetings that were held. *Electro-Voice, Inc.*, 320 NLRB 1094, 1094–1095 (1996). He threatened the employees with termination if they selected the Union as their bargaining representative by telling them that if they voted in the Union, the Ameren UE work, which constituted approximately 40 percent of Respondent's business, would disappear. There was no factual basis for that comment. *NLRB v. Gissel Packing Co.*, 395 U.S. at 618–620. By repeatedly telling the employees that Respondent was not going to be a union facility, Eirvin threatened the employees that it would be futile to select the Union. Eirvin also unlawfully threatened employees with the closure of its facility if employees selected the Union as their bargaining representative. He unlawfully solicited employees who supported the Union to quit and to obtain employment with two union facilities, Sachs and Perkins. By April 15, some employees were already wearing American flag pins, with the eye toward wearing union pins later. Eirvin's speech was directed toward banning the wearing of pins, particularly in light of the ongoing union organization, and impliedly threatened the employees with discipline for wearing pins demonstrating support for the Union. Notwithstanding his reliance on Respondent's handbook, there is nothing in the handbook regarding pins. Accordingly, his threat served no legitimate business concern and was made solely to hamper union organization. M*eijer, Inc.*, 318 NLRB 50 (1995).

On April 18, Respondent mailed and gave the following letter and agenda (emphasis in the original) to the employees with their checks; and Robinson read both documents to the employees who were engaged in work for Ameren UE:

> To the Employees and Families of ADB,
>
> IBEW Local 2 is once again attempting to unionize the company. I'm writing this letter to clarify the company position on the union issue for all of us.
>
> As most of you know, ADB went through some tough times over the last two years because of the problems in the telecom and broadband industries. We have successfully survived by implementing many cost saving measures and securing other customers *while keeping us employed thanks to our status as a non-union company.*
>
> Many of our utility customers employ the services of ADB only because we are a nonunion company. They firmly believe we can do the job more efficiently and economically than their own union workers because of our flexible multi-functional crews. We will lose our edge in a very competitive market and our ability to generate new customers by unionizing. *The bottom line is many or all of us will very likely be looking for work elsewhere due to a decreased volume of work by eliminating our competitive edge in electing to unionize the company.*
>
> We all are painfully aware that the current job market is poor at best. I find it amazing that any of our employees would want to take a chance on jeopardizing the security of their well paying jobs, superior insurance, and a matching retirement plan by voting to unionize. The employees of our FEW union competitors have been sitting in union halls across the country for sometime without weekly paychecks. The truth is that IBEW Local 2 is interested in organizing ADB in order to make ADB less competitive with those companies already represented by the IBEW. In other words, ADB would secure less work, the other union companies would keep a little more, *AND THE REAL REWARD WOULD GO TO OUR NON UNION COMPETITION***.** Local 2 is interested in large numbers of members and currently represents employees of very large companies. ADB's St. Louis—Jacksonville—Kansas City employee base is relatively small, do you think the IBEW is interested in your welfare or will you become just another number? The union is trying to protect their large membership by taking the non-union competitive edge away from ADB.
>
> ADB has been successful because of our ability to work flexibly with small multi-functional crews in an ex-

tremely competitive market. *Our competitors are non-union, and we must remain non-union in order to compete equally with them.* Many of our competitors have not survived in this economy, and we must do everything we can to keep this company healthy. *Putting a union in our company may kill it.*

ADB will fight all attempts to bring a union into our company even if it takes years. The cable, telephone and many other industries we serve have proven many times that unions don't fit their construction needs.

LOCAL 2 COULD DESTROY ADB
AND OUR JOBS!!
HELP US KEEP ADB UNION FREE

Sincerely,

(sgd.) Chris Eirvin, General Manager

AGENDA

ADB will never unionize!

—you can vote
—you can strike
—we will replace

Bottom Line: we will NEVER recognize a UNION at ADB

Industry is non union

—our markets are non union
—look at our competition . . . nationwide it is non union
—these individuals will ruin it for 200 people and their family livelihoods

Rough Economy and Job Market

—I project to spend $100K+ to fight
—This is part of your bonus money
—ADB pays above industry standards
—The Best insurance and retirement plans + year end bonus
—How many non rain days can you afford to miss because of a picket?
—How many of your friends are out of work?

Union does nothing . . . and can't make promises happen

—How many people are sitting at the hall
—12 months vs 15 hours per week. . . .
—Will you be a number or part of a team and a company to be proud of
—Talk to people who have been union . . . there are many at ADB
—if your [sic] convinced you want UNION I will setup an interview at Gerstner

Bottom Line: Leave on your own terms you will lose and so will innocent others

Data

—42% of votes win . . . ours won't with regional offices
—16% get a contract . . . 84% fail
—7% actually bargain for better packages than existing . . . 93% don't
——*not good percentages*
—Are you willing to risk this . . . how about your family?
—If you strike will you be replaced or have a job?

Lastly

ADB will subcontract more work
ADB will fill positions for strikers
ADB will never recognize a union
ADB and Their Families will prosper
Do you want to be a part of the
best utility company?

The complaint alleges that these two documents contain a multitude of unfair labor practices in violation of Section 8(a)(1) of the Act. I agree. They threatened the employees that they would lose their jobs by selecting the Union as their bargaining representative, because they owed their employment to the fact that Respondent was nonunion. Somehow, but not explained by objective fact, if that status should change, Respondent would lose its competitive edge, and that would result in the loss of employment. Indeed, putting a union in Respondent might kill it, according to Eirvin, resulting in loss of not only employment but also insurance and Respondent's retirement plan and Respondent's "destruction." Those are unlawful threats. *NLRB v. Gissel Packing Co.,* 395 U.S. at 618–620.

By telling employees that it would fight all attempts to bring in a union, even if it took years, and that it would never unionize and would never recognize a union, Respondent unlawfully threatened its employees that it would be futile for them to select the Union as their bargaining representative. Respondent unlawfully invited its employees to resign their employment and promised to arrange for an appointment at a union company. It unlawfully threatened to "subcontract more work" if its employees selected the Union as their bargaining representative. It unlawfully threatened the employees with the loss or reduction of their year-end bonus money, because it would spend that money on fighting the Union. Yet another unfair labor practice related to the letter and agenda occurred when Project Manager Kevin Sellers read them to his employees, adding that, no matter what the employees might do, Respondent would never go union. That is similarly an unlawful threat of futility.

Finally, on April 23, 2003, the day that many employees distributed lists of the union supporters at Respondent's facility, Eirvin stopped Lohman in the hallway and asked if his name was on that list. Lohman said that it was, and Eirvin said that that was all he needed to know. In the context of the many other unfair labor practices that Respondent was committing, including the threats of closure and the advice that union supporters should move elsewhere, and the fact that the question was asked by Respondent's highest ranking official, this constitutes illegal, coercive interrogation. *Medicare Associates, Inc.*, 330 NLRB 935, 939–940 (2000); *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

The remainder of the complaint alleges that Respondent violated Section 8(a)(3) by discharging or unlawfully transferring employees, but Respondent contends that the following "crew

leaders" are not employees but are supervisors within the meaning of Section 2(11) of the Act: Williams, Bridges, Farris, Lohman, Hanephin, Nathan Schaffer, John Shipp, and Matt Sutton. Section 2(11) provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or 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.

In *Kentucky River*, 532 U.S. 706 (2001), the Supreme Court found erroneous the Board's rejection of a nursing home's proof of supervisory status of nurses with respect to directing patient care. It stated, 532 U.S. at 712–713, that Section 2(11) of the Act sets forth a three-part test for determining supervisory status:

> Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment," and (3) their authority is held "in the interest of the employer."

Where the Board went astray, held the Court, was the Board's interpretation of the second part of the test, "that employees do not use 'independent judgment' when they exercise 'ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards.'" 532 U.S. at 713. The Court rejected that interpretation, noting that, in analyzing the statutory term "independent judgment," while the Board was free to examine, within reason, the degree of discretion required for supervisory status, and that that discretion "may be reduced below the statutory threshold by detailed orders and regulations issued by the employer," 532 U.S. at 713–714, the Board could not categorically exclude without statutory basis certain kinds of judgments. The Board's categorical exclusion "turns on factors that have nothing to do with the degree of discretion an employee exercises," the Court held, 532 U.S. at 714, and reasoned that there was no supervisory judgment worth exercising that does not rest on professional or technical skills or experience. Furthermore, the Board's attempt to limit "its categorical exclusion" to professional judgment applied "'in directing less-skilled employees to deliver services'" (532 U.S. at 715) failed because it was "directly contrary to the text of the statute." Id. Every supervisory function must require the use of independent judgment before supervisory status will obtain; yet, the Board would limit "independent judgment" to only 1 of the 12 listed functions: "responsibly to direct." 532 U.S. at 715–716.

Although Respondent made much of its *Kentucky River* defense at the hearing, insisting that various employees were supervisors under *Kentucky River*, it wrote very little in its brief. Indeed, Respondent relies more on a traditional claim of supervisory status, as is shown by one of the only two decisions it cites,[4] and not a claim, which parenthetically is not urged by the General Counsel or the Union, that the crew leaders have such professional or technical backgrounds or are so experienced that their decisions or their direction to <u>*less experienced employees*</u> would not be supervisory. And thus *Kentucky River* is not particularly relevant to the disposition of whether the crew leaders are supervisors within the meaning of the Act, at least as of the moment of the issuance of this Decision.[5]

Kentucky River is helpful, however, in setting forth some guidelines to determine this issue. First, Respondent, by claiming that certain employees are supervisors, bears the burden of proving the challenged employees' supervisory status. 532 U.S. at 711, approving *Masterform Tool Co.*, 327 NLRB 1071, 1071–1072 (1999). Second, the Board maintains the reasonable discretion to resolve the question of the degree of judgment which alleged supervisors exercise by focusing on the "clerical" or "routine" nature of the judgment. 532 U.S. at 714.

The supervisory issue here concerns, except for Lohman and Sutton, crew leaders among the laborers, machine operators, and locators who are engaged in underground work, either boring through the ground with a boring machine or digging trenches in the ground with a backhoe or similar equipment to insert pipes or conduits from one location to another and pulling wire or cable through the pipes. That is accomplished by boring or drilling the conduit underneath the ground, performed by the boring crew, typically comprised of an operator of a boring machine, a locator for that operator, and perhaps a laborer, or by digging a trench and laying the conduit into it, performed by the backhoe crew, comprised of the backhoe operator, who is the crew leader, and a laborer, sometimes two. In a boring crew, the locator is the crew leader. I do not credit Eirvin's testimony that the operator would be the crew leader if he had more experience. Robinson knew of no operator on a boring crew who was designated a crew leader and testified, although the transcript is somewhat garbled, that on a boring

[4] In *Arlington Masonry Supply*, 339 NLRB 817 (2003), the employee prioritized jobs, assigned employees to work on specific trucks, decided what type of maintenance work needed to be done, inspected all work, approved time off, and recommended suspension. He was held to be a supervisor. In *Sheet Metal Workers Locals 102 & 105 (Comfort Conditioning Co.)*, 340 NLRB 1240 (2003), although the administrative law judge found that Jack Dresser was a supervisor, that was not the crux of that 8(b)(1)(B) case. The issue was whether he was "an employer representative" within the meaning of that Section. The Board affirmed that he was not.

[5] Almost 2 years ago, on July 25, 2003, the Board issued a "Notice and Invitation To File Briefs" in three cases involving supervisors to consider issues raised by *Kentucky River*. Two of the three involve nurses: *Oakwood Healthcare, Inc.*, Case 7–RC–22414; *Golden Crest Healthcare Center*, Case 18–RC–16415–6; and the third, perhaps critical to the issue in this proceeding, involves leadmen at a manufacturing plant, *Croft Metals, Inc.*, Case 15–RC–8393. I have delayed the issuance of this Decision in the hope that the Board would have disposed at an earlier date of these *Kentucky River* issues, which may impact my resolution of Respondent's contentions, particularly because so many of the alleged discriminatees are alleged to be supervisors and a finding that four of them are supervisors would destroy the Union's claim of majority support for the purpose of its requested bargaining order. Due to personal commitments, I can delay no longer.

crew, the locators were always the crew leaders, not the operators.

The actual performance of the job begins each morning when the project manager gives to the crew leader blueprints for or otherwise explains the jobs that are to be performed that day. The blueprints are of neighborhoods or streets or townships and show basically which pole or electric pad one is going from to which pole or pad the dig is going to. It indicates the address of the dig, the locations of the poles and pads, and the materials that are needed to perform the job. When the employees arrive at the job, they will see paint on the ground (locates), placed there by an outside company, indicating the location of utilities (telephone, gas, electric) which are to be avoided during the digging or drilling operation. The first thing that the crew does upon arriving is to dig the locates. Everyone, the locator, the operator, and the laborer (if there is one) finds a locate and digs, normally 1-foot holes, up to 3-feet deep, or at least the depth needed to find the utility. However, frequently, the locates are not accurate, and the hole must be widened by 2 feet, until the utility is found.

When the crew completes the locates, if a boring crew, the crew sets up the boring machine, which is a drill, and decides on the initial location of the bore. The boring machine operator inserts a drill rod as much as 3 feet under the ground. At the end of the rod is a drill head which contains a transmitter or beacon that sends a signal back to the locator box, held by the locator. The operator steers the rod, adding rods as required, to its target, and being guided by the locator, who stands in front of the boring machine with a locator box which shows the depth of the boring head and its pitch. The locator reads the box and tells the operator by hand signals or over a radio transmission to dive deeper or to change directions. The result is that the operator and the locator work together in guiding the rods through the locate holes that they have dug so they can miss the utilities. When the operator gets to the end of the bore or if he runs out of rods, he will pitch the head up and it will pop the rod out of the ground. The head is then removed and a puller is put on. Then the operator pulls the rods back one at a time and pulls their conduit off of a reel at the same time down into the ground and all the way back to where he started. At that point, he is done with that portion of the bore, and the crew will then dig the tie-ins, bringing together or splicing two runs of conduit. If the operator is not through with the bore, he will start a new bore at the end point and proceed, as above, until he reaches a point where there will be a new tie-in or the end of the bore.

The work of the backhoe or open cut crews is not appreciably different from the work of the boring crews, except that they use different equipment, such as a backhoe, and sometimes a trencher, supplemented by digging by hand, to dig because the soil is too hard or rocky for the boring crews to bore or there are too many utilities or a ditch which interfere with an unobstructed underground path for the borer. Backhoes are also used to set hand holes in the ground, install conduit in the ground, tie conduit already in the ground, place plastic bends into the ground (at a 90- or 45-degree angle), and to dig near electrical pads. When the backhoe crew leader arrives at a job, he first walks the job to make sure all the locates are marked, then he unloads the backhoe, and then he and the laborer or, more rarely, laborers, dig locates by hand. Because it is the job of the laborer to dig locates, he always carries a shovel and does not need to be told to dig. When the backhoe operator begins his work with his machines, he cannot see the ground, or at least much of it, where he is digging; and so the job of the laborer is to watch the backhoe bucket to ensure it does not hit unmarked utilities (swamping). If the laborer sees something in the hole, he directs the crew leader to stop, climbs in the hole, and digs with a shovel until he either exposes the suspected utility or satisfies himself there is no utility there. Similarly, when the crew leader feels something in the hole, he asks the laborer to check the hole. If the crew is doing a tie-in, both the crew leader and laborer get the materials and get into the hole to do the work; and they both will backfill the hole. When the drilling or digging reaches the target destination, the cable or wire is then inserted into the opening of the conduit and pulled back.

Most of these crew leaders agreed that they were responsible for production and for getting the job done. In the instance of a drill operator, he cannot see. The crew leader, in that instance, the locator, is the operator's eyes, and the drill operator depends on the locator's skills to keep drilling and can go no faster than the locator can advise him. On the other hand, a backhoe operator can see, but not all that much, and he is the one, with the assistance of the laborer, who is watching for utilities, who ultimately determines how much he will produce. So, in both instances, how much they get done is dependent on how good the crew leader is, which, of course, is impacted by the type of ground they are digging or drilling through, how rocky or not, how many utilities they encounter, and, initially, how many locates must be dug and the accuracy of and the difficulty of digging the locates.

But many of the work conditions of the crew were dictated not by any individual, particularly the crew leader, but by the job. Thus, overtime was limited in part by Respondent's cap on the number of hours that could be worked on an Ameren UE job, 50, but equally important by the consensual decision by all as to whether they wanted to continue to work. Often, the progress on the job, that is, whether they could finish during the daylight, dictated whether the employees would stay to finish. Similarly, lunch was a communal decision; and some employees continued to work through lunch, even though they were not being paid. The issue of rain was subject to some conflicting testimony. Williams testified that he made the decisions that the inclement weather was sufficiently serious to call off work and that the rain had let up sufficiently so that work could be resumed. Edgar Schreit (a crew leader whom Respondent does not claim to be a supervisor), however, insisted that he would have to call his project manager. Bridges testified that he left the decision up to his laborer, Wayne Schaffer, because Bridges was riding in the cab of the backhoe and Schaffer, the laborer, was the one who was getting wet. In addition, Bridges testified that Robinson would always call to see what the weather was, how hard it was raining, and whether Bridges was able to get anything done and that Bridges always called Robinson before leaving because of weather. Robinson did not deny this testimony.

Nanney essentially admitted that the job of the boring crew is routine. Arriving at a job and observing that there are locates, the boring crew knows that the first thing they have to do before they can bore is to dig the locates. It does not matter what order they dig their locates, but typically the boring crews dig their locates from the start of the bore to the end. The duties that they perform, they do day in and day out. The boring crew uses a machine to bore through the ground, an operator operates the machine, and the locater locates. The crew also dig locates. It is routine for them to arrive at a job and communally decide that they are going to start at a certain place, so they would dig the first locate. The digging of the locates is also routine; the crew leader and the operator would dig down until they found and exposed the located utility. If there is more than one locate, they would move on to the next one, on down the line; and after digging their locates, and before they start operating, they have to set up the machine and have to decide where, the options being at one end or the other or, in some cases, the middle. Typically, what determined that was where space was available, such as public or private property, and where the equipment would do the least damage. (And there was credible evidence that the location was determined by the operator and the locator, jointly.) Once the machine is set up, they would start boring, and the routine, as Nanney affirmed, would be that they would bore and it goes fine and they leave. Regularly a boring crew will set up and bore all day long and nothing happens, and they leave and go back the next day. On occasion, however, there are problems, such as they would encounter unlocated utilities or a rock they cannot bore through. For the former, they would call Locate Supervisor Josh Martychenko for a locate. For the latter, they would call Nanney, and normally he would send a bigger drill. The crew leader does not call out a bigger drill without going to Nanney first.

The backhoe work is similarly repetitive and routine. The laborer knows that digging locates and swamping is his job and does not have to be told how or when to do so by the crew leader. On the few occasions when a crew leader is assigned two laborers, one will swamp, while the other will dig locates; but, because both tasks are so routine and repetitive, it does not matter which laborer does which job. When Williams and Bridges, both backhoe operators, had two laborers, Williams told them which laborer would swamp and which would dig locates; but Bridges let them decide between themselves what they wanted to do. Picking between two equally qualified employees to perform a routine and repetitive task is not the type of "assignment" or "responsible direction" contemplated by Section 2(11). *Injected Rubber Products Corp.*, 258 NLRB 687, 689 (1981). On the rare occasion when something unusual happened, such as hitting an unlocated utility, equipment problems, or an absence of locate paint on the job, the crew leaders called their superintendent or project manager. There were also times that the project manager would actually meet the employees on the job to show them what to do, if the crew was unsure.

In short, what the crew does is basically understood by the crew members: the locates had to be dug, and then the conduit had to be laid and the cable or wire pulled back through it. While some of the crew leaders testified that they were responsible for the productivity and efficiency of their crews, there was in fact no power that Respondent vested in them to do anything to ensure either productivity or efficiency. Furthermore, until the unfair labor practices at issue herein, Respondent presented no evidence that it ever held even one crew leader responsible for the productivity and efficiency of his crew or lack thereof. Rather, whatever decisions that crew leaders make, such as ensuring that the work had been completed, did not result in their directing anyone to do anything and, assuming that they did, were not more than routine and repetitive and not supervisory decisions made "in the interest of the employer."

"It is well settled that the burden of establishing supervisory status rests on the party asserting it." *Armstrong Machine Co.*, 343 NLRB 1149, 1149 fn. 4 (2004). "[A]ny lack of evidence in the record is construed against the party asserting supervisory status." *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999), quoted with approval in *Armstrong Machine*, supra, slip op. at 1 fn. 4. By the very nature of the routine, repetitive work performed by the crews, the crew leaders do not responsibly direct the work of anybody. "'[R]esponsible direction' . . . depends 'on whether the alleged supervisor is held fully accountable and responsible for the performance and work product of the employees he directs.'" *Franklin Home Health Agency*, 337 NLRB 826, 831 (2002), quoting *Schnurmacher Nursing Home*, 214 F.3d 260, 267 (2d Cir. 2000). No crew leader ever was.

The most evidence that Respondent presented was conclusionary statements by various crew leaders about their being "bosses" and their responsibility for the productivity of their crews and to see that their job got done. However, conclusionary statements, without supporting evidence, are insufficient to establish supervisory status and authority. *Armstrong Machine*, supra, slip op. at 1 fn. 4, citing *Chevron Shipping Co.*, 317 NLRB 379, 381 fn. 6 (1995), which in turn cited *Sears, Roebuck & Co.*, 304 NLRB 193, 199 (1991). What Respondent omitted from the presentation of its case were the crew leaders' "particular acts and judgments that make up their direction of work." *Armstrong Machine Co.*, supra, slip op. at 1 fn. 4, quoting from *North Shores Weeklies, Inc.*, 317 NLRB 1128 (1995). Finally, because the "Board has a duty not to construe supervisory status broadly because 'the employee who is deemed a supervisor is denied employee rights which the Act is intended to protect,'" *Armstrong Machine Co.*, supra, slip op. at 1 fn. 4, quoting from *Chicago Metallic Corp.*, 273 NLRB 1677, 1689 (1985), enfd. in relevant part 794 F.2d 527 (9th Cir. 1986), the Board has found that only individuals with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen . . . and other minor supervisory employees," *Armstrong Machine Co.*, supra, slip op. at 1 fn. 4, quoting from *Chicago Metallic Corp.*, 273 NLRB at 1688. I reject Respondent's generalized contention that crew leaders exercise supervisory functions by being in charge of production and getting the work done.

Each of the crew leaders, except Lohman, testified affirmatively that he had never been given the authority, in those words, to exercise any of the 12 supervisory functions set forth in the statute. Respondent offered no proof that any of its offi-

cers or supervisors specifically authorized the crew leaders to exercise any of those functions. The most that can be said is that, perhaps on occasion, the crew leaders may have told a particular laborer to dig a particular locate. That is, at best, in the circumstances of the facts in this proceeding, routine and not a supervisory, independent judgment. *Hexacomb Corp.*, 313 NLRB 983, 984 (1994).

Respondent, however, cites in its brief certain testimony of the crew leaders to support its contention that they are supervisors. I now consider that testimony of each of the crew leaders. Williams testified that Nanney asked him how a new laborer, Grant Gresham, was working out, and Williams told Nanney that he was not. There was no evidence that Nanney took any action on Williams' reply; and this demonstrates only that an admitted supervisor asked an employee about his opinion of another employee, and not that Williams was a supervisor. In addition, Williams once recommended that Respondent "replace [Gresham] when he hurt his wrist." Nanney, however, did not do so; and Gresham eventually quit about a month later. So, Williams did not effectively recommend that Gresham be discharged. That, however, is not even the test. The authority to effectively recommend generally means that the recommended action is taken without independent investigation by superiors, and not simply that the recommendation is ultimately followed. *Children's Farm Home*, 324 NLRB 61, 61 (1997). Neither Nanney nor the other project managers testified about whether they did, or did not, independently investigate these "recommendations."

Respondent contends that Williams relayed to Nanney the complaint of laborer Steve Mack about having to get into a deep hole that had no shoring. There was no evidence, however, that Respondent authorized or directed Williams to do so or that that was part of Williams' responsibilities. Rather, Williams merely acted as a conduit to relay that complaint, which Williams denied was a "grievance"; and thus this instance does not prove that he had any authority to adjust the grievances of Respondent's employees. *Pine Brook Care Center*, 322 NLRB 740, 748 (1996). I conclude that Williams was not a supervisor within the meaning of Section 2(11) of the Act.

Respondent contends that, when Bridges was on a job, higher supervision relied upon him to see that the job he was working on got done. There is nothing in the record to support this proposition, except Bridges' *assumption* that that was so. In any event, even if the contention is accurate, the mere fact that higher supervision relies on an employee to see that he is doing his job does not prove that the employee is a supervisor. Rather, Bridges had to get the work done, and he knew, as did the member or members of his crew, what each job entailed because it was so routine and repetitive. Respondent also relies on Bridges' testimony that, when he arrived on a job, he would figure out how the job would be done. That was a reference to a job Bridges had worked with Williams and a laborer, Steve Mack. It is unclear who, Williams or Bridges, was acting at that time as a crew leader; but Bridges' testimony made clear that any decision was a joint one and appears to be based on making the most routine of decisions, such as which end of the job to start on or which locate an employee should dig.

Regarding Respondent's contention that Bridges was responsible to see that all of the proper equipment, tools, and supplies were on the jobsite, the evidence demonstrates that the blueprints that Bridges received each day provided this information. Besides, the fact that an employee ensures that he has the right tools and equipment is not a supervisory function within the plain language of Section 2(11). Finally, Respondent claims that Bridges made the decision that his crew would work 9 hours a day. That is accurate, at least to the point that Bridges stated that he wanted to work 9 hours per day, and not more. Conspicuously absent is proof that he set 9 hours as the workday, or directed employees to work 9 hours, when they wanted to work less, or refused to permit employees from working more time. In fact, Bridges' laborer, Wayne Schaffer, had no problem working an hour of overtime each day. In sum, even if I credited Respondent's contentions, I would still find no proof that Bridges was a supervisor; and I conclude that he was not.

Respondent's contention that Hanephin motivated lazy crew members is inaccurate. Clearly, he never gave orders to anyone to move faster or otherwise directed their work. That he may have trained a new worker is not an indicia of being a supervisor. He had no authority to give breaks. His desire to work 50 hours a week was apparently joined in by members of his crew. He did not order them to work overtime, and he acceded to the wishes of some of his crew to return to the shop at a particular hour. Whether Hanephin considers that he was the boss of a worksite is of no consequence. The question is whether he exercised supervisory authority. As he testified:

> I guess I was just told that I was in charge on the job site. If there was a question about anything, that I made the decisions, but there isn't a whole lot to it. I mean where to dig or where to start digging. I mean there isn't—I don't ever remember being told anything other than, you know, just you are a crew leader and I've been a laborer for years, so I knew basically. Nobody specifically told me anything. It was just play it by ear and that was about it.
>
> Q. Were you ever told what kind of decisions you had the authority to make?
>
> A. No.

The record reveals that he is not a 2(11) supervisor.

Lohman was the crew leader of the restoration crew,[6] normally consisting of one laborer, whose responsibility was to fill in the holes and trenches dug by the boring and backhoe crews; rake, tamp, and level the soil; lay down sod or, more frequently, plant new grass seed; and cover the seed with straw. Although within the first week of his employment in early April 1999, Nanney told him that he had the authority to fire employees, it subsequently turned out that he did not. He wanted to fire employee Damian, but Nanney told him that he could not, because Nanney was the supervisor. When Lohman recommended that Nanney needed to do something about Damian, because he was sleeping on the job, sleeping on the truck, and was not doing anything, Nanney said that he could not fire him. Although Nanney

[6] In addition, Lohman performed some open cut work using a small backhoe, ran a small excavator, dug into electrical pads and poles, pulled electrical wire, and spliced conduit.

also told Lohman in April 1999 that, in addition to having the authority to fire employees, he had the right to suspend employees, it is most likely that Lohman did not have that authority. In more than 4 years, he never exercised it; Nanney admitted that crew leaders were not involved at all in the termination process; no other crew leader had the authority that Lohman thought he had; and, had he exercised what he thought was his authority to suspend employees, it is probable that Nanney would have told him, just as he did when Lohman wanted to fire someone, that he could not, because Nanney was the supervisor.

Respondent contends that Lohman asked that two employees be removed from his crew for poor performance and succeeded in that request. However, one was Damian, and Lohman did not succeed. Respondent also cites the example Vince Vulsteki; but Lohman asked Nanney to take Vulsteki off his crew because he could not get along with him ("He just liked to argue with everybody. It didn't matter who he was with."), and not because of poor performance ("he was a good worker"). Nanney moved him several weeks to a month later. I find that this was not a recommendation for a transfer, exercised with "independent judgment," but only a personality conflict between two employees, and not a reflection of a supervisory function. Indeed, Nanney testified that he tried "to get everybody that gets along, that does a good job and works well with each other, on the same crew." Respondent next contends that Lohman recommended raises for two employees. However, Respondent did not give a raise to laborer Garret Jones, despite Lohman's kind words. Another laborer, Gabe Creswell, who had been employed for 6 or 8 months, told Lohman that he wanted a raise. Lohman relayed that request, telling Nanney "that Gabe doesn't need any supervision on any of the jobs. He knows exactly what to do. He can be a crew leader if he wants, if he'll let him do it. He needs a raise." Creswell was "promoted" 2 weeks later. Lohman was never told that he supervised anyone and believed that the supervisor supervised the laborers. His function, he believed, was just to relay a message from the supervisor to them. His recommendation in this one instance, unsolicited by Nanney and not part of Lohman's normal duties and responsibilities, does not constitute an effective recommendation of a raise. *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994).

Lohman testified that he told his crewmembers that, when they came to work with him, he had been told to get as much done as he could in a day, which was as long as one could work. He acknowledged that as crew leader he had overall responsibility for the performance, effectiveness, and productivity of his crew. He further acknowledged that a crew leader was responsible for the on-the-job training and instruction of all crew members regarding their job functions and work policies. Finally, he conceded that the crew leader was expected to lead by example and make every effort to help crewmembers achieve productivity as often as possible, while thoroughly completing every job safely and professionally. None of these admissions establish Lohman's supervisory status where Respondent never, until the day that it finally trumped up evidence in an attempt to justify his discharge, held him accountable for the actions of anybody on his crew. Equally important, Respondent never offered any evidence, other than the evidence that I have rejected, about the authority Lohman actually exercised, nor any evidence on his independent judgment.

