

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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No. 04-10942-H

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AIR 2, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,  
LOCAL NO. 222

Intervenor

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

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Air 2, LLC (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, a Decision and Order of the Board. The Board’s order issued

on January 30, 2004, and is reported at 341 NLRB No. 23 (D&O 1-16).<sup>1</sup>

International Brotherhood of Electrical Workers, Local No. 222 (“the Union”), has intervened on behalf of the Board.

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Court has jurisdiction over this unfair labor practice proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)); the Company has an office in Miami, Florida. The Court does not have jurisdiction over the representation election portion of the case. *See NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1422 n.2 (11th Cir. 1998) (Court “lack[s] jurisdiction in this appeal to review the Board’s decisions regarding representation matters”); *Custom Recovery, Div. of Keystone Resources, Inc. v. NLRB*, 597 F.2d 1041, 1046 (5th Cir. 1979) (“[I]t has been clear that Courts of Appeals do not have the power to review representation proceedings. And jurisdiction does not come into being because the

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<sup>1</sup> “D&O” refers to the Board’s Decision and Order, contained in the Record Excerpts at Tab C. “Tr” refers to the transcript of the hearing before the administrative law judge, contained in Volumes I and II of the record. “GCX” refers to exhibits offered at the hearing by the Board’s General Counsel. “RX” refers to exhibits offered at the hearing by the Company, respondent before the Board. All exhibits are contained in Volume III of the record. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

representation order arises out of a consolidated hearing as to which the Court of Appeals has jurisdiction to review the order concerning unfair labor practices.”).

The Company filed its petition for review on February 26, 2004. The Board filed its cross-application for enforcement on March 26. Both were timely; the Act places no time limit on the institution of proceedings to review or enforce Board orders. The Board’s order is final with respect to all parties under Section 10(e) and (f) of the Act.

#### STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board’s finding that the Company violated Section 8(a)(1) of the Act by making numerous threats, promises of benefits, and other unlawful statements in order to discourage employees from supporting and voting for the Union.

#### ORAL ARGUMENT STATEMENT

The Board believes that this case involves the application of well-settled principles to straightforward facts and that argument would therefore not be of material assistance to the Court. However, if the Court believes that argument is necessary, the Board requests that it be permitted to participate.

## STATEMENT OF THE CASE

This case was before the Board on unfair labor practice charges filed by the Union against the Company. After a mail-ballot representation election was held among the Company's employees, the Union timely filed objections to the election. The results of the election were unresolved due to challenges to certain voters' eligibility to vote, which would determine the outcome of the election.<sup>2</sup> After investigation, the Board's General Counsel issued an order consolidating for hearing the objections with a complaint, alleging that the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by discriminating against employees to discourage their union support, and by making numerous threats, promises of benefits, and other unlawful statements. (D&O 2-4; Vol III GCX 1(bb).)

Following a hearing, the administrative law judge issued his decision and recommended order, finding numerous violations of Section 8(a)(1), but dismissing the remaining complaint allegations. (D&O 2-16.) After the Company, Union, and General Counsel filed timely exceptions to the judge's findings and

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<sup>2</sup> The tally of ballots showed three votes for the Union, two against, with six challenged ballots. The parties stipulated that three of the challenged ballots were void, leaving three challenged ballots (Tracy Blackwell, Jeff Laslovich, and Marty Lyons). (D&O 2; Vol I Tr 17-20, Vol III GCX 3(d).)

conclusions, the Board issued its Decision and Order, affirming the judge's findings of fact and conclusions. (D&O 1-2.)

## STATEMENT OF FACTS

### I. THE BOARD'S FINDINGS OF FACT

#### A. Background; the Company's Business and Supervisory Organization

The Company provides power line services to electric utilities throughout the country. Its workforce was divided into two crews that traveled to jobsites and performed inspection, installation, or repair work on live electric transmission lines. The linemen worked from a platform on a helicopter or on the electric towers or poles after being dropped off by the helicopter. (D&O 4, 5; Vol I Tr 22-23, 47-48, 78, Vol II Tr 547, 686-89, Vol III RX 11.) In addition to journeyman and apprentice linemen, the crew also included a helicopter pilot and a mechanic. (D&O 4; Vol I Tr 44.) The crews traveled to the jobsites from their homes around the country and worked 20 days straight followed by 10 days off. (D&O 5; Vol I Tr 49.)

A crew leader headed each crew. Tracy Blackwell, Marty Lyons, and J.P. Flynn were crew leaders during the period relevant to this case. When other crews worked with Blackwell's crew, Blackwell was in charge of the combined crew. (D&O 4; Vol I Tr 242, 294.) The crew leader reported to Vice President Lou Woodward. Woodward visited each jobsite about once a month; otherwise, she

communicated with the crew leaders from her office near Beaumont, Texas. Her background was in sales and she has never performed line work. (D&O 4; Vol I Tr 39, 65, 118-19, Vol II Tr 646, 653-54.) Above Woodward was Company President Thomas McShane. He visited a jobsite about every 2 to 3 months. (D&O 6; Vol II 684, 727, Vol III GCX 48.)

Until October 2001, the Company employed a superintendent of linemen, Jeff Fleming, who was between Woodward and the crew leaders in the Company's hierarchy.<sup>3</sup> (D&O 4, 5; Vol III GCX 48.) After Fleming's termination, Blackwell took on some of his responsibilities. (D&O 4; Vol I Tr 358-59, 443-44.)

As crew leader, Blackwell was responsible for the day-to-day activities of the journeyman and apprentice linemen. He gave guidance to employees and explained to them what they were to do. When he observed them working unsafely, he told them to stop. Blackwell also checked on employees' work and told them if they had done something wrong. For example, when employees did not clean out the company trailer properly, he could tell them to do so. If Blackwell observed problems with an employee's performance, whether he notified Woodward depended on the task involved and how bad the problem was. (D&O 4; Vol I Tr 78-79, 91, 93, 182-83, 310, 361, Vol II 633.)

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<sup>3</sup> The parties stipulated that Fleming was a supervisor under the Act. (Vol II Tr 516.)

When a problem on a job arose, Blackwell handled it himself or notified Woodward, depending on the severity of the situation. He was not required to report problems to her, but advised her if fixing the problem added more hours to the job than previously allotted. He determined whether to advise Woodward of a problem based on his judgment of safety issues, the difficulty of the job, and how long it would take to rectify. (D&O 4; Vol I Tr 45-49.) Blackwell also communicated assignment changes and any other information from the office to the crew. The pilot and Blackwell determined when the crew quit work for the day and if the weather was too bad to continue working. (D&O 4; Vol I 60, 77-78.)

Blackwell transferred apprentices from job to job. He made transfer determinations based on his assessment of the match between the experience the apprentice had and what was needed for the job. (D&O 4; Vol I Tr 62-64, Vol II Tr 439-40.)

In the Company's hiring process, Blackwell performed a variety of functions. He visited technical or trade schools to recruit applicants. (D&O 4; Vol I Tr 164, 269-70, Vol II Tr 435, 651-52.) He also interviewed applicants and recommended several who were hired. In interviews, Blackwell asked applicants about their background, history, and work experience. He also asked some technical questions, although he generally assessed an applicant's knowledge from the general conversation. (D&O 4; Vol I Tr 88-89, 121-23.)

