RCC Fabricators, Inc. *and* Metropolitan Regional Council of Carpenters, Eastern Pennsylvania, State of Delaware and Eastern Shore of Maryland.

RCC Fabricators, Inc. *and* Piledriver's Local 454 a/w Metropolitan Regional Council of Carpenters, Eastern Pennsylvania, State of Delaware and Eastern Shore of Maryland and Construction *and* General Laborers Union Local 172 of South Jersey. Cases 4–CA–31757, 4–RC–20569, and 4–RC–20572

September 30, 2006

ORDER REMANDING PROCEEDING TO ADMINISTRATIVE LAW JUDGE

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND KIRSANOW

On October 23, 2003, Administrative Law Judge Paul Buxbaum issued the attached decision in this proceeding. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

On September 29, 2006, the Board issued its decisions in *Oakwood Healthcare, Inc.*, 348 NLRB No. 37, *Croft Metals, Inc.*, 348 NLRB No. 38, and *Golden Crest Healthcare Center*, 348 NLRB No. 39, in light of the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001). *Oakwood Healthcare, Croft Metals,* and *Golden Crest* specifically address the meaning of "assign," "responsibly to direct," and "independent judgment," as those terms are used in Section 2(11) of the Act.

The Board has decided to remand this case to the judge for further consideration in light of *Oakwood Healthcare*, *Croft Metals*, and *Golden Crest*, including allowing the parties to file briefs on the issue, and, if warranted, reopening the record to obtain evidence relevant to deciding the case under the *Oakwood Healthcare*, *Croft Metals*, and *Golden Crest* framework.

IT IS ORDERED that this proceeding is remanded to the administrative law judge for appropriate action as noted above.

IT IS FURTHER ORDERED that the administrative law judge shall prepare a supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Henry R. Protas, Esq. and *Ann Marie Cummins, Esq.,* for the General Counsel.

John H. Widman, Esq. and *Amy Niedzalkoski, Esq.,* of King of Prussia, Pennsylvania, for the Respondent.

Richard C. McNeill Jr., Esq., of Philadelphia, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on April 8 and 10 and May 15, 2003. The charge was filed on November 25, 2002, and an amended charge was filed on January 28, 2003. The complaint was issued on February 19, 2003.

On October 25, 2002, the Metropolitan Regional Council of Carpenters, Eastern Pennsylvania, State of Delaware and Eastern Shore of Maryland filed a petition for certification as collective-bargaining representative of certain employees of the Company.[1] Six days later, the Construction and General Laborers Union Local 172 of South Jersey filed a similar petition.[2] The Regional Director consolidated these petitions on October 31, 2002.

A representation election was held on November 21, 2002. Sixteen votes were cast. Six votes favored the Carpenters, five votes were against any union representation, and no votes were cast in favor of the Laborers. Five ballots were challenged, a potentially determinative number. On March 6, 2003, the Regional Director issued an order consolidating the ballot challenges and the unfair labor practice allegations and scheduling a hearing.

The General Counsel alleges that an admitted supervisor told an employee that the Company would close if the employees selected a union as their bargaining representative. It is also alleged that a foreman interrogated employees regarding their union activities and created an impression that union activities were under employer surveillance. That foreman is alleged to be a supervisor and agent of the Company. Finally, the General Counsel contends that the Company discharged an employee, Daniel Pohubka, because of his involvement in union activities. The Company filed an answer, denying the material allegations of the complaint, including the contention that the foreman was a supervisor and agent.

Regarding the representation election, the Board agent challenged three ballots since the names of the prospective voters were not contained on the *Excelsior* list of voters.[3] One of these prospective voters is Pohubka. His eligibility depends on a resolution of the unfair labor practice allegation that he was wrongfully terminated from employment due to his union activities. The remaining two prospective voters challenged by the Board agent were employees who were laid off prior to the election. The Union contends that these employees enjoyed a

[1] This is Case 4–RC–20569. As the Carpenters were the only labor organization that participated actively in this trial, I will refer to them where appropriate as the "Union."

[2] This is Case 4–RC–20572. The Laborers Union did not participate in this trial, either through counsel or otherwise.

[3] *Excelsior Underwear*, 156 NLRB 1236 (1966).

reasonable expectation of returning to work in the foreseeable future. The Company denies that such an expectation existed. Finally, the Union challenges the ballots of the two shop foremen, contending that they were supervisors within the meaning of the Act. The Company denies this assertion regarding their status.