Instead, Lohman's job appears rather routine and repetitive. His laborer normally decided what he wanted to do and performed it without checking by Lohman, unless the laborer was inexperienced. He and the laborer worked until the job was finished, it was too dark, or he and his crew were too tired to work anymore. When it rained, Lohman called Nanney. If the laborer did not want to work overtime, Lohman called Nanney. Every night, before leaving the jobsite, Lohman called Nanney. I conclude that Lohman is not a 2(11) supervisor.

Employed for 2-1/2 months, Matt Sutton spent only some of his time as a crew leader on a pulling crew on the cable/telecommunications side of Respondent's business, installing fiber optic cable into pipe already in the ground. Eighty percent of Sutton's latter portion of his employment was spent working on one particular job, a World Com/MCI job, supervised by Project Manager Sellers, who was at that jobsite daily, from 8 or 9 a.m. until the employees left in the evening. There was nothing on that job that was not supervised by Sellers, with whom Sutton met each morning, who told Sutton what equipment to use; assigned other employees to work with Sutton, without input from Sutton; determined the priority of work; told Sutton where to start each day; shuffled employees around during the day; and determined when employees went home. In addition, Sutton worked about 80 percent of his time on this World Com/MCI job and other jobs with John Langford, a backhoe operator, who was the crew leader. So, for that portion of his work, Sutton was not even a crew leader.

For the other relatively minor portion of his employment, at which Sellers was not present and Langford was not the crew leader, Sutton mostly "proofed duct," which is the process of checking the plastic piping for obstructions and installing a pull wire, accomplished by using an air compressor to blow rope, to which a heavy object, called a rocket, is attached, through the pipe from one hole in the pipe to the next, where a laborer is stationed and radios Sutton to stop the compressor when he sees the rocket. The laborer pulls the rocket out of the hole and wraps the rope around an assist wheel which is used later when the wire is pulled through the pipe. The crew then moves one hole down the pipe and repeats the process, hole-by-hole, each time the crew proofs duct. Sutton's decisions as a crew leader are to decide where to set up the reel of rope and to tell the laborer which hole to go to. There is no independent judgment required in telling a laborer which hole to go to where the rope is always blown to the next hole down. Lunch was taken at a good stopping point in the work. Sellers decided whether to send employees home when it was raining, and Sutton never left work for the day before calling Sellers, whom he also called if anything unusual happened, such as an obstruction in the pipe.

In sum, the vast majority of Sutton's time was spent on a crew on which he was not the crew leader. During the much smaller period that he was, he was closely supervised by Sellers and, in any event, engaged in the most routine and repetitive work that required no independent judgment. There is no evidence that Sutton had any authority to exercise independent

judgment in directing the work of anybody. I conclude that Sutton was not a 2(11) supervisor.

Respondent contends that Farris had the authority to recommend effectively the removal of one of his crew members from his crew. The facts are that Farris was dissatisfied with operator Jason Politte and complained to Robinson that Politte was lazy. Farris asked for a different operator, to which Robinson replied, "Not at the moment," adding, "That's what everybody says about Jason." About 2 weeks later, Politte was taken off his crew. Farris's complaint was based on the fact that, when he was digging locates, Politte did not like to work when he was with a group of people; he would rather talk, leaving Farris to do the digging. Farris complained "[b]ecause he wasn't being a team player."

Because Robinson did not testify, it is impossible to gauge whether he removed Politte from Farris's crew because he agreed with Farris's recommendation, or whether Robinson already knew of Politte's proclivity to slack off from work, as evidenced by his acknowledgement that others had complained about Politte, or whether Robinson moved him for a reason entirely unrelated to Farris's complaint. Thus, it is unclear whether Farris' comment was an effective recommendation. In order to confer supervisory status, "the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel." *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). Besides, Robinson agreed that he wanted crews to get along with one another, and this was not discipline that was being recommended but a shift of one person because of a personality conflict. Finally, this was merely a complaint by one employee about another, dealing with the compatibility of employees who worked together. Complaints about compatibility do not prove supervisory status. *Armstrong Machine Co.*, 343 NLRB 1149, 1150; *Brown & Root, Inc.*, supra at 21.

Respondent contends that Shipp had the authority and exercised it to request that Politte, then a member of his crew, be removed and that Nanney removed him. What Shipp actually complained about to Nanney was that he had told another laborer to "to put the carrot [phonetic] inside the pipe, and pull the pipe out that we needed for that job." Politte told that laborer not to do it, because Shipp did not have that authority; Politte was there longer. Shipp told Nanney: "I can't deal with him anymore." This statement was merely a complaint and not a recommendation of anything. Assuming, however, that it could be construed as a recommendation, Nanney did not testify about this incident; and thus the record is barren of proof that he understood what Shipp was stating and that he adopted Shipp's recommendation, without independent investigation, in removing Politte from Shipp's crew. Respondent's only specific contention about Nathan Schaffer was that: "He was aware of his authority as he testified to the fact that another crew leader had a laborer taken off his crew for failing to follow directions." Although Schaffer recalled that the laborer's name was Puhl, it is likely that it was Politte. In any event, once again, Nanney did not testify; and Schaffer's hearsay recollection is meaningless. I conclude that neither Shipp nor Schaffer are 2(11) supervisors.

Having found that all the persons who were discharged by Respondent are employees and not supervisors, I turn now to the discharges, each of which are alleged to have violated Section 8(a)(3). On Monday, March 31, 2 days after the first union meeting, Eirvin held a meeting of crew leaders to whom he stated that all boring crews should drill 1000 feet per week and threatened that, if they did not, he would start "getting rid of them" after a month. In the first few days of April, Mike Stankewitz, one of Respondent's project managers, asked Eirvin's brother, Ed, another project manager, if he had heard that Respondent was going to discharge a couple of employees that had started "that union shit in St. Louis." Ed denied hearing that; he had not talked to his brother. On April 14, Nanney threatened Hanephin that, if things kept going the way they were, there was going to be a bunch of people gone from the Ameren UE side in the next few weeks.

Respondent did not wait as long as Nanney threatened and as Robinson suspected, when he warned Farris just after Eirvin's April 15 speech: "Just watch your ass, and don't give Mr. Happy [Eirvin's nickname] a reason." On the afternoon of April 15, within hours of delivering his diatribe against the Union and only 2 weeks after threatening to discharge crew leaders a month later, Respondent terminated for poor production Farris and Schaffer, two locators, and Edgar Schreit, a boring machine operator, all of whom had attended the Union's first meeting on March 29. At the second union meeting, on April 8, Farris and Schreit sat at the head table, Farris helping employees complete authorization cards and collecting completed cards, Schreit taking attendance and answering questions of employees. As noted above, Eirvin had knowledge of exactly what was happening at that meeting and had to have knowledge of who had attended and what each did. In fact, in his earlier speech, he specifically directed his remarks to "those of you guys that are just so adamant about being union." Although Eirvin's own words evidence his complete knowledge of the union drive, the General Counsel also relies on the "small plant doctrine," which permits the inference of knowledge of union activity from the fact that there are 59 employees in this unit. I agree. *Breuer Electric Mfg. Co.*, 184 NLRB 190, 194 (1970); *NLRB v. Joseph Antell, Inc.*, 358 F.2d 880, 882 (1st Cir. 1966), enforcing *Malone Knitting Co.*, 152 NLRB 643 (1965). Many employees, including Schreit and Farris, were talking with their fellow employees in an effort to get more of them to attend the union meetings. While Schaffer may not have actively engaged in soliciting employee support, he nonetheless attended union meetings before April 15 and signed a union authorization card.

Although Respondent made much of the fact that various locators were responsible for production and thus were supervisors, Respondent discharged Schreit for lack of production, in spite of the fact that he was a boring operator and not responsible for his crew's production. Indeed, I have found above, in partial agreement with Respondent, that the bore could go no faster than the locator was able to locate, and in that sense the locator was responsible for the production of the crew. Respondent offered no explanation for its discharge of Schreit, other than Eirvin's testimony that poor production is the crew leader's responsibility "unless it is the operator's fault," an explanation which is so general as to be meaningless.

What makes Respondent's defense worse is Eirvin's claim, on examination by the counsel for the General Counsel, that Schreit was one of the "three individuals we'd change people around on to give them the better people to see if they'd come up to par." Eirvin claimed that Respondent swapped Schreit "around with several other people and he wasn't getting it." Very simply, that was not so. Even Robinson did not agree with Eirvin, denying that he obtained any help for Schreit or even considered doing so ("He had time—they had time, as crews, to get their production up.") Rather, Respondent assigned Schaffer, whom it subsequently discharged for poor production, when Schaffer was promoted from operator to locator on about February 10; and, as a new locator, Schaffer's regular operator was Schreit, except for 1 day, when Schreit was the operator for Shipp, who had even worse production that Schaffer and was also fired later for low production. Finally, although Robinson wrote on Schreit's personnel appraisal the word "production," he never discussed that with Schreit, whom he otherwise graded as a good operator, an opinion that he confirmed in his testimony.

Having found that Respondent's explanation for this one of three discharges on April 15 was false and concocted, I turn to the other two discharges, which I find to be pretextual. First, I rely on their timing, the same day as Eirvin's antiunion tirade. Second, I rely on my earlier credibility findings and refuse to believe Eirvin and Respondent's supervisors. In fact, regarding Schaffer, Eirvin supplied the same kind of lies that he did in attempting to justify the discharge of Schreit, claiming that he attempted to help Schaffer, a brand new locator, by placing weekly as many as two or three of the best operators "to try to bring him back up to speed . . . and he still didn't cut it." Eirvin named his better operators as David Farris, Clifford Krause, Steve Gordon, and Jerry Benetatos; yet none of them, including Krause, whom he specifically named after having worked with Schaffer, spent a full week or any time with Schaffer sometime after Eirvin decided that Schaffer was not producing. Robinson, in addition to failing to corroborate much of Eirvin's testimony, knew of no plan to help Schaffer locate better and offered Schaffer no help to improve his production.

Similarly, Eirvin's claim that he put Farris "with several different people [a]nd it never did click" was false. It is true that Farris worked with Krause, but he did so very early in his employment, before Farris' "production problem" allegedly came to Respondent's attention. But later, from about the middle of February, Farris was assigned Politte, who was a legitimate problem employee, and Bartle, neither of whom were among Respondent's best operators. Thus, Robinson's claim that "[w]e tried to move people around and get [Farris'] production up" cannot be sustained.

The General Counsel's final argument to demonstrate Respondent's discrimination against Farris and Schaffer rests on disparity, that Respondent retained Shipp, another locator, whose union activities were not as significant as Farris' and Schaffer's. His production was lower, averaging 138 feet per day, against the average of 158 feet for Schaffer and 151 feet for Farris. Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the General Counsel has presented a prima facie case of 8(a)(3) discrimination. Respondent knew of the union activities of all three employees, it was intensely opposed to the Union, it had no cause at all to discharge Schreit, and its reason for discharging Schaffer and Farris was suspect, because Respondent had never previously discharged crew leaders for lack of production. Their production was used by Eirvin as a pretext, and his discharge of them was disparate, in light of the General Counsel's showing that Shipp's production was even worse.

Under *Wright Line*; *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999); and *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), Respondent may overcome the General Counsel's prima facie case by demonstrating that it would have taken the same action, even in the absence of the union activities of the three discharged employees. It did not do so. I note particularly Eirvin's lack of any credible reason that he discharged Farris and Schaffer, rather than Shipp. Furthermore, Respondent's explanation of the process of terminating the three employees was unpersuasive. Although testifying that he met with Eirvin to discuss the terminations, Robinson could not recall how many months of production sheets they had at this meeting, how long the conversation lasted, or if time and material work, for which Respondent credits employees with three times their footage for boring in rock or hand-trenching, was part of the discussion. Eirvin and Robinson could not agree on when they noticed that Farris' production became so poor, and, although the evaluations of many of the employees noted problems with production, the problem never became so important that it was ever actually discussed with Farris and Schaffer, no less a warning that they risked termination. Indeed, at one point, when Robinson was asked the reason that he did not reassign Farris to be an operator, Robinson said: "He was let go for low production. If he had a bad attitude about something, he would have a bad attitude anywhere he was at." That inadvertent switch from "low production" to "bad attitude" revealed Robinson's real concern about Farris' union activities. *James Julian Inc. of Delaware*, 325 NLRB 1109 (1998); *Armstrong Machine Co.*, 343 NLRB 1149, 1149 fn. 4 (2004).

The lack of clarity of Robinson's testimony, together with the credibility problems previously discussed, persuades me that this testimony was a fiction and that a cogent discussion of the work failures of these three employees never occurred. Respondent had no history of terminating operators or locators for poor production, and Eirvin's claim that "multiple" locators had been fired for poor production was false. Even Nanney and Robinson disagreed with Eirvin, and Respondent produced no documents to support Eirvin's testimony about "multiple" locators. In addition, Eirvin admitted that Respondent has reassigned poorly performing locators to other positions rather than terminating them, but failed to justify his refusal to treat Schaffer and Farris similarly. I conclude that Respondent's discharge of these three employees violated Section 8(a)(3) and (1) of the Act.[7] *D & F Industries,* 339 NLRB 618, 622 (2003).

[7] Strangely, both Schaffer's and Schreit's personnel files contain employee warning reports that indicate that they were discharged for hitting a located gas line. However, the reports were dated March 17,

Hanephin attended the Union's first and most of the other meetings, talked to other employees to drum up union support, and wore a "Union Yes" pin on his shirt everyday at work for a week or two before his termination. His name was on the list of union supporters and the Union's request for recognition. He was the one whom Nanney told that there was going to be a bunch of people gone from the Ameren UE side of Respondent's business in a couple of weeks; and, when Nanney told him on April 24 or 25 that he wanted a great big bumper sticker and a "Union Yes" pin, Hanephin replied that he knew where he could get them. Despite Nanney's awareness of Hanephin's feelings about the Union, Eirvin did not admit that he had knowledge that Hanephin was a union supporter. Instead, he testified: "I did not know for sure Rodney was a union supporter. I assumed . . . by his attitude."

Whether Eirvin "assumed" or knew, and I find that he knew, on April 25, Hanephin gave him the perfect excuse to get rid of him. As I have found above, Eirvin seized on the fact that Hanephin brought conduit out of the ground on the nontransformer side of a utility pole, fabricated a document to support Hanephin's discharge, and repeatedly testified falsely at the hearing. That is a classic case of a pretextual discharge and needs nothing more to prove a violation of Section 8(a)(3) and (1) of the Act. In addition, Eirvin, knowing, according to his own admission, of Hanephin's "attitude," assumed that no one of his employees would commit the kind of mistake that Hanephin did, unless he did it as a result of "treason." That kind of mindset is the epitome of antiunion bias and prejudice.

The General Counsel makes a number of other arguments to support the finding of a violation. Hanephin, a 2-1/2-year employee with an impeccable reputation (according to his February 14 evaluation: "Rodney Works Hard Every Day Finds A Way To Get The Job Done Right The 1st Time & In A Timely Manner. He Makes Good Decisions Without Being Prompted."), testified that he had placed conduit bends near a telephone pole 100–150 times and, when Nanney was his supervisor, he sometimes told him that he wanted the bend on a specific side of the pole and, other times, there would be paint clearly indicating where the bend was to be placed. In this instance, Hanephin believed that the red paint on the other side of the pole from where he put the bend signified an existing electrical utility, which he erroneously thought was a little bit off on their mark. He explained that there was no other locate mark near that pole so he figured that was for the electric wire running up the pole.

Respondent issued no written document detailing the place for the wire on a pole and never told its employees at meetings or otherwise that they always had to run the wire on the transformer side of the pole. Lohman testified that there was no industry standard as to the meaning of red paint on a utility pole, and no one was called by Respondent to refute that testimony. Hanephin testified that he placed the conduit to save time and money and less hand digging, because the wire was left by the boring crew sticking out of the ground about 4 feet from that side of the pole (the opposite side of the pole from the paint and transformer above), and denied that he had made this mistake purposefully, as an act of sabotage. I believe that his denial was truthful and sincere. All the credible evidence (and that excludes Eirvin's, the only testimony to the contrary) indicates that Hanephin was never told that the conduit was to be brought out of the ground and up the pole on the transformer side of the telephone pole.

Despite Eirvin's claim that Hanephin was the only employee to have brought a 90-degree bend out of the ground on the wrong side of a pole, Nanney admitted having done so and not being terminated. Pour testified that Hanephin's mistake was not the first time one of Respondent's employees had put a bend on the wrong side of the pole. Lohman testified he put a 90-degree bend on what turned out to be the wrong side of a pole at least 5 times without discipline; and, at least 10 times, he also moved conduit that had been put on the wrong side of the pole by others. On other occasions, employees placed the conduit too close or too far away from the pole or bored them too deep or too shallow, all of which had to be corrected; and no employee was disciplined. Nor were employees discharged for jack hammering through a parking garage, tearing the awning off a McDonald's restaurant, damaging a golf course, or committing mistakes that cost Respondent thousands of dollars.

The General Counsel made a more than ample prima facie case under *Wright Line*, and Respondent made no credible case that, but for Hanephin's union activities, it would have treated his mistake in any manner different from the mistakes of its other employees, whom it did not discipline. The day before Hanephin was fired, he was called into Eirvin's office, where he explained what he had done. Eirvin said that this was the first time he had ever had him in the office so he did not want to fire him, but noted "just consider yourself lucky you are not fired with these buttons and bumper stickers and a magic list floating around." Eirvin felt that Hanephin had a bad attitude because of "all this union activity," so that Eirvin turned Hanephin's mistake into an act of "sabotage," showing how deeply affected Eirvin was by the union organizing drive. I infer from the falsity of Eirvin's testimony about Hanephin's discharge that there is another unlawful reason for the discharge, the source of Hanephin's "bad attitude," union activities. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). I conclude that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Hanephin.

On the same day that Eirvin fired Hanephin, Friday, April 25, Sellers and Respondent's Safety Director Mike McElligott met with pulling crew leader, Sutton, and his crew, Ryan Adams, Clarence Williams, Rocky Lucas, and John Langford. Sellers said that the work in St. Louis had run out and that he needed three employees to go to Jacksonville, Florida. The move was permanent, the employees would not be given a raise or relocation fee, and they needed to be in Florida in 3 days, on Monday. He called on each of them, and each declined. He then told Langford and Lucas to go back to what they had been doing the day before and told Sutton, Williams, and Adams that they were laid off. An internal memorandum and Respondent's

and both employees were actually discharged on April 15. Respondent did not rely on the incident in defending its action; and I reject the General Counsel's contention that Respondent's defense shifted or was inconsistent and that I should conclude, for this reason, that no legitimate reason existed for the discharges.

termination report ("Matt was offered a position in Florida but declined. Matt was terminated due to his decision.") indicate, however, that they were terminated.

The three who were terminated supported the Union. Langford and Lucas were the only employees on this crew who did not engage in any union activities.[8] When Sutton was being interviewed for his job (he started 2-1/2 months before, on February 10), Sellers said that there would be no lay offs; that the previous year he kept employees working 40 hours; and that, if things did slow down, he would find work around the yard for Sutton to do, but he expected things to pick up. Sutton informed Sellers that he could not travel because his wife worked Monday and Friday nights and he had trouble getting babysitters for his child. Sellers said that Respondent could work with that and that Sutton's inability to travel would not be a problem; he would be able to keep Sutton working around the shop.

At the end of his employment, Sutton worked primarily on a large MCI job and was aware that the job was about to end. On April 17 or 18, he asked Sellers what he would do when the MCI job ended. Sellers said that the crew was to go to Blue Springs, Missouri next. Sutton asked what Sellers was going to do with him because he could not travel with his wife working nights and not having a babysitter. Sellers said he would find him work with another crew so that he could stay busy. Despite Sellers' commitment and assurances, Sutton was terminated.

The General Counsel has proved a prima facie case under *Wright Line*. The three who were terminated were union adherents: the two who were not terminated were not union supporters. Sutton attended all the Union's meetings; he talked to the employees on his crew about the Union; he signed an authorization card; he wore a "Union Yes" pin on his hat at work in the presence of Eirvin, Nanney, Robinson, and Sellers; and his name was on the list of union supporters and request for recognition that various employees delivered to Respondent. On April 23, 2 days before his discharge, Sutton gave Sellers a copy of the Union's request for recognition, which Sellers refused to accept and which Sutton left face-up on Sellers' desk. A promise had been made to Sutton that he would not be transferred but would continue to be employed by Respondent at the same place. Sellers had committed that the two other union adherents would be transferred to another job in Missouri. There is no credible evidence that Respondent terminated employees for refusing to accept permanent transfers to Florida. There is evidence that Respondent was hiring three laborers on a concrete crew, work that Adams and Clarence Williams could have done or trained to do.

Respondent did not overcome the General Counsel's prima facie case. In particular, Sellers never testified about any lack of work for Sutton or the reason that he did not find work for him, as he had promised earlier. There still remained cleanup and restoration work on the MCI job. There was no testimony that Clarence Williams and Adams, both laborers, were not qualified to do the concrete work. I do not believe Eirvin's testimony to the contrary, because a laborer hired on April 24 had absolutely no concrete experience. Besides, the evidence was overwhelming that, of all the employees for whom Respondent had need, it constantly needed good laborers. In fact, Respondent rehired Williams and Adams on May 27 and June 2, respectively. I conclude that these three discharges violated Section 8(a)(3) and (1) of the Act.

I have previously discussed Respondent's blatant and unconscionable fabrications of customer complaints to support the discharge of Lohman, a known union adherent, on April 28.[9] Those fabrications came specifically from Martychenko and Robinson, who must have been following Eirvin's orders. The customers whom the latter two identified as having made complaints denied that they had done so. They, unlike Respondent's representatives, were not biased and prejudiced and had no reason to lie. I credit them. Even Respondent's alleged documentation was faulty: it tried to blame Lohman for jobs that he had not completed or had no part in the alleged faulty restoration work. Added to that is Robinson's questionable claim that Respondent had been receiving customer complaints about Lohman's restoration work for 6 months, the number and dates of which he was unsure and the written record of which was absent. Indicative of the falseness of his testimony was the fact that his February 14 evaluation of Lohman not only omitted mention of all these complaints but also praised Lohman for his work (he "takes pride in completed jobs"). Lohman testified that no one had discussed any customer complaints with him, which is consistent with Respondent's lack of customer complaints (other than fabricated); and I believe him.

The General Counsel's prima facie case under *Wright Line* was overwhelming. To the contrary, Respondent made no showing that it would have terminated Lohman absent his union activities. Before April, Respondent had always permitted Lohman to repair whatever the customer had complained about.[10] Robinson could testify only that he did not know the reason that Lohman was not permitted to make the new repairs, as well, which, as found above, were no more than Respondent's contrivances. Eirvin's insistence that Respondent had a history of terminating employees for poor restoration was false. Both Robinson and Nanney contradicted him, and Respondent, despite having an opportunity to do so, introduced no documentary proof to support Eirvin. Another employee, Doug Kutter, left his job in much worse condition than Lohman was accused of, albeit falsely, and was only warned. For all these reasons, I conclude that Respondent violated Section 8(a)(3) and (1) of the Act.

From early December, Adam Williams had been the crew leader of a two-man crew, the other member being laborer

[8] That they may have had more seniority than the other three employees is irrelevant. No one testified that Respondent followed seniority when it transferred or laid off its employees.

[9] The General Counsel contends that Respondent presented a shifting or inconsistent defense when it opposed Lohman's application for unemployment benefits on the ground that "he was offered work in Florida and chose not to go." I find that that opposition, prepared by one of Respondent's clerical employees, was an inadvertent mistake.

[10] By this finding, I do not imply that Lohman did his work poorly. Sometimes, for example, despite throwing down sufficient grass seed, the planting is disturbed by a violent storm, which washes away the seed.

Steve Mack, performing open cut work. After April 15, somewhere about April 17–24, Bridges was put on the crew. On Thursday, May 8, Robinson and McElligott met with the three employees.[11] Robinson told them that the open cut work in St. Louis had dried up and gave them the choice of going to work, starting Monday, in Florida, which would be a temporary assignment on which they would hand dig, or being laid off, which, in light of all the facts, meant "terminated." The employees would have to find their own means of transportation (when transferring to Florida, Ed White's crew had been permitted to drive a company truck); motel expenses would be paid; the employees would be paid an extra dollar per hour, as was usual for out-of-town work; but they would not be paid for their time driving to Florida, which was not Respondent's usual practice. Bridges declined the assignment and was terminated on May 13.

Mack and Williams agreed to go and were given the telephone number of the project manager in Florida, Mike Stankewitz, who said, in the first telephone call that Williams made, that he had no work for them until May 18 and, in the second, that he would not be ready for them on May 18. That prompted Williams to speak to Eirvin, who denied Williams' accusation that they were being transferred because of the Union and said that they would be in Florida until work in St. Louis picked up and that, if they did not go to Florida, they would not be called back and would be fired. Williams threatened that, if he went to Florida, he would try to organize the facility there. Williams and Mack never went to Florida. On the day that they were supposed to leave for Florida, sometime about May 18, Mack backed out, because he feared being laid off in Florida because of his union activities. Williams then decided that he would not go, because he could not afford to take the trip alone.

Respondent knew that Bridges, Williams, and Mack were union supporters. Eirvin so admitted; except for Mack, Robinson did, too. Employee Harold Armstrong was interrogated by Eirvin on about April 15 and identified both Bridges and Williams as being at the April 7 union meeting. On April 16, Bridges presented the employees' request for union recognition to Eirvin, which he rejected, stating that he had told the employees the day before that he would not recognize the Union. It was only after that event that Bridges was first assigned to work with Williams and Mack.

The reason for their layoff is suspect. First, I find it difficult to believe that open cut work simply disappeared, as Respondent told the employees. The employees were in the middle of their job, with just a bit more work to finish (it began to rain midday, so they could not continue to work), on the very day that they were given the transfer option. Other employees had to be sent back to that job to finish it, which the three employees could have finished. Furthermore, they had been working regular overtime; and, within several weeks prior to their transfer option, Respondent had contracted out a substantial amount of open cut work. It is undisputed that the soil in Missouri is filled with rocks, and the rocks prohibit the use of equipment other than the trenchers and backhoes that Bridges and Williams operated. Nanney conceded that Respondent had no idea which of the 10 or 20 jobs given to it by Ameren UE, on any given day, week, or month, would hit rock and need to be open cut. After Bridges and Williams were discharged, Respondent had new open cut work and, just 1 day after it issued its termination letter to Williams, hired Jeremy Warden, another backhoe operator, and John Carrigan to do the same open cut work that Bridges and Williams had previously performed. Respondent shifted Krause from a boring machine to a backhoe. In June it received bills for open cut work that it subcontracted to CSG Utilities (the bills do not show when the work was performed). By July, Respondent transferred Lucas from the telecommunications to the Ameren UE side and had so much additional open cut work that it had to bring to St. Louis Florida Project Superintendent Jay Searles to perform that work.

So there was open cut work in St. Louis that Respondent could reliably predict would be available for these two very experienced operators. Williams could operate a bulldozer, backhoe, track hoe, plow, trencher, cement cutter, and excavator; Bridges, with 8 years of underground utility experience, could operate a backhoe, boring machine, trencher, and plow, and he could also locate. Even had there not been work available at the instant that they were offered their choice of Florida or discharge, work in some craft was available to tide them over, certainly the laborers' work of hand digging that they were offered in Florida. Nanney rated Williams as a "[v]ery good operator of anything we have. He will get the product in. Will try anything and succeed UE, water, etc. Does anything we ask him to do." Robinson rated Bridges "very professional" and a "good operator." In sum, I find that there was work available for these employees.

Second, Respondent's offer was suspect. Bridges was first employed by Respondent on January 13, and expressly told Nanney during his interview that he had been traveling for 6 years and would not be willing to travel outside of Missouri. Nanney represented to him that Respondent had "a vast amount of open cut work" and that Respondent had enough work in St. Louis that he would not have to travel further than Knob Noster or Kansas City, Missouri. By offering Bridges a transfer to a location that Respondent knew Bridges would not accept, Respondent discharged him. Indeed, Respondent offered no reason that it needed Bridges, a trained and experienced operator and, for that matter, the other two employees, to hand dig in Florida and could not hire manual laborers in Florida, instead, and no proof was supplied by Respondent to show that its Florida operation could not hire persons there.

Third, even Respondent admitted that Mack was one of its best laborers. He was a better performing employee than some (for example, Ryan Lamb) who were retained. Respondent traditionally had trouble retaining its laborers, who had a substantial turnover. There is no reason that Respondent would have wanted to rid itself of one of the few laborers who performed his work well and diligently and for whom Respondent had a high regard. In fact, during his interview in November 2002, Mack was told not to expect any lay offs unless it was

[11] The testimony of the employees differed in numerous respects. The narration of these discharges is based on the probabilities of what actually happened, and when, and not on any particular employee's recollections.

raining or snowing. Furthermore, even if the open cut work had dried up, as Robinson told the employees, Mack was experienced in digging locates and performing restoration and concrete work; and because Respondent had a practice of switching employees from one side of its business to another to fill its needs, Mack, but for his union activities, was certainly in demand. For example, Respondent had an opening for a laborer on a concrete crew on May 8 and could have retained Mack in that position. In addition, after Mack was terminated, Respondent hired numerous laborers, but failed to rehire Mack or call him back.

Fourth, there are documents that reveal that something in this transfer-discharge was amiss. For example, in the three employees' personnel folders was a termination memo, dated May 7, that McElligott wrote regarding the meeting that day, captioned "Termination due to refusal to relocate and due to lack of work." It stated: "All employees were undecided for relocation at this time. So a decision was made as of [sic] for lack of work in the St. Louis area, the employee would unfortunately be terminated at this time with no time frame of re-hire." Obviously, Respondent expected that the very offer of a transfer to Florida would be so unappealing that the employees would reject the transfer, even though only Bridges did immediately. Also included in Williams' personnel file is a memo written by Ed Eirvin the day after the meeting, May 8, about receiving a customer complaint regarding a job Williams performed in 2002. Respondent gave no explanation about this complaint regarding an event that occurred at least 5 months before, and I infer that Respondent was trying to strengthen its case to justify its discharge of Williams.