Of the four examples in the record, three of those applicants interviewed and recommended by Blackwell were hired. (D&O 4; Vol I 43, 60-62, 120-21.) For example, about a half-hour after Walt Stephens faxed his application to the company office, Blackwell called him to ask where he had worked before and what type of work Stephens had done. At the end of the call, Blackwell told Stephens he was “pretty well hired,” but would have to call him back. Fifteen to 30 minutes later, Woodward called Stephens and told him that, if he wanted the job, he was hired. (Vol I Tr 128-30, 201.)

Blackwell talked to Travis Trachta, another applicant, about working away from home and then told Trachta that someone would call him with flight information for when he could fly out to his first job. (Vol I Tr 132-33.) Further, former Superintendent Fleming authorized Blackwell to interview applicant Jeff Laslovich and hire him if he “sounded good” on the telephone. Blackwell did so and hired Laslovich. (Vol I Tr 111-12, 255-57.)

Blackwell also disciplined employees. For example, when an employee overslept and missed the start of his shift, Blackwell suspended him for the day without pay. Blackwell’s e-mail to Company Vice President Woodward documenting the incident was also placed in the employee’s file. Blackwell’s e-mail stated: “Lou, on 1-21-02 Tommy [McKenzie] did not show up for work on time. The crew proceeded on without him. He called me about 8:00 a.m. and said

he had overslept. I advised him that he had the rest of the day off without pay.”

(D&O 4; Vol III GCX 46.)

The Company paid Blackwell a salary. The journeymen and apprentices earned hourly wages. Blackwell was also offered stock options. (D&O 4; Vol I Tr 39, 78, Vol III GCX 6.) The Company described his duties in a disability claim as “performs service work, plus supervises others doing same.” (D&O 4; Vol III GCX 49.)

**B. The Employees Begin a Union Organizing Campaign; the Company Responds with Promises, Threats, and Interrogation**

In February 2001, the employees began a union organizing campaign by signing cards authorizing the Union to represent them. The campaign continued through the summer with union representatives speaking and meeting with employees. (D&O 5; Vol I Tr 351-54, Vol III GCX 5, 7, 10-18.) On October 23, a union member obtained a job at the Company in order to further the organizing. (D&O 5; Vol I Tr 83.) On the same day, the Union sent a letter to the Company seeking recognition as the collective-bargaining representative of the employees. The Company, however, had heard rumors of union organizing beforehand. (D&O 5; Vol II Tr 654-55, Vol III GCX 8.)

Two days later, on October 25, Company President McShane and Vice President Woodward traveled to a jobsite in Diboll, Texas, to speak with employees regarding the union campaign. They followed up with a similar

meeting the next day at another jobsite in Lake Charles, Louisiana. At both meetings, Woodward told employees that former Superintendent Fleming was supposed to have started an apprenticeship program, but that he had not done so. She told them that she would continue the project and the Company would implement an apprenticeship program. (D&O 5; Vol I Tr 133-35, 139, 175-76, 263, 317-19.) McShane told one employee that he did not need the Union to get his apprenticeship. (Vol I Tr 175.)

On November 1, the Union filed a petition with the Board seeking a representation election. (D&O 5; Vol III GCX 3(a).) The next day, two employees—Troy Smith and James Lake—who had previously left work claiming they were on strike, wrote to the Company requesting to return to work. Around that time, Blackwell received a call from either Smith or Lake stating that they wanted to return to work. Afterwards, he told employees about the call and that he would make Smith and Lake “sweat” before they found out if they could return to work. (D&O 14; Vol I 95-96, 145-48.)

Also in November, Blackwell told employees that they had to remove all stickers from their flight helmets. Previously, the employees, including Blackwell, had a variety of stickers on their helmets. After employee Stephens put a union sticker on his helmet, however, Blackwell told them to get all stickers off their helmets. (D&O 7-8; Vol I Tr 68-72, 164-66, 284-86.)

On November 16, Union Organizer Michael Muenks attended a barbecue at the home of one of the pilots in Jasper, Texas, at the invitation of one of the employees. Muenks and Blackwell got into a heated exchange over the union issue. Among other comments, Blackwell told the employees that the Company's pilots would refuse to fly with union linemen. (D&O 7; Vol I Tr 153-55, Vol II Tr 417-19, 480-82.)

On November 17 or 18, Muenks visited the jobsite in Jasper. Blackwell told the employees that he would buy a case of beer for someone to "whip Muenks' ass." (D&O 7; Vol I Tr 157-59, 178, 277-79.)

Sometime before the Thanksgiving break, Woodward visited the Jasper jobsite and held a meeting with employees regarding the apprenticeship program. She advised employees that the Company was getting the "ball rolling" and that they would get pay raises shortly. She provided them with a packet of information on what requirements they needed to meet to become journeymen linemen. (D&O 6, 11; Vol II 416-17.)

#### C. Employees Vote in the Election; the Company Asks Them How They Voted and Threatens Them for Voting in Favor of the Union

On November 20, ballots for the union election were mailed to employees' homes. The next day, they went home for Thanksgiving vacation. (D&O 6, 8; Vol II Tr 465-66, Vol III GCX 3(b).) When the employees returned on November 26, Blackwell asked them how they voted. (D&O 8; Vol I 82-83, 161-63.) Employee

Laslovich told Blackwell that he had voted for the Union. Blackwell replied that it was a long bus ride to Laslovich's home in Montana. (D&O 8; Vol I Tr 283-84.)

On December 11, the ballots were counted, but, as described above, the results were inconclusive due to challenges to some voters' eligibility. (D&O 2, 6; Vol III GCX 3(d).) In late December, the Company implemented its apprenticeship program and registered it with the Department of Labor. (D&O 6; Vol II Tr 564-65.)

## II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Battista and Members Liebman and Schaumber) found, in agreement with the administrative law judge, that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by making numerous threats, promises of benefits, and other unlawful statements in order to discourage employees' union support and to dissuade them from voting for union representation. (D&O 1.) The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). (D&O

15.) Affirmatively, the Board's order requires the Company to post and mail copies of a remedial notice to employees. (D&O 1, 15-16.)<sup>4</sup>

### SUMMARY OF ARGUMENT

Substantial evidence supports the Board's findings that the Company violated the Act by both promising employees benefits and threatening employees in order to discourage their support for the Union. First, the record amply supports the Board's finding that it was not until the Company learned about the Union that it took an active interest in implementing an apprenticeship program that the employees had long desired. Contrary to the Company's portrayal, it did not simply complete a program that was long in the making coincidentally at the time of the campaign. Instead, within 2 days of learning of the union demand for recognition, the Company's president and vice president hurried to jobsites to promote its program to employees as an alternative to the union program. The fact that previously it had assigned a supervisor to look into developing the program is immaterial, because it allowed that development to languish and accepted the

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<sup>4</sup> Regarding the three remaining challenged ballots, the Board, in agreement with the judge, determined that Blackwell's ballot should not be counted because he was a supervisor under the Act (discussed at length below); found Lyons' ballot was void due to concerns over its secrecy; and determined that Laslovich's ballot be opened and counted. (D&O 1, 11, 15.) Thus, Laslovich's ballot may affect the outcome of the election. Similarly, if the Court finds, contrary to the Board, that Blackwell was not a supervisor under the Act, his ballot could similarly affect the outcome of the election.

supervisor's lack of progress on the project until it needed to use the program as campaign propaganda.