As described in detail in the decision that follows, I conclude that the General Counsel has failed to prove that a supervisor threatened closure of the Company in the event the employees elected union representation. I further find that the foreman, a supervisor and agent of the Company, did unlawfully interrogate employees and create an impression that their union activities were under surveillance. I also conclude that, while the General Counsel met its initial burden regarding the discharge of Pohubka, the Company established that he would have been discharged regardless of his union sympathies and activities. It follows that Pohubka's ballot in the representation election was properly subject to challenge. By the same token, I find that the remaining four ballot challenges should be sustained since the evidence establishes that the laid-off employees did not have any reasonable expectancy of return within the foreseeable future and that the two shop foremen were supervisors within the meaning of the Act.

Before detailing my findings of fact, I must address preliminary matters regarding the state of the record. As is virtually inevitable, there are errors in the transcription of the testimony. Those significant errors involving testimony given on April 8 and 10 were corrected on the record during the second portion of the trial conducted in May. (Tr. 463–465.) Several errors relating to the testimony on May 15 require correction. The witness was actually asked if Pohubka often "didn't" punch in on time. (Tr. 543, l. 10.) The witness testifies that he observed Pohubka "wandering."[4] (Tr. 580, l. 14.) Three other errors can be seen in a more lighthearted vein. The Company's comptroller is reported to have testified that he was a "beam counter." (Tr. 609, l. 9–10.) This would be logical given the Company's involvement in the structural steel industry. Nevertheless, in referring to his duties as financial analyst, he actually said he was a "bean counter." (Tr. 670, l. 13.) Counsel for the Union characterizes the Company as asserting a "Great Wine Defense." While such a defense would certainly be interesting, counsel's reference was, of course, to a *Wright Line* defense. Finally, at the conclusion of the hearing, it is reported that I promised the parties that I would strive for a decision that was both just and "fear." (Tr. 677, l. 21.) Naturally, I expressed my hope that the eventual decision would be just and "fair."

On June 5, 2003, the Company filed a motion to reopen the record and admit newly discovered evidence. This evidence consists of a decision of the Appeal Tribunal of the State of New Jersey Department of Labor regarding the disposition of Pohubka's claim for unemployment compensation benefits. On June 11, 2003, counsel for the Union filed an opposition to this motion, contending that the decision did not constitute newly discovered evidence and was "at best . . . marginally relevant." The General Counsel takes a somewhat different view, conceding that the document is admissible, but asserting that it should be accorded no probative worth.

Counsel for the Union argues that the Department of Labor's decision cannot be deemed newly discovered evidence since the Company was aware of the pendency of the unemployment compensation claim throughout the hearing in this matter and could have offered to introduce evidence regarding "the possibility of the issuance of a decision favorable to RCC" by the Appeals Tribunal. I find this argument to be unpersuasive. Counsel does not cite, and I am not aware of, any principle in the law of evidence that would authorize the submission into evidence of a "possibility" that a party may at some future date prevail in a pending lawsuit whose outcome could affect these proceedings. Evidence of such a contingency would fail the test for relevancy since it would not have

> [A]ny tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Federal Rules of Evidence, Rule 401. As a result, I attach no significance to the Company's failure to mention the pending unemployment case during the trial of this matter.

The Company has filed an affidavit from its comptroller, Frank Santos, indicating that he received the decision of the Appeals Tribunal upon returning to his office after attendance at the final day of trial in this case on May 15, 2003. The Appeals Tribunal decision states that it was mailed to the parties on May 13, 2003. This is entirely consistent with Santos' uncontroverted affidavit. By unfortunate coincidence, it appears that the Company received the document immediately after the trial concluded and the record was closed. From this it follows that the Appeals Tribunal decision was newly discovered evidence that could not reasonably have been produced during the trial in this matter.[5]

I must next address the question of whether the Appeals Tribunal decision is relevant to the issues under consideration. Both counsel for the Union and counsel for the General Counsel concede that the document is at least marginally relevant. More importantly, the Board had addressed this issue on several occasions. In *Western Publishing Co.,* 263 NLRB 1110 (1982), it observed that

> We have long held that [unemployment compensation decisions by state departments of labor], although not controlling as to the findings of fact or conclusions of law contained therein, have some probative value and are admissible into evidence.