Fifth, Respondent had never laid off an employee on the Ameren UE side of the business. Respondent had never forced transfers to Florida, under penalty of termination. Its experience was exactly the opposite. When work slowed down, Respondent moved its employees to another part of its business. Respondent's policy was to avoid layoffs. However, according to Respondent's treasurer, David Fischer, it has laid off employees from other portions of its business for lack of work; but, when there is additional work, it has recalled them. That was not Respondent's offer here. Its intent was, as Williams' testimony shows that he understood, to terminate the three employees, upon their refusal of a transfer. Considering Respondent's union animus and knowledge of the union activities of the three employees, I conclude that the General Counsel has presented a prima facie case of 8(a)(3) discrimination.

The burden then shifts to Respondent to show that it would have transferred these three employees even in the absence of their union activities. Respondent did not meet that burden. Respondent did not demonstrate the necessity of transferring these employees to Florida, a transfer it knew Bridges would not accept. Nor did Respondent produce evidence to show, assuming that work was not available, the reason that it did not offer the employees a layoff and wait for work to pick up, as it assuredly did. Finally, Respondent did not even prove that it had no work. Eirvin testified that Respondent probably had documents to demonstrate that the open cut work dried up and that Nanney should have sheets that showed the open cut jobs that were left. However, Respondent produced nothing. Nanney did not testify about the issue, nor did Robinson, who, Eirvin alleged, told him that "the open cut work was all done." Thus, Respondent never proved that it had any need to transfer the three employees to Florida or to lay them off. It did not meet its burden of proof under *Wright Line*, and I conclude that it violated Section 8(a)(3) and (1) of the Act.

In so concluding, I reject Respondent's contention that the three employees conspired to give false testimony in this proceeding, that their testimony should be disregarded, and that they should be disqualified from being granted any remedy. The counsel for the General Counsel asked Mack whether he had ever talked to Bridges and Williams about making up some reason to give at the hearing in this proceeding that he or they did not go to Florida. Mack's answer, on which Respondent relies, was that he wanted to say "yes" but could not recall. That is certainly not a definitive answer, as Respondent suggests. With their different recollections and different reasons for rejecting Respondent's offer, all of which make at least some sense, I find the notion of perjury in these circumstances quite impossible. Finally, the three employees are not on trial. Although Respondent may question the reasons that Mack and Williams gave for not going to Florida, that is not the point. The issue is why Respondent tried to transfer them there in the first place.

Respondent discharged Shipp on September 16 for low production. There is no question that his production was low at the time of the discharges of Farris, Schreit, and Schaffer; and I have already used his low production, which was lower than Farris' and Schaffer's, to support my finding that Respondent violated Section 8(a)(3) when it discharged the two higher-producing employees. My finding that he had low production prior to April 15 does not mean that he, anymore than Farris and Schaffer, should have been discharged. It means only that Respondent's justification for those discharges was false. The issue now becomes, as of September 16, whether Respondent was again motivated by Shipp's work performance, rather than his union activities.

If Respondent had not known of Shipp's union activities on April 15, it certainly learned of them, despite Eirvin's incredible denial that he heard Shipp's name mentioned, during the first 2 weeks of the hearing in this proceeding in August and the first week of September. Shipp began to wear a "Union Yes" pin at work only on April 16, the day after the first three discharges; and an argument could be made, as the General Counsel impliedly does, that Respondent discharged Shipp to justify the discharge of Farris, Schreit, and Schaffer, knowing that the General Counsel was relying on its failure to discharge Shipp. In any event, there is more than ample evidence of Respondent's knowledge of Shipp's union activities by September 16, as well as its union animus.

I turn then to Respondent's motivation. McElligott, the safety director, was the one who actually fired Shipp. He told Shipp that he was told by upper management to release him that day for poor production and bad work habits. McElligott apparently knew nothing more of Shipp's work. He did not testify about Shipp, at all. Nanney, Shipp's supervisor, said that he was not the one who made the decision to fire Shipp. Eirvin testified that he terminated Shipp because of "low production

and being real low in production and not doing any better and not improving." That is essentially the same explanation that he used in justifying the discharges of Farris and Schaffer, which I have discredited; and I do not believe the current one, either, on the basis of Eirvin's general lack of credibility. I, therefore, conclude that his reason was false and that there was an unlawful reason that Eirvin was trying to conceal. That conclusion is consistent with well-settled law that, when the asserted reason for an action fails to withstand scrutiny, the Board may infer that there is another reason—an unlawful one which the employer seeks to conceal—for the discipline. *Shattuck Denn Mining Corp.*, 362 F.2d 466, 470 (9th Cir. 1966); *Painting Co.*, 330 NLRB 1000, 1001 fn. 8 (2000).

My conclusion is independently supported here by Eirvin's untruthful testimony, as shown by the lack of consistency between his testimony and that of Nanney and Martychenko, as well as the lack of credible corroboration of his testimony. The "not doing any better and not improving" rationale for the discharge got Eirvin into trouble. As he did in justifying the discharges of Farris and Schaffer, his thesis was that, once he was told by Nanney and Martychenko in July of Shipp's need to improve his "super low" production (conversations that neither Nanney nor Martychenko corroborated), he told them, "Bring him up to speed, and put some people with him." Contrary to Eirvin's testimony that Shipp was assigned laborers to help with the digs and speed them up, Respondent's records reveal that a laborer was assigned for only 2 days, September 3 and 4. Contrary to Eirvin's testimony that Shipp was given three quality operators to improve his production, he could recall none but Benetatos, whom Eirvin had earlier identified as one of his better operators and who started with Shipp on July 24. What Eirvin did not say was that, when Benetatos started with Shipp, he, according to Nanney, whose objectivity is suspect, may have had only a few days' experience operating the Vermeer 1620 boring machine, which was being used on Shipp's assignments. Shipp had to teach Benetatos how to operate his machine.

When asked the reason that a more experienced operator had not been assigned to Shipp, Nanney answered that he assigned Benetatos more to motivate Shipp, rather than to give him an operator of more experience, and that he talked with Shipp about how Benetatos was doing, and Shipp replied that he was doing fine, so he did not think that there was "a big issue." One would have thought that, instead of asking Shipp, the allegedly poor producer, about how the fine operator was doing, Nanney would have asked Benetatos, the "better" operator, whether Shipp was more motivated. Singularly curious about Respondent's whole story is the fact that Robinson evaluated Shipp in February and found him "[m]otivated," that he "tries hard," and that he was a "Good Accurate Locator." While the evaluation also indicated that Shipp needed to improve his production, Robinson appeared to write that on many of his evaluations and otherwise did not discuss production with the employees, particularly Shipp, during his evaluations.

In fact, Respondent never warned Shipp about his production or told him that Benetatos had been assigned to him to improve his production. Nanney testified that he knew 2 weeks before Shipp's termination that Shipp was not improving, but he never gave Shipp any kind of warning. Not only that: he did not go even then to Eirvin to recommend Shipp's discharge. Instead, he waited. "I think I am pretty fair, and I was just trying to hang in there with him." But, at some point, according to Nanney, he either went to Eirvin's office, or Eirvin called him into the office, and Eirvin "had all of the numbers there, and it was right there on the paper. It was low." When asked what the documents were, Nanney quickly retracted, testifying that he did not know that he had any. "[W]e were just discussing the low production." Eirvin, however, originally claimed that he did not speak to anybody before deciding to terminate Shipp; later, he testified that he did. In addition, Eirvin originally testified that he reviewed Shipp's weekly production reports and a spreadsheet that Martychenko had created; then he denied doing so.

Even as to Shipp's low production, Respondent's case was unconvincing; and it seemed to me that Eirvin was making it up as he testified. Respondent keeps records of the footage that each crew produces daily. But not all footage is equal, and certainly not for billing purposes. For example, Respondent charges a per-foot price for boring based on the thickness of the conduit and the type of soil. Respondent has a minimum requirement of 150 feet bored and on jobs less than 150 feet charges the customer the difference. Where a boring crew bores through rock, Respondent charges three times the normal boring price and credits its employees with three times their footage for boring in rock or hand-trenching. Respondent also charges a flat high hourly rate for time and material work, which is crew work other than boring and which, Eirvin testified, "is also a factor of production." Yet, Eirvin's testimony made it unclear that he considered Shipp's time and material work, or his days off work for personal reasons, or his assignment to restoration work.

The lying, the change of testimony, and the lack of credible corroboration persuade me that the General Counsel has proved a prima facie case. Respondent did not overcome it by showing that it would have terminated Shipp but for his union activities. Respondent has not shown that it ever discharged a locator for poor production other than the discriminatees in this proceeding. In addition, Eirvin testified that, if Shipp had bored 570 feet per week, he would not have been terminated. However, the counsel for the General Counsel's brief contended that Shipp averaged 570 gross feet per week during the 7 weeks before he was fired. Respondent did not contest those figures. I conclude that Respondent violated Section 8(a)(3) and (1) of the Act by discharging Shipp.

The final discharge occurred on November 26. Eirvin terminated Wayne Schaffer (Wayne), until then a highly rated laborer ("Wayne is A Very Hard Worker[.] Crew Leaders Want Him on their Crew. He Gets Along with others & Does His Job To the Best of His Ability[.] He Cares & I[s] A Very Good Employee For ADB."), according to Respondent's termination report, for the following reasons:

> Termination Due to Racial Harassment; Amplified & Displayed on Rear of Personal Vehicle in St. Louis Parking Area; Having To Subject others to view same as above mentioned. Does Not Constitute Freedom Of Speech Act. [Photos avail-

able.]

Respondent stipulated that Wayne was a known union supporter. He was referred to repeatedly in the earlier sessions of this proceeding, was at the time of his discharge one of only three employees still employed who attended the Union's first meeting, and was cited by Eirvin on the second day of the hearing as "part of the union problem" at Respondent. Thus, knowledge of Wayne's union activities and Eirvin's union animus is clear. Regarding motivation, McElligott testified in great detail that employee Tony Williams, an African-American, had complained that he found a bumper sticker or stickers with the Confederate flag on Wayne's car "very offensive." McElligott did not tell the truth. Williams, called as a witness by the counsel for the General Counsel, denied that he said any such thing to McElligott. Rather, he testified that he had never seen Schaffer's bumper stickers and, therefore, never told McElligott that he had found them offensive. This current employee had no reason to fabricate; and McElligott, one of Respondent's supervisors and agents, had ample reason.

But somebody may have made a complaint about a bumper sticker at some time.[12] Courtney West, a boring machine operator, had a "Heritage Not Hate" bumper sticker on his car that included a Confederate flag since he was first hired on June 15. He was neither discharged nor threatened with discipline. Instead, 6 months later, Ray Door, a project manager, called his son, Jeff, another boring machine operator, about mid-November, and asked if West had any bumper stickers on his car, specifically a Confederate bumper sticker. Jeff answered that he had; and Ray said that Eirvin had told him that someone was complaining about that bumper sticker and that Eirvin said that West needed to take it off his car.

That evening, Jeff told Wayne and West that Eirvin wanted West to remove the Confederate bumper sticker; and the three were upset with what Eirvin had said, Wayne believing that Eirvin violated West's First Amendment right of freedom of speech. So, on Saturday, November 22, to demonstrate support for West, Jeff and Wayne purchased their own Confederate stickers and placed them on their cars.[13] The following week, beginning November 24, Jeff drove his car directly to his jobsite, where it was in clear view of Robinson. In fact, Respondent had photographs of Jeff's vehicle with those bumper stickers. Thus, Respondent was fully aware that the three had the very same sticker or similar "offensive" stickers.

Yet, only Wayne, who attended all the union meetings, including the very first, was discharged. The other two were not even reprimanded and removed their Confederate bumper stickers only after Schaffer was terminated. What distinguishes Wayne was his active union partisanship, whereas West and Jeff were both hired well after the union activity in April. West never revealed his union sympathies, or lack thereof, to Respondent, and until November 21, Jeff never wore a union pin or told anyone about his feelings about the Union. On that day, he put two union bumper stickers on his car. On that day or the day after, Wayne also put a union bumper sticker on his car. On Friday, November 28, Ray warned Jeff that, if he and West [still] had any Confederate-flag stickers on their cars, they should remove them because a guy was just fired for it and they could get fired, too, because Respondent considered it racist. Ray also told Jeff that he should get the union stickers off his car because it was not appreciated, that he could be put under a spotlight because of his involvement with the Union, and that there was the possibility that he could get fired for some other reason, that Respondent would find a reason to fire him, but it would lead back to his involvement with the Union. Jeff and West removed all the Confederate-flag stickers that day; and Jeff removed the union stickers on Monday, December 1.

The disparate treatment of Wayne is evident. Eirvin knew that West had the "offensive" bumper sticker on his car. He told Ray, a supervisor, who then told Jeff to tell West to take it off. Eirvin did not fire West or, later, Jeff. He fired Wayne, and an arguable reason that he did so was Wayne's earlier union activities. The General Counsel has proved a prima facie case. McElligott's lie about Tony Williams' complaint permits an inference that there was another unlawful reason for Wayne's discharge. *Shattuck Denn*, supra.

Respondent failed to demonstrate, as it had to do under *Wright Line*, that it would have discharged Wayne absent his union activities. Eirvin, no longer employed by Respondent on February 5, 2004, the day of the hearing of Case 14–CA–27677, the case dealing solely with Wayne's discharge, did not testify to his motivation. Respondent offered no excuse that Eirvin was unavailable to testify, and the testimony of Respondent's owner, Rusty Keeley, shows that Respondent knew where Eirvin was. Accordingly, I cannot find that he had a lawful motivation. Without Eirvin, Respondent could not meet its *Wright Line* burden.

The Request for a Bargaining Order

As noted above, the General Counsel requests a bargaining order, which requires an examination of the Union's majority status and the nature of Respondent's unfair labor practices. But, first, I consider the question of the appropriate unit. Respondent's answer and its counsel at the trial contended that the appropriate unit should consist of not only its St. Louis facility, but also its two other offices in Kansas City, Missouri, and Jacksonville, Florida. That opposition seems to have been abandoned because no mention of it is made in Respondent's briefs. Had it been raised, the law is clear that a proposed single facility unit is presumptively appropriate unless it has been so effectively merged into a more comprehensive unit, or is so functionally integrated with employees at another facility, that it has lost its separate identity. To determine whether Respondent has successfully rebutted the presumption, the Board examines such factors as: bargaining history; functional integration of operations; the similarity of skills, functions, and work-

[12] A second person who was alleged to be irate was Tony Ausley, then one of Respondent's project managers, who wrote an e-mail, dated November 26, but did not testify. Another African American, a new secretary named Toni, also allegedly complained, according to McElligott, but she also did not testify and did not corroborate McElligott's testimony.

[13] Wayne's were the same "Heritage Not Hate" sticker that West had and "Never Apologize for Being White." Jeff's were: "Hey dumb ass, it's lack of parenting not guns!," "Confederate American," and the word "Rebel," the latter two having the Confederate flag or written to resemble that flag.

ing conditions of employees; central control of daily operations and labor relations; interchange or transfers of employees among sites; and distance between sites. *J & L Plate, Inc.*, 310 NLRB 429 (1993).

Centralized control of some labor relations policies and procedures is not inconsistent with a finding that there exists sufficient local autonomy to support the single location presumption. *D & L Transportation*, 324 NLRB 160, 161 (1997). While the record reflects that Eirvin had overall responsibility for Respondent's three offices, that McElligott traveled among the facilities, and that Respondent's handbook applied to all employees (albeit it was not distributed to all employees), there is also evidence of local autonomy. Among the facts that demonstrate that there is "sufficient local autonomy to support the single location presumption," *New Britain Transportation Co.*, 330 NLRB 397, 398 (1999); *Rental Uniform Service,* 330 NLRB 334, 335 (1999); local management at each facility is in charge of hiring, overtime, vacations, and leaves; job vacancies are not posted at other facilities; employees do not travel to other facilities for training; and the project managers at the three facilities do not participate in management meetings with each other. In addition, the locations of the St. Louis, Kansas City, and Jacksonville offices are sufficiently far apart to suggest that the single St. Louis facility unit is appropriate. I so conclude.

The parties stipulated at the hearing that, if the unit limited only to St. Louis was found appropriate unit, the unit shall be described as follows:

> All employees employed by ADB Utility Contractors, Inc. at its St. Louis, Missouri facility, EXCLUDING project managers, office clerical, managerial, professional employees, over-the-road truck driver, guards and supervisors as defined in the Act.

Because I have found the St. Louis unit appropriate, I conclude that the above constitutes a unit which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. The General Counsel contends that, because the parties' stipulation also listed the employees who were appropriately included in the unit, and they were all field employees, the appropriate unit, notwithstanding the stipulation, should be described as including "all field employees." I will not do so, because there is no legal or factual basis in the record for me to cancel or disregard the parties' stipulation.

The General Counsel and Respondent's counsel also stipulated that on April 15, the Union obtained valid signed authorization cards from a majority of employees in the above-described unit authorizing the Union to represent them in collective bargaining, but Respondent, albeit perhaps not in haec verba, withdrew from that stipulation, when he claimed that the crew leaders were supervisors. In any event, I am satisfied that, as of April 15, there were 59 employees in the unit and that 33 signed cards, giving the Union a majority.

Having found that the Union represented a majority of the employees, I turn to the question of the need for a bargaining order. The Board wrote in *Center State Beef & Veal Co.*, 330 NLRB 41, 43 (1999), enfd. in part 227 F.3d 817 (7th Cir. 2000):

> Under *Gissel*, the Board will issue a bargaining order, absent an election, in two categories of cases. The first category involves "exceptional cases" marked by unfair labor practices so "outrageous" and "pervasive" that traditional remedies cannot erase their coercive effects, thus rendering a fair election impossible. The second category involves "less extraordinary cases marked by less pervasive practices which nonetheless [ ] have a tendency to undermine majority strength and impede the election processes." In this second category of cases, "the possibility of erasing the effects of past practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and . . . employee sentiments once expressed [by authorization] cards would, on balance, be better protected by a bargaining order." [*Gissel*, 395 U.S.] at 613–615.

Within 2-1/2 weeks of the Union's first meeting on March 29, Eirvin delivered his April 15 speech filled with antiunion rhetoric, and, more critically, unlawful threats of termination of employees and closure of the facility and of the futility of selecting the Union as the collective-bargaining representative. He unlawfully solicited employees who supported the Union to quit and threatened the employees with discipline if they should wear pins showing their support of the Union. Those threats were followed by correspondence to the employees, as well of readings of the letters directly to the employees, containing similar threats of loss of jobs and the futility of selecting the Union and new threats of subcontracting the employees' work and reduction of their bonus money. Most of these unfair labor practices are "hallmark violations," having lasting effects on bargaining-unit employees that cannot be underestimated. *Garvey Marine, Inc.*, 328 NLRB 991, 994 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001); *General Fabrications Corp.*, 328 NLRB 1114 (1999), enfd. 222 F.3d 218 (6th Cir. 2000). His threats have been recognized as an "insidious reminder to employees every time they come to work that any effort on their part to improve their working conditions may be met with complete destruction of their livelihood." *Electro-Voice, Inc.*, 320 NLRB 1094, 1095 (1996).

Eirvin's speech also created the impression of surveillance, an impression that was entirely accurate. His subsequent discharge of 9 of the 11 employees who attended the March 29 meeting was no accident. He knew exactly who was there. Three employees, two of whom were leaders in the organizing efforts, were fired later on the same day that he gave his speech, threatening the employees with termination. "The discharge of union adherents has long been considered by the Board and the courts to be a 'hallmark' violation of the Act because of its lasting effect on election conditions." *Center State Beef & Veal Co.*, 330 NLRB 41, 43 (1999); *NLRB v. Jamaica Towing*, 632 F.2d 208, 212–213 (2d Cir. 1980).

Respondent's 8(a)(1) threats, spoken and written by Eirvin, were made to all the bargaining-unit employees. The discharges, all of which had little or no justification and some of which were concocted with lies and fake documents, continued throughout the year. They directly affected not only the 13 union adherents in a unit of 59 employees, 22 percent of the bargaining unit, who were discharged, but the remainder of the

unit, which had to be aware that those who continued to favor the Union were destined to lose their jobs, no matter that they did nothing else but engage in activity protected by the Act. That high percentage warrants a bargaining order, because the possibility of holding a fair election is minimal. *Cogburn Healthcare Center*, 335 NLRB 1397, 1399 (2001); *General Fabrications Corp.*, 328 NLRB at 1115.

In fact, word of the first three discharges was widely disseminated, and Eirvin obtained the result that he sought. At the April 15 union meeting, after Respondent discharged Farris, Schaffer, and Schreit, employees expressed concern that they, too, might be terminated; employees expressed fear that Respondent would close; and two employees were afraid that they would be fired and refused to sign the request for recognition that many employees signed that night. That the threats were made by Eirvin, Respondent's highest-ranking official, heightened the significance and impact of Respondent's message. *Aldworth Co.*, 338 NLRB 137, 149 (2002), enfd. sub nom. *Dunkin' Donuts Mid-Atlantic Distribution Center v. NLRB*, 363 F.3d 437 (D.C. Cir. 2004); *Cogburn Healthcare Center*, 335 NLRB at 1400.

That Shipp and Wayne Schaffer were discharged during the course of the hearing demonstrates that the unfair labor practices have continued and not diminished and warrant the finding that a fair election is not possible. Eirvin wanted all employees to think that they would lose their jobs if they voted for the Union and hoped that his speech would cause employees to stop engaging in union activities. He got his wish. The Union's organizing effort was gaining momentum before April 15; after then, attendance at union meetings declined significantly, the only ones ultimately attending being the ones who were unlawfully discharged and two other mainstays. Others who had supported the Union withdrew their support. The granting of a normal cease-and-desist order will not erase the significantly pervasive and lasting deleterious impact of Respondent's unfair labor practices. The possibility of holding of a fair election is improbable. I will recommend that a *Gissel* bargaining order issue.

REMEDY

Having found that 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. In addition to bargaining with the Union, Respondent, having discriminatorily discharged employees, must offer them reinstatement, except for Ryan Adams and Clarence Williams, who have previously been recalled, and make all of the discharged employees whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Because of Respondent's egregious misconduct, demonstrating a general disregard for the employees' fundamental rights, I find it necessary to issue a broad Order requiring it to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act. *Hickmott Foods*, 242 NLRB 1357 (1979).

On these findings of fact and conclusions of law and on the entire record,[14] including my observation of the witnesses as they testified and my consideration of the briefs and reply briefs filed by the parties,[15] I issue the following recommended[16]

ORDER

Respondent ADB Utility Contractors, Inc., St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression among its employees that their union activities are under surveillance.

(b) Impliedly threatening its employees with termination if they select Local 2, International Brotherhood of Electrical Workers, AFL–CIO (Union) as their collective-bargaining representative.

(c) Threatening its employees that it is futile to select the Union as their collective-bargaining representative.

(d) Threatening or impliedly threatening its employees with closure of its St. Louis facility if its employees select the Union as their collective-bargaining representative.

(e) Soliciting its employees who support the Union to quit their employment.

(f) Impliedly threatening its employees with discipline for wearing pins demonstrating support for the Union.

(g) Impliedly threatening its employees that selecting the Union as their collective-bargaining representative would result in the reduction or loss of their bonus and loss of their employment.

(h) Threatening its employees that selecting the Union as their collective-bargaining representative would result in the loss of their employment, insurance, and retirement plan.

(i) Threatening to subcontract more work if its employees select the Union as their collective-bargaining representative.

(j) Interrogating its employees about their union activities and threatening its employees with unspecified reprisals because of their union activities.

(k) Discharging its employees because of their union activities or sympathies and in order to discourage their membership in the Union or any other labor organization.

(l) Refusing to recognize and bargain with the Union as the

[14] The counsel for the General Counsel moved to correct certain errors in the official transcript. There being no opposition, the motion is granted; and the official transcript is amended accordingly.

[15] Much of the Union's briefs is devoted to a discussion of Respondent's allegedly contrary position and testimony in an earlier representation proceeding. I have not considered that discussion. Although an attempt was made to stipulate the record into evidence in this proceeding, the counsel for the General Counsel would not join in the stipulation; and the record was not received. Respondent's brief was, and that showed that Respondent did not contend that any of the crew leaders were supervisors within the meaning of Section 2(11). That is interesting, but not determinative.

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

exclusive collective-bargaining representative of its employees in the unit set forth below.

(m) In any other manner interfering with, restraining, or coercing its 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) On request, bargain with the Union as the exclusive representative of its employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All employees employed by ADB Utility Contractors, Inc. at its St. Louis, Missouri facility, EXCLUDING project managers, office clerical, managerial, professional employees, over-the-road truck driver, guards and supervisors as defined in the Act.

(b) Within 14 days from the date of the Board's Order, offer Jeremy Farris, Edgar Schreit, Nathan Schaffer, Rodney Hanephin, Matt Sutton, Jason Lohman, Adam Williams, Matt Bridges, Steve Mack, John Shipp, and Wayne Schaffer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Jeremy Farris, Edgar Schreit, Nathan Schaffer, Rodney Hanephin, Matt Sutton, Ryan Adams, Clarence Williams, Jason Lohman, Adam Williams, Matt Bridges, Steve Mack, John Shipp, and Wayne Schaffer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the Decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Jeremy Farris, Edgar Schreit, Nathan Schaffer, Rodney Hanephin, Matt Sutton, Ryan Adams, Clarence Williams, Jason Lohman, Adam Williams, Matt Bridges, Steve Mack, John Shipp, and Wayne Schaffer, and within 3 days thereafter notify these employees in writing that this has been done and that the discharges will not be used against them in any way.

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

(f) Within 14 days after service by the Region, post at its facility in St. Louis, Missouri, copies of the attached Notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by Respondent's authorized representative, shall be posted by 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 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, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since April 15, 2003.

(g) 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 Respondent has taken to comply.

IT IS FURTHER ORDERED that the portions of the record that were placed under seal will continue to be maintained under seal.

Dated, Washington, D.C. May 10, 2005

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 create the impression among our employees that their union activities are under surveillance.

WE WILL NOT impliedly threaten our employees with termination if they select Local 2, International Brotherhood of Electrical Workers, AFL-CIO (Union) as their collective-bargaining representative.

WE WILL NOT threaten our employees that it is futile to select the Union as their collective-bargaining representative.

WE WILL NOT threaten or impliedly threaten our employees with closure of our St. Louis facility if our employees select the Union as their collective-bargaining representative.

WE WILL NOT solicit our employees who support the Union to quit their employment.

WE WILL NOT impliedly threaten our employees with discipline for wearing pins demonstrating support for the Union.

WE WILL NOT impliedly threaten our employees that selecting the Union as their collective-bargaining representative would result in the reduction or loss of their bonus and loss of their employment.

WE WILL NOT threaten our employees that selecting the Union as their collective-bargaining representative would result in the

[17] 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."

loss of their employment, insurance, and retirement plan.

WE WILL NOT threaten to subcontract more work if our employees select the Union as their collective-bargaining representative.

WE WILL NOT interrogate our employees about their union activities and threatening our employees with unspecified reprisals because of their union activities.

WE WILL NOT discharge our employees because of their union activities or sympathies and in order to discourage their membership in the Union or any other labor organization.

WE WILL NOT refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of our employees in the unit set forth below.

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

WE WILL on request, bargain with the Union as the exclusive representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All employees employed by ADB Utility Contractors, Inc. at its St. Louis, Missouri facility, EXCLUDING project managers, office clerical, managerial, professional employees, over-the-road truck driver, guards and supervisors as defined in the Act.

WE WILL within 14 days from the date of the Board's Order, offer Jeremy Farris, Edgar Schreit, Nathan Schaffer, Rodney Hanephin, Matt Sutton, Jason Lohman, Adam Williams, Matt Bridges, Steve Mack, John Shipp, and Wayne Schaffer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jeremy Farris, Edgar Schreit, Nathan Schaffer, Rodney Hanephin, Matt Sutton, Ryan Adams, Clarence Williams, Jason Lohman, Adam Williams, Matt Bridges, Steve Mack, John Shipp, and Wayne Schaffer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Jeremy Farris, Edgar Schreit, Nathan Schaffer, Rodney Hanephin, Matt Sutton, Ryan Adams, Clarence Williams, Jason Lohman, Adam Williams, Matt Bridges, Steve Mack, John Shipp, and Wayne Schaffer, and within 3 days thereafter notify these employees in writing that this has been done and that the discharges will not be used against them in any way.

ADB UTILITY CONTRACTORS, INC.

Paula B. Givens, Esq., for the General Counsel.[1]

Michael E. Kaemmerer, Esq. and *Bryan M. Kaemmerer, Esq.,* of Chesterfield, Missouri, for the Respondent.[2]

Christopher N. Grant, Esq., of Saint Louis, Missouri, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried before Administrative Law Judge Benjamin Schlesinger in Saint Louis, Missouri, during a 16-day proceeding held between August 4, 2003, and February 5, 2004. The original charge was filed on April 16, 2003,[3] and was amended on July 19. Additional charges were filed by the Union on September 16 and December 2. The first complaint was issued June 26. Additional complaints were filed on October 9 and December 9. All of these complaints were eventually consolidated for disposition.

The issues in this case arose from the Company's response to an organizing campaign conducted by the Union at the corporate facility in St. Louis. The General Counsel alleged that the Company's officials engaged in a variety of unlawful activities, consisting of the utterance of numerous threats, creation of an impression of surveillance of employees' activities, solicitation of union supporters to quit their employment, interrogation of employees, and most importantly, the discharge of 13 employees because of their support for the Union. The General Counsel sought a variety of remedial measures, notably including the issuance of a bargaining order of the type authorized in *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969).