Concurrently with its promise of the apprenticeship program to employees, Crew Leader Blackwell repeatedly threatened employees who expressed support for the Union. Indeed, the Company does not dispute that the statements were made or that they were otherwise unlawful. Instead, it contends that Blackwell was an employee not a supervisor, therefore excusing the Company from liability. Substantial evidence, however, supports the Board's finding that Blackwell was a supervisor under the Act, because he responsibly directed employees, effectively recommended hiring, disciplined employees, and transferred employees between crews.

Blackwell provided the only daily, on-site supervision for the employees. His immediate superior, Vice President Woodward, visited jobsites only about once per month and had no substantive electrical work experience or training. Blackwell also therefore was the only company official who interviewed employees who was able to assess applicants' ability to perform the work. Most of his recommended applicants were in fact hired. He also issued discipline to at least one employee. Finally, Blackwell himself testified that he transferred employees among crews. Thus, the Board's supervisory status finding was amply supported by the record evidence.

## ARGUMENT

## SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY MAKING NUMEROUS THREATS, PROMISES OF BENEFITS, AND OTHER UNLAWFUL STATEMENTS IN ORDER TO DISCOURAGE EMPLOYEES FROM SUPPORTING AND VOTING FOR THE UNION

## A. Introduction

In this case, the Company used both a carrot and a stick to dissuade employees from supporting and voting for the Union. First, knowing that the employees had long desired an apprenticeship program, the Company waited until it received the Union's demand for recognition as the employees' collective-bargaining representative before it actively worked on implementing that program. Two days after the Union's demand, the Company's president and vice president traveled to two separate jobsites to begin the Company's antiunion campaign. At those meetings, Vice President Woodward advised employees that the Company was reviving its long-dormant plans to implement an apprenticeship program. She reiterated that promise shortly before the election.

At the same time, Crew Leader Blackwell took a negative approach to the campaign by repeatedly threatening employees when they expressed support for the Union. In fact, Blackwell admitted making the statements. The Company's only defense therefore is that it is not liable for Blackwell's statements because he was an employee, not a supervisor, under the Act. The record evidence, including

testimony from Blackwell himself, however, showed that Blackwell was aligned with management and provided the Company's only regular oversight and direction of the crew. The Company also involved him heavily in its hiring process; he effectively recommended hires, particularly where he was the only person who could evaluate applicants' skills and ability to do the work. Further, he also disciplined and transferred employees based on his independent judgment.

B. The Company Unlawfully Promised Employees an Apprenticeship Program

1. Applicable Section 8(a)(1) principles and standard of review

An employer's conduct violates Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) if it has a reasonable tendency to coerce employees or interfere with their Section 7 (29 U.S.C. § 157) right "to form, join or assist labor organizations" and "to engage in other concerted activities." *NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1421 (11th Cir. 1998). As the Supreme Court and this Court have stated, in examining such violations, it is appropriate for the Board to consider "the economic dependence of the employees on their employers, and the necessary tendency of the former . . . to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Weather Tamer, Inc. v. NLRB*, 676 F.2d 483, 488 (11th Cir. 1982) (quoting *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617, 89 S.Ct. 1918, 1941 (1969)). The critical inquiry is what the employee reasonably could have inferred from the employer's

statements or actions, and not what the employer intended to imply. *NLRB v. Varo, Inc.*, 425 F.2d 293, 298 (5th Cir. 1970).

Specifically, an employer violates Section 8(a)(1) of the Act by announcing or granting additional benefits during an election campaign. *Wackenhut Corp. v. NLRB*, 666 F.2d 464, 466 (11th Cir. 1982) (announcement of new medical plan 2 weeks before election); *NLRB v. Big Three Indus. Equip. Co.*, 579 F.2d 304, 309 (5th Cir. 1978) (“subtle intimation of advancement for workers who rejected the union” was unlawful). The Supreme Court has aptly observed: “The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.” *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409, 84 S.Ct. 457, 460 (1964). *Accord Chromalloy Mining & Minerals Alaska Div., Chromalloy American Corp. v. NLRB*, 620 F.2d 1120, 1124 (5th Cir. 1980) (promise of training school).

The Board’s reasonable interpretation of the Act is entitled to affirmance. *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 398-99, 116 S.Ct. 1396, 1401 (1996). The findings of fact underlying the Board’s decision are “conclusive” if supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S.Ct.

456, 459 (1951); *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428 (11th Cir. 1985). Moreover, the Board's reasonable inferences drawn from the facts may not be displaced even if the Court might have reached a different conclusion had the matter been before it *de novo*. *Purolator Armored*, 764 F.2d at 1428. With regard to issues of credibility, this Court gives "special deference" to the administrative law judge's Board-affirmed credibility determinations, "which will not be disturbed unless they are inherently unreasonable or self-contradictory." *McClain of Georgia*, 138 F.3d at 1422.

2. When faced with the prospect of a union campaign, the Company unlawfully promised to fulfill the employees' longstanding wish for an apprenticeship program

It is undisputed that the employees had long sought an apprenticeship program. In March 2001, the Company directed former Superintendent Fleming to look into developing such a program. Months went by with little progress. Yet, within 2 days of receiving the Union's demand for recognition as the employees' bargaining representative, the Company sprung into action, with President McShane and Vice President Woodward traveling to Texas and Louisiana to meet with employees and tell them that the Company would provide an apprenticeship program. Indeed, McShane told one employee that he did not need the Union to get his apprenticeship. Then, shortly before the election, in late November,

Woodward reiterated that promise and provided the employees with more concrete information on the requirements to become a journeyman.

That course of events demonstrates that the Company kick-started its languishing development of an apprenticeship program only when it had evidence of the union campaign, fully cognizant that the program was something the employees previously had requested. The timing of the Company's announcements reveals that it sought to demonstrate to the employees that the Union, with its own apprenticeship program, was unnecessary. While the Company had mulled over creating the program, its decision to implement it could not be "husbanded until right before an election and sprung on the employees in a manner calculated to influence the employees' choice." *NLRB v. Styletek, Div. of Pandel-Bradford, Inc.*, 520 F.2d 275, 280 (1st Cir. 1975). In that context, the Board reasonably found (D&O 12) that the Company made the decision to implement the program only after it had concrete evidence of the union campaign.

The Company's claim (Br 43-46) that it simply put into effect a program long in the making rings hollow in the circumstances. From March to his termination in October, Fleming sat on the project with no progress and little prompting from his superiors. Indeed, for months, Fleming's progress reports to Company President McShane on the program's development largely consisted of feeble excuses and complaints that he had been unable to get in touch with the

people he needed. (Vol II Tr 705-10.) *See NLRB v. WKRG-TV, Inc.*, 470 F.2d 1302, 1307 (5th Cir. 1973) (rejecting employer's defense that delay in granting planned benefits was due to a "breakdown in communications"). Only upon hearing of the organizing did the Company hastily put the apprenticeship program together and use it as campaign propaganda.