Id. at fn. 1. The Third Circuit has described the Board's view as being that the decisions of state unemployment compensation agencies, although not controlling, "may be judicially noticed." *NLRB v. Duquesne Electric & Mfg. Co.,* 518 F.2d 701, 703 (3d Cir. 1989). Under the Board's longstanding policy

[4] This error, using the term "wondering" instead of "wandering," also occurs at Tr. 581, l. 10, Tr. 607, l. 24, Tr. 630, ll. 11, 12, 20, 24, and 25, and Tr. 648, l. 1.

[5] In his affidavit, Santos also stated that the parties before the Appeals Tribunal were not given an indication of when its decision would issue. This is certainly consistent with the nature of the litigation process.

authorizing admission of unemployment compensation decisions, I will reopen the record and admit the decision of the Appeals Tribunal into evidence. At the appropriate time, I will discuss the weight I have assigned to this document.

Finally, I note that, on June 19, 2003, the General Counsel filed an errata to counsel for the General Counsel's brief to the administrative law judge. This contains only technical corrections. No party has objected to this submission, and I grant leave to file this document.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company and the oral closing argument presented by counsel for the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, manufactures railroad equipment and structural steel components at its facility in Southampton, New Jersey, where it annually purchases and receives at the facility goods valued in excess of $50,000 directly from points outside the State of New Jersey. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[6]

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Factual Background

Alphonso Daloisio Jr. is the owner of RCC Fabricators, Inc. The firm's acronym is an abbreviation of "Railroad Construction Company." Daloisio's family has a long history in this field of endeavor. His grandfather started the original company in 1926, with exclusive focus on the railroad industry. Over time, the nature of the business expanded to include road, bridge, and site work, as well as, building construction. In 2000, the original company was divided into a number of separate entities. Historically, these companies have had work forces represented by a variety of unions. Daloisio testified that the family of companies currently has 27 agreements with unions, including the operators, teamsters, iron workers, laborers, dock builders, and carpenters.

Although RCC Fabricators, Inc. has a venerable corporate ancestry; the Company itself is quite new. Its immediate predecessor was a corporation known as RCC Materials and Equipment, located in North Carolina. Daloisio owned this company in conjunction with his brother, James. The company manufactured railroad equipment, but it was not a profitable enterprise. Daloisio testified that in the fall of 2001, it was decided to combine the North Carolina production with a steel fabrication operation intended to supply the building component of the RCC family of companies. It was further decided to locate this new company in New Jersey. As a result, Daloisio established the Company as a New Jersey corporation engaged in the manufacture of railroad equipment and structural steel components for the building industry.

A suitable facility for the Company was purchased. Located in Southampton, New Jersey, the property consists of 16 acres, including a 53,000 square foot manufacturing plant. Several veteran employees from the former North Carolina plant were recruited for operations in Southampton. Among those who transferred to New Jersey for this purpose were two who figure prominently in this case, Carl Baer and James Phillips. Along with several other employees, they were housed in a residence located on the Company's property. Baer was hired as the shop superintendent. Daloisio testified that Phillips was initially hired to be a "jack of all trades" and did not have a formal title. (Tr. 42.) As the autumn of 2001 progressed, additional employees were hired, including principal management officers. Among them was Dave Puza, the Company's vice president. He testified that one of his initial impressions was a concern that the Company lacked formal disciplinary procedures for employees. He believed that the absence of such procedures was a cause of developing disciplinary problems. As a result, he directed that disciplinary forms be obtained from other components of the RCC family of companies.

In November 2001, operations began. Originally, these consisted of the cleaning and painting of the shop facility. At this time, Phillips was appointed as a foreman. He was told that he "would be working, as well." (Tr. 403.) The hiring process also continued. In December, Ronald Earley was hired as a welder and fitter. He had extensive prior experience, having risen from laborer to foreman in the defunct company that had been the prior occupant of the Southampton plant. Less than a year after he was hired, Earley was promoted to be the second shop foreman. At that point, the two foremen, Phillips and Earley, were each given responsibility for a facet of the Company's operations. Phillips dealt with the production of railroad equipment, while Earley was foreman of the structural steel operation. Both men reported to Baer.

By January 2002, the Company was fully operational and was manufacturing its products. The first billing was generated in that month. At the same time, the Company implemented use of the disciplinary form provided by the human resource manager of the RCC family of companies.

In the following month, Daniel Pohubka, another important participant in the events involved in this case, was hired. His job was as a laborer and the duties consisted of painting, sweeping, and, as he put it, "a little welding" and "whatever [else] I was told to do." (Tr. 169.)