The Company denied the material allegations of the complaint. As the litigation evolved, the Company eventually asserted that a key aspect of its defense to the charge of unlawfully discharging employees was a contention that eight of those employees, characterized as leaders of various work crews, fell within the National Labor Relations Act's (the Act) exclusion of coverage based on their supervisory status. The eight were: Boring Crew Leaders Jeremy Farris, Nathan Schaffer, and John Shipp; Backhoe Crew Leaders Matt Bridges and Adam Williams; Restoration Crew Leader Jason Lohman; Cable Crew Leader Matt Sutton; and Underground Crew Leader Rodney Hanephin.

On May 10, 2005, Judge Schlesinger issued his decision finding that the Company had engaged in the unlawful conduct alleged in the various complaints. Based on his conclusion that the misconduct had been egregious, he recommended issuance of a broad cease-and-desist order. He also recommended a make-whole remedy for each of the individuals who had been discharged by the Company. Finally, his order included a requirement that, on request, the Company bargain with the Un-

[1] Mary J. Tobey, Esq., was with P. Givens on the General Counsel's Opposition to Respondent's Motion to Reopen the Record to Receive Evidence of Changed Circumstances.

[2] During the prior portions of this litigation, the Respondent was represented by Lawrence P. Kaplan, Esq. and Joshua M. Avigad, Esq., of Saint Louis, Missouri.

[3] All dates are in 2003, unless otherwise indicated.

ion as the exclusive representative of a unit of employees at the Saint Louis facility. See *ADB Utility Contractors, Inc.,* 348 NLRB 895 (2006).

The Company filed exceptions to a number of the judge's findings and conclusions, particularly his determination that the crew leaders were not excluded from the Act's coverage because of supervisory status. On September 30, 2006, the Board issued an order remanding this proceeding to permit an assessment of the impact of the Board's recent trilogy of decisions addressing a number of issues relating to the statutory definition of supervisory status.[4] Specifically, the remand order directed "further consideration in light of *Oakwood Healthcare, Croft Metals,* and *Golden Crest*" regarding "the meaning of 'assign,' 'responsibly to direct,' and 'independent judgment,' as those terms are used in Section 2(11) of the Act." Infra at 895.

The Board's remand order contained several other provisions. It granted the parties the opportunity to file briefs regarding the issues presented in the remand. By contrast, it instructed the judge on remand to determine whether a reopening of the record to obtain additional evidence was "warranted." 348 NLRB at 895. Finally, the Board took note that Judge Schlesinger had retired. As a result, in the event he was unavailable, it ordered that the case be reassigned to another judge.

Pursuant to the remand order, Deputy Chief Administrative Law Judge C. Richard Miserendino issued a show cause order directing the parties to submit their positions on the question of any reopening of the evidentiary record. Once these were received, I was assigned the case on February 26, 2007.[5]

I. THE STATE OF THE EVIDENTIARY RECORD

In the show cause order, Judge Miserendino noted that counsel for the General Counsel and counsel for the Union both opined that "great care had been taken to develop a full and complete record in the prior proceeding which is amply sufficient." (Show Cause Order, p. 1.) Counsel for the Company disagreed, contending that there was a need to reopen the record to obtain additional evidence. In light of this disagreement, the judge issued specific instructions to the parties regarding the manner in which this would be resolved. First, he required the Company to provide a detailed explanation for its position on reopening of the record, accompanied by the identification of the specific "gaps in the record that need to be supplemented by additional evidence," and an explanation of why that evidence had not been submitted during the original trial. (Show Cause Order, p. 1.) Once this was received, the opposing parties were directed to file detailed replies, including the identification of those parts of the record that constituted a sufficient basis for rendering a decision on remand.

The parties have responded to these requirements. In particular, on December 22, 2006, the Company filed suggestions in support of a reopening of the record.[6] In its suggestions, it begins by contending broadly that, prior to the decisions in the *Oakwood* trilogy, the labor law community lacked "sufficient and workable guidance" as to the meaning of the terms, "assign," "responsibility to direct," and "independent judgment." (Suggestions, p. 1.) As a result, it is claimed that,

> Respondent did <u>not</u> present sufficient evidence on these issues in the prior proceedings because it did not, and could not, have known what evidence was appropriate to present regarding these ambiguous terms given the lack of sufficient guidelines from the Board. [Underlining in the original.] [Suggestions, p. 1.]

Although counsel began his argument by making this broad claim, he then proceeded to cite only one specific area in which he contended that the record was insufficiently developed. While noting that the record contained evidence as to the crew leaders' authority to designate employees to specific jobsites and shifts, he asserted that "there is a gap in the record regarding whether the crew leaders assigned overall duties to the employee(s) whom they supervised." (Suggestions, p. 4.) This is the only alleged specific gap in the record cited by counsel for the Company.

Beyond this, counsel for the Company made a generalized equitable argument in support of reopening of the record, noting that the "slight inconvenience" to the parties was outweighed by potential prejudice to the Company. (Suggestions, p. 4.) He concluded by observing that, "[i]t is fundamentally unfair to the Parties for the Board to decide a much-heralded, long-anticipated decision and <u>not</u> allow those whose cases are pending before the Board the opportunity to address the same." (Underlining in the original.) (Suggestions, p. 5.)

Based on these arguments, counsel for the Company sought reopening for what he characterized as a limited purpose. He described the scope of the proposed reopening as,

> generally consist[ing] of the testimony of the eight Crew Leaders, the Operator(s) and Laborer(s) whom they supervised, and the Superintendent(s) or Project Manager(s) to whom the Crew Leaders reported. [Suggestions, p. 3.]

In his reply to the Company's suggestions, counsel for the Union noted that the Board had not provided for an automatic grant of reopening and,

> [a]ccordingly, any lack of notice or guidance stemming from any prior ambiguity, and any guidance the *Oakwood* decisions now provide, cannot in itself warrant re-opening the record. Respondent must show something more. ADB fails to do this.

(Union's Reply, p. 3.) Counsel for the Union took note that the Company cited only one specific alleged gap in the evidence. In response, he provided citations to the record regarding that issue. (Union's Reply, pp. 5–6.) Furthermore, the Union argued that any deficiency in the record regarding crew leaders'

[4] The *Oakwood* trilogy consists of: *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Croft Metals, Inc.,* 348 NLRB 717 (2006); and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006).

[5] It had previously been determined that Judge Schlesinger was not available. See, the show cause order of November 21, 2006.

[6] Many months after this, on July 10, 2007, the Company filed a second motion to reopen the record regarding a remedial issue. I will address that motion much later in this decision.

power to make overall assignments would not be determinative because the evidence revealed that crew leaders did not exercise independent judgment in making such assignments.

Counsel for the General Counsel also noted the significance of the Board's directive that the record be reopened only if warranted, pointing out that the Board chose not to reopen the record in any of the three actual *Oakwood* trilogy cases. In addition, she made similar arguments to those presented by the Union, including the provision of numerous citations to the transcript to demonstrate both that the issues had been addressed in the existing record and that prior counsel for the Company had explored those issues through his examination of the witnesses. (GC Opposition to Reopening, pp. 3 and 11–30.) Finally, citing the requirements of the Board's reopening rule, Section 102.48(d)(1), she observed that,

> Respondent fails to explain, however, the specific evidence that such testimony would adduce and why such evidence was not submitted in the prior proceeding. [GC Opposition to Reopening, p. 35.]

Having considered these submissions and having carefully reviewed the extensive record of proceedings thus far in this litigation, including the transcripts, documentary exhibits, and numerous briefs filed by the parties, I issued an order denying the request for reopening. I indicated that, to minimize further delay in this lengthy case, I would defer an explanation of my reasoning until the issuance of this decision. I will now provide that rationale.

At the outset, it is important to place this matter in the broad context of labor law. Whether in unfair labor practice proceedings or representation cases, nothing is more routine in this field of the law than litigation of the issue of supervisory status. Years ago, the Board observed that supervisory status "is one of the most common issues" it faces. As a result,

> the Board's decisions are replete with findings of supervisory and nonsupervisory status. A number of factors, principally those set forth in the definition of supervisor in Section 2(11) of the Act, are relevant. The difficulty lies in the assessment of the facts and circumstances in each case in light of the relevant factors. There are few, if any, hard and fast rules. Rather, the Board must decide in each case whether a preponderance of the evidence shows that an employer has in fact delegated supervisory authority to each employee claimed to be a supervisor.

McCullough Environmental Services, 306 NLRB 565 (1992).[7] The message to practitioners was unmistakable. When litigating supervisory status, whatever the current state of the precedents, the parties must strive to present a detailed and comprehensive "assessment of the facts and circumstances in each case." Infra at 565.

This analytical methodology requiring detailed factual exploration existed at the time of the trial of this case in 2003. Indeed, it was perhaps more vital during the trial of this case that at any comparable period of the Board's history because, shortly before the commencement of this trial, the Board gave notice to the labor law community that it was planning to examine this area of jurisprudence.[8] In its conclusory section of *Oakwood*, the Board took pains to underscore the continuity of this principle of analysis. It observed that its holdings in the *Oakwood* cases did not represent any "sea change in the law," and reminded the labor law community that it would "continue to assess each case on its individual merits." *Oakwood Healthcare*, supra at 699.

In my view, it is has always been clear that the obligation of a proponent of supervisory status consists in presenting any and all competent evidence that sheds light on the totality of the functions, duties, and responsibilities of the jobs at issue. Nothing in *Oakwood* supports counsel for the Company's contention that the Company was unable to ascertain what evidence to present at trial, "because it did not, and could not, have known what evidence was appropriate to present." (Suggestions, p. 1.) To the contrary, the Board has always made it clear to the labor law community that the requirements of a fact-specific determination meant that the parties should present a thorough and complete picture of the job whose status was in contention.[9]

Not only did the parties in 2003 know that they were charged with presenting any and all relevant evidence about the actual duties and conditions of employment for the crew leaders, they proceeded to meet this obligation in a complete and thorough manner. Each of the crew leaders whose status was in contention testified in detail about the scope and nature of their jobs. They were subject to wide-ranging examination by counsel for all of the parties. In addition, various company officials, including the Company's founder and general manager, Chris Eirvin, Project Manager Rich Robinson, and Project Manager Ernest Nanney, also provided information and opinions regarding the crew leaders' status and functions.[10]

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[7] Ironically, in this case where the Board took the opportunity to stress the fact-specific nature of the inquiry and the possibility for reasonable decision makers to come to differing conclusions, the court of appeals denied enforcement of the Board's decision. In so doing, it underscored the point being made here, noting "the infinite and subtle gradations of authority which determine who, as a practical matter, falls within the statutory definition of supervisor." *NLRB v. McCullough Environmental Services,* 5 F.3d 923, 939 (5th Cir. 1993).

[8] See the Board's notice of July 25, 2003, inviting the labor law community in general to file briefs in the *Oakwood* cases. The invitation made particular reference to issues regarding the meaning of the terms: assign, responsible direction, and independent judgment. The complete text of the notice may be found at: http://www.nlrb.gov/nlrb/press/releases/kyriver.pdf.

[9] Indeed, the Board has always considered evidence beyond that which is directly related to the statute's primary indicia of supervisory status. Such probative secondary evidence includes anything that distinguishes the purported supervisor from other unit employees, such as pay differentials, eligibility for bonuses, attendance at management meetings, training opportunities, and access to supervisory office spaces. *McClatchy Newspapers,* 307 NLRB 773 (1992). All of these so-called secondary indicia were thoroughly explored during the trial of this case.

[10] In this regard, I reject counsel for the General Counsel's contention in her brief on remand that the Company failed to call "a single witness" regarding the status of the crew leaders. (GC Remand Br., at p. 3.) Whether technically produced by the Company or the General Counsel, the fact is that several important management officials were

The trial judge took pains to ensure that the record on this key issue was fully developed. For example, at one point during the testimony, counsel for the Company objected to counsel for the General Counsel's detailed inquiry regarding Crew Leader Sutton's work processes. Judge Schlesinger responded by telling counsel that,

> I'll overrule it. That's the reason why we're going to go on for days. We've got to know what the—for the purposes of the record, we've got to know what all these people do.

(Tr. 1564–1565.) I conclude that the record compiled by the parties and the trial judge does present a clear and comprehensive picture of the full scope and extent of the crew leaders' functions, duties, and responsibilities. As a result, the record is entirely adequate to permit analysis and determination of their status under the Act, including application of the teachings contained in the *Oakwood* cases.[11]

In addition to examining the state of the existing record, I have considered the equitable issues raised by counsel for the Company. He contends that there would be only slight inconvenience to the parties if the record were to be reopened to permit testimony from all of the crew leaders, their superiors, and the members of their crews. In fact, what counsel proposes is essentially the relitigation of the entire matter. The original trial extended over a 16-day period and clearly represented a very substantial effort and expense to the private litigants and the General Counsel. The proposal to recall the numerous crew leaders and produce yet additional witnesses would greatly increase the effort and expense of this litigation. I agree with counsel for the Union's rather vivid characterization of the breadth of the Company's request for reopening. As counsel phrased it, "ADB essentially asks for a do-over, a mulligan."[12] (U. Reply, p. 2.) Where the record is already sufficient, there is simply no basis in law or equity to put the parties through the expense, inconvenience, and delay that would be the inevitable result of the reopening proposed by the Company.[13]

Finally, counsel for the Company argues that it would be "fundamentally unfair" for the Board to decide supervisory status issues after *Oakwood* without allowing "those whose cases are pending before the Board the opportunity to address the same." (Suggestions, p. 5.) There are two difficulties with this argument. First, "[t]he Board's usual practice is to apply new policies and standards retroactively to all pending cases in whatever stage." [Internal quotation marks and citations omitted.] *SNE Enterprises,* 344 NLRB 673 (2005). The wisdom of that policy is well illustrated by consideration of the consequences of any alternative. An excellent example of those perils has arisen in another *Oakwood* situation, *Jackson Hospital Corp.,* 2007 WL 601570 (Div. of Judges, Feb. 22, 2007). This is a compliance proceeding involving the determination of the amount of backpay arising from a 2003 Board Order imposing a make-whole remedy for unlawful activity. In her decision awarding backpay, the administrative law judge, citing *SNE Enterprises*, denied the respondent's motion to reopen the proceedings to examine the supervisory status of a discriminatee due to the alleged impact of the *Oakwood* cases.[14] Liberal grant of such procedural relief would open a Pandora's Box of litigation with inequitable consequences for the affected parties.

Beyond this, counsel for the Company's argument fails for the simple reason that the Board is not proposing to decide the supervisory status issue in this case without allowing the parties' to address the impact of *Oakwood.* To the contrary, the Board's remand specifically authorizes the filing of briefs designed to give it an opportunity to consider the parties' views as to the impact of *Oakwood.* In my opinion, this is the appropriate response to the question of procedural fairness presented here. While the standards for creation of an evidentiary record on the issue of supervisory status have not changed, the analytical criteria have been refined. Thus, the parties have been afforded an opportunity to explain how those refinements should be applied to the record in this case. There is simply nothing unfair or inequitable about the use of these procedures.

Finally, I have considered counsel for the General Counsel's argument that the issue of reopening of the record must be ad-

examined by all parties on this issue. Furthermore, the Company specifically called Crew Leader Eric Flores as a witness on the status of his fellow leaders. Given the quantum of testimony produced on the issue, I also reject counsel for the General Counsel's request that I draw an adverse inference from the Company's failure to call project managers as witnesses on the issue of supervisory status. In theory, virtually every employee of the Company, from the highest to the lowest ranking, would have been able to provide relevant testimony on the issue. The record was fully developed without the production of any additional testimony. I find nothing untoward in the Company's failure to produce any further testimony. There is a substantial likelihood that it would have been merely cumulative. See, *Roosevelt Memorial Medical Center,* 348 NLRB 1016, 1022 (2006) ("A party has no obligation to call every witness at its disposal to prove its case.").

[11] In fact, I agree with trial counsel for the Company's opening sentence of his brief to Judge Schlesinger, noting that "[t]he case before the Administrative Law Judge, while extended, is not complicated." (R. Trial Br., p. 1.) Furthermore, I also agree with his conclusion in that same brief that, "[t]he scope of the supervisory authority of crew leaders at Respondent can be determined through the testimony of those crew leaders that testified." (R. Trial Br., p. 4.)

[12] Merriam-Webster's online dictionary defines "mulligan" as "a free shot sometimes given a golfer in informal play when the previous shot was poorly played." See, www.c-w.com.

[13] I have also taken note of the diminished probative value of testimony provided this long after the events at issue. The status of the crew leaders must be determined based on the nature of their jobs during the period under consideration in 2003. Enough time has passed that there is a significant risk that testimony from current managers and employees regarding the crew leader position will be distorted by the evolution of the work processes during this intervening period. In addition, when the witnesses attempt to testify about matters as they stood years ago, the quality of that testimony is eroded due to the effects of time on human memory. There is a substantial risk that the complete and timely record compiled in 2003 will be degraded rather than enhanced by additional testimony taken at this late juncture.

[14] The Board has addressed this problem as well. In *T. Steele Construction, Inc.,* 348 NLRB 1173, 1173 fn. 1 (2006), it denied a similar motion to amend an answer to a complaint in light of the *Oakwood* decision in a case pending before it on respondent's exceptions to an administrative law judge's decision. See also *C & C Roofing Supply, Inc.,* 349 NLRB 667 (2007) (Board grants summary judgment, rejecting an attempt to raise an *Oakwood* issue in a refusal to bargain case).

judicated by reference to the Board's general procedural rule governing motions to reopen. That rule, Section 102.48(d)(1), provides that, in extraordinary circumstances, after the issuance of a Board decision or order, a party may move to reopen the record. In applying this rule, the Board has employed relatively stringent criteria. For example, in *APL Logistics, Inc.,* 341 NLRB 994 (2004), it denied reopening where the issue of agency status "was fully litigated at the hearing, and the Respondent has not shown why it could not have developed the same facts at that time."

It is not clear to me that Section 102.48 applies to this case. The Board did not cite the rule while directing that the judge on remand determine whether reopening is warranted. In deciding this issue, I will not directly apply the rule. Nevertheless, its provisions, and the Board's commentaries about those provisions, are illustrative of the considerations that I should bear in mind. In that regard, I agree with counsel for the General Counsel that the Board's statements in *Lockheed Martin Astronautics*, 332 NLRB 416 at fn. 2 (2000), are instructive. In that case, the respondent sought to reopen the proceeding to produce the testimony of Buehler, the person who had decided to discharge the alleged discriminatee. In denying the request, the Board observed:

> The Respondent does not specify what testimony Buehler would give (it says only that he would describe the Respondent's practices for dealing with employees who make threats), and it does not claim that his testimony would require a different result. Nor does the Respondent have any satisfactory explanation for Buehler's failure to testify at the hearing; indeed, it admits that he was available to testify at that time. The Respondent does not contend—nor could it—that Buehler's evidence is newly discovered or has become available only since the close of the hearing. The Respondent's contention that Buehler's testimony became relevant only after the remand is entirely meritless. That testimony, through which the Respondent apparently would attempt to establish the validity of [the] discharge, was every bit as relevant at the time of the hearing as it would have been on remand. [Citation omitted.]

By the same token, the testimony being proffered in support of reopening this case would have been entirely relevant on the issue of the crew leaders' authority to make assignments to members of their crews during the original trial. The Company chose not to present it then. There are no reasons in law or equity that would support granting its belated request to provide it now. For these reasons, I have denied the request to reopen the record.

II. EVALUATION OF THE EVIDENCE

Before proceeding to the merits of this case, I must address certain remaining preliminary considerations. It its remand order, the Board specifically directed that "the administrative law judge shall prepare a supplemental decision setting forth credibility resolutions." *ADB Utility Contractors, Inc.,* supra at 895. Although recognizing that the original judge may have become unavailable, the remand order is silent as to the manner in which the successor judge may determine credibility.

It is noteworthy, however, that this was the second instance in 2006 when the Board remanded a group of cases for issuance of supplemental decisions. The earlier set of remands arose from the Board's concern with the manner in which the original judge had prepared his decisions. As a result, the remand order mandated reassignment of each case to another judge. The Board directed that, "[t]he new judge may rely on [the former judge's] demeanor-based credibility determinations unless they are inconsistent with the weight of the evidence." *CMC Electrical Construction & Maintenance, Inc.,* 347 NLRB 273, 297 fn. 4 (2006).[15] Given that the judge on remand was authorized to adopt the original judge's demeanor-based credibility resolutions in circumstances where that judge's conduct was under scrutiny, I conclude that the same procedure should certainly apply to this remand where the trial judge's conduct is not in question. I will, therefore, examine the evidentiary record and ascertain whether Judge Schlesinger's demeanor-based credibility findings are consistent with the weight of the evidence. If I find that they are consistent with that evidence, I will accord them appropriate consideration.

Beyond this, I recognize that the Board has endorsed the use of a variety of effective tools and methods to determine credibility in the absence of an opportunity to gauge the demeanor of the witnesses. In *Northridge Knitting Mills, Inc.,* 223 NLRB 230 (1976), the trial judge's illness forced his retirement before he could issue a decision. The Board proceeded to decide the case, observing that,

> we are mindful of our initial responsibility to determine credibility because of the several sharp conflicts in the testimony on this record. As the parties recognize, our task is made more difficult in this respect because we do not have the opportunity to make our credibility findings on the demeanor of the witnesses. Nonetheless, it is abundantly clear that the ultimate choice between conflicting testimony also rests on the weight of the evidence, established or admitted facts, inherent probabilities, reasonable inferences drawn from the record, and, in sum, all of the other variant factors which the trier of fact must consider in resolving credibility. [Citation omitted.]

Supra at 235. See also *Panelrama Centers,* 296 NLRB 711 at fn. 1 (1989).

I will now proceed to examine the record in this case applying all of the timeworn and proven methods authorized by the Board. My purpose will be twofold: to determine whether Judge Schlesinger's demeanor-based credibility resolutions comport with the weight of the evidence and to decide which evidence is entitled to credence based on the other traditional methods of analysis.

My inquiry must naturally begin with Judge Schlesinger's decision itself. Upon first reading that decision prior to examining any of the evidence in the case, I was struck by how emphatic my colleague was on the subject of the credibility of the

[15] This is simply one example from the group remand. All contained the same instruction. I was assigned the remand in *CMC Electrical.* I addressed the credibility issue under discussion in my supplemental decision. See *CMC Electrical Construction & Maintenance, Inc.,* 2006 WL 2927251 (Div. of Judges, Oct. 10, 2006), at fns. 3, 15, and 16.

testimony of the Company's management officials. To begin with, he dealt at length with the reliability of the testimony of the Company's original founder and general manager during the events at issue, Chris Eirvin. He concluded that Eirvin, "has no regard for the truth," engaged in "fabrications," told "blatant" falsehoods, was "untruthful," and "was making it up as he testified." *ADB Utility Contractors, Inc.,* supra at 897 and 911. In addition, he characterized Eirvin as "evasive and argumentative," and found portions of his testimony to be "particularly outrageous," "utterly improbable," and "carefully fabricated." *ADB Utility Contractors, Inc.,* supra at 897 and 898. He also concluded that Eirvin had manufactured documents in an attempt to justify his unlawful decisions to discharge supporters of the Union. He summarized his conclusions as follows:

> Eirvin's testimony was no mistake or inadvertent error. It was deliberate, calculated lying . . . I do not credit Eirvin at all, about anything, unless corroborated by an impartial, credible witness. [Infra, p. 4.]

Judge Schlesinger reached similar conclusions about the testimony of the other important management officials who participated in the trial. Of particular significance were his findings with regard to the credibility of Project Managers Robinson and Nanney. These men, admitted supervisors,[16] were officials to whom the crew leaders in this case reported. The judge found that Robinson "joined in" Eirvin's "deliberate, calculated lying." Infra, p. 4. He found a "lack of clarity" in Robinson's testimony which, together with other factors, convinced him that Robinson's testimony "was a fiction." Infra, p. 12. Overall, he concluded that, "Robinson is complicit in attempting to mislead me, and I do not trust him." Infra, p. 4. He reached the same conclusion regarding Nanney, determining that his testimony was also "utterly improbable." Infra, p. 3. He observed that, "[a]s to both Robinson and Nanney, I found them beholden to Eirvin, who appeared to dominate their testimony; and I trust neither of them." Infra, p. 4. Put as plainly as it could possibly be, he concluded that the project managers "were not telling the truth."[17] Infra, p. 3.

Judge Schlesinger's ultimate credibility conclusion was that the Company's witnesses, "purposely fabricated" evidence to rid the Company of union supporters and thwart the organizational effort. Having now studied the voluminous record in this matter, I readily conclude that my colleague's demeanor-based credibility resolutions regarding the Company's management witnesses are entirely consistent with the great weight of the evidence. As a result, I will factor them into my decisionmaking process. Beyond that, apart from any demeanor-based credibility resolutions, I conclude that the management witnesses were not credible and that their testimony cannot be relied upon.

To begin with, I have considered what the evidence demonstrates regarding the motives of those management witnesses. That evidence was overwhelming in showing the lengths that the Company was prepared to go to in order to achieve its unlawful objectives. In his testimony, Eirvin admitted that he told the employees, "that the Company would shut the doors . . . . Repeatedly, I said, 'This place will not be Union.'" (Tr. 90.) He admitted that he wanted to create the impression among those employees that they would lose their jobs if the Union's organizational campaign succeeded. He went so far as to tell the employees that the Company would reallocate $100,000 of their bonus money to fight the Union. Indeed, the record establishes that there was virtually nothing from which the Company would shrink in its effort to destroy the organizing effort.[18] In a most egregious example, the Company's officials fabricated customer complaints in order to justify the illegal discharge of an employee, Jason Lohman. As Judge Schlesinger put it, the use of such foul methods to destroy an employee's reputation and terminate his livelihood was "blatant and unconscionable." Infra, p. 14. The virulent and amoral nature of management's attitude in this case is strong proof of a mindset that supports a finding that the evidence the Company has offered in this trial is utterly unreliable.

Beyond the stark and powerful nature of the evidence regarding motivation, I also find that the specific testimony regarding supervisory status provided by the Company's officials was completely unpersuasive. A number of examples illustrate this point. Project Manager Nanney reported that he would consult his crew leaders before deciding whether to fire a member of their crews. Upon further questioning, he had to admit that he had not consulted Crew Leaders Hanephin or Lohman prior to discharging members of their crews. Ultimately, the examination continued as follows:

> COUNSEL: So today you cannot think of a single crew leader whose opinion you have asked about whether or not you should fire a laborer, right?
>
> NANNEY: That is correct.
>
> COUNSEL: In fact, the crew leaders aren't involved in the termination process at all; correct?
>
> NANNEY: That is correct.

(Tr. 1180–1181.) Similarly, he was asked if crew leaders were invited to meetings at which employee terminations were discussed. He replied that, "[m]ost of the time they are." (Tr. 1181.) Just a few moments later, he was forced to retreat when asked if it was standard practice to invite the crew leaders. He responded, "I would say no." (Tr. 1182.)

Project Manager Robinson demonstrated a similar level of imprecision in his description of the duties and responsibilities of the crew leaders. Counsel asked him if backhoe crew leaders were supervisors. He responded:

[16] See the Company's answer to the original complaint and its trial stipulation to the same effect. (GC Exh. 1(f); Tr. 896.)

[17] Judge Schlesinger made similar findings regarding the lack of credibility of other management witnesses, including Josh Martychenko and Michael McElligott. Infra at pp. 14 and 18.

[18] In Eirvin's tape-recorded speech on this topic given on April 15, he provided a strong hint as to what was going to occur in the future. He told the employees that, "[t]hose of us that don't want to [be]come union are not gonna be out of a job—alright." (GC Exh. 37, p. 1.) This raised an obvious inference regarding the fate of those employees who did want to become union members. In essence, it was a prophecy that management soon fulfilled.

> ROBINSON: To be supervisors, I don't know if I would call it a supervisor. They do supervise—they do look over the job, as what I call a crew leader, but, yes, they decide who the job—how the safety goes on the job and how the job gets done, yes.
>
> COUNSEL: And does ADB consider all of its backhoe operators to be supervisors?
>
> ROBINSON: I don't know.

(Tr. 1101.) Given the fact that the crew leaders report directly to the project managers, Robinson's testimony is absolutely breathtaking in its imprecision.

General Manager Eirvin was no clearer in his testimony about supervisory authority. He was examined regarding the Company's position on the issue of supervisory status for crew leaders at the representation hearing held just a few months earlier. Since he was a key participant and witness during that proceeding, one would have expected him to have no difficulty in articulating the Company's position. Despite this, when counsel asked him if, "it was ADB's position at that [representation] hearing in May, that its Crew Leaders were not supervisors and managers," his reply was, "I don't recall exactly how we classified everybody . . . It kind of got confusing." (Tr. 2682.)

The probative value of Eirvin's testimony was illustrated by another episode during the trial. He was asked if boring crew leaders prepared written evaluations of the members on their crews. He responded with an unequivocal affirmation that they did so. Counsel for the General Counsel then showed Eirvin evaluations of boring crew members that did not contain anything from their crew leaders. He conceded this point, but repeatedly claimed that other evaluations prepared by the crew leaders would be produced later during the trial. As he put it, "I can provide all of them." (Tr. 55.) Although the trial continued over the course of many months, no such evaluations were ever presented.

In addition to the vague, inaccurate, and contradictory nature of the managers' testimony about the supervisory status issue, I have also considered the Company's overall representations to the Board on this question. While the Company has vigorously asserted in this unfair labor practice proceeding that the crew leaders are statutory supervisors, this represents a radical departure from its position in the representation case, a virtually contemporaneous proceeding. In that case, not only did the Company deny that crew leaders were supervisors, it went so far as to argue that the project managers to whom the crew leaders reported also lacked supervisory status. In the Company's brief to the Regional Director, former counsel asserted that, "the Project Managers do not demonstrate the degree of independent control normally associated with supervisors." (GC Exh. 65, p. 13.)