Moreover, the Company's precise argument has previously been rejected in this circuit: "In arguing that the company intended to grant the benefits all along, the company is met head on by the simple fact that the benefits were not granted until the organizational drive had actually materialized and presented a substantial threat of success." *Id.* at 1308.<sup>5</sup> The Court continued, "[w]e cannot ignore decisional acceleration in employee benefits preceded by months of lethargy. Lightning struck only after the union's rod was hoisted." *Id.* Thus, the fact that the Company had contemplated and even explored instituting an apprenticeship program before the union campaign is immaterial. A desire to defeat the organizing effort by fulfilling a longstanding employee desire clearly prompted the swift implementation of the program and timing of the announcement that the program was finally in effect. *See Styletek*, 520 F.2d at 280-81 (pre-election announcement of wage increases unlawful even where they had been planned

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<sup>5</sup> Fifth Circuit decisions issued prior to October 1, 1981, are precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

before campaign).<sup>6</sup>

Finally, the Company's claim (Br 8-9, 44) that it advised linemen in late August that the program would be implemented in September is meritless. First, no employee testified to such a meeting or that they had been advised of a September implementation. As described above, the linemen testified that Woodward advised them in October that she was taking over the project from Fleming. In any event, the fact remains that the Company did not take an active interest in the program until it learned of the union petition and then scrambled to promote and implement the program.

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<sup>6</sup> The Company's cited cases (Br 45) are contrary to the above-cited in-circuit precedent that an employer cannot decide to implement a benefit because of the union, even if it was contemplated before a union campaign, and are also distinguishable on the facts. *See NLRB v. Steinerfilm, Inc.*, 669 F.2d 845 (1st Cir. 1982) (Board not warranted in discrediting testimony that established a lawful motive for the wage increase, which was also the third increase in 18 months); *Royal Manor Convalescent Hosp., Inc.*, 322 NLRB 354 (1996) (credibility issue; testimony established a business need for the wage increase), *enforced*, 141 F.3d 1178 (9th Cir. 1998) (table); *LRM Packaging, Inc.*, 308 NLRB 829 (1992) (medical benefits and wage increase motivated by employer's improved financial condition); *Marine World USA*, 236 NLRB 89 (1978) (wage increase was consistent with past practice and need to maintain competitive wages to avoid turnover), *remanded*, 611 F.2d 1274 (9th Cir. 1980). Unlike in *Churchill's Supermarkets, Inc.*, 285 NLRB 138 (1987), *enforced*, 857 F.2d 1474 (6th Cir. 1988) (table), cited by the Company (Br 45), the Company offered no explanation for its months of inattentiveness to the apprenticeship program followed by a hasty implementation after learning of the union campaign.

### C. Blackwell Was a Supervisor Under the Act and Unlawfully Threatened and Interrogated Employees

The Board found that the Company also violated Section 8(a)(1) of the Act by making various threats and unlawful statements to employees. Specifically, the Board found that Crew Leader Blackwell unlawfully ordered employees to remove union insignia from their flight helmets, interrogated employees about how they voted in the election, implicitly threatened to lay off or discharge employees if they voted for the Union, threatened to assault a union organizer in the presence of employees, and told employees that the Company's pilots would refuse to fly with union linemen. *See, e.g., NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1422-23 (11th Cir. 1998) (unlawful interrogation and threats of reprisal); *NLRB v. Malta Constr. Co.*, 806 F.2d 1009, 1011 (11th Cir. 1986) (right to wear union insignia on hardhats protected by Act); *La Favorita, Inc.*, 302 NLRB 849, 852 (1991) (employer offered money to employees to assault a union organizer and interrogated them regarding their votes), *enforced*, 963 F.2d 382 (10th Cir. 1992) (table).

The Company's only defense (Br 15-43) to the violations committed by Crew Leader Blackwell is that he is an employee under the Act and, therefore, the Company is not responsible for his statements. That is, the Company does not dispute that Blackwell made the statements attributed to him or that they were otherwise lawful. Thus, if the Court finds that substantial evidence supports the

Board's finding that Blackwell was a supervisor under the Act, it must enforce the Board's order with respect to the violations committed by him. *See, e.g., NLRB v. Dadco Fashions, Inc.*, 632 F.2d 493, 496-97 (5th Cir. 1980) (rejecting employer's defense that individuals who committed unfair labor practices were employees, not supervisors, and therefore affirming Board's finding of violations).

### 1. Applicable supervisory status principles

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

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

Accordingly, individuals are statutory supervisors "if (1) they have the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer.'" *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713, 121 S.Ct. 1861, 1867 (2001) (citation omitted). In *Kentucky River*, the Supreme Court held that "the statutory term 'independent judgment' is ambiguous

with respect to the *degree* of discretion required for supervisory status,” and that “[i]t falls clearly within the Board’s discretion to determine, within reason, what scope of discretion qualifies.” *Id.* (emphasis in original). Because Section 2(11) lists the supervisory indicia in the disjunctive, the individual in question need only exercise one of those powers to constitute a supervisor. *See Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1263 (11th Cir. 1999); *Berry Schools v. NLRB*, 627 F.2d 692, 697 (5th Cir. 1980).

While, as the Company points out (Br 16-17), the Board construes Section 2(11) narrowly so as to avoid disenfranchising employees from participation in the election and collective bargaining, the Board also takes care not to construe Section 2(11) *too* narrowly lest it fail to give effect to the language and policy of the Act designed to ensure that persons vested with supervisory authority over others do not participate in union activities. This is because individuals who in fact are vested with supervisory authority owe a duty of undivided loyalty to their employer that is inconsistent with their possession of Section 7 rights. *See NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 581, 114 S.Ct. 1778, 1784 (1994). Moreover, employees with Section 7 rights are entitled to protection against supervisors interfering with or dominating their organizational and bargaining activities. *See, e.g., NLRB v. Metropolitan Life Ins. Co.*, 405 F.2d 1169,

1178 (2d Cir. 1968); *Douglas Aircraft Co.*, 238 NLRB 668, 671 (1978), *enforced sub nom. McDonnell Douglas Corp. v. NLRB*, 655 F.2d 932 (9th Cir. 1981).

The Board's supervisory determination will be upheld as long as it is supported by substantial evidence. *See NLRB v. Big Three Indus. Equip. Co.*, 579 F.2d 304, 309 (5th Cir. 1978) (granting deference to the Board's determination of "the infinite gradations of authority within a particular industry"). Contrary to the Company's suggestion (Br 12), the Court's "robust application" of the substantial evidence standard to supervisory issues is no different than the Court's review of any of the Board's factual findings. In *Cooper/T. Smith, Inc.*, the Court declined to adopt a *de novo* or heightened standard of review for supervisory issues. 177 F.3d at 1259. Instead, it acknowledged that "judges, who are generalists, should respect the specialized knowledge of the Board and accede to its factbound determinations as long as they are rooted in the record." *Id.* at 1269. It adhered to the standard definition of substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 1262.<sup>7</sup>

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<sup>7</sup> Similarly, the Company's attempt (Br ii) to portray the Board as manipulating supervisory findings is specious. *NLRB v. Res-Care, Inc.*, 705 F.2d 1461, 1466 (7th Cir. 1983), which it cites (Br ii, 17), does not support its attack. There, the court merely noted consequences of the Board's case-by-case, as opposed to rulemaking, approach; it never implied that it viewed the Board as manipulating supervisory findings. Indeed, the Company here has failed to meet its burden of demonstrating that "the proceedings were characterized by fell expedition or determined purpose to reach a predetermined end, or were attended with suppressive and exclusionary rulings and actions, designed to prevent and

Here, the record amply supports the Board’s finding that Crew Leader Blackwell was a supervisor under the Act. He exercised independent judgment with respect to multiple supervisory indicia: responsibly directing, hiring, disciplining, and transferring employees. Other evidence relating to his benefits and how the Company described his role also supports the finding that he was a supervisor.