At the approximate time that Pohubka began his employment with the Company, the question of union representation for the work force first arose. Daloisio testified that he serves as co-chair of Project Build, a cooperative union-management committee that resolves jurisdictional disputes among unions in New Jersey. His co-chair is Frank D'Antonio, the president of Laborers Union Local 172. On the occasion of a Project Build meeting in February 2002, Daloisio told D'Antonio that he had opened a new shop. Daloisio testified that D'Antonio responded by asking, "hey, do you want me to get a shop agreement, you know, for down there also?" (Tr. 43.) Daloisio re-

[6] The Company's position as to jurisdiction is set forth in its answer to the complaint, par. 2(b), as supplemented by counsel for the Company's stipulations at Tr. 6–7.

ports that he told D'Antonio that he was uncertain about the Company's viability. As a result, he suggested,

> [W]hy don't you give us a year or two and we'll definitely, we'll talk about it, there's no question that if the co-workers[7] are interested[,] that we'd be interested.

(Tr. 44.) Daloisio indicated that subsequent to this conversation, D'Antonio would occasionally ask him about the status of the Company.

Pohubka testified that in March 2002, he began speaking to his fellow employees regarding the question of union representation. He reported that the idea for such representation came to him after employees of another RCC company took him to task, telling him that he was doing union work and should be getting paid union wages. Pohubka asserts that in the following month he asked Baer why there was no union at the plant and Baer responded by telling him that Daloisio would "shut down the shop" if a union came in. (Tr. 219.) Baer flatly denies any such conversation.

There is general agreement that Pohubka raised a peripheral issue regarding union representation during a meeting in April. Puza testified that during the meeting Pohubka asked why the employees were not being paid union wages when the material they were fabricating was being used on union contract jobs. Puza responded by noting that the contracts were prevailing wage contracts and that the Company was complying with this requirement. Puza opined that this response appeared to satisfy Pohubka, "because I was never asked about it again." (Tr. 640.)

On July 2, 2002, Pohubka became involved in an event that resulted in his first formal disciplinary sanction. Foreman Phillips discovered Pohubka and another employee, Shawn Mace, sleeping in the parts room 10 minutes after the conclusion of an employee breaktime. Phillips testified that he told both men that they owed the Company 10 minutes of work time. He told both men to make up the 10 minutes and then "forget about it." (Tr. 482.) Pohubka refused to make up the lost time and told Phillips he was being "anal" about the episode.[8] By contrast, Mace readily agreed to make up the time.

Phillips instructed Pohubka to return to the welding job that he had been performing. Pohubka testified that approximately 1 hour later, he became angry that he was being required to perform a welder's duties but was not being compensated at a welder's level of pay. He took this complaint to Phillips. Pohubka conceded that he behaved poorly, intentionally dropping a 30-pound piece of metal and cursing at Phillips.[9] Phillips ordered Pohubka to report to Baer's office. Pohubka was given formal notice that he was being suspended for 3 days. The suspension was memorialized and explained on a written "Corrective Action Notice" form. The nature of the misconduct was characterized as "insubordination" and "inadequate work performance." Pohubka was warned that he must improve both his attitude and his performance. (GC Exh. 4, p. 24.)

As mentioned, another employee, Mace, was discovered sleeping in the parts room at the same time as Pohubka. The corrective action notice issued to Mace is significantly different from Pohubka's. The level of discipline is listed as a verbal warning that Mace must be "more aware of scheduled break time." In addition, Baer added a comment that Mace deserved commendation for "the manner in which he handled this incident." (GC Exh. 4, p. 14.)

In his testimony regarding these events, Baer evinced a bit of difficulty in articulating his reasoning underlying Pohubka's suspension. At first, he contended that the suspension was imposed for the offense of sleeping on work time. Later, he testified that "[a]ttitude was the major reason" for the suspension. (Tr. 410.) Interestingly, Pohubka chose the same word to describe his conduct on this date, testifying that he gave his supervisors "attitude" and that he "yelled back at them." (Tr. 201.) I conclude that the best explanation for Pohubka's suspension is found in the reasons enumerated on the contemporaneously prepared corrective action notice, particularly the offense of insubordination. Emphasis on Pohubka's poor attitude as demonstrated by his insubordinate refusal to make up the lost time and his cursing at his foreman satisfactorily account for the difference in severity and tone between his discipline and that issued to Mace.[10]

In the following months, the new company continued to experience a variety of growing pains. Santos testified that among these was an increase in employees' tardiness. He described this problem as a spreading cancer. In mid-July, Santos drafted six identical corrective action notices addressing this tardiness. Among the six employees cited in these notices was Pohubka. Santos gave the draft notices to Baer for issuance to the employees. Baer did not issue them. In fact, he threw all of them away, including the one addressed to Pohubka.[11]

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[7] In his testimony, Daloisio referred to the Company's employees as "co-workers."