I concur with counsel for the Union's characterization of the Company's litigation strategy in this regard. He observed that,

> [w]hat is most offensive about this situation is that Respondent makes no effort to explain its change in position. Apparently, on May 6, 2003 (the date of the representation hearing) the discriminatees were employees; but, on surrounding dates—April 15, April 25, April 28, and May 8, 2003 (the dates of the first 11 discharges)—they were supervisors. Respondent offers no evidence to explain how this is possible. All one can surmise is that Respondent needed a defense to the unfair labor practice charges, so changed its position despite its earlier assertions. [U. Br. to Judge Schlesinger, p. 20.]

Consideration of the entire record, including the striking lack of clarity in the testimony of the management officials, the potent evidence of malicious intent and behavior, and the lack of consistency about matters that one would expect to be straightforward, persuades me that the testimony of the managers is incredible and totally unreliable. Without in any way meaning to be facetious, I will illustrate my conclusion by noting that, if one of the Company's managers were to have testified that the city of Saint Louis is located within the State of Missouri, I would have felt an overpowering compulsion to consult my road atlas for verification. In accord with Judge Schlesinger, I place no probative value on any testimony from the Company's managers unless that testimony is clearly corroborated by other credible evidence.

An additional facet of credibility resolution remains to be addressed, a determination as to the reliability of the testimony of the crew leaders themselves. I begin by noting that, to a substantial extent, the Company has not challenged the credibility of those employees. To the contrary, in its exceptions to Judge Schlesinger's decision, former counsel for the Company noted that, "Respondent does not rely on the testimony of Eirvin but rather relies on the testimony of the affected employees."[19] (R. Brief in Support of Exceptions, fn. 2.)

While I generally credit the testimony of the former crew leaders, I have drawn a clear distinction between two differing aspects of their accounts. They were asked two types of questions about their former jobs. Most of the questions posed by all counsel were designed to elicit information about the specific duties, functions, and responsibilities of the crew leader role. Such questions concerned whether the crew leaders had ever exercised management authority of the types outlined in the statutory definition or simply called for the witnesses' recollections about the daily routine events of their employment. In their detailed responses to this type of questioning, I found the crew leaders to have provided logical, consistent, and credible information. I conclude that their accounts of their actual duties and activities are reliable.

In addition to the careful elicitation of the details of the daily work of the crew leaders, all counsel occasionally indulged in questions designed to solicit the opinions of the witnesses regarding some of the ultimate issues in this case. For example, counsel for the Company asked Crew Leader Farris if he had ultimate responsibility for the production of the crew. He re-

[19] Before the trial judge, citing one portion of a crew leader's testimony that both Judge Schlesinger and I conclude was simply based on a misunderstanding of a question posed by one of the attorneys, the Company contended that certain of the employees had conspired to provide false testimony. In accord with Judge Schlesinger, based on the evidence as a whole, I agree that "the notion of perjury in these circumstances [is] quite impossible." *ADB Utility Contractors, Inc.,* supra at 910.

sponded, "Yes, because of the title." (Tr. 2143.) He added that he "assumed" this was the case, although nobody ever told him so. (Tr. 2144.) Similarly, Crew Leader Shipp also testified that he "assumed" that he was responsible for production, although he was never told this by management. (Tr. 2599.) Crew Leader Lohman opined that the proverbial "buck" stopped with him. (Tr. 1919.) When asked whether anybody had told him this or was it simply his assumption, he replied that, "I assumed it." (Tr. 1926.)

In rejecting the Company's argument that the crew leaders were statutory supervisors, Judge Schlesinger noted that:

> The most evidence that Respondent presented was conclusory statements by various crew leaders about their being "bosses" and their responsibility for the productivity of their crews and to see that their job got done. However, conclusory statements, without supporting evidence, are insufficient to establish supervisory status and authority.

ADB Utility Contractors, Inc., supra at 902. The judge cited a line of Board precedents in support of his refusal to give weight to such conclusory remarks. In particular, he referenced *Armstrong Machine Co.,* 343 NLRB 1149 at fn. 4 (2004) ("Conclusory evidence is insufficient to prove supervisory status."); *Chevron Shipping Co.,* 317 NLRB 379 at fn. 6 (1995) (statement that individual "oversees" others does not establish supervisory status absent specific proof that such power was exercised with independent judgment); and *Sears, Roebuck & Co.,* 304 NLRB 193, 199 (1991) ("conclusory statements, without supporting evidence, are not sufficient to establish supervisory authority").

Interestingly, the Board has now addressed this issue in the post-*Oakwood* context. In *Avante at Wilson, Inc.,* 348 NLRB 1056 (2006), the issue was whether certain staff nurses exercised supervisory authority over nursing assistants. One staff nurse testified that she believed she had authority to send an insubordinate assistant home. Relying on two of the same precedents cited by Judge Schlesinger, the Board held that this evidence was insufficient to prove supervisory status. In particular, the Board refused to accord weight to this opinion because, "the testimony is utterly lacking in specificity." Supra at 1057. The key consideration was that the witness,

> failed to particularize her testimony in any way, such as by specifying when any such incident took place, who was involved, what the alleged insubordination consisted of, whether higher-level managers had been consulted, or whether the situation was anything more than a one-time occurrence.

Supra at 1057. Additionally, the Board rejected the testimony of another staff nurse who indicated that she believed she had authority to send an assistant home for misbehavior. Once again, the Board placed emphasis on the absence of testimony to,

> explain the basis of her belief (for example, that she had been told she had that authority by one of her superiors) or provide any examples of situations or details of circumstances where she or any other staff nurse actually ordered a CNA to leave the facility. Supra at 1057.

Given the Board's consistent pre and post-*Oakwood* insistence on analysis of specific details about the job being evaluated, I will not accord significant probative value to the conclusory opinions elicited from the crew leaders during the trial. Instead, I will rely on their detailed descriptions of their actual activities. Those descriptions were convincingly consistent with each other and the overall evidence of record and with the application of a common sense appreciation to the significance of the daily routines of the Company's work crews.

Finally, I recognize that the evaluation of supervisory status may also involve consideration of documentary evidence. Typically such evidence will include an employer's handbook or job descriptions. In this case, that evidence took the form of job descriptions set forth in the Company's handbook dated August 2001. (GC Exh. 6.)

The handbook purports to describe the duties of several types of employees whose functions are highly relevant to the issues before me. It describes the jobs performed by employees in the positions of crew leader, locator, operator, and laborer. It was undisputed throughout the trial testimony that a boring crew always included an operator and a locator. Sometimes the crew would include a laborer. No witness ever reported that a boring crew would also contain a crew leader, an individual who was separate from the locator. There was virtually universal agreement that the locator always functioned as the crew leader.[20]

This background is significant because the Company's handbook paints a completely different picture of the composition of a boring crew. It clearly states that the crew leader is an employee entirely distinct from the locator. In fact, it notes that, "[t]he Locator is also a member of the crew taking instructions from the Crew Leader." (GC Exh. 6, handbook at p. 15.) This is underscored at the point that the handbook describes the operator's function. It provides that, "[t]he Operator follows the lead of the locator and the instructions of the Crew Leader while helping all crew members perform efficiently and effectively." (GC Exh. 6, handbook at p. 16.) Any lingering doubt that the handbook visualizes the crew leader as a person separate from the locator is dispelled by examining the description of the laborer's role. At that point, the handbook indicates that the laborer, "[t]ake[s] direction from Crew Leader while serving the needs of the Locator and Operator." (GC Exh. 6, handbook at p. 17.) Thus, the handbook presents a picture of a boring crew as composed of a crew leader, locator, operator, and laborer.

It is evident that the vision of the crew leader function contained in the handbook does not represent the reality on (or in) the ground. While there was no testimony regarding the manner which the job roles had evolved since the handbook was written, it appears that the duties of the crew leader and locator were merged. There is no question that, during the period at

[20] The relationship between the crew leader job and the locator job provided a further example of the untrustworthy nature of Eirvin's testimony. Although he agreed that the locator was generally the crew leader, he claimed that sometimes the operator would be designated the crew leader. No other witness agreed with this contention and there was no evidence showing that any boring machine operator had ever served as a crew leader.

issue in this case, there was no crew leader position separate and apart from the locator job. The two roles were always combined in the same individual.

Interestingly, a disparity between a handbook's written job description and the day-to-day reality of the work itself is a subject that the Board has twice addressed in the post-*Oakwood* context. In *Golden Crest Healthcare Center*, 348 NLRB 717, 721 (2006), one of the *Oakwood* trilogy, the Board cautioned against basing a finding of supervisory status on evidence of "paper accountability." Citing existing precedent, it held that,

> [j]ob descriptions or other documents suggesting the presence of supervisory authority are not given controlling weight. The Board insists on evidence supporting a finding of actual as opposed to mere paper authority.

Infra. at 721, citing *Training School at Vineland,* 332 NLRB 1412, 1416 (2000). The point was reiterated in the post-*Oakwood* case of *Avante at Wilson, Inc.,* supra. In that case, the written job descriptions stated that the nurses supervised the nursing assistants. However, at trial the employer stipulated that the nursing and assistant jobs were identical. As a result, the Board found that this "[c]lear evidence of a significant inaccuracy renders the reliability of the . . . job descriptions suspect." *Avante at Wilson, Inc.,* supra at 1058.

In this case, the Company's written description of the crew leader position plainly visualizes that job as being separate and distinct from the locator. The reality is to the contrary. There exists precisely the sort of significant inaccuracy that undermines the probative value of the job descriptions. As a result, I have relied on the descriptions in the handbook only when they are supported by credible evidence regarding the actual duties and functions of the various occupations.

III. THE NATURE OF THE CREW LEADERS' JOBS

In his decision, Judge Schlesinger concluded that the Company's management fired eight crew leaders due to their support for the Union's organizing campaign. If those crew leaders were not supervisory employees, their termination for this reason is unlawful under the Act. Therefore, it is essential to determine whether the eight crew leaders possessed the sort of supervisory authority that would place them outside of the Act's protections. The starting point for this inquiry must be a determination of the full nature, duties, and responsibilities of their jobs.

Although the eight discharged employees were all crew leaders, they performed this role on a number of different types of work crews. The most common position was that of crew leader for a boring crew. Employees Farris, Schaffer, and Shipp were boring crew leaders at the time they were terminated. In addition to these three boring crew leaders, two backhoe crew leaders, Bridges and Williams, were also fired. The remaining three discharged crew leaders were assigned to different types of work crews. Sutton was crew leader on a cable crew. Hanephin was assigned to an underground crew. Finally, Lohman was the restoration crew leader. As one would expect, crew leaders shared many common characteristics irrespective of the type of work being performed by their crews. In addition, there were some slight variations in the nature of their functions that depended on the particularities of the work being performed by each sort of crew.

Since the Company's primary function is to perform directional boring, it is not surprising that the boring crews were central to its operation. Such crews invariably contain a locator and an operator. These employees utilize the boring machines that accomplish the task of drilling an underground passage that can accommodate the various types of lines that are being installed. The operator runs the actual drilling machine. The locator uses a device to detect the position of the drilling rods and guide the operator in the safe performance of the boring operation. While this requires some degree of experience and skill, it is not particularly sophisticated. As Project Manager Robinson put it when asked how long it should take a new locator to function as well as an experienced one, "I would say, in a couple of weeks."[21] (Tr. 947.) Indeed, Schaffer reported that he had served as an operator for approximately a year. He was then assigned to the locator job. He had never done this job before and received no instruction manual or formal training. Instead, he was trained by another locator and it took "[a] week or two." (Tr. 2429.) In addition to operating the locating device, the locator also serves as the crew leader. Sometimes the crew contains a laborer whose function is to assist the two equipment operators by performing certain types of manual labor.

The boring crews' workday begins at the employer's facility. The crew leader picks up the blueprints that both describe the jobs to be performed that day and detail the equipment needed. The crew then proceeds to the first jobsite. There is no particular discretion involved in determining the order that the crew performs its tasks. Once the crew arrives at the site, the locator and operator walk the job to plan the route for the bore. There is nothing complex about this planning. Typically, it involves selection of the closest distance between two points.

At this juncture, the real work of the crew begins. Before any boring can be undertaken, the crew must find all of the buried utility lines along the projected path of the drill. In the business, the task of uncovering the buried utilities is called, "digging locates." This involves the classic example of unskilled manual labor, digging a hole in the ground with a shovel.[22] In order to understand the job of the crew leader, it is vital to note that it involves a very substantial amount of dig-

[21] This was a far shorter description of the timeframe for becoming fully qualified than that provided by Eirvin. Eirvin claimed that, for a brand-new locator, "[t]wo months was long enough to get it" so as to perform the job as well as an experienced hand. (Tr. 222.) Even this claim, which I find to be an exaggeration, demonstrates that the job was not highly skilled or sophisticated.

[22] An objective description of the work of the boring crews requires that I note the simple, unsophisticated nature of the work. As operator Ed Schreit described it, the digging is "pretty hard" manual labor consisting of "hand digging all day long." (Tr. 1321 and 1297.) The holes, which can be as deep as five feet, are dug in all kinds of ground including dirt, clay, rock, mud, and sand. It is apparent that this is the epitome of honest, hard work that accomplishes a task essential to modern society's need for critical infrastructure. It is not my intention to denigrate this work in any way.

ging locates. As Supervisor Robinson described the boring crew,

> [T]hey work together as a—they are a crew. They did their locates together . . . . It takes more time to dig your locates and everything else than it does to actually operate the [boring] machine.

(Tr. 950.) Indeed, numerous witnesses, including Robinson, testified that often a boring crew leader, operator, and laborer will spend an entire day digging locates together.

Once all of the underground utilities are located and exposed, the actual boring operation can commence. The crew sets up the machinery and connects it to a water source. They then bore the required path. The operator runs the machine while the locator directs the course to be taken. The evidence was overwhelming in establishing that this was routine and repetitive. As operator Schreit said, "Pretty much it was the same thing, hand dig and bore." (Tr. 1271.) Crew Leader Flores agreed, noting that, "[i]t's routine every day. It's the same thing, you're just at a different place." (Tr. 2350.) Crew Leader Schaffer confirmed that, "one bore is the same as the next."[23] (Tr. 2440.)

As one would anticipate in a job that involves almost exclusively field work, sometimes something unusual does happen. Once again, the testimony was overwhelming that, in such rare cases, the crew leader contacted the project manager to obtain instructions. For example, since the crews often performed their work on private property, there would be homeowner complaints about the disturbance of the land. Schreit testified that customers would make such complaints to either the crew leader or the operator. When this happened, "[w]e always then call [Project Manager] Rich Robinson." (Tr. 1314.) By the same token, weather issues would arise. In the event of such occurrences, the crew contacted their project manager for instructions. Similarly, if the crew arrived at a job and found that the utility companies had failed to paint lines on the property to show the approximate sites for the digging of locates, the crew contacted their project manager. The same procedure was followed when the crew discovered that the ground conditions necessitated use of different types of machinery. Schreit summarized the situation when asked why a crew leader would call his project manager. He reported,

> Well, it wasn't [the crew leader's] call to go ahead and do it by himself . . . . You know, if it was hard dirt or if it started raining, you know, to see if [the project manager] wanted us to stay out or come in. If anybody had a complaint. . . . Like one of the customers. [Tr. 1263.]

Having described the work process, it is now important to consider the nature of the relationship between the crew leader and the other members of the boring crew. To begin with, the testimony established that crew leaders had no input into who was going to serve on their crews. Beyond this, there was no credible evidence that crew leaders could force crew members to perform their work. Crew Leader Farris testified that he was never told that he could compel his operator to do things and he never attempted to do so. For example, Farris reported that he had asked his operator to wear safety equipment, but "[i]f he didn't want to put it on, it is his choice." (Tr. 2146–2147.) Similarly, Crew Leader Shipp described a situation where he disagreed with his operator as to the correct place to set up the machine. He was asked, "because you were a Crew Leader, you made him move it, right?" (Tr. 2608.) He testified that he did not do so, adding that, "I just tried to bore where he put it." (Tr. 2608.) He also indicated that, although he was dissatisfied with one of his operator's refusal to dig locates, he lacked authority to order him to do so. Another boring crew leader whose status was not at issue in this case, Eric Flores, testified that, when faced with a crew member who was slacking off, "I'd just talk to my supervisor about it."[24] (Tr. 2337.)

Consistently with the evidence regarding lack of authority to direct the performance of duties, the crew leaders were not involved in either discipline or evaluation of members of the crews. Thus, Project Manager Nanney conceded that it was "correct" that crew leaders did not participate at all in the evaluation process for employees. (Tr. 1173.) When asked if he could recall any instance when a crew leader had made any kind of decision that affected the employment of a crew member, he was unable to recall such an example.

There was great consistency in the testimony regarding the crew leaders' lack of authority to regulate the work hours and attendance of crew members. For instance, the decision whether to work overtime was made with the participation of all crew members. As laborer Steve Mack testified, "[w]e would decide together, when we were tired, or when we were ready to go." (Tr. 2244.) By the same token, operator Schreit reported that decisions about when to eat lunch or work overtime were made jointly by the crew. He noted that, "[i]f [Project Manager Robinson] didn't tell us we had to work overtime, it was all three of us discussed it, decide[d] when to go in." (Tr. 1305.) Finally, the evidence was clear regarding employee requests for time off or sick leave. As Farris described, if operators wanted to be absent or leave early, they would call Project Manager Robinson. Project Manager Nanney confirmed that it was company policy that crew leaders lacked authority to approve time off.

As I have already indicated, witnesses were also examined about more general aspects of the crew leaders' authority. For example, there was some conclusory testimony that the crew leader set the pace for production. In this regard, it is crucial to understand why this was so. It did not arise from the exercise of supervisory authority to punish or reward the crew members. Instead, the testimony was clear that it was the direct result of the nature of the boring crew's work process. It fell to the crew leader, in his function as the locator, to guide the boring ma-

[23] Having digested many pages of testimony describing this process, I have become acutely aware that the word, "boring," has more than one definition in the English language.

[24] I place considerable weight on Flores' testimony. He was called as a witness by both the General Counsel on the issue of the Company's antiunion campaign, and by the Company regarding the duties and responsibilities of the crew leaders. Flores had been one of the highest performing crew leaders and had voluntarily left the Company's employ to take a position with a utility company. His testimony struck me as particularly objective and unbiased.

chine through the earth. To the extent that a locator was more efficient in performing this function, the pace of production would be affected. Nevertheless, this was only true to a very limited degree. As operator Schreit explained, the pace of production really, "depend[ed] on the ground condition. You know, if you're in rock or you're in dirt." (Tr. 1268.) He summarized that, "99% of the time, it's on your ground condition of how fast the bore can do." (Tr. 1269.)

Just as crew leaders had little ability to affect the pace of production, they were not held accountable for problems that their crews experienced. Crew Leader Schaffer testified that he never observed a crew leader being held accountable for the actions of an operator. One of Schaffer's operators, Schreit, confirmed this by citing an example involving both men. While Schreit was operating, he pushed the bore into a gas line. He testified that this was his error, and Schaffer was not held responsible for his mistake. Farris corroborated this, testifying that he never heard of a crew leader being held responsible for the performance of an operator or laborer. Even Eirvin conceded the point. He testified that a crew leader would be held responsible for poor production, "[u]nless it is the operator's fault." (Tr. 246.)

In assessing the supervisory status of the boring crew leaders, I have also taken note of the secondary indicia. These were well-developed in the record. Crew leaders were paid an extra dollar per hour. They did not attend management meetings. They were not issued offices or company vehicles. While the Company offered production bonuses, these were shared equally among the crew members. In common with the other crew members, leaders punched the timeclock. Crew leaders did have minor paperwork responsibilities, but these chores took only a few minutes at the end of each workday.

In addition to the three boring crew leaders, the status of two backhoe crew leaders, Bridges and Williams, is contested. A backhoe crew is used to dig trenches in circumstances where the soil conditions preclude use of the boring machine to prepare for the installation of cable. That crew consists of a backhoe operator and laborer. Sometimes the crew is assigned a second laborer. Of course, the operator runs the backhoe. He also digs locates and serves as crew leader. The laborers have only two duties, to dig locates and to "swamp." Swamping is the process of observing the backhoe operator's excavation to ensure that no utilities are inadvertently damaged during the trenching process. If the laborer who is swamping observes something suspicious in the trench, he signals the operator to stop excavating. The laborer then uses a shovel to expose the suspicious item to ascertain whether it is a utility line.

As with the boring crews, the backhoe crew begins the day by obtaining the necessary blueprints. As Williams explained, "[t]he markings on the blueprints dictate what needs to be done." (Tr. 741.) He could not recall a situation where the blueprints failed to provide the complete information. Once the crew arrives at a worksite, they use the print to plan the job. This is a simple process because, as Williams observed, "I mean, you're going to take the shortest route possible to get from Point A to Point B." (Tr. 759.) All members of the crew, including the leader, then use their shovels to dig the required locates.

In the event that a backhoe crew was assigned two laborers, it became necessary to divide their tasks. One laborer would focus on digging locates ahead of the excavating machine's route and perform ancillary tasks such as directing traffic around the project area. The remaining laborer would swamp for the machine. Crew Leader Bridges was asked how these tasks were assigned. He testified that it was accomplished, "[b]etween the laborers. If one wanted to swamp or one wanted to direct traffic, they'd just, you know, they'd worked it out." (Tr. 1993.) In contrast, Crew Leader Williams testified that he always made the assignments for the laborers. As to the criteria he employed to make these decisions, he was asked if he took into consideration the "knowledge, skill, and experience" of the individual laborers. He replied in the negative, explaining that the laborer's job was not difficult. As he put it, "[y]ou know, it's not brain surgery. It's pretty simple, a pretty simple thing to learn . . . . I'd say it's a little harder than tying your shoes, but not a whole lot." (Tr. 2000.) Citing an actual example, Williams indicated that he based the assignments on the personalities of the laborers. Because he had a low opinion of Laborer Gresham's work ethic, he assigned him to dig locates while the other laborer swamped for the backhoe. Williams also emphasized the limited scope of his authority to make assignments. He was asked what would happen if a laborer refused an assignment. He replied, "I couldn't force him to get in the hole. All I could do is call the Project Manager and say this guy refuses to do his job." (Tr. 794.)

The backhoe crew leader possessed very limited control over the working conditions of the crew. Williams was asked if he had the power to determine the length of the crew's work schedule. He replied in the negative, observing that, "I think that is a crew decision actually. I don't think a crew leader can force his guys to work if they don't want to work." (Tr. 688.) This was thoroughly explored during cross-examination. Williams again testified that, "I didn't make anybody do anything they didn't want to do, period." (Tr. 789.) He added:

> At no time did I ever shut my machine down and say we're done for the day. It was always a group decision of what happened, of who went home, or who needed to go home unless a Project Manager otherwise told me that we were shutting down.

(Tr. 790.) He also indicated that the crew "didn't have to ask me to take lunch." (Tr. 670, 692.)

Bridges provided similar testimony, explaining that if his laborer wished to quit due to bad weather, "I would call [Project Manager Robinson] and let him make the decision." (Tr. 1994.) Laborer Mack also confirmed this information, noting that he and Bridges "would both decide" whether to work overtime. (Tr. 2380.) He also reported that he would make requests for time off directly to Project Manager Sellers.

The backhoe crew leaders were asked general questions about their responsibility for the quantity of production. Williams readily agreed that he was responsible for setting the pace and pushing for productivity. Importantly, he also explained why this was the case, noting that "everything revolves around the machinery that is working. So the person on the machinery, which typically is a crew leader, is responsible for the produc-

tion." (Tr. 724.) In other words, the rate of work depended on the crew leader's skill as a backhoe operator, not on his prowess as a motivator of personnel. He reiterated that he was in charge of production because he "operated the machinery that did the work."[25] (Tr. 749.) When asked if he possessed the authority to direct a laborer to fix a mistake, he reported that,

> I don't have that authority. I'm not [the laborer's] boss. I'm just part a of a crew just like [the laborer] is. We're there just to get the job done period. [Tr. 750.]

Consistently with this view of the crew leader's role, Williams also testified that he was never told that he was accountable for the behavior of the crew members. When asked who would be held responsible if a mistake were made, he explained:

> It depends on how the job is screwed up. I mean if it is something I did, then I would be in trouble. If it's something [the laborer] did, he would be in trouble.

(Tr. 765.) Again, Bridges verified this, indicating that he was never held accountable for the performance or output of his laborers. He spelled this out very clearly:

> I'm not a supervisor. I'm a backhoe operator . . . . What I'm responsible for is running that tractor. I'm not responsible to stand over Wayne or any other laborer and harp on them and tell them, you know—that's not my responsibility. Tell them they're not going fast enough or what-not, that's—that's not my responsibility.

(Tr. 2001–2002.) Put another way, Bridges opined that, "[i]f there's a problem, [the project manager] needs to get out there and figure out what the problem is. He's the one making the big bucks." (Tr. 2041.)

Consistent with this lack of supervisory control, the backhoe crew leaders did not have any duty to evaluate their crew members or make recommendations, either positively or negatively. Indeed, Williams reported that, while he did ask Project Manager Nanney to replace Laborer Gresham due to his laziness, this was not done. Eirvin confirmed that Williams never prepared an employee evaluation. Bridges also indicated that he never evaluated his laborers.

In assessing issues of supervisory status for the backhoe crew leaders, it is also important to consider the complexity of the decisions they were required to make. The key point was that the crew leaders obtained direction from the project managers whenever an unusual issue arose. Williams indicated that he could not recall a single instance of something unusual that did not result in a call to his project manager. Bridges was asked, "Now, what about your job as an open cut operator is routine, if anything, or repetitive?" He responded, "[e]verything." (Tr. 1991.) He could only recall one unusual occurrence, a time when the boom on his machine broke. He called the project manager. Similarly, Williams recounted that a drunk driver once ran into his backhoe. When asked how he responded, he stated, "I called the Project Manager." (Tr. 664.) Bridges acknowledged that the crew leaders did have responsibility to prepare certain simple daily production reports. This paperwork took only "a couple of minutes" each day. (Tr. 1989.)

Regarding the secondary indicia of supervisory status, the most striking one involves the rate of pay for the two backhoe crew leaders. Project Manager Robinson testified that neither Bridges nor Williams were paid anything additional for performing the crew leader job. They were required to punch the same timeclock as their laborers. They were hourly employees and were not issued company vehicles. They did not attend management meetings. Their timesheets did not contain the computer code that was used to designate supervisors.

At one point during his testimony, Bridges provided a very clear vision of the nature of the backhoe crew leader's role for the Company. He was asked what the difference was between the crew leader and the laborer. He replied, "[w]ell, the only thing I can figure, I knew how to run the backhoe and [the laborer] didn't." (Tr. 2040.) Counsel persisted, asking if "[i]t's just having the additional skills? There's no other reason they made you a crew leader?" Bridges answered, "That's the only reason I could see." (Tr. 2040.) Bridges' response is entirely consistent with the great weight of the evidence regarding the functions, duties, and responsibilities of the backhoe crew leaders.

Three more crew leader positions remain to be assessed. These are the jobs held by Cable Crew Leader Sutton, Underground Crew Leader Hanephin, and Restoration Crew Leader Lohman.[26] In the broad outline, their roles as crew leaders mirrored the information presented regarding the backhoe and boring crew leaders. I will now address the more specific aspects of these three crew leader jobs.

Sutton testified that he was the leader of a pulling crew that placed fiber optic cable in the ground. He reported to Project Manager Sellers. The crew would consist of the crew leader and one or more laborers. While Sutton testified at length about the nature of the work process, this description was aptly summarized by former counsel for the Company who explained,

> they blow this rocket through the conduit. At various places, the conduit is not connected. At that point, the rocket comes out. They either pull the cable—they pull the cable through. And they go back and they go onto the next area . . . . That's as simple as it is. [Tr. 1565.]

Unlike other types of production crews, the pulling crew did not utilize blueprints. They were given their daily assignments by Project Manager Sellers. The crew leader had no input into this process. Similarly, the composition of the crew was decided by the project manager without input from Sutton. Indeed, Sutton reported that sometimes the laborers were shuffled around from one crew to another during the course of the

[25] Bridges was even more emphatic on this issue, contending that the backhoe crew leader had no responsibility for the pace of production. He opined that this was the role of the project manager.

[26] Because their work involved the threading of cable, Cable Crew Leader Sutton and Underground Crew Leader Hanephin were both sometimes referred to as leaders of "pulling" crews.

workday. This was done by Sellers without consultation with Sutton.

As to the assignment of specific duties during the workday, Sutton testified that Sellers made some of these decisions directly. He reported that, "[w]hoever he would send out with me, he'd assign the laborer that was supposed to go out and catch the rocket." (Tr. 1556.) Otherwise, the crew leader could direct the laborers as to the hole at which they would be stationed. He noted that it did not matter which laborer was placed at any particular hole and that the laborers did not have any preference as to which hole they were assigned. He noted that, "[i]t was all the same. It is monotony. I mean, once you do it once, it is the same at every hole." (Tr. 1625.)

As with the other crew leaders, Sutton testified that he did not have authority to authorize a laborer to leave early or take a day off. The project manager decided how long the pulling crew would work each day based on the volume of work that needed to be performed. If there were problems with the weather, the project manager decided whether to stop the work. In general, Sutton explained that, "[a]ny problems [the laborers] had, or questions, they'd go straight to [Project Manager Sellers]." (Tr. 1614.)

Sutton's testimony regarding his accountability as a crew leader was entirely consistent with the overall picture of the job already discussed. Thus, he reported that he was never held accountable for anything done by one of his laborers. He added that he would protect an errant laborer the first time they made a mistake, but after that initial coverage, they were on their own regarding any "butt chewing" for mistakes. (Tr. 1574.) He also indicated that he did not need to motivate his crew members because they were all "self motivated." (Tr. 1608.)

Similarly, Sutton's picture of the routine nature of the job was identical to that of the other crew leaders. He reported that he almost never ran into unusual circumstances. The one occasion when this happened, a cable became stuck in a conduit. In response, he called Sellers. The job was summarized when counsel for the General Counsel asked Sutton what differences existed between the pulling crew leader and the pulling crew laborers. He replied:

> None whatsoever. I did basically the same thing. The only difference would be I would tell them what hole they needed to go set their unit up. That would be the only variant difference
>
> . . . Otherwise, I did the exact same work they did. [Tr. 1568.]