## 2. Blackwell responsibly directed employees<sup>8</sup>

As crew leader, Blackwell was the highest-ranking company official on the jobsite. When two crews worked together, Blackwell was in charge of both crews, over the other crew leader. Being “in charge” is the quintessence of responsible direction and supervisory authority. *See Beverly Ents., West Virginia, Inc. v. NLRB*, 165 F.3d 307, 309 (4th Cir. 1999) (en banc) (LPNs were supervisors where they were most senior staff present and “in charge” for almost half of working

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preventing a fair hearing.” *Helena Labs. Corp. v. NLRB*, 557 F.2d 1183, 1188-89 (5th Cir. 1977) (citation omitted). *See also NLRB v. Hilliard Dev. Corp. v. NLRB*, 187 F.3d 133, 140-41 (1st Cir. 1999) (rejecting claim of Board manipulation or bias in supervisory issues); *Louisiana Ass’n of Indep. Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1119 (D.C. Cir. 1992) (“courts assume administrative officials to be ‘men [and women] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances’” (citation omitted)).

<sup>8</sup> Contrary to the Company’s argument (Br 34-36), the Board did find that Blackwell responsibly directed employees. Although the decision did not use the exact words “responsibly direct,” the Board plainly was discussing that type of authority in describing (D&O 4) Blackwell as “responsible for the day-to-day activities of the other linemen and apprentices on the job.”

hours); *Grancare, Inc. v. NLRB*, 137 F.3d 372, 376 (6th Cir. 1998) (charge nurses were supervisors where a contrary finding would mean there was no on-site supervision almost half the time, which is “not a reasonable conclusion for a well-run nursing home” (citation omitted)); *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484, 491 (2d Cir. 1997) (tug masters were supervisors where they commanded vessel). *See also Dale Serv. Corp.*, 269 NLRB 924, 925 (1984) (senior operators at sewage treatment plant were supervisors where they were responsible for plant operations in absence of managers).

Blackwell’s superior, Vice President Woodward, visited jobsites only about once a month. President McShane visited jobsites even less frequently—only about every 2 to 3 months. Blackwell therefore provided the only daily, on-site oversight for the dangerous work performed by the linemen. *See Vanguard Tours*, 300 NLRB 250, 261 (1990) (bus dispatcher in sole charge of operation for at least 2 hours at a time and manager’s availability by phone did not limit dispatcher’s discretion), *enforcement denied on other grounds*, 981 F.2d 62 (2d Cir. 1992); *Dixon Indus.*, 247 NLRB 1446, 1446 n.3, 1449-51 (1980), *enforced*, 700 F.2d 595, 598-99 (10th Cir. 1983) (departmental leadmen were supervisors where superiors were rarely present and they were “in charge”). Even when Woodward visited sites, Blackwell remained the only official to provide substantive supervision as Woodward had no experience or background in linework.

Indeed, Woodward admitted that the Company needed someone who knew how to do the work to be present to direct the employees and that if the employees lacked proper supervision, they could die. (Vol II Tr 642-43.) Therefore, if Blackwell observed the linemen doing anything he considered unsafe, it was his responsibility to correct them or direct them to stop. *See Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 345 (5th Cir. 1980) (foreman was supervisor where he checked others' work and corrected errors). Thus, if Blackwell was not a supervisor, the employees would be left working in dangerous situations without any supervision for weeks at a time. *See id.* at 344 (higher managers "very rarely went to the job sites so if [the disputed individual] was not a supervisor, the workers would be almost completely unsupervised"); *Vega v. NLRB*, 341 F.2d 576, 577 (1st Cir. 1969) ("we regard it as of considerable importance that if the petitioners were not supervisors, the company's employees were entirely without supervision a large part of the time").

Contrary to the Company's claim (Br 40-41), that Blackwell was in daily contact with Woodward by telephone does not undermine the Board's finding.<sup>9</sup> When a problem arose, Blackwell had the discretion to handle the problem himself

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<sup>9</sup> Indeed, inasmuch as Woodward has no substantive line experience, it is specious for the Company to suggest (Br 9, 41) that Woodward was in a position to direct linework in far-flung locations simply because she made the sales leading to the jobs.

or to call Woodward. He typically only consulted Woodward if fixing the problem required considerably more time on the job. *See NLRB v. Detroit Edison Co.*, 537 F.2d 239, 244 (6th Cir. 1976) (notification of higher authority did not remove system supervisors' discretion in emergencies); *West Virginia Pulp & Paper Co.*, 122 NLRB 738, 742 (1958) (foremen were supervisors where higher supervision was available by telephone, but foremen had discretion whether to call).<sup>10</sup> Thus, contrary to the Company's characterization (Br 40-42), Blackwell did not serve solely as a conduit or reporter for Woodward as did the individuals in *Injected Rubber Prods. Co.*, 258 NLRB 687, 690 (1981), and *Monongahela Power Co.*, 176 NLRB 915, 917-18 (1969), relied on by the Company (Br 41-42).<sup>11</sup>

Similarly, the Company is incorrect in stating (Br 40-41) that the linemen's testimony showed that Blackwell did not responsibly direct them because he was frequently on the telephone with Woodward and did the same work as the other

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<sup>10</sup> Blackwell's discretion in this regard negates the Company's claim (Br 42-43) that he did not exercise any independent judgment.

<sup>11</sup> *Black River Elec. Coop.*, 98 NLRB 539, 540 (1952), cited by the Company (Br 41), is likewise distinguishable. There, the maintenance foremen did not responsibly direct employees because they were capable of working independently. That is not the case with the apprentices working under Blackwell's direction, who needed guidance in developing their skills.

Further, the foremen's superior in *Black River* planned all operations for the day. As noted above, because Woodward had no substantive linework experience, that task fell to Blackwell. In addition, there is no evidence that the foremen in *Black River* had the discretion that Blackwell had to handle problems using their own discretion.

crew leaders. The Company ignores Crew Leader Flynn's testimony that Blackwell told him what to do. (Vol I Tr 361.) The linemen also testified that, in contrast to the other crew leaders (Flynn and Lyons), Blackwell very rarely did any linework. *See NLRB v. Dadco Fashions, Inc.*, 632 F.2d 493, 496 (5th Cir. 1980) (individuals who did little production work were supervisors); *Maine Yankee Atomic Power Co. v. NLRB*, 624 F.2d 347, 352 (1st Cir. 1980) (shift operating supervisors at atomic power company spent only 30 percent of time doing linework). For example, employees Stephens and Laslovich testified that in their time at the Company, they saw Blackwell working with tools on 2 days. Similarly, employee Jason Collins testified that he observed Blackwell working with the crew only once. In contrast, Lyons worked with the crew 80-90 percent of his time. (Vol I Tr 183, 242, 293-94, Vol II Tr 435.)

The Company's labeling (Br 36-37) of Blackwell as a "leadman" does not further the supervisory analysis. As it recognizes (Br 33), the status of supervisor under the Act is determined by an individual's duties, not by his or her title or job classification. *Longshoremen ILA v. Davis*, 476 U.S. 380, 396 n.13, 106 S.Ct. 1904, 1915 n.13 (1986); *Berry Schools v. NLRB*, 627 F.2d 692, 697 (5th Cir. 1980). Accordingly, there is no facile rule, as the Company seems to suggest (Br 36-37), that leadmen are not supervisors under the Act. *See Brusco Tug & Barge Co. v. NLRB*, 247 F.3d 273, 276 (D.C. Cir. 2001) (because supervisory status is

fact-dependent and job duties vary, designating certain classes of jobs as always or never supervisory is generally inappropriate).

Just as the Board and Court have found leadmen not to be supervisors in some cases, they have found the opposite in others. *See, e.g., Trailmobile Div., Pullman, Inc. v. NLRB*, 379 F.2d 419, 422 (5th Cir. 1967) (leadmen who assigned work and overtime, reprimanded employees, and reassigned employees to different jobs were supervisors); *NLRB v. Schill Steel Prods., Inc.*, 340 F.2d 568, 571 (5th Cir. 1965) (leadmen were supervisors where they assigned work, directed employees, effectively recommended discipline); *Cannon Indus.*, 291 NLRB 632, 632 (1988) (lead welder was supervisor where he directed employees' work, granted time off, ordered overtime, resolved employee complaints, and issued discipline); *Potomac Elec. Power Co.*, 111 NLRB 553, 558-59 (1955) (lead charwomen directed crew on night shift where no acknowledged supervisors were on duty).

Moreover, the Company's reliance (Br 37) on *S.D.I. Operating Partners*, 321 NLRB 111 (1996), is misplaced. In that case, the Board found that a leadman was not a supervisor because he did not use independent judgment in directing others' work and made "routine decisions typical of leadman positions that are found by the Board not to be statutory supervisors." *Id.* at 111. In that case, unlike here, the purported supervisor's superiors had substantive experience and therefore

did not rely solely on him to manage the projects. Also, the purported supervisor lacked the authority to discipline, effectively recommend hiring, and transfer employees, that Blackwell had. In short, the leadman in *S.D.I.* did not exercise discretion in performing Section 2(11) functions, as Blackwell did here.

In addition, the Board in *S.D.I.* further explained its finding: the leadman in question “provides direction and guidance to other employees involved in a project based on his experience and craft skill.” *Id.* Such a finding that the use of experience and craft skill is by definition not independent judgment has been rejected by the Supreme Court in *Kentucky River*, 532 U.S. at 714-15, 121 S.Ct. at 1867-68. There, the Court stated that the Board’s “categorical exclusion” of professional or technical judgment from independent judgment was not consistent with the statute. *Id.* Thus, to that extent, the Board’s pre-*Kentucky River* finding in *S.D.I.* may no longer be apposite.

Further, contrary to the Company’s claim (Br 37-40), the Board’s and this Court’s precedent do not *require* that an individual be held accountable for others’ performance in order to sustain a supervisory finding.<sup>12</sup> While the Board has

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<sup>12</sup> In any event, although not determinative, there is some evidence that the Company held Blackwell accountable for a number of responsibilities. The crew leader job description (Vol III GCX 52 p. 3) states that the position was “accountable for the maintenance of truck(s) and trailer(s) assigned to your job,” “accountable for truck and trailer inventory reports for trucks and trailers under your care at the end of each job and for transmitting those reports to the home office,” “accountable for crews’ time sheets for crew members *under your*

considered accountability in some cases as part of its multi-factored analysis, it has not required it for a supervisory finding. Indeed, in *Providence Hosp.*, 320 NLRB 717, 729 (1996), *enforced*, 121 F.3d 548 (9th Cir. 1997), the Board explicitly declined to adopt an accountability test. In *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1265-66 (11th Cir. 1999), cited by the Company (Br 38), the Court noted that “responsibility is defined as being ‘answerable for the discharge of a duty or obligation. Responsibility includes judgment, skill, ability, capacity and is implied by power’” (citation omitted). The Court, however, did not make that observation in the context of discussing whether the docking pilots at issue were held accountable for others’ work. Rather, the Court only discussed the pilots’ expertise and the inherent dangers of their work.

### 3. Blackwell effectively recommended hiring of employees

Blackwell was also a key component in the Company’s hiring process. As the Board found (D&O 4), he recruited, interviewed, and effectively recommended hiring of applicants. According to Blackwell’s own testimony, he routinely interviewed applicants, asking technical questions and determining from the general conversation whether the applicant knew the work. Although Woodward also interviewed some of the applicants, she had no substantive experience in

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*supervision* and responsible for forwarding them to the home office on a daily basis,” and “accountable for job inspection reports when required” (emphasis added).

linework, leaving Blackwell as the only judge of whether an applicant could do the work. *See Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719, 721 (7th Cir. 2000) (captains and first mates were supervisors because they interviewed applicants even though they did not have the final say on hiring); *Desert Hosp. v. NLRB*, 91 F.3d 187, 193 (D.C. Cir. 1996) (nurse’s conducting initial screening interviews, although she did not hire employees, showed that she “was aligned with management as her hiring and evaluation work was a ‘regular and frequent portion[ ]’ of her responsibilities” (citation omitted)). Specifically, on one occasion, former Superintendent Fleming told Blackwell to interview an applicant—Jeff Laslovich—and to hire him if he sounded good on the phone. Blackwell did so and hired Laslovich. *See NLRB v. Hoerner-Waldorf Corp.*, 525 F.2d 805, 808 (8th Cir. 1975) (personnel assistant who interviewed applicants and was given authority to reject those applicants who did not meet employer’s criteria was supervisor).<sup>13</sup> Blackwell also recommended the hire of other applicants—

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<sup>13</sup> The Company’s characterization (Br 21) of the evidence as demonstrating that Blackwell “did not recommend the hire of Laslovich and did not use an iota of independent judgment in the process” is incorrect. As Laslovich testified (Vol I Tr 256), Blackwell had no need to ask about his education because Blackwell already had Laslovich’s resume. Blackwell himself testified that, although he sometimes asked applicants technical questions, he could usually tell if an applicant knew what he was talking about from the conversation. (Vol I Tr 88, 121-23.) Even assuming that Blackwell’s interview of Laslovich was as informal as the Company suggests, it remains undisputed that Fleming delegated the authority to hire Laslovich to Blackwell who conducted the required interview. The Company

including Stephens and Trachta—who were in fact hired. Further, Blackwell visited trade schools to recruit applicants. *See NLRB v. Publishers Printing Co.*, 625 F.2d 746, 748 (6th Cir. 1980) (individual who could effectively recommend hire of employees was supervisor).