Like Sutton, Crew Leader Hanephin was assigned to a crew whose function was to "pull" cable. He sometimes worked with a laborer or two. On other occasions, he would work by himself. The workday began with the project manager's assignment of the jobs and issuance of the blueprints. If there were time pressures, the managers would prioritize the jobs. Otherwise, Hanephin could do them in the order he chose. As to how to perform the jobs, Hanephin explained that, "[e]verything is pretty much on the print." (Tr. 1396.)

Once the crew arrived at a worksite, Hanephin described how matters proceeded. He would address the laborers as follows:

> Well, we've got to dig here, here, here, and here. I guess we'll start up by the pole. Do you guys want to dig by the pole or do you want to dig by the meter base[?]

(Tr. 1458.) While he could direct the laborers to dig particular holes, he noted that there was not much to the decisionmaking process because, "[y]ou just start at one end and work toward the other." (Tr. 1386.)

Regarding the remainder of the work process and the respective duties of the leader and the laborers, Hanephin reported that, "very rarely did I stand over them and watch them and tell them what to do." (Tr. 1380.) He added that:

> About the only time I wasn't physically working is when I was sitting on . . . a small tractor or a mini escalator or something. The rest of the time if we couldn't use, you know, small machinery, then I would be using a shovel to dig or pulling wire by hand or sometimes we would use a pulling machine. But I did just as much labor as my laborers.

(Tr. 1380.) During the pulling process, Hanephin reported that he did not generally make specific assignments for the laborers. Instead, he usually asked them, "[w]hat do you want to do, push or pull?" (Tr. 1403.)

Once again, Hanephin's testimony about his degree of supervisory control was fully consistent with that of the other types of crew leaders. If a laborer sought to leave early or take a day off, he told them to "talk to the supervisor, Rich or Ernie, and let him know what was going on and get permission from him." (Tr. 1390.) The crew made decisions about overtime work by discussion among everyone. Hanephin reported that he was never told he had authority to require overtime. Similarly, he testified that he was not involved in issues of evaluation and discipline of the laborers. Indeed, he reported that he never told a laborer to work faster. He was never consulted about promotions and did not prepare evaluations. As to discipline, not only was he uninvolved, but he expressed irritation about the failure to communicate such decisions to him. He reported that on two occasions his laborer was fired and he was not given advance notice. As to one of those, he complained that, "I was expecting to go work with him and five minutes later he was gone." (Tr. 1394.)

In one respect, Hanephin's testimony painted a different picture than that described by all of the other crew leaders. He viewed himself as the boss at the worksite with the power to determine lunch breaks and with the responsibility for any mistakes made by the laborers. Critically, however, when counsel for the General Counsel asked him if he had ever actually been held accountable for any laborer mistakes, he replied that he had not. In my view, Hanephin's conclusory statements in this regard reflect a perfectly understandable human tendency to view oneself as important, perhaps more important than one actually is. In fact, in his musings about this subject, Hanephin made essentially the same point, describing his role as follows:

> I guess I was just told that I was in charge on the job site. If there was a question about anything, that I made the decisions, but there isn't a whole lot to it. I mean where to dig or where to start digging.

(Tr. 1476.) I conclude that Hanephin's more expansive statements about the role of the crew leader are not entitled to significant weight because they vary from the consistent accounts of the other crew leaders and, more importantly, they differ from his testimony as to the actual duties, functions, and responsibilities of his work.

The remaining position under examination is perhaps the simplest of the crew leader jobs. Jason Lohman was the lead for the restoration crew. This crew would perform its work after the cable had been installed. Their function was to place the affected land in safe and clean condition. The work involved such routine tasks as breaking up topsoil, spreading that soil, scattering grass seed, placing straw, and general cleanup and landscape work. Occasionally, the crew would repair a retaining wall or install sod. The crew generally consisted of Lohman and a laborer. They worked under the supervision of Project Manager Robinson.

Consistently with the nature of the tasks involved, Lohman reported that all of the work was routine and the great majority was repetitive as well. He opined that he spent 95 percent of his workday engaged in the same physical labor as his crewmate. His remaining duties involved the preparation of simple paperwork and interaction with the property owners. In this regard, his authority was very limited. He testified that if a property holder wished to have sod installed instead of seed, he was required to obtain authorization from his superiors. Indeed, he supplied great detail in his testimony regarding the requirement that he consult and obtain instructions from his supervisors whenever anything out of the ordinary occurred. As he described it,

> I'd have to call the supervisor to let them know what was going on. If there was—pretty much any time there was any problem, in general, on job sites, either with your laborers on the job, anything. [Tr. 1906–1907.]

Lohman testified that he received all of his job assignments from Robinson. His description of how the work was divided among the members of the restoration crew was telling. He reported that he always asked his laborers what chores they wanted to perform. As he described it, "[w]ell, I ask them, what do you want to do. Would you rather go down here? Would you rather go down there? What do you want to do?" (Tr. 1746.) Unsurprisingly, Lohman reported that the laborers would usually select the easier tasks for themselves. When counsel asked him why he did not simply instruct the laborers as to their assignments, Lohman responded that, "it isn't my choice to make anybody do anything." (Tr. 1775.)

Beyond the issue of assignment authority, Lohman reported that he had very little control over the working conditions of the laborers. For example, when a laborer reported that his wife was having a baby, Lohman called Robinson to obtain authorization for the man to leave work early. He also obtained instructions from his supervisor in the event of bad weather. Similarly, he had no authority to require overtime work. Indeed, he reported that a laborer complained about overtime. In response, Lohman called Nanney. Nanney instructed him to send the laborer home.

Regarding Lohman's accountability for the performance of the restoration crew, his testimony followed the same general contours as other crew leaders. When asked in broad terms about his responsibility, Lohman agreed that in a "[r]oundabout" way, he was responsible for the overall performance of the crew. (Tr. 1760.) He reported that he believed the figurative "buck" stopped with him. When probed, he conceded that he was never told this, but simply "assumed it." (Tr. 1926.) When the questioning got down to specifics, he reported that he had never been held accountable for anything that a laborer had done. Thus, although Lohman indicated that he had been assigned a number of poorly performing laborers, he had never been held responsible for their unsatisfactory performance. This was clearly illustrated by his response to a question asking him what his function in the work life of the laborers was. He said that it was, "[j]ust to relay a message from the supervisor to them." (Tr. 1752.)

Lohman's testimony regarding his restricted role was supported by the fact that he was never vested with disciplinary authority of any kind. In a very good illustration of the dissonance between his belief as to his responsibility and the reality of his place in the corporate hierarchy, Lohman testified that he did attempt to fire a laborer named Damian. Nanney informed him, "You can't do that. I'm the supervisor. You're not—you can't fire him." (Tr. 1718.) As a result, Damian remained employed and continued to serve on Lohman's crew until he was injured some weeks later. Lohman did testify that he told another employee, Garrett Jones, that he was discharged. He noted that it was Robinson's decision to discharge Jones and Lohman was simply acting on his instructions.

Finally, Lohman provided further insight into the variance between his subjective beliefs and the objective reality of his status when discussing the subject of accountability for the work of his crew. He opined that it was his duty to make certain that the laborers did their work properly. Yet, he readily reported that he never evaluated any crew members, nor was he ever held accountable for their performance. Similarly, he was never given any bonus based on the productivity of the crew. A realistic appraisal of Lohman's position, taking care to separate inflated subjective notions from actual facts on the ground, demonstrates that he lacked any meaningful degree of supervision and control of the other crew members.

IV. APPLICATION OF THE *OAKWOOD* ANALYSIS

Having outlined the nature of the crew leaders' duties, functions, and responsibilities, I will now apply the Board's newly refined analytical standards. Naturally, I will turn most of my attention to an assessment of the particular aspects of supervisory authority highlighted by current counsel for the Company in his brief on remand. In conformity with the Board's remand order, I will also address the other aspects of the refined *Oakwood* analysis.

In the *Oakwood* trilogy, the Board clarified the definitions of three key concepts involved in the adjudication of supervisory status. It first addressed the meaning of the power to assign as a primary indicia of such supervisory status. It held that the term encompassed three distinct types of authority: the power to designate an employee to work in a specific place, the power

to give an employee significant overall duties,[27] and the power to appoint an employee to a specific work period. Possession of any of these powers can be a primary indicia of supervisory status. *Oakwood Healthcare, Inc.,* supra at 689–690.

The Board also provided a detailed articulation of the standards for assessment of the statute's primary indicia of supervisory status involving the power "responsibly to direct" other employees. This expansion of the definition includes three separate analytical factors. To qualify under the Act, this type of supervisory authority must include a grant by the employer of the power to direct other employees, the authority to take corrective action against those employees if needed, and "a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Oakwood Healthcare, Inc.,* supra at 692. Significantly, the Board directed adjudicators to apply these factors within the context of the overall Congressional purpose underlying the exclusion of supervisors from the Act's protections. Thus, it is vitally important that a distinction be drawn between those employees who direct others "simply" for the purpose of completing a certain task and those whose purpose in issuing directives is to carry out "the interests of management."[28] *Oakwood Healthcare, Inc.,* supra at 692. As the Board noted, it is the "fundamental alignment" of the supervisor with management that forms the "heart" of the purpose behind the statutory exclusion. Infra at 692.

Lastly, the Board described key principles involved in the determination of whether a putative supervisor's possession of any primary indicia of authority also meets the requirement that it involve the exercise of independent judgment. Possession of this degree of authority to make decisions requires that the putative supervisor must act in a manner free from the control of others. Among the constraints that may reduce the nature of the authority below the statutory threshold are detailed written rules or policies of the employer, verbal instructions from higher ranking managers, or contractual provisions that govern the result. *Oakwood Healthcare, Inc.,* supra at 692–694.

Qualitatively, independent judgment also requires that the person form an opinion through the process of analyzing data and that the analytical process be of a degree that rises above "the merely routine, clerical, perfunctory, or sporadic." *Oakwood Healthcare, Inc.,* supra at 693, citing *Browne of Houston*, 280 NLRB 1222, 1223 (1986). The Board provided an example of merely routine decisionmaking that does not qualify under the Act. An individual who decides how best to deploy his or her coworkers, even when acting free from the influence of others and analyzing data and reaching a reasoned conclusion from that data, nevertheless fails to exercise independent judgment if the sole purpose of the reasoning process is to equalize workloads among employees. See *Oakwood Healthcare, Inc.,* supra at 694.

With these fundamental principles in mind, I will now turn to the analysis of the crew leader positions at issue.

A. The Boring Crew Leaders

The largest category of employees whose status is in contention in this case involves the position of crew leader for the boring crews. Specifically, Crew Leaders Farris, Schaffer, and Shipp were assigned to crews consisting of a boring machine operator and a laborer. There is no doubt that these crew leaders, in common with all of the Company's crew leaders, exercise some degree of control over the members of the crews. This does not conclude the inquiry but merely represents the starting point. As the Board has cautioned:

> In enacting Section 2(11), Congress emphasized its intention that only supervisory personnel vested with genuine management prerogatives should be considered supervisors, and not straw bosses, leadmen, setup men and other minor supervisory employees. The Board has long recognized there are highly skilled employees whose primary function is physical participation in the production or operating processes of their employer's plants and who incidentally direct the movements and operations of less skilled subordinate employees, who nevertheless are not supervisors within the meaning of the Act, since their authority is based on their working skills and experience. [Quotation marks and numerous citations omitted.]

Dynamic Science, Inc., 334 NLRB 391, 392 (2001).[29]

Counsel for the Company argues that the three boring crew leaders possess a variant of the power to assign within the meaning of the *Oakwood* trilogy. In particular, he contends that Crew Leader Farris exercised this power by effectively recommending that Jason Politte be transferred out of his boring crew. He also asserts that Crew Leader Schaffer effectively recommended the assignment of operators to his crew and the removal of operators from his crew. Finally, he claims that Crew Leader Shipp effectively recommended the reassignment of Politte from his crew to another one.

At the outset, I note that counsel does not contend that any of the boring crew leaders possessed the actual power to assign. The evidence would not support such a contention. Boring crew leaders cannot designate an employee to work in a particular place (i.e., on a particular crew). Project Manager Nanney was clear as to this point. He testified as follows:

> NANNEY: Normally we have crews set up.
> COUNSEL: And you set those crews up.
> NANNEY: That is correct.

[27] The Board further defined the meaning of "significant overall tasks," as involving more than simply giving instructions to perform discrete chores. *Oakwood Healthcare, Inc.,* supra at 689. Thus, telling an employee to restock the shelves in a warehouse or to administer medicines to a group of patients both qualify as assignments of significant overall tasks. By contrast, instructing an employee to restock toasters before coffeemakers or to give a sedative to one particular patient does not represent the sort of designation that would qualify as an assignment within the meaning of the Act.

[28] In this connection, the Board cautioned against an overbroad vision of the importance of the ability to direct other workers. It noted that the right to issue any simple instruction to a coworker does not transform an individual into a supervisor. Instead, "[t]he de minimus principle obviously applies." *Oakwood Healthcare, Inc.,* supra at fn. 28.

[29] *Dynamic Science, Inc.,* was cited with approval in *Oakwood Healthcare, Inc.,* supra at fn. 41.

(Tr. 1176.) There was absolutely no testimony from any witness indicating that a crew leader ever possessed the authority to tell an operator or laborer which crew they would work on. As indicated by Nanney, that power was held by the project managers. Similarly, there was not an iota of evidence suggesting that any crew leader ever assigned an employee to a particular job classification such as operator or laborer. Finally, crew leaders did not appoint crew members to any particular work period or shift. All employees worked the same shift. The most that could be said is that crew leaders could request that crew members agree to work some overtime. In *Golden Crest Healthcare Center,* 348 NLRB 727, 729 (2006), the Board made clear that the power to request employees to work overtime does not establish supervisory authority.[30] Boring crew leaders do not possess the power to assign within the meaning of the Act.

Counsel for the Company is correct in contending that the power to effectively recommend assignments is the functional equivalent of the power to make such assignments directly. The Supreme Court has noted that, "[t]he statutory definition of 'supervisor' expressly contemplates that those employees who 'effectively . . . recommend' the enumerated actions are to be excluded as supervisory." *NLRB v. Yeshiva University,* 444 U.S. 672 at fn. 17 (1980). The Board has observed that it is "well established that the authority effectively to recommend generally means that the recommended action is taken with no independent investigation by superiors, not simply that the recommendation ultimately is followed." *ITT Lighting Fixtures,* 265 NLRB 1480, 1481 (1982), enfd. denied 712 F.2d 40 (2d Cir. 1983), cert. denied 466 U.S. 978 (1984).

The first difficulty with counsel's claim that the boring crew leaders effectively recommended assignments is that this power was specifically denied by Shipp and Farris. Shipp testified that he never assigned or transferred any employee. He was then asked:

> COUNSEL: Did you ever recommend any of those things?
>
> SHIPP: No.

(Tr. 2601.) Similarly, Farris was asked if he ever recommended the transfer or assignment of any employee. His concise response was, "[n]o." (Tr. 2142.) Even more clearly, the issue was explored with Farris as follows:

> COUNSEL: And what influence did you have on the assignment of operators to your crew?
>
> FARRIS: None.
>
> COUNSEL: Did [Project Manager] Rich Robinson ask for your input?
>
> FARRIS: No. [Tr. 2139.]

Despite this uncontroverted testimony, counsel relies on two examples of what he views as an effective recommendation to remove Jason Politte from both Shipp and Farris' crews. Farris testified that he complained to Robinson that Politte was too lazy. He requested that he be assigned a different operator. Robinson responded, "[n]ot at the moment. . . . That's what everybody says about Jason." (Tr. 2173.) Farris reported that "[a] couple of weeks" later, a new crew was formed and Politte was transferred to that crew. (Tr. 2175.)

In contending that this evidence demonstrates that Farris possessed effective power to recommend Politte's transfer, counsel indulges in a venerable logical fallacy known as post hoc, ergo propter hoc ("after this, therefore because of this").[31] While there is no doubt that Farris' request preceded Politte's reassignment, there is no evidence that it caused that action.[32] Indeed, the testimony suggests that the reason for the transfer was the formation of a new crew. It will be recalled that Robinson essentially dismissed Farris' request, noting that everyone complained about Politte's work ethic. The two-week interval between the request and the reassignment is also not suggestive of a power to make an effective recommendation.

The same general pattern occurred when Shipp requested that Nanney remove Politte from his crew due to his laziness. Shipp testified that there was no result from this request. Politte remained on his crew until "[h]e ended up getting hurt." (Tr. 2597.) Shipp added that Politte's injury was "the only reason that he was off my crew." (Tr. 2597.) This testimony clearly belies any claim of an effective recommendation.

Any lingering doubt about a supposed power to make effective assignment recommendations was dispelled by the testimony of Project Manager Nanney:

> COUNSEL: So simply because some guy comes and says, I want him off my crew, that does not get a laborer off the crew, does it?
>
> NANNEY: That is correct.

(Tr. 1177.) The evidence will not support a contention that boring crew leaders possessed the power to effectively recommend assignments.

Although not relied on by counsel for the Company, I will examine the question of whether the boring crew leaders held the authority to responsibly direct their crew members within the meaning of the Act. The first step is to determine whether crew leaders directed their crew members to perform particular tasks. Actually, there was some variation among the various witnesses on this point. Some witnesses took the viewpoint that the roles of the crew members were well defined and there was no need to direct them to perform the duties that they knew

[30] By the same token, there was much testimony, some of it contradictory, about the power of crew leaders to determine the times for lunch and breaks. None of this matters because the Board holds that "determination of order of lunch and other breaks is essentially clerical." *Los Angeles Water & Power Employees' Assn.,* 340 NLRB 1232, 1234 (2003), quoting *NLRB v. Hilliard Development Corp.,* 187 F.3d 133, 146 (1st Cir. 1999).

[31] Perhaps the classic illustration of this fallacy is the conclusion that, because the rooster crows shortly before dawn, he is responsible for producing the sunrise.

[32] In his brief on remand, counsel for the Company mischaracterizes the record on this point. He contends that "Robinson explicitly testified that he removed Mr. Politte from Mr. Farris' crew 'in order to get production up.'" (R. Remand Br. at p. 4, citing Tr. 938.) The context shows that the person whose production was under scrutiny at that point was Farris, not Politte. Thus, Politte's transfer was hardly based on an effective recommendation from Farris. (See Tr. 937–938.)

were theirs. For example, Farris testified that the process of setting up the boring machine was so routine that it "[be]comes automatic." (Tr. 2158.) Williams noted that, "[a] laborer walks around with a shovel in their hand all the time . . . . You don't have to tell them to dig locates." (Tr. 722.) On the other hand, Shipp agreed with counsel's contention that he "ran" the crew. (Tr. 2659.) On balance, I conclude that boring crew leaders did direct their crew members to perform some specific tasks.

The next step in the analysis is to determine whether boring crew leaders possessed the authority to enforce their directives. The consistent testimony revealed that they did not. Farris noted that he asked his operator to put on safety equipment. However, "[i]f he didn't want to put it on, it is his choice." (Tr. 2146–2147.) Schaffer confirmed that he was never given the authority to force a crew member to do something. Shipp provided a very clear and specific example, noting an occasion when he and operator Politte disagreed about the placement of the machine. Counsel observed that, "because you were a Crew Leader, you made him move it, right?" (Tr. 2608.) Shipp responded in the negative and added that, "I just tried to bore where he put it." (Tr. 2608.) There is simply no evidence that boring crew leaders possessed the authority to require that their crew members comply with their directions.

Finally, the evidence also firmly establishes that crew leaders lacked what is perhaps the hallmark criterion for possession of the power to responsibly direct others. In *Oakwood Healthcare, Inc.,* supra at 692, the Board reiterated the requirement that responsible direction is only present when,

> the person directing and performing the oversight of the employee must be accountable for the performance of the task 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.

In this case, the employer presented no evidence indicating that any crew leader had ever suffered such an adverse consequence from the failure of a crew to perform its tasks.[33] Thus, Farris both testified that he was never told he would be accountable for the performance of his operator and reported that, "[a]ctually, both the operator and crew leader are responsible for production." (Tr. 2142.) Schaffer also confirmed that he was never held accountable for the actions of his crew members. Indeed, he noted that he never observed any crew leader being held responsible for a problem on a crew. Shipp appeared less certain on this point. Although he seemed to feel that crew leaders were held responsible, when asked to be specific he could only report that, "[t]hey would just say that we needed to get our footage up." (Tr. 2663.) This type of exhortation to improve production does not constitute the type of concrete adverse consequence required by the Board.

I have concluded that the boring crew leaders did not possess any authority to assign, responsibly direct, or effectively recommend assignments or directions. The remaining *Oakwood* issue is a qualitative evaluation of the type of judgments performed by the crew leaders. I will perform this analysis in a separate section of this decision that will apply the test to all of the crew leaders in general.

B. The Backhoe Crew Leaders

Two of the employees whose status is in dispute are Backhoe Crew Leaders Bridges and Williams. I will examine the evidence regarding their authority to assign or responsibly direct the members of their crews.

Turning first to the question of responsible direction of crew members, I note that counsel for the Company does not contend that Bridges or Williams possessed this type of authority within the meaning of the *Oakwood* trilogy. The record demonstrates that the backhoe crew leaders did not have this indicator of supervisory status. It will be recalled that the only job classifications assigned to a backhoe crew were the leader and one or two laborers. The leader actually operated the backhoe. Laborers had only two duties, digging locates and swamping while the backhoe was in operation. These duties were virtually identical since they both involved digging in the ground with a shovel for the purpose of exposing buried utility lines. Williams did testify that he would select which laborer would perform each task.[34] Even assuming that this rose to the level of a direction, the evidence was clear in revealing that the crew leaders possessed no authority to take corrective action in the event of a problem. Williams reported that, "I couldn't force [the laborer] to get in the hole. All I could do is call the Project Manager and say this guy refuses to do his job." (Tr. 794.) Indeed, when asked what he would do if he was paired with a lazy laborer, he replied that, "[m]ost of the time I would get in the hole and do it myself." (Tr. 665.)

In addition to the absence of any power to take corrective action, the backhoe crew leaders were not held accountable for the performance of their laborers. Bridges testified that he was never held accountable for the efficiency of his crew. While Williams was not as specific on this point, he noted that he was not his laborer's "boss," and could not require the laborer to correct any errors that he made. Instead, he testified that, "I'm just part of a crew just like [the laborer] is. We're there just to get the job done period." (Tr. 750.) I readily infer that Williams was not subject to any adverse consequence for a failure to properly supervise his laborer under such circumstances.

Regarding the backhoe operators' purported power to make assignments, the starting point for evaluation is General Manager Eirvin's testimony concurring in counsel's assertion that the project managers handle "day-to-day assignments, granting of overtime, reassigning, granting vacation, leave of absence." (Tr. 57.) This was confirmed by Bridges, who reported that he never had authority to assign or recommend assignments. He noted that Project Manager Robinson assigned the laborer to his crew and never sought Bridges' input into these decisions.

[33] In this connection, I have not considered any of the pretextual explanations offered for the discharges of any crew leaders. As counsel for the Union put it, any such argument would simply be "a tainted extension of Respondent's concocted and false excuses for firing union supporters, and cannot support a showing of supervisory status." (U. Remand Br. at p. 18.)

[34] By contrast, Bridges testified that he did not make such directions. Instead, he reported that, "[b]etween the laborers . . . they'd just, you know, they'd worked it out." (Tr. 1993.) This certainly suggests that the crews handled this on an ad hoc basis without any specific authorization from management.

Williams provided identical testimony, reporting that he never picked the laborers to be assigned to his crew and was never asked his opinion about this question.

Despite this overwhelming evidence on the issue of authority to make assignments, counsel for the Company contends that Bridges possessed the power to assign "his laborers' hours of work," and that Williams "assigned tasks to his laborers." (R. Remand Br., pp. 13, 14.) The evidence will not support this attempt to show some degree of statutory supervisory status.

Bridges testified that the laborers assigned to his backhoe crew would seek approval to miss a day of work or leave work early from Project Manager Robinson. Laborer Mack agreed that, when he worked with Bridges, if he needed time off, he would call the project manager. Furthermore, Bridges reported that if the laborer wanted to quit work due to bad weather, "I would call [Project Manager Robinson] and let him make the decision." (Tr. 1994.) Nevertheless, counsel for the Company contends that Bridges exercised the authority to assign since, "he would not stay on a job later than 4:30 simply because his operator wanted to work additional overtime." (R. Remand Br., p. 13.) Counsel cites no authority for such an expansive reading of the meaning of the power to assign. I hardly think that a refusal to agree to work overtime so as to enable a coworker to earn additional pay constitutes a primary indicator of supervisory status under the Act.

Beyond this, the evidence does not support counsel's contention that Bridges unilaterally determined the length of the crew's workday. The Company placed a maximum limit on overtime at no more than 2 hours per day. Bridges testified that he had a long commute and chose not to work more than 1 hour of overtime. Counsel asked him if this was "your decision, right?" He replied, "That was both of ours." (Tr. 2031.) He went on to agree that if "something had to be done" and the laborer was willing to put in two hours of overtime, they would do so. However, if there was no pressing reason for the extra work, he would not agree to stay simply to please the laborer. Taken as a whole, this testimony simply demonstrates that the decision whether to work overtime was made by both crew members jointly.[35] This was explicitly confirmed in the testimony of Laborer Mack who was asked who decided on working overtime and replied, "[w]e would both decide." (Tr. 2380.) It was also confirmed by fellow Backhoe Crew Leader Williams who flatly testified that, as to overtime work, "I think that is a crew decision actually. I don't think a crew leader can force his guys to work if they don't want to work." (Tr. 688.) I find that Bridges did not possess the power to assign, including any supposed power to determine his laborers' hours of work.

Although Bridges and Williams held the same job as backhoe crew leader, counsel for the Company relies on a different justification for the contention that Williams possessed the power to assign. He contends that Williams assigned the tasks of digging locates and swamping between his laborers. This certainly contrasts with Bridges' report that he never made these decisions because the laborers on his crew divided these chores between themselves. This strongly suggests that Williams' decisionmaking was simply a personal response to the need to divide the chores rather than the exercise of any corporate grant of authority. The fact remains that Williams did tell one laborer to dig locates and the other one to swamp. I simply cannot find this to be a legally significant exercise of supervisory authority. Both tasks are fundamentally identical, involving nothing more than digging in the earth with a shovel and spotting buried utility wires. As a result, this situation is analogous to that described by the Board when considering the status of lead persons in one of the *Oakwood* cases. In *Croft Metals, Inc.,* 348 NLRB 717, 722 (2006), the Board held that,

> the occasional switching of tasks by the lead persons here does not implicate the authority to "assign" as that term is described in *Oakwood Healthcare* because the activity does not constitute the "designation of significant overall duties . . . to an employee." This sporadic rotation of different tasks by the lead persons more closely resembles an "ad hoc instruction that the employee perform a discrete task" during the shift and as such is insufficient to confer supervisory status on the lead persons pursuant to Section 2(11) under *Oakwood Healthcare.* [Citations omitted.]

Counsel for the Company contends that digging locates and swamping represent the sort of "plum" and "bum" assignments that impose a significant impact on an employee's work life. See *Oakwood Healthcare, Inc.,* supra at 689. He does not explain why one of these tasks is better or worse than the other. I cannot perceive of any reason why digging one set of holes would be more or less desirable than digging another set of holes. As counsel does concede, "[e]ach of these jobs is directed toward the same goal—avoiding severing an underground utility." (R. Remand Br. at p. 14.) From either the employees' viewpoint or management's perspective, there is no meaningful distinction here. The record does not demonstrate that Williams exercised any aspect of the assignment power within the meaning of the Act.[36]

C. The Cable Crew Leader

Crew Leader Sutton worked on a cable crew, sometimes referred to as a pulling crew. The crew inserted wire into underground conduit by means of a device that blew a so-called

[35] Bridges' fellow backhoe crew leader, Williams, was extremely clear on this point. He testified that, "[i]t's not a one guy makes the decision deal. A crew works as a team and if we agree that we are at a good stopping point, we would stop. I mean, it's not a dictatorship so to speak." (Tr. 726.) On cross-examination about this same point, he gave an even more precise vision of the corporate structure as to this issue, testifying that, "[a]t no time did I ever shut my machine down and say we're done for the day. It was always a group decision of what happened, of who went home, or who needed to go home unless a Project Manager otherwise told me that we were shutting down." (Tr. 790.)

[36] By footnote, counsel for the Company argues that Williams "assigned work time" to the laborers by determining when they should cease working due to bad weather. (R. Remand Br. fn. 3.) He is forced to admit, however, that the "ultimate authority" on this issue resided with the project manager. (R. Remand Br. fn. 3.) Williams testified that, "[i]n bad rain, we would call somebody. In light rain, we would probably keep going." (Tr. 706.) This is consistent with Bridges' testimony that the project manager always decided whether to have the crew stop working due to adverse weather conditions.

"rocket" through the conduit. The crew leader operated this machine while the laborer would wait in the hole to catch the rocket. Once again, counsel for the Company does not contend that Sutton possessed the power to assign. The evidence confirms that he did not possess this power. He testified that Project Manager Sellers selected the crew's laborers without seeking any input from Sutton. Indeed, Sellers would sometimes shuffle the composition of the crews as the work shift progressed. As with other crew leaders, Sutton lacked authority to approve time off or vacations. Sellers determined the length of the workday and the impact of bad weather.

Counsel for the Company submits that Sutton possessed the authority to responsibly direct the laborers. Once again, it is necessary to examine the *Oakwood* factors. Initially, I agree that Sutton was vested with some authority to direct his laborers to perform tasks.[37] He would "tell them what hole they needed to go set their unit up at." (Tr. 1568.) As to the second analytical factor, there was no evidence that Sutton was vested with any authority to enforce his decisions by taking corrective action against an errant laborer. Indeed, he agreed with counsel's characterization that he was never told by management that he possessed "any authority to do anything that would impact the employment of the laborers." (Tr. 1542.)