The Company’s heavy reliance (Br 21, 23) on Woodward’s role in the hiring process is misplaced. Although she did interview some of the candidates, she could not evaluate their ability to perform the work as her experience and skills were in sales not linework. Thus, as noted above, Blackwell was the only company official involved who could make that determination. Where the Company had to fly a new hire to a jobsite from wherever he lived, pay for his lodging, and assume liability for any injury he may sustain on what all parties agree was a dangerous job, Blackwell’s assessment of the applicant’s ability certainly had added import for the Company.<sup>14</sup>

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overstates (Br 20-21) Fleming’s involvement in Laslovich’s hiring. Laslovich testified only that he talked to Fleming about possible openings. (Vol II Tr 255-56.) There is no evidence that Fleming ever conducted a substantive interview with Laslovich, much less that Laslovich “interviewed with Fleming on multiple occasions,” as the Company claims (Br 20).

<sup>14</sup> The Company’s broad claim (Br 24 n.6) that assessment of an applicant’s technical ability does not constitute an effective recommendation to hire is not supported by its case citations. For example, in *GRB Entertainment, Inc.*, 331 NLRB 320, 320 (2000), the individual at issue never made any recommendations as to whether applicants should be hired or rejected; instead, he merely tested applicants’ technical skills. *Id.* at 320-21. In *Plumbers Local 195 (Jefferson Chemical Co., Inc.)*, 237 NLRB 1099, 1102 (1978), the disputed individual

Contrary to the Company's claim (Br 23-25), the Board and courts have found to be supervisors individuals who do not have the final say in hiring and who are not the sole interviewer or investigator of an applicant. For example, in *Detroit College of Business*, 296 NLRB 318, 319 (1989), the Board found that department coordinators effectively recommended hiring where their recommendations were followed for more than a dozen applicants and rejected for two. The Board so found even though the employer's associate dean had to approve all hires and participated in the interviews with the coordinators. *Id.* See also *Empress Casino Joliet Corp. v. NLRB*, 204 F.3d 719, 721-22 (7th Cir. 2000) (captains and first mates were supervisors where they interviewed applicants, but did not have the final approval on hiring); *Hoyt, Brumm & Link, Inc.*, 292 NLRB 1060, 1060, 1063 (1989) (individual whose hiring recommendations were followed only 50 percent of the time had authority to effectively recommend hiring); *Monsanto Chem. Co.*, 81 NLRB 625, 627 (1949) (leadmen effectively recommended hiring although superiors independently investigated).

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administered welding tests to applicants who would work for a contractor; those who failed were not allowed to work on the project. *Id.* Also, he vouched for applicants' character and qualifications because of his familiarity with local welders. *Id.* The Board found that he was not a supervisor because the company had not delegated any managerial authority to him. Here, Blackwell did not merely assess, vouch for, or test applicants' skills. He determined from the interview the applicant's skill and experience and had the authority to make recommendations on hiring, which were typically followed.

The Company overstates (Br 22-23) the Court's decisions in *Cooper/T. Smith, Inc. v. NLRB*, 177 F.3d 1259, 1264 (11th Cir. 1999), and *NLRB v. Security Guard Serv., Inc.*, 384 F.2d 143, 148 (5th Cir. 1967), regarding the significance of an individual's authority to recommend hires. As described above, it is the *effective* recommendation of hiring that confers supervisory status, not merely the ability to recommend applicants. The Court in *Cooper/T. Smith* and *Security Guard Service* merely stated that recommendations alone do not indicate supervisory status. The Board did not so find here. Rather, the Board's finding that Blackwell had the authority to *effectively* recommend hires is supported by several instances in which his recommendations were indeed followed and one instance (Laslovich) in which Blackwell was given the authority to decide whether to hire or not.

Indeed, other in-circuit precedent has acknowledged that "the Act states, a person is a supervisor even if he does not have complete authority to perform any of these functions but can 'effectively recommend' the performance of one or more." *Berry Schools v. NLRB*, 627 F.2d 692, 697 (5th Cir. 1980). *See also Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 345 (5th Cir. 1980) (individual who had the power to make effective recommendations regarding the assignment of workers was a supervisor); *Brewton Fashions, Inc. v. NLRB*, 361 F.2d 8, 12 (5th Cir. 1966) (foremen and floor ladies who had authority to effectively recommend

action for employees were supervisors); *NLRB v. Charley Toppino & Sons, Inc.*, 332 F.2d 85, 86 (5th Cir. 1964) (individual who effectively recommended a pay raise was a supervisor).

To accept the Company's position (Br 22) that Blackwell's recommendations did not demonstrate supervisory authority would operate to eliminate from Section 2(11) of the Act the words "or effectively to recommend such action." This could not have been the Court's intent in *Cooper/T. Smith* and *Security Guard Service*. Compare *NLRB v. Southern Airways Co.*, 290 F.2d 519, 524 (5th Cir. 1961) (flight and dock chiefs effectively recommended discharges and transfers even though the recommendations were accepted only a "good portion of the time" and independent investigations were conducted if there was a complaint about the recommended action). Indeed, the Supreme Court and a number of other circuits have held that a lack of final authority does not detract from the supervisory authority to effectively recommend personnel actions. See *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 683 n. 17, 100 S.Ct. 856, 863 n.17 (1980) (the "relevant consideration is effective recommendation or control rather than final authority"); *NLRB v. Attleboro Assocs.*, 176 F.3d 154, 164 (3d Cir. 1999) (nurses effectively recommended discipline although superiors independently investigated); *Glenmark Assocs. v. NLRB*, 147 F.3d 333, 342 (4th Cir. 1998) (nurses effectively recommended discipline although their recommendations were

subject to review); *Caremore, Inc. v. NLRB*, 129 F.3d 365, 369-70 (6th Cir. 1997) (nurses effectively recommended discipline although they did not have final authority); *ITT Lighting Fixtures v. NLRB*, 712 F.2d 40, 45 (2d Cir. 1983) (“The [Act] does not preclude supervisory status simply because the recommendation is subject to a superior’s investigation.”). *See also* cases cited above, pp. 36-37.

Additionally, contrary to the Company’s claim (Br 22) that a “few” recommendations are insufficient to confer supervisory status, the number of hires that Blackwell effectively recommended is not dispositive.<sup>15</sup> The examples in the record are more than sufficient to demonstrate that the Company vested Blackwell with the authority to effectively recommend hires, if not (as in the case of Laslovich) hire on his own. Indeed, it is the existence of authority rather than the frequency of exercise that determines supervisory status. *See e.g., NLRB v. Prime Energy Ltd. Partnership*, 224 F.3d 206, 210-11 (3d Cir. 2000) (single incident of sending an employee home was sufficient to show authority to discipline); *Beverly California Corp. v. NLRB*, 970 F.2d 1548, 1550 n. 3 (6th Cir.1992) (“[i]t is the existence of disciplinary *authority* that counts under the statute, and not the frequency of its exercise” (emphasis in original)); *Oil, Chemical and Atomic*

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<sup>15</sup> The fact that the record contains “only” (Br 19) four examples of applicants interviewed by Blackwell is neither dispositive nor surprising given the unusual and dangerous nature of the work involved, and the Company’s admittedly (Br 2) small size. The Company did not introduce evidence of other applicants interviewed by Fleming or Woodward without Blackwell.