The Company argues that Sutton was held accountable for the performance of the pulling crew. He bases this on Sutton's explanation that, the first time a laborer would make a mistake, he would take a "butt chewing" for it. (Tr. 1574.) He said he did this in order to gain the respect of the laborers. However, he was very clear in adding that, if a laborer made additional errors, he would not take the blame. In my view, all this testimony establishes is that Sutton took upon himself the burden of shielding a new laborer from the consequences of an initial mistake. His refusal to do so for a more experienced laborer shows that accountability for the laborer's performance was not a component of his job. Significantly, Sutton provided uncontroverted testimony on the issue of his responsibility for the crew members:

> COUNSEL: Did [Project Manager] Kevin Sellers ever hold you accountable or responsible in any way for anything done by any of the laborers on your crew?
>
> SUTTON: No, ma'am.

(Tr. 1543.) I conclude that the evidence will not support any contention that Sellers was vested with authority to responsibly direct his laborers within the meaning of the *Oakwood* analysis.

D. The Underground Crew Leader

Like Sutton, Underground Crew Leader Hanephin was assigned to a crew that pulled cable through pipes that had previously been installed underground. The crew also performed tie-ins, connecting underground wire to the electrical pad. Counsel for the Company contends that Hanephin possessed supervisory status because he "had the responsibility to direct his laborers." (R. Remand Br. p. 6.) He does not argue that Hanephin possessed the assignment power.[38]

Turning first to the assignment power, I agree with the conclusion that Hanephin did not possess this attribute of supervisory status. He testified that he was never given the authority to assign or transfer employees. In common with the procedures used by other crews, underground crew members were required to obtain approval from the project manager if they wished to leave early or take a day off. Overtime was either ordered by the project manager or agreed upon by the entire crew. Hanephin flatly explained that, "I was never told that I could force them to work overtime." (Tr. 1392.) There is no evidence that Hanephin possessed the assignment power within the meaning of the *Oakwood* standards.

In contrast, Hanephin did issue directions to crew members. He reported that, "I could tell them where to dig and which order things should be done in, but that's about it." (Tr. 1385.) Similarly, he could determine whether the laborer would do the pushing or pulling of wire through the pipe. On the other hand, Hanephin testified as to the very limited extent of his power to direct the laborers. For example, he noted, "I usually ask my laborer what they wanted to do. What do you want to do, push or pull?" (Tr. 1403.) Indeed, he described his role as follows,

> very rarely did I stand over them and watch them and tell them what to do . . . . About the only time I wasn't physically working is when I was sitting on . . . a small tractor or a mini escalator or something. The rest of the time if we couldn't use, you know, small machinery, then I would be using a shovel to dig or pulling wire by hand or sometimes we would use a pulling machine. But I did as much labor as my laborers. [Tr. 1380.]

While Hanephin possessed some power to issue directions to the laborers, there is no evidence that he was authorized to take corrective action in the event that his directions were not obeyed. There was no testimony to this effect. On the contrary, Hanephin reported that his project managers never told him that he supervised the members of his crew. Indeed, he expressed irritation that two of his laborers had been terminated without any consultation or even notification to him.

As to the key concept of accountability, Hanephin accepted counsel's formulation that he would "take the heat" for anything that went wrong on his crew, including mistakes made by the laborers. (Tr. 1456–1457.) However, on redirect examination, he testified that he was never held accountable for any mistakes made by a laborer. The evidence on this point raises a classic problem in the analysis of supervisory status. Counsel for the Company makes the thoughtful point that the mere fact that a putative supervisor has never exercised an indicator of

[37] I note, however, that this was a strictly circumscribed authority. Sutton reported that Project Manager Sellers exercised much direct authority in this regard. As Sutton described it, "[l]ike for proofing duct. Whoever [Sutton] would send out with me, he'd assign the laborer that was supposed to go out and catch the rocket." (Tr. 1556.)

[38] Counsel for the Company also asserts that Hanephin possessed a secondary indicator of supervisory status, attendance at "weekly supervisor meetings." (R. Remand Br. p. 8.) This is incorrect. Hanephin did attend crew leader meetings, but he specifically testified that he did not attend management meetings. His testimony in this regard was confirmed by Project Manager Nanney, who also testified that crew leaders did not attend the monthly managerial meetings. In addition, former counsel for the Company stipulated that crew leaders did not attend these meetings. See Tr. 1387.

supervisory authority does not preclude a finding of statutory supervisory status provided that the authority was granted to that supervisor by the employer. This is correct. As the Board has stated, "[I]t is not required that the individual have exercised any of the powers enumerated in the statute; rather, it is the *existence* of the power that determines whether the individual is a supervisor." *Mountaineer Park, Inc.,* 343 NLRB 1473, 1474 (2004). (Italics in the original.)

Recognizing the validity of counsel's argument, I nevertheless find that the employer has failed to demonstrate that it actually imposed an accountability requirement on the underground crew leader. The evaluative standard was discussed at length in one of the *Oakwood* cases as follows:

> [I]n determining whether accountability has been shown, we shall similarly require evidence of actual accountability. This is not to say that there must be evidence that an asserted supervisor's terms and conditions of employment have been actually affected by her performance in directing subordinates. Accountability under *Oakwood Healthcare* requires only a *prospect* of consequences. But there must be a more-than-merely-paper showing that such a prospect exists. That is, where accountability is predicated on employee evaluations, there must be evidence that a putative supervisor's rating for direction of subordinates may have, either by itself or in combination with other performance factors, an effect on that person's terms and conditions of employment.

Golden Crest Healthcare Center, 348 NLRB 727, 731 (2006). (Italics in the original.)

The evidence of potential accountability in *Golden Crest* was far stronger than in this case. The putative supervisors in *Golden Crest* were actually subject to written evaluation based on their performance of a job duty that required them to direct the nursing assistants. Despite this, the Board declined to find supervisory authority because there was no evidence that there would be an actual consequence for any deficiency in performing that job function. Responsible direction is not established "simply because the job evaluation forms suggest that such accountability exists." Infra at 731. In the case of Hanephin, the evidence is much thinner. Apart from his subjective belief that he was accountable, there is nothing from the employer to indicate that this was, in fact, the case. As a result, the evidence fails to establish that Hanephin was actually accountable for the quality or effectiveness of his direction of the crew members. The employer has failed to establish that Hanephin possessed any of the primary indicia required for a finding of supervisory status.

E. The Restoration Crew Leader

The remaining employee whose status must be assessed is Restoration Crew Leader Lohman. I have already noted that the work of this crew was perhaps the least skilled of any production crew. It consisted of landscaping, seeding, placing sod, repairing retaining walls, and cleaning up land that had been disturbed in the process of laying cable. The restoration crew consisted of the leader and one or more laborers. Lohman testified that "95 percent of the time" he performed physical labor along with his laborers. (Tr. 1746.) The remainder of his time was spent completing paperwork and interacting with the landowners. When asked how much time he spent "standing over the laborer and directing their work," he responded, "[n]one." (Tr. 1715.)

Counsel for the Company contends that "Lohman effectively recommended the assignment of his laborers." (R. Remand Br. p. 10.) Before assessing this claim, I note that the record establishes that Lohman did not actually assign laborers or responsibly direct them. He testified that Project Manager Robinson assigned the laborers to his crew. As crew leader, he had no authority to assign or transfer employees or to require them to work overtime. In common with the other crew leaders, Lohman lacked authority to authorize vacation or sick leave. This was vividly illustrated by his report that a laborer sought to leave work early because his wife was in the process of delivering their baby. Lohman was unable to make even this obvious decision, but telephoned Robinson in order to seek his approval.

It is also clear that Lohman did not responsibly direct the laborers on the restoration crew. In dividing up the work chores, Lohman always asked the laborers what tasks they wanted to do. In what I suspect was a bit of wistful testimony, Lohman noted that the laborers would usually pick the easier assignments. He also lacked any sort of authority to correct misbehavior by the crew members. For example, he testified that he could not require that the laborers wear their hardhats and safety vests. Furthermore, the evidence was rather detailed in establishing that Lohman was not accountable for the performance of his laborers. He reported that he had at least three poorly performing laborers and was never held responsible for their deficient performance. He also had laborers who were sometimes late for work. He was never held accountable for their tardiness. It is evident that Lohman did not possess the supervisory indicia of assignment or responsible direction.

Despite this, I readily understand why counsel for the Company contends that Lohman possessed the indicator of supervisory status concerning the effective recommendation of laborers' assignments. I agree that the record is replete with testimony by Lohman establishing that he made numerous recommendations to the project manager regarding personnel matters affecting his crew. He complained about laborers who performed poorly, seeking their transfer or discipline. He also recommended raises and promotions.

The difficulty with counsel's argument is that the Act requires that a putative supervisor's recommendations be effective. In two relatively recent cases, *Progressive Transportation Services,* 340 NLRB 1044 (2003), and *Mountaineer Park, Inc.,* 343 NLRB 1473 (2004), the Board has refined the standards for analysis of this question.[39] A finding of the power to make

[39] In his brief, counsel for the Company relies on an earlier Board precedent regarding effective recommendation, *General Telephone Co. of Michigan,* 112 NLRB 46 (1955). I find that case to be clearly distinguishable. Those putative supervisors were required to prepare written evaluations of the employees. The evaluations were placed in the personnel files and were always considered in making decisions regarding promotions. In *Williamette Industries,* 336 NLRB 743 at fn. 5 (2001), the Board noted that the central reality underlying the rationale in *General Telephone* was the fact that management actually relied on these

effective recommendations requires that there be an absence of independent investigation by the superior authorities to whom the recommendation is made and evidence establishing that the recommendations are adopted on a regular basis.[40] Neither prong of this test is met in the case of Lohman's recommendations.

The most formidable hurdle regarding the need for an absence of independent investigation is the testimony of Project Manager Nanney, who informed counsel that it was "correct" that, "simply because some guy comes and says, I want him off my crew, that does not get a laborer off the crew, does it?" (Tr. 1177.) Beyond this, Lohman's recommendations regarding the laborers met with a very mixed fate. In fact, on two occasions they were met with derision. Lohman testified that he recommended that laborer Garrett Jones receive a raise. He reported that this recommendation met with the following response: "Ernie Nanney told me to tell Garrett to take his raise and stick it up his a-s-s."[41] (Tr. 1753.) On another occasion, Lohman reported that he attempted to fire a laborer named Damian. Nanney overruled him, observing that, "[y]ou can't do that. I'm the supervisor. You're not—you can't fire him." (Tr. 1718.) Damian remained employed with the Company and continued to serve on Lohman's crew until he was injured weeks later. Only after that injury was he transferred to a warehouse job.

Lohman made additional recommendations. He recommended a raise for an employee named Brian. Brian did not get the raise. Lohman complained about an employee named Stringer. He testified that, "I pretty much complained to Ernie [Nanney] about him every day." (Tr. 1831.) Asked what happened, Lohman reported that, "Ernie finally fired him." (Tr. 1831.) Apart from any evidence of causative effect, the frequency of the complaints and the lack of immediate result strongly suggest that Lohman's recommendations did not meet the standard of effectiveness. Similarly, Lohman complained about a personality conflict involving employee Vitulski, asking that Vitulski be transferred. While Vitulski was transferred, this did not take place until weeks later.[42] The lack of testimony regarding causality and the length of time between complaint and response indicate a failure of proof of effectiveness.

The record was well developed regarding Lohman's personnel recommendations and their fate at the hands of higher authority. Applying the Board's standards for assessment of the potency and effectiveness of those recommendations, I readily conclude that they failed to establish Lohman's possession of the statutory authority to make effective recommendations.

F. The Issue of Independent Judgment

The remaining task that I must perform under the terms of the Board's remand order is to assess whether, within the meaning of the *Oakwood* refinements, the crew leaders exercised independent judgment when they made decisions affecting the crew members. As previously described in detail in this decision, the record demonstrates that all of these crew leaders made similar types of decisions involving similar types of personnel assigned to their crews and similar work processes.[43] As a result, I will undertake the qualitative analysis of the exercise of judgment for all of the crew leaders together. I so doing, I will examine the context, apply the *Oakwood* tests, and consider the cases decided since *Oakwood.*

In my view, it is important to keep in mind the nature of the position being examined in this remand. As is explicit in their job titles, the Company's crew leaders are not managers, but simply lower-level lead persons. As such, they spend the vast majority of their day engaged in the actual work processes, including demanding manual labor such as digging holes in the ground with a shovel. It was clear from the evidence that they spent very little time directing or overseeing the work of the crew members.[44] Furthermore, there was an overwhelming consensus among the witnesses that the work of the crew leaders was routine and repetitive. Perhaps Crew Leader Sutton provided the best description, testifying that, "[i]t was all the same. It is monotony. I mean, once you do it once, it is the same at every hole." (Tr. 1625.)

Turning now to the legal context for analysis of the degree of judgment possessed by lead persons, I will briefly examine the Board's precedents in the years leading up to *Oakwood*. In late 2003, the Board declined to find any exercise of independent judgment where a lead clerical employee engaged in routine shifting around of employees in order to complete work projects. *Los Angeles Water & Power Employees' Assn.,* 340 NLRB 1232 (2003). Shortly thereafter, in *Volair Contractors, Inc.,* 341 NLRB 673 (2004), the Board addressed the status of a foreman of a boiler assembly crew. The crew consisted of a welder, crane operator, and helper. The Board noted that these crew members' "functions on the job were undoubtedly determined in large part by their craft skills." Supra at fn. 10. While the foreman was found to possess the authority to make assignments and give responsible direction to the crew, he was not required to exercise the degree of independent judgment necessary to establish supervisory status. Although he assigned work tasks to the crew and laid out the jobs, he did so by fol-

evaluations when making personnel decisions. In this case, there is no evidence that management's decisionmaking process was affected in any way by the suggestions made by various crew leaders.

[40] As to the required frequency of adoption, in *Mountaineer Park*, supra at 1475, the Board cited two examples from its precedents, one showing that every recommendation had been effectuated and the other showing that the recommendations had been followed three-fourths of the time.

[41] At the same time, Lohman reported that he also recommended a raise for laborer Cresswell. Cresswell did receive a raise. Apart from the lack of proof that Lohman's recommendation was a causal factor in Cresswell's good fortune, this would give Lohman a success rate of 50 percent. Such a random rate of response is far from the required proof that effective recommendations be regularly adopted by higher authority.

[42] Lohman's testimony as to the length of time it took before Vitulski was transferred was inconsistent. He first reported that it took 2–3 weeks. Later he indicated that it took more than 1-1/2 months before Vitulski was transferred.

[43] As to the work processes, all involve the installation of underground cable except the work of the restoration crew. The issues and decisionmaking processes for the leader of that crew are simpler than those involved in the work of the other crews.

[44] For instance, Bridges noted that he spent "99.9 or 99.5%" of his worktime physically performing work. (Tr. 1988.)

lowing the instructions contained on blueprints and the verbal orders of his superior. In such circumstances, the Board found insufficient evidence of independent judgment. Finally, in a third case, the Board addressed the same issue regarding a repair foreman who worked alongside his crew but was responsible for making job assignments and ensuring that the other employees were productive. In these circumstances, the Board held:

> Nothing in the record supports a finding that [the foreman's] employee placements are based on anything other than the common knowledge, present in any small workplace, of which employees have certain skills and which employees do not work well together. In other words, the record fails to evince that [the foreman's] assignment of work was anything other than routine. [Footnote omitted.]

Armstrong Machine Co., 343 NLRB 1149, 1150 (2004). Indeed, the Board cited precedent establishing that this degree of supervisory capacity did not involve independent judgment since, "he assigned work in the manner of a skilled leadman." Supra at 1150.

It was in this context that the Board addressed the issue of independent judgment in the *Oakwood* trilogy. In *Oakwood*, the Board explained that independent judgment involved decisionmaking that was free from the control of others and required the formulation of an opinion or evaluation through a process of discerning and comparing data. Beyond this, the Board emphasized, in pertinent part, that,

> [i]t may happen that an individual's assignment or responsible direction of another will be based on independent judgment within the dictionary definitions of those terms, but still not rise above the merely routine or clerical . . . . [W]e find that a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement . . . . [I]f the assignment is made solely on the basis of equalizing workloads, then the assignment is routine or clerical in nature and does not implicate independent judgment, even if it is made free of the control of others and involves forming an opinion or evaluation by discerning and comparing data. [Footnote omitted.]

Oakwood Healthcare, Inc., 348 NLRB 686, 693–694 (2006). The Board then proceeded to assess the qualitative nature of the judgments being made by the charge nurses in *Oakwood.* Interestingly, in determining that those charge nurses possessed both the power to assign and the duty to exercise independent judgment in making their assignment decisions, the Board noted that their decisionmaking process "involves a degree of discretion markedly different than the assignment decisions exercised by most leadmen."[45] Infra at 696.

Two of the *Oakwood* cases involved the supervisory status of nursing personnel. It is the third case that is of the utmost importance to the analysis required here.[46] In *Croft Metals, Inc.,* 348 NLRB 717 (2006), the job under consideration was the position of lead person in a rather large factory that produced doors and windows. The leads spent "a great deal of their time actually performing hands-on work of the type performed by undisputed unit employees." *Croft Metals, Inc.,* supra at 717–718. [Footnote omitted.] They occasionally directed the production employees to switch tasks and perform functions designed to ensure that projects were completed on schedule. As the Board described, the leads "have the authority to make decisions about the order in which the work is to be performed and to determine who on the crew is to do which tasks." Infra at 718. In their testimony, several of the lead persons described both the work of their crews and their own directions to those crews as routine in nature. In fact, the Board noted that the evidence established that the production employees "generally perform the same job or repetitive tasks on a regular basis and, once trained in their positions, require minimal guidance." Infra at 722. Based on the nature of the lead persons' duties and the quality of their decisionmaking processes, the Board concluded that their exercise of judgment did not rise above the routine or clerical level. As a result, they were not found to possess statutory supervisory status.

Six months after deciding the *Oakwood* trilogy, the Board had occasion to evaluate the status of another team leader. That individual made task assignments to ensure that the work kept flowing. Once an employee had completed an assigned task, the team leader was responsible to direct the employee to perform another chore. These assignments and directives were always made subject to the oversight of the team leader's supervisor. The team leader spent 90 percent of his day, "working with his tools." *Austal USA, L.L.C.,* 349 NLRB 561, 575 (2007), [administrative law judge's decision]. Citing *Croft Metals,* the Board affirmed the judge's conclusion that the team leader's decisionmaking did not rise above the routine or clerical.

Finally, in *Shaw, Inc.,* 350 NLRB 354 (2007), the Board has just provided a very detailed analysis of the supervisory status of foremen on construction pipeline crews. The crews varied in size from 2 to 20 members, consisting of operators, welders, and laborers. Foremen were charged with "ensuring the performance and completion" of jobs in the field. Infra at 354. The Board held that they did not exercise independent judgment in performing their duties and responsibilities. In language that speaks directly to the situation in the case before me, the Board observed that,

> a foreman's designation of which crewmembers will perform particular functions is often based on an employee's trade or known skills, and is, thus, essentially self-evident. For example, if an operator is part of a crew, he will operate the heavy equipment, a fuser will fuse plastic pipe, and a welder will

[45] It should be noted that, unlike the Board majority's discussion of assignment and responsible direction, the refinements in the definition of independent judgment were approved by the dissenting members. They agreed that those definitions were "reasonable," although they declined to endorse the specific examples offered by the majority members. *Oakwood Healthcare, Inc.,* supra at 708.

[46] Indeed, Judge Schlesinger accurately predicted that the *Oakwood* case involving lead persons at a manufacturing plant would "perhaps [be] critical to the issue in this proceeding." *ADB Utility Contractors, Inc*., 348 NLRB 895, 895 fn. 5 (2006).

> handle metal pipe. Such assignments do not involve the exercise of independent judgment.
>
> Other assignments are based on an employee's readiness to carry out one of the less skilled tasks that compose the bulk of the Respondents' workload. As the Respondents' business involves an abundance of unskilled, laborer-type work, there are often multiple laborers on a crew. Because their duties tend to be somewhat repetitive and are often physically demanding, foremen routinely rotate laborers among those tasks to vary their work and equalize their burdens . . . Rotating essentially unskilled and routine duties among available crewmembers in this fashion does not involve the use of independent judgment and is not, therefore, indicative of supervisory authority. [Footnotes omitted.] [Supra at 356.]

Of the cases remanded by the Board for application of the *Oakwood* analysis, four of those already decided by administrative law judges have involved settings outside the health care professions. In *Talmadge Park, Inc.,* 2007 WL 174480 (Div. of Judges, January 19, 2007), the issue concerned the status of a laundry employee who had some authority to direct her coworker. In finding her to lack supervisory status within the meaning of *Croft Metals*, the judge noted that the laundry work was simple and repetitive and that the forms of decisionmaking required did not rise above the level of the routine or clerical. In *GFC Crane Consultants, Inc.,* 2007 WL 486711 (Div. of Judges, February 9, 2007), the employees at issue were port engineers who led work crews responsible for maintaining equipment. They were provided with lists that determined the work to be performed. The work itself was routine and repetitive. In the event a problem arose, the port engineers were to contact their supervisors for instructions. Citing *Croft Metals,* the administrative law judge determined that the port engineers did not exercise independent judgment within the meaning of *Oakwood. CGLM, Inc.,* 2007 WL 633122 (Div. of Judges, February 27, 2007), concerned the status of a warehouse manager. The manager set up the delivery routes based on his geographical knowledge and understanding of the time needed to complete the trips. The loading of the trucks was performed in a set pattern. Again citing to *Croft Metals,* the judge concluded that the manager's judgment did not rise above the routine or clerical. Finally, in *A & G, Inc.,* 2007 WL 1879534 (Div. of Judges, June 26, 2007), the judge found that a shift leader in a knitting department failed to exercise independent judgment when he directed the machine assignments for employees engaged in repetitive industrial tasks.

Based on this guidance, I have no difficulty in finding that the Company's crew leaders did not exercise that degree of judgment sufficient to rise above the routine or clerical. In particular, the evidence was strikingly consistent on the question of whether the crew leaders' work was routine and repetitive. The Company's witness, Crew Leader Flores, observed that, "[i]t's routine every day. It's the same thing, you're just in a different place." (Tr. 2350.) When asked if his crew leader job was routine and repetitive, Shipp unhesitatingly replied in the affirmative. When asked if there was anything routine about setting up his boring machine, Farris replied that "[e]verything" was routine. (Tr. 2157.) Bridges gave the identical answer when asked what was routine and repetitive about his job as backhoe crew leader. (Tr. 1991.) When asked if the backhoe job involved the same thing day in and day out, Williams agreed, adding that, "[y]ou are digging trenches all the time." (Tr. 736.) Lohman testified that all of his duties as restoration crew leader were either routine or repetitive or both. Put the opposite way, Schaffer was asked if there was anything about his crew leader job that was not routine and repetitive. He responded, "No, one bore is the same as the next." (Tr. 2440.)

In addition to the stunning congruity of the evidence as to the nature of the work, the record also clearly demonstrates that the crew leaders operated within a tightly constrained framework consisting of comprehensive blueprints, detailed verbal instructions from their project managers, or both. Once on the job, the assignments given to crew members by the lead persons involved the simple switching of routine chores to facilitate completion of the work. Crew leaders made these routine decisions by using nothing more sophisticated than the assessment of crewmembers' personality styles and job preferences.[47] It was universally acknowledged that on the rare occasions when something unusual might transpire, the crew leaders were required to make immediate contact with their project managers for instructions. The evidence fails to establish that the crew leaders exercised any degree of judgment or discretion that would rise above the routine and clerical within the meaning of those concepts as defined in *Oakwood Healthcare* and *Croft Metals.*

G. Some Final Considerations

In his brief on remand, counsel for the Company raises two other issues that merit consideration. Quite understandably, in making his arguments, counsel refers to my own *Oakwood* remand case, *RCC Fabricators, Inc.,* 348 NLRB 920 (2006), on remand at 2007 WL 313431 (Div. of Judges, January 30, 2007). I will begin with a brief discussion of that case. In particular, I will assess counsel's two contentions, that the crew leaders possess supervisory powers of effective recommendation similar to the shop foremen in *RCC Fabricators* and that the crew leaders share a fundamental alignment with management in the same manner as those shop foremen.

The company involved in *RCC Fabricators* manufactured specialized equipment for the railroad and structural steel industries. It employed two shop foremen, each assigned to run one of these respective industrial operations. Unlike the crew leaders, these foremen spent a great deal of time directing their employees. In assigning work tasks to their staff, the foremen were required to address what I termed "critical issues of competence and safety" because the employees' assignments "ran the gamut from simple to complex, and even dangerous, duties." As a result, "the foremen applied a sophisticated analyti-

[47] Counsel for the Company argues that Williams chose the job duties of his laborers based on their "relative abilities." (R. Remand Br. at p. 16.) In fact, as counsel acknowledges, Williams testified that his only reason for making his choices was his assessment that one of the laborers was lazy and the other was not. This is a decision based on assessment of personality and temperament, not skill or aptitude.

cal process to match skills and abilities with work tasks and safety considerations." (Supplemental Decision, at pp. 14, 24, and 27.) I also noted that both foremen possessed "meaningful and powerful disciplinary authority." (Supp. Decision, at p. 19.) Because I determined that the shop foremen possessed the statutory powers to assign, effectively recommend assignment, discipline (including power to suspend, layoff, and discharge), and effectively recommend discipline, and exercised those powers through application of independent judgment, I found that they were excluded from the Act's coverage due to their supervisory status.

All of this stands in sharp contrast to the evidence regarding the very circumscribed authority possessed by the crew leaders in this case. For example, I stressed the important role that safety considerations played in the assignment decisions faced by the shop foremen. Crew leaders had no supervisory involvement in safety issues. The consensus of the testimony established that they lacked even the power to require the crew members to wear hard hats and safety vests. Crew Leader Williams provided a telling example of the manner in which safety issues were handled by the Company. He reported that a member of his crew complained to him about the lack of shoring in his excavations. Since the crew member responsible for swamping for the backhoe was required to climb into the excavations in order to dig for hidden utilities, this posed a potential risk of injury. Williams testified that he merely reported the problem to the project manager who told him, "we don't have time to do that. Just dig the hole and be careful." (Tr. 733–734.)

The situation regarding effective recommendations is similar. I have already assessed the absence of evidence demonstrating that crew leaders could make recommendations that were effective within the meaning of the Board's precedents. On the other hand, in *RCC Fabricators,* I noted that the shop foremen had "obvious" powers in this regard, citing an instance where a foreman and a misbehaving employee reported to their superintendent. The foreman told the superintendent that he was sick of the employee's bad attitude. The employee testified that, immediately thereafter, the superintendent "looked at me and said they no longer needed my services." (Sup. Decision, at p. 30.) This is a far cry from the hit-or-miss results of crew leader complaints about their crew members. In sum, while I fully recognize my duty to apply consistent standards of analysis in the cases that I am called on to adjudicate, this has lead to widely different outcomes here because of the large and crucial factual dissimilarities.

Finally, in *RCC Fabricators,* I expressed the belief that it was worthwhile to step back from the detailed factual inquiry to ponder the most basic question involved in the analysis of supervisory status. I noted that, in *Oakwood Healthcare,* supra at 692, the Board drew attention to the fact that the "heart" of the rationale for the statutory exclusion of supervisors was to ensure that a collective-bargaining unit did not include employees, "whose fundamental alignment is with management." In considering this overarching question, I concluded that the shop foremen's powers and responsibilities required that they act with undivided loyalty toward higher management. As a result, they lacked the necessary community of interest with members of the bargaining unit.

Counsel for the Company urges me to make a similar analysis here. I agree that such an analysis remains appropriate. For all the reasons I have discussed in detail in this decision, I conclude that the result of such an assessment must be to find that these crew leaders are not aligned with management. Rather, their interests lie with their fellow crew members. Long ago, in *Stop & Shop Cos. v. NLRB,* 548 F.2d 17, 19 (1st Cir. 1977), an appellate court observed that, apart from "looking mechanically at the facts," it was important "to have in mind the reason for excluding supervisory employees from the bargaining process." The court went on to explain:

> The reason for excluding supervisors is that they must be representatives of their employer vis-à-vis other employees. An employee who can discharge other employees, or direct them in matters involving judgment, has a duty to put his employer's interest over the interests of subordinates.
>
> The mere fact that an employee may give some instructions to others, or that he may command their respect, does not indicate that he must identify with the interests of the employer rather than the employees. The test must be the significance of his judgments and directions. It is precisely for this reason that the question of the effectiveness of the alleged supervisor's authority must normally be a question of fact. To put the issue in homely terms, do the other employees feel, assuming the alleged supervisor is one who reasonably respects his duties, "Here comes that so-and-so, get to work," or is he, basically, but one of the gang who merely gives routine instructions? [Citations omitted.]

After digesting thousands of pages of testimony regarding the day-to-day life of the leaders and members of the Company's work crews, I am left with the firm conviction that crew leaders are not vested with the type and degree of supervisory authority that would deprive them of the Act's protection. Applying the court's "homely," but nevertheless apt, methodology, I find that a crew leader for this employer is merely one of the gang, entitled to the right to bargain collectively with fellow members of the crew.

CONCLUSION OF LAW

The Company's crew leaders, Matt Bridges, Jeremy Farris, Rodney Hanephin, Jason Lohman, Nathan Schaffer, John Shipp, Matt Sutton, and Adam Williams, are not supervisors within the meaning of Section 2(11) of the Act.

REMEDY

Judge Schlesinger, having found that the Company engaged in unfair labor practices, recommended a variety of remedies, including such traditional measures as a make-whole remedy for the unlawfully discharged employees, reinstatement, and expungement of their records.[48] In addition, he recommended

[48] The make-whole remedy includes reinstatement for all discharged employees, except for Ryan Adams and Clarence Williams, who have previously been recalled. It also provides that the remedy for any loss

imposition of two extraordinary remedies, a broad cease-and-desist order and a *Gissel* bargaining order.