*Workers Int'l Union v. NLRB*, 445 F.2d 237, 244 (D.C.Cir.1971) (“[O]nce the existence of supervisory authority is established, the degree or frequency of its exercise is of little consequence.”).<sup>16</sup>

#### 4. Blackwell disciplined employees

Blackwell also disciplined employees. For example, when employee Tommy McKenzie overslept and failed to show up for work, Blackwell suspended him for that day without pay. His e-mail to Woodward reflected that he, not Woodward, made the decision to dock McKenzie’s pay: “I advised him that he had the rest of the day off without pay.” (Vol III GCX 46.) *See Beverly Ents., Virginia, Inc. v. NLRB*, 165 F.3d 290, 297 (4th Cir. 1999) (en banc) (LPNs at nursing home were supervisors where, among other indicia, they could send employees home for the day and suspend them).

The Board reasonably relied on the documentary evidence of Blackwell’s discipline of McKenzie over the testimony of Woodward, cited (Br 26) by the Company. Nothing in Blackwell’s e-mail suggests that he had spoken to Woodward prior to suspending McKenzie or that she had made the decision that

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<sup>16</sup> Blackwell’s performance evaluation (Vol III GCX 4 p. 3) from December 5, 2001, completed by Woodward, also supports the Board’s finding. Under the category of “accomplishments or new abilities demonstrated since last review,” Woodward included “interviewing and assisting in the selection of new hires.” Under the category of “specific areas needing improvement,” Woodward listed “management techniques.”

McKenzie would not be paid for the day.<sup>17</sup> Thus, the solid documentary evidence supports the Board's finding that Blackwell had the authority to discipline employees and did so.

The Company's other arguments related to Blackwell's authority to discipline likewise lack merit. The fact that the record contains a single example (Br 27-28) of Blackwell disciplining an employee is not dispositive. As noted above, it is the existence of authority rather than the frequency of exercise that determines supervisory status. *See* cases cited above at pp. 39-40. *See, e.g., Prime Energy*, 224 F.3d at 210-11 (finding that one instance of supervisors sending an employee home was sufficient to show authority to discipline).

Also, the Company's attempt to characterize (Br 27) Blackwell's action as something other than discipline or suspension is specious. According to Blackwell's e-mail (Vol III GCX 46), McKenzie called Blackwell at 8:00 a.m.—well before the end of the workday. Instead of allowing McKenzie to join the rest of the crew, Blackwell decided that he should not work the rest of the day and therefore he lost a day's pay. Although the e-mail did not describe the action as a suspension, the effect was the same: at Blackwell's direction, McKenzie did not work and was not paid. Moreover, the e-mail was forwarded to Human Resources

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<sup>17</sup> The Company did not attempt to corroborate Woodward's testimony by questioning Blackwell about this incident.

for placement in McKenzie's personnel file as any discipline would be. *See Venture Indus.*, 327 NLRB 918, 919 (1999) (individuals were supervisors where their oral and written reprimands to employees were kept in the employees' files).

5. Blackwell transferred employees from job to job

Additionally, Blackwell has transferred employees from one job to another and has effectively recommended other such transfers. He testified that he based his decisions on his assessment of the need for experience on particular jobs and the level of experience and skill possessed by the employees. *See Trailmobile Div., Pullman, Inc. v. NLRB*, 379 F.2d 419, 422 (5th Cir. 1967) (leadmen who transferred employees to different jobs were supervisors); *Beverly California Corp. v. NLRB*, 970 F.2d 1548, 1550 (6th Cir. 1992) (nurses were supervisors where they could transfer LPNs and nurse's aides between wings to cover temporary staffing shortages); *Int'l Union of Elec., Radio & Mach. Workers, v. NLRB*, 426 F.2d 1243, 1246 & n.2 (D.C. Cir. 1970) (individual who transferred employees from job to job was supervisor); *NLRB v. Big Ben Dept. Stores, Inc.*, 396 F.2d 78, 82 (2d Cir. 1968) (individuals who could transfer employees from one station in store to another depending on pressure of business were supervisors).<sup>18</sup>

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<sup>18</sup> The Company cites no authority for its suggestion (Br 28-29) that the authority to transfer requires transfers between job classifications or changes to an employee's job status. As the cases cited above show, transfers may be between departments, work stations, or projects.

The Company's reliance (Br 29) on testimony that Blackwell consulted with Woodward before transferring employees between crews shows, at most, that Blackwell effectively recommended such transfers. The record contains—and the Company asserts—no examples of instances in which Woodward overruled or rejected any of Blackwell's transfer decisions.

The Company's claim (Br 29-31) that the record does not contain any examples of Blackwell transferring employees is incorrect. First, Blackwell himself testified that he transferred employees. (Vol I Tr 62-64.) Also, employee Collins testified that Blackwell transferred him from one crew to another when, for example, the other crew was shorthanded. (Vol II Tr 439-40.)

6. Secondary or circumstantial evidence further supports the Board's finding

Other evidence, while not dispositive supervisory indicia listed in Section 2(11), also supports the Board's finding of supervisory status. *See e.g., Entergy Gulf States, Inc. v. NLRB*, 253 F.3d 203, 209 (5th Cir. 2001) (“secondary indicia of supervisory authority may be pertinent”); *E & L Transp. Co. v. NLRB*, 85 F.3d 1258, 1270 (7th Cir. 1996) (“[a]lthough not determinative on their own, where one of the enumerated indicia in [Section 2(11)] is present, secondary indicia support a finding of statutory supervisor”).

For example, the Company pays Blackwell a salary as opposed to the hourly wages that the linemen receive. *See Peerless of America, Inc. v. NLRB*, 484 F.2d

1108, 1111 n.3 (7th Cir. 1973) (salary rather than hourly wage indicated supervisory status); *American Barge Line Co.*, 337 NLRB 1070, 1072 (2002) (ship pilots were supervisors where they were salaried compared with deckhands paid by the day). He has been offered stock options. Also, in a disability claim for Blackwell, the Company admitted that Blackwell performed supervisory functions, stating that he “performs service work plus supervises others doing same.” (Vol III GCX 49.) Thus, it held him out as one of its supervisors. *See Great American Prods.*, 312 NLRB 962, 962 (1993) (leadman held out by management as a supervisor).

In sum, the various factors relied upon by the Board support the broader principle that Blackwell was aligned with management rather than the other linemen and therefore was a supervisor. *See Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 345 (5th Cir. 1980) (individual whose “natural alignment was with the owners” was supervisor). The Company relied on Blackwell to keep the crew and job on track. Thus, Blackwell, who was the highest-ranking company official the employees encountered on a daily basis, rarely performed linemen’s work; checked and corrected employees’ work; told employees what to do; interviewed and effectively recommended them for hire; disciplined them; and transferred them among crews, was aligned with management rather than the bargaining unit. Accordingly, the Board reasonably found him to be a supervisor under Section

2(11) of the Act, and held the Company responsible for his numerous unlawful threats and statements to employees.

CONCLUSION

The Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's order in full.

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