I note that the Board's standards for assessment of the appropriateness of the proposed extraordinary remedies have continued to evolve since Judge Schlesinger's decision. Interestingly, recent cases demonstrate that the Board finds these remedies to be particularly appropriate as relief for the harm caused to employees' rights under the Act through the commission of the types of unlawful conduct engaged in by this employer in its response to an organizing effort. For example, in *Five Star Mfg.,* 348 NLRB 1301 (2006), the Board amended the judge's proposed remedy by adding a broad order. In that case, the company's response to an organizing campaign began with its president warning that the employees were "finding themselves a way out of there." Supra at 1301. This was followed by a number of unlawful measures, culminating in the discharge of a union supporter. Although the company had no prior history of violations, the Board held that a broad remedy was required because "the serious and wide-ranging nature of the Respondent's violations . . . demonstrates a general disregard for its employees' Section 7 rights." Supra at 1302. Applying this example, it is evident that a broad order remains an appropriate response to the unlawful conduct committed in this case.

With regard to the recommendation for a bargaining order, I note that, on July 10, 2007, the Company filed a Motion to Reopen the Record to Receive Evidence Regarding the Continuing Validity of the Bargaining Order in Light of the Changed Circumstances. The General Counsel and the Union have filed oppositions to this motion.

I must observe that, procedurally, this motion is both too early and too late.[49] It is tardy because it has been filed more than 6 months after the deadline for such filings established in this case. It will be recalled that Judge Miserendino issued a show cause order dated November 21, 2006, addressing the entire question of reopening of the record. He reported that the Company "asserted that the record needed to be reopened to obtain evidence," and afforded the Company until December 22, 2006, to submit an explanation justifying reopening, including the identification of any gaps in the record that needed supplementation. (Show Cause Order, p. 1.) On December 22, 2006, the Company filed its Suggestions in Support of a Limited Re-Opening of the Record in Response to the Show Cause Order. Nowhere in that document did counsel for the Company raise any issue regarding the need for additional evidence on the issue of the continuing propriety of Judge Schlesinger's recommended bargaining order.

In the Company's second motion to reopen filed over 6 months later, the Company now contends that the record should be reopened to admit affidavits from management officials addressing the turnover in employees and managers since Judge Schlesinger's original decision. Nowhere in the motion is any explanation provided for the failure to raise this issue within the time period provided in Judge Miserendino's show cause order. Review of the affidavits and the motion itself demonstrates that the proffered new evidence was clearly available prior to December 22, 2006. Absent any explanation for the very tardy submission of this new request, I conclude that it is untimely.[50]

In addition, counsel's request for reconsideration of the proposed bargaining order is premature. Counsel's fundamental premise underlying his request for reconsideration of the bargaining order is his contention that there is "overwhelming authority that the relevant time to consider the appropriateness of a bargaining order is *at the time the order is issued,* as opposed to the time that the violation occurred." [Italics in the original. Citations omitted.] (R. Motion to Reopen, at p. 3.) This formulation glosses over a very thorny area of contention between the Board and many circuit courts. Left to its own policy judgment, the Board's position has been clear and consistent. It was well summarized in *Garvey Marine, Inc.,* 328 NLRB 991, 995 (1999), enfd. 245 F.3d 819 (D.C. Cir. 2001):

> The Board traditionally does not consider turnover among bargaining unit employees in determining whether a bargaining order is appropriate, but rather assesses the appropriateness of this remedy at the time the unfair labor practices were committed. Otherwise, the employer that has committed unfair labor practices of sufficient gravity to warrant the issuance of a bargaining order would be allowed to benefit from the effects of its wrongdoing. These effects include the delays inherent in the litigation process as well as employee turnover, some of which may occur as a direct result of the unlawful conduct. Thus, the employer would be rewarded for, or at a minimum, relieved of the remedial consequences of, its statutory violations. Such a result would permit employers, particularly in businesses like the Respondent's that experience significant turnover in normal circumstances, to disregard the requirements of the Act with impunity, with little expectation of incurring the legal consequences of their violations. In addition, the Board has noted that a bargaining order's impact on employee free choice is limited, because employees remain free to reject their bargaining representative after a reasonable period of time. [Citations omitted.]

Numerous circuit courts, most notably the District of Columbia Circuit, have taken strong issue with this viewpoint. See, for example, *Cogburn Health Center v. NLRB,* 437 F.3d 1266, 1273 (D.C. Cir. 2006) ("we have made it clear that the Board must consider the appropriateness of a bargaining order

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of earnings and benefits shall be computed on a quarterly basis from the date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[49] As a preliminary matter, both the General Counsel and the Union contend that I lack authorization to consider this motion because it falls outside the scope of the remand order. While it is true that the primary intent of the remand was to consider the impact of the *Oakwood* decisions, the Board's Remand Order goes beyond this limited purpose. It directs me to resolve credibility issues, make findings of fact, and most significantly, issue a recommended order. As a result, I conclude that I am authorized to address the issue raised in the Company's second motion to reopen the record.

[50] The Board adheres to strict standards regarding acceptance of untimely filed motions. See *Elevator Constructors Local 2,* 337 NLRB 426 (2002).

at the time the order is issued.") (Italics in the original.) As a result, in cases where the Board concludes that a bargaining order would appear to be unenforceable in circuit court, it has proceeded to direct an election so as to avoid litigation delays arising from a remedial quest that would prove to be futile in any event. See, for example, *Wallace International de Puerto Rico, Inc.,* 328 NLRB 29 (1999); *Cooper Industries*, 328 NLRB 145 (1999), rev. denied sub. nom. *Steelworkers v. NLRB.,* 8 Fed. Appx. 610 (9th Cir. 2001); and *Audubon Regional Medical Center*, 331 NLRB 374 (2000). However, the fact that the Board bows to appellate authority does not demonstrate that it has changed its views. To the contrary, recently the Board quoted the lengthy passage from *Garvey Marine* cited above as continuing to represent its position.[51] See *California Gas Transport, Inc.,* 347 NLRB 1314, 1325 (2006).

This dispute between the Board and some appellate courts, while generating instances of particularly heated judicial commentary, is simply an aspect of a perennial issue in administrative law.[52] In Section 10(c) of the Act, Congress charged the Board with the responsibility for the delineation of appropriate remedial measures for unfair labor practices, including the power to require "such affirmative action . . . as will effectuate the policies of this Act." The Supreme Court has observed that it has, "repeatedly interpreted this statutory command as vesting in the Board the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject to only limited judicial review." [Citations omitted.] *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 897 (1984). The Board's nationwide responsibilities in this area make for an uneasy fit with the appellate responsibilities of the various circuit courts for oversight within their geographical and jurisdictional boundaries.

There has been a tendency among some appellate judges to misperceive the nature of the Board's response to this inherent institutional tension. For example, in *Cogburn Health Center, Inc. v. NLRB,* 437 F.3d 1266, 1275 (D.C. Cir. 2006), the Board is accused of having "flouted" the law of the circuit. This followed an earlier decision accusing the Board of "inexplicably" defying the law of the circuit. *Douglas Foods v. NLRB,* 251 F.3d 1056, 1067 (D.C. Cir. 2001). Frankly, it is puzzling that these authorities fail to express any empathy for the Board's genuine jurisprudential dilemma presented by these differences in geographical and jurisdictional scope. While appellate judges may understandably be displeased by the Board's course of action, I do not see how they can find it inexplicable or contumacious.

Respectfully, I think it worthwhile to consider a pertinent hypothetical example. If an employer located in California engages in egregious unfair labor practices to thwart a union organizing effort, and the Board determines that a bargaining order is appropriate, it must then decide whether to consider any changed circumstances. Circuit law in California is very clear on this issue. The Ninth Circuit has held that it will draw a "wall of authority upholding the policy of deterring employers' delay tactics" by finding changed circumstances to be irrelevant to the determination of whether to issue a bargaining order. (Internal quotation marks omitted.) *NLRB v. Bakers of Paris, Inc.,* 929 F.2d 1427, 1438 (9th Cir. 1991).[53] Thus, if the Board were to ignore its own precedents and consider a claim of changed circumstances, it would run afoul of the law of that judicial circuit.

On the other hand, if the Board decided to honor its precedents by refusing to consider a claim of changed circumstances, it would run afoul of the holdings of the District of Columbia Circuit. This is significant since my hypothetical litigants are authorized to seek relief in either the Ninth or the District of Columbia Circuits. See 29 U.S.C. § 160(f). Thus, the Board would be aware that its ruling may be appealed by either party in courts that have already expressed strong disagreement with each other.[54] In such circumstances, it strikes me that the only responsible course is to do what the Board has done, enter an order which it believes is fair, just, and consistent with its statutory responsibilities for the formulation of the nation's labor law policies. Having taken such actions, it is, nevertheless, clear that the Board has scrupulously complied with any resulting remand orders directing it to assess changed circumstances. See, for example, *Impact Industries,* 293 NLRB 794, 795 (1989) ("we are bound by the court's rationale"); and *Research Federal Credit Union,* 327 NLRB 1051, 1052 (1999) ("we are constrained to give substantial weight to the court's criteria . . . on remand").

I recognize that I have digressed into an area that, in the parlance of the Government, is above my pay grade. Returning to the case at hand, whatever the considerations affecting the Board and the appellate courts, my duty is crystal clear. Thus, the Board's judges have been reminded that,

> [i]t has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme

[51] In his motion, counsel for the Company contends, citing *Abramson, LLC,* 345 NLRB 171 (2005), that Chairman Battista and Member Schaumber have stated that they disagreed with the Board's refusal to consider the passage of time in determining whether to impose bargaining orders. As to the Chairman, this is accurate. However, Member Schaumber simply observed that the passage of time had rendered the "enforceability," of a bargaining order "problematical." He did not express any disagreement with the Board's ongoing standard.

[52] For example, see 20 C.F.R. § 404.985, a Social Security Administration regulation that sets forth the circumstances under which that agency will acquiesce in a circuit court holding that differs from its own interpretation of the statute. Interestingly, among the reasons cited for a refusal to fully acquiesce is, "[s]ubsequent circuit court precedent in other circuits [that] supports our interpretation of the Social Security Act or regulations on the issue(s) in question." 20 C.F.R. § 404.985(c)(1)(iii).

[53] The Ninth Circuit has just reiterated its position, noting that, "in our court changed circumstances during intervals of adjudication have been held irrelevant to the adjudication of enforcement proceedings." [Internal quotation marks and citations omitted.] *East Bay Automotive Council v. NLRB,* 483 F.3d 628, 634 (9th Cir. 2007).

[54] While I am speaking hypothetically, the situation is entirely real. For an instance of a union appealing the Board's decision to consider changed circumstances due to concern that a bargaining order would be otherwise unenforceable, see *Steelworkers v. NLRB,* 8 Fed. Appx. 610 (9th Cir. 2001).

> Court of the United States has ruled otherwise . . . [I]t remains the [judge's] duty to apply established Board precedent which the Supreme Court has not reversed. Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved. [Citations omitted.] [*Pathmark Stores, Inc.,* 342 NLRB 378 at fn. 1 (2004).]

Counsel for the Company's motion seeks relief from the proposed bargaining order based on changes in the composition of the employer's work force and management team since the trial of this matter in 2003. The Board's rule, based on consideration of labor law policy concerns involving effective enforcement of the Act, is to decline to consider such changed circumstances in determining whether to impose a bargaining order. *California Gas Transport, Inc.,* supra at 1325, citing *Garvey Marine*, supra. As a result, I cannot grant the relief being sought.

While I am precluded from considering the relief being sought due to the tardiness of the request and my inability to deviate from Board precedent, I am still mindful that the Board's remand order requires me to propose an appropriate remedial order. As a result, I will apply the Board's standards for assessment of the propriety of a bargaining order in this case. Those standards and their applicability to this case were comprehensively discussed by Judge Schlesinger.[55] I fully agree with his analysis of the Union's proof of majority status, the outrageous and pervasive nature of the Company's hallmark violations of the Act, and the dramatic effect of the misconduct on the bargaining unit with the resulting drastic diminution of support for the Union. As Judge Schlesinger concluded:

> The granting of a normal cease-and-desist order will not erase the significantly pervasive and lasting deleterious impact of Respondent's unfair labor practices. The possibility of holding of a fair election is improbable. I will recommend that a *Gissel* bargaining order issue.

ADB Utility Contractors, Inc., supra at 914. I join in this recommendation.

As I have previously noted, sometimes the Board considers whether to forego a bargaining order because changed circumstances render such an order unenforceable in the circuit courts. The relevant circuit courts in this case do require consideration of changed circumstances. See the D.C. Circuit precedents already discussed, and *NLRB v. Cell Agricultural Mfg. Co.,* 41 F.3d 389 (8th Cir. 1994). Obviously, as in the motion it filed before me, the Company will raise this argument, citing the considerations of turnover in both the work force and management ranks and the passage of time. If the Board should assess this case as one where the issue should be addressed due to circuit law, I recommend that a bargaining order be issued despite any changed circumstances.

The record in this case does reflect that the primary management official responsible for many violations, Eirvin, left the Company's employ during the course of the trial of this case. However, the evidence shows that his departure was not reflective of any change in management's labor relations policies. The Company's owner, Keeley, testified that Eirvin left the Company by "mutual agreement." (Tr. 3089.) At the same time, Eirvin purchased Keeley's share of another company that they both had owned. Most importantly, the evidence demonstrates that, while Eirvin was the most visible official in the employer's antiunion effort, his behavior was entirely consistent with the desires and attitudes of the owner, Keeley. Project Manager Nanney testified regarding Keeley's attitudes. He reported that Keeley spoke at management meetings, advising that he would "help" prounion employees to find work at other companies. (Tr. 1160.) Counsel for the General Counsel probed Nanney as to Keeley's attitude:

> COUNSEL: Okay, so the way Rusty [Keeley] feels about the Union is, if you wanted the Union, work elsewhere; correct?
>
> NANNEY: Yes.
>
> COUNSEL: So he doesn't want anyone pro-Union working at ADB; correct?
>
> NANNEY: He has never came out and said it, but. . . .
>
> COUNSEL: Is that what you thought he meant?
>
> NANNEY: Yes.

(Tr. 1160.) Later, Nanney confirmed that Keeley and Eirvin were the number one and number two persons in the Company. Counsel then asserted that this meant that the number one and two managers "did not want Union employees working at ADB," and Nanney responded that this was "[c]orrect." (Tr. 1163.)

This case is different from cases where a complete change of management has been found to be a material factor when considering a bargaining order. See *Impact Industries,* 293 NLRB 794 (1989) ("Respondent was under new management unre-

[55] Judge Schlesinger did not explicitly state whether he concluded that the employer's conduct met the standards of the first category of *Gissel* violations, those that involve outrageous and pervasive unfair labor practices, or the second category consisting of less severe cases that nevertheless have a tendency to undermine the electoral process. *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 613–615 (1969). This is a close question. While the employer did not fire the entire unit in response to organizing activity, it certainly chose a course of action marked by outrageous and pervasive misconduct. In particular, it went beyond the run-of-the-mill discriminatory discharge of union supporters. By this I mean that this employer did not merely seize on some actual employee misbehavior as a pretext designed to justify an unlawful discharge. Instead, the Company's management chose to trump up fictitious allegations of employee misconduct, bolster those fabrications with phony paperwork inserted into the personnel files, and present this toxic concoction to the Board as evidence in support of the terminations. The impact of this depraved behavior on the Company's work force must have been, and must continue to be, enormous. No reasonable person would run the risk of suffering consequences that potentially include a falsified documentary record of work-related misconduct that could certainly impact one's efforts to find new employment after having been wrongfully fired. While not identical to the circumstances in cases deemed to fall within the first category by the Board, I find this case to lie within that range of severity. For comparison, see *Power, Inc.,* 311 NLRB 599 (1993), enfd. 40 F.3d 409 (D.C. Cir. 1994), and *National Steel Supply,* 344 NLRB 973 (2005), enfd. 207 Fed. Appx. 9 (2d Cir. 2006). If the Board deems this to be a so-called category I case, there is no requirement for detailed additional analysis of the need for a bargaining order. See the Board's discussion of circuit law on this point in *National Steel Supply,* infra at 977 fn. 15.

lated to the original owners"), and *Audubon Regional Medical Center,* 331 NLRB 374, 377 (2000) ("none of the supervisory or managerial employees who perpetrated the unfair labor practices is still employed by Audubon or is still associated with Audubon in any capacity"). The situation in this company is the same as when it was assessed by trial counsel for the Company in this manner: "Mr. Keeley is the chief executive officer of this company. So, as such, he is in charge of everything. The buck stops with him." (Tr. 3095.) As a result, any management turnover does not mitigate the likelihood of continuing coercion of employees.[56]

It may well be that, as asserted by counsel for the Company, there has been very substantial turnover in the work force. Of course, this turnover will be reduced by virtue of the orders of reinstatement for a substantial number of wrongfully discharged employees. As the Board has observed, "Respondent's reliance on employee departures . . . is partially offset by our remedial order directing the reinstatement of employees . . . whom it had unlawfully terminated." *California Gas Transport, Inc.,* supra at fn. 34. As the Board has also noted, such reinstated employees "would not likely risk the recurrence of a long period of unemployment by engaging in further attempts to improve their working conditions, in the absence of a bargaining order." *Cassis Management Corp.,* 323 NLRB 456, 460 (1997), enfd. 152 F.3d 917 (2d Cir. 1998), cert. denied 525 U.S. 983 (1998).

Beyond the ongoing impact on those employees who were present during the course of unlawful conduct, the Company's behavior will resonate in other ways. As the Board has explained:

> [N]ew employees may well be affected by the continuing influence of the Respondent's past unfair labor practices. As the Fifth Circuit has recognized, "Practices may live on in the lore of the shop and continue to repress employee sentiment long after most, or even all, original participants have departed." . . . [T]he Respondent's violations are precisely the types of unfair labor practices that endure in the memories of those employed at the time and are most likely to be described in cautionary tales to later hires. [Footnote omitted.] [*Garvey Marine, Inc.,* supra at 996.]

I cannot but imagine that any new employee who inquired of a veteran coworker about union activity would be told the story of Crew Leader Lohman's victimization through use of phony customer complaints and falsified documents. Furthermore, one can readily visualize such a new employee being shown the Company's so-called "Agenda," a document filled with expressions of unlawful animus, including the promise that management would spend $100,000 to fight the Union, adding that "[t]his is part of your bonus money[.]" (GC Exh. 23, p. 2.) In fact, the record reveals that the Company is well aware of the coercive impact of its past attitudes and responses to union activity. Eirvin began his speech to the work force regarding the organizing campaign that is the subject of this case by noting that, "I'm getting pretty good at this one—this is my fifth attempt at the same subject." (GC Exh. 37, p. 1.) I conclude that the persistent effects of the severe misconduct in this case cannot be dissipated through turnover in the work force. As the Board has colorfully explained, sometimes an employer's conduct is "so pervasive as to have created a corporate culture of lawlessness" that leads to "a legacy of hostility that will pervade the atmosphere" with a resulting impact that "may grow to legendary proportions." *Aldworth Co.,* 338 NLRB 137, 151–152 (2002), enfd. 363 F.3d 437 (D.C. Cir. 2004). This is such a case.

Finally, I note that the passage of time, while regrettable, is not extraordinary. Thus, the Seventh Circuit observed that similar delay represented an "ordinary institutional time lapse . . . inherent in the legal process." *NLRB v. Intersweet, Inc.,* 125 F.3d 1064, 1068 (7th Cir. 1997). Citing this language, the Board has held that a similar delay "does not approach the time found to render the *Gissel* orders stale." *Garvey Marine, Inc.,* supra at 997. See also *Evergreen America Corp.,* supra at 189 (Board notes that the courts have enforced bargaining orders involving comparable time periods.) Beyond this, the effect of the passage of time must be weighed against the seriousness of the misconduct. In this case, that analysis indicates that much more time must elapse before the work force can be freed from the burden of oppression created by this employer's behavior.[57]

The Company's behavior in this case bears a strong resemblance to the course of unlawful conduct found to require a bargaining order in *California Gas Transport, Inc.,* supra. As in this case, that employer began a pattern of violations as an immediate response to an organizing campaign. This culminated in the commission of numerous hallmark violations of the

[56] In addition, I note that the Company does not argue that it has taken steps to repudiate its unlawful activities. The Board has found this to be a relevant consideration, holding that, where an employer "has presented no evidence showing a new willingness to allow its employees to freely exercise their rights," a bargaining order remains appropriate despite other evidence of changed circumstances. *California Gas Transport, Inc.,* supra at 1326.

[57] It is this psychological burden that is the key rationale underlying the bargaining order remedy. Counsel for the Company cites an eloquent denunciation of bargaining orders in a concurring opinion by Judge Sentelle in *Exxel/Atmos, Inc.,* 147 F.3d 972, 978–979 (D.C. Cir. 1998), cert. denied 525 U.S. 1067 (1999). The author contends that it is undemocratic for an administrative agency to impose a result on a body of voters simply because that agency believes that the voters have been "deceived" due to "fraud" perpetrated by a party to that election. 147 F.3d at 979. The difficulty with this argument is that it misidentifies the remedial problem that bargaining orders are designed to redress. Based on my experience as a labor law judge, I certainly agree with Judge Sentelle that the typical American worker is well capable of deciding what is in his or her enlightened self-interest, both economic and personal. However, it is not the misleading effects of deceit that are the issue, it is coercion and intimidation. Employees who may readily be able to determine what they perceive to be in their best interest, nevertheless, cannot reasonably be expected to vote consistently with that determination when faced with the threat of employer misconduct of the scope and nature involved here. As the Supreme Court noted in *Gissel*, representation elections are different from political contests because of the "economic dependence of the employees on their employers." *Gissel*, supra at 617. The bargaining order is a measured response to bullying and intimidation. By effectuating the last uncoerced expression of the employees' opinions, it addresses the consequences of the employer's misconduct without undue impact on the Sec. 7 rights of the work force.

Act, including the unlawful discharge of 11 employees. Based on the employer's "calculated and systematic campaign to frustrate and suppress the Section 7 activities of its employees," the Board imposed a bargaining order. Supra at 1323. In this case, the Company engaged in at least an equivalent degree of misconduct, including discharges of union supporters using falsified evidence, threats of futility, threats of plant closure, threats of reduction of bonus payments, threats of increased subcontracting of work, threats of loss of benefits, unlawful interrogations, and the creation of an unlawful impression of surveillance of employees' protected activities. These measures were designed to intimidate and coerce employees in the free expression of their will regarding whether to organize collectively.

Finally, I note that the bargaining order remedy, while not an ideal solution to the difficult problem presented, is the best available measure to effectuate the Act's objectives. It will implement the collective will of the majority of the work force as expressed in the only uncoerced manner available in this case. I recognize that the desires of some portion of the work force may be frustrated by this action. In the first instance, it must be recognized that this is the virtually inevitable result of any democratic process. Beyond that, it is important to acknowledge the limited nature of the bargaining order. As the Supreme Court observed in *Gissel*, supra at 613, "there is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a decertification petition." The Union's status as bargaining representative is only inviolate for a limited and specified period of time.[58] As is always the case with a newly-certified union, the initiation of collective bargaining is very much of an experiment and a great range of possible outcomes exists. Continuing to act in their own uncoerced best interests, the Company's employees will determine the future role of the Union as their representative.

In sum, I conclude that nothing in the Board's evolving precedents indicates any need to alter Judge Schlesinger's findings of fact, conclusions of law, or recommended remedial measures. For ease of reference, I will copy his proposed order and notice below.[59] In so doing, I have amended them to reflect the Company's correct corporate name and have added a provision addressing the Company's second motion to reopen the record.

ORDER

The Respondent, American Directional Boring, Inc., d/b/a ADB Utility Contractors, Inc., of St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression among its employees that their union activities are under surveillance.

(b) Impliedly threatening its employees with termination if they select Local 2, International Brotherhood of Electrical Workers, AFL–CIO (the Union) as their collective-bargaining representative.

(c) Threatening its employees that it is futile to select the Union as their collective-bargaining representative.

(d) Threatening or impliedly threatening its employees with closure of its St. Louis facility if its employees select the Union as their collective-bargaining representative.

(e) Soliciting its employees who support the Union to quit their employment.

(f) Impliedly threatening its employees with discipline for wearing pins demonstrating support for the Union.

(g) Impliedly threatening its employees that selecting the Union as their collective-bargaining representative would result in the reduction or loss of their bonus and loss of their employment.

(h) Threatening its employees that selecting the Union as their collective-bargaining representative would result in the loss of their employment, insurance, and retirement plan.

(i) Threatening to subcontract more work if its employees select the Union as their collective-bargaining representative.

(j) Interrogating its employees about their union activities and threatening its employees with unspecified reprisals because of their union activities.

(k) Discharging its employees because of their union activities or sympathies and in order to discourage their membership in the Union or any other labor organization.

(l) Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the unit set forth below.

(m) In any other manner interfering with, restraining, or coercing its 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) On request, bargain with the Union as the exclusive representative of its employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All employees employed by American Directional Boring, Inc., d/b/a ADB Utility Contractors, Inc., at its St. Louis, Missouri facility, EXCLUDING project managers, office clerical,

[58] Indeed, the regulatory process involved in this area is one of the most effective aspects of the bargaining order remedy for this case. If the Company wishes to ensure that conditions exist that would permit its employees the opportunity to revisit the question of union representation through the Board's electoral processes, it must refrain from the commission of unfair labor practices so as to enable the period of uncontestable certification to run. This provides a powerful incentive for the Company to conform its conduct to the requirements of the law. See *Lee Lumber & Building Material Corp.,* 322 NLRB 175, 177 (1996) (*Lee Lumber II*), enfd. in pertinent part and remanded in part 117 F.3d 1454 (D.C. Cir. 1997) (lawful withdrawal of recognition can only occur in a context free of unfair labor practices likely to cause employee disaffection with the union).

[59] To the extent that my duplication of this order and notice language may suggest that I endorse all of the findings and recommendations made by Judge Schlesinger, I embrace that implication wholeheartedly. I conclude that it is appropriate to note this since the Board's Order directed the judge on remand to set forth an appropriate recommended order. *ADB Utility Contractors, Inc.,* supra at 895. Judge Schlesinger's order remains the appropriate recommendation.

managerial, professional employees, over-the-road truck driver, guards and supervisors as defined in the Act.

(b) Within 14 days from the date of the Board's Order, offer Jeremy Farris, Edgar Schreit, Nathan Schaffer, Rodney Hanephin, Matt Sutton, Jason Lohman, Adam Williams, Matt Bridges, Steve Mack, John Shipp, and Wayne Schaffer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges enjoyed.

(c) Make Jeremy Farris, Edgar Schreit, Nathan Schaffer, Rodney Hanephin, Matt Sutton, Ryan Adams, Clarence Williams, Jason Lohman, Adam Williams, Matt Bridges, Steve Mack, John Shipp, and Wayne Schaffer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges of Jeremy Farris, Edgar Schreit, Nathan Schaffer, Rodney Hanephin, Matt Sutton, Ryan Adams, Clarence Williams, Jason Lohman, Adam Williams, Matt Bridges, Steve Mack, John Shipp, and Wayne Schaffer, and within 3 days thereafter notify these employees in writing that this has been done and that the discharges will not be used against them in any way.

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

(f) Within 14 days after service by the Region, post at its facility in St. Louis, Missouri, copies of the attached notice marked "Appendix."[60] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 15, 2003.

(g) 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 Respondent has taken to comply.

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

IT IS ALSO ORDERED that the portions of the record that were placed under seal will continue to be maintained under seal.

IT IS FURTHER ORDERED that the Company's Motion to Reopen the Record to Receive Evidence Regarding the Continuing Validity of the Bargaining Order in Light of the Changed Circumstances, filed on July 10, 2007, is denied.

Dated, Washington, D.C., August 23, 2007.

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 create the impression among our employees that their union activities are under surveillance.

WE WILL NOT impliedly threaten our employees with termination if they select Local 2, International Brotherhood of Electrical Workers, AFL–CIO (the Union) as their collective-bargaining representative.

WE WILL NOT threaten our employees that it is futile to select the Union as their collective-bargaining representative.

WE WILL NOT threaten or impliedly threaten our employees with closure of our St. Louis facility if our employees select the Union as their collective-bargaining representative.

WE WILL NOT solicit our employees who support the Union to quit their employment.

WE WILL NOT impliedly threaten our employees with discipline for wearing pins demonstrating support for the Union.

WE WILL NOT impliedly threaten our employees that selecting the Union as their collective-bargaining representative would result in the reduction or loss of their bonus and loss of their employment.

WE WILL NOT threaten our employees that selecting the Union as their collective-bargaining representative would result in the loss of their employment, insurance, and retirement plan.

WE WILL NOT threaten to subcontract more work if our employees select the Union as their collective-bargaining representative.

WE WILL NOT interrogate our employees about their union activities and threaten our employees with unspecified reprisals because of their union activities.

WE WILL NOT discharge our employees because of their union activities or sympathies and in order to discourage their membership in the Union or any other labor organization.

WE WILL NOT refuse to recognize and bargain with the Union as the exclusive collective-bargaining representative of our employees in the unit set forth below.

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

WE WILL on request, bargain with the Union as the exclusive representative of our employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All employees employed by American Directional Boring, Inc., d/b/a ADB Utility Contractors, Inc., at its St. Louis, Missouri facility, EXCLUDING project managers, office clerical, managerial, professional employees, over-the-road truck driver, guards and supervisors as defined in the Act.

WE WILL within 14 days from the date of the Board's Order, offer Jeremy Farris, Edgar Schreit, Nathan Schaffer, Rodney Hanephin, Matt Sutton, Jason Lohman, Adam Williams, Matt Bridges, Steve Mack, John Shipp, and Wayne Schaffer full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Jeremy Farris, Edgar Schreit, Nathan Schaffer, Rodney Hanephin, Matt Sutton, Ryan Adams, Clarence Williams, Jason Lohman, Adam Williams, Matt Bridges, Steve Mack, John Shipp, and Wayne Schaffer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Jeremy Farris, Edgar Schreit, Nathan Schaffer, Rodney Hanephin, Matt Sutton, Ryan Adams, Clarence Williams, Jason Lohman, Adam Williams, Matt Bridges, Steve Mack, John Shipp, and Wayne Schaffer, and within 3 days thereafter notify these employees in writing that this has been done and that the discharges will not be used against them in any way.

AMERICAN DIRECTIONAL BORING, INC., D/B/A ADB UTILITY CONTRACTORS, INC.