[8] I do not find Pohubka to be a credible and reliable witness. As an example, in his testimony he initially conceded that he refused to make up the time spent sleeping. Later, he denied being asked to make up the time. Still later, he was again asked if Phillips directed him to make up the lost time. He responded, "[h]e might have, and he might have not. I really do not recall." (Tr. 226.) Compounding the confusion, later still in his examination, Pohubka agreed that the portion of the written disciplinary report about this incident describing the need to make up the time was accurate. That portion included the notation that Pohubka "was asked by [Phillips] to make-up the 10 mins. at end of shift. He thought it was funny." (GC Exh. 4, p. 24.)

[9] He testified that, in a loud voice, he told Phillips, "[d]on't f—kin' talk to me." (Tr. 224.)

[10] It follows from this that I further conclude that Pohubka's union sympathies and activities did not play a role in the differing disciplinary outcomes. Pohubka confirmed that his supervisors did not raise this as an issue and I find that it was not a factor. As both Baer and Pohubka noted, the problem was Pohubka's attitude toward his supervisors as manifested in his behavior on that day. This impression is reinforced by Phillips' testimony that he made his initial report regarding the incident due to Pohubka's "bad attitude" about it. (Tr. 484.)

[11] This is a good illustration of one of the sources of conflict and inconsistency among the Company's management officials. It is evident that those managers with prior experience in New Jersey favored a tougher, more confrontational approach to employee discipline. Supervisors whose prior experience was gained in the North Carolina operation were more inclined to a conciliatory approach to employee relations.

In early October 2002, the first concrete action was taken regarding union representation for the Company's employees. One of those employees, Brian VanNortwick, contacted the Carpenter's Union through his son's teacher's husband, a union member. VanNortwick discussed the issue of representation with his coworkers. Pohubka testified that he escalated his own similar discussions after VanNortwick made contact with the Union. He indicated that he spoke to all but two of his coworkers about the issue, albeit doing so "a little secretly." (Tr. 186.) Paradoxically, Pohubka also testified that at this time he had a similar conversation with Phillips and Baer in Baer's office. He asked them why they opposed a union, and suggested to them that a union would benefit them. Pohubka testified that Phillips made no response, but Baer told him that Daloisio would close the shop if the employees chose union representation. Baer denied the existence of any such conversation, testifying that he never discussed union issues with any employees.

VanNortwick took the next step by scheduling a meeting between interested employees and representatives of the Union.[12] Pohubka suggested that VanNortwick hold the meeting at a local pizzeria owned by Pohubka's friend. The meeting was scheduled for October 9 at the pizza shop. Approximately 13 employees attended the meeting. This represented the great majority of the Company's work force. All of those in attendance, including Pohubka and VanNortwick, signed cards authorizing the Union to act as their collective-bargaining representative.

There is no evidence to suggest that company officials had any advance notice that the Carpenters were meeting with employees. On the other hand, it is clear that immediately after the meeting the Company learned about it from a number of sources. Phillips testified that three employees told him about it either later that evening or the following day. Indeed, he reported that "lots of people" were discussing it. (Tr. 491.) Phillips also confirmed that he "probably" asked employees questions about the meeting, including why he was not invited to attend. (Tr. 491.) Counsel asked Phillips if he told employees "that the employer would go out of business with the Carpenters." (Tr. 164.) He responded that he may not have used those exact words, but "I'm sure I probably would've said something to that effect." (Tr. 164.) Pohubka testified that Phillips asked him "how the meeting went, what was said at the meeting." (Tr. 192.) In response, Pohubka indicated that he "just blew him [Phillips] off." (Tr. 192.) Another employee, Jesse Iannaco, also testified that Phillips inquired why he had not been invited to the meeting. He also asked who had attended the meeting.

Earley reported that he learned of the meeting through employee discussions on the following day. He confirmed the fact that he and Phillips asked employees why they had not been invited. He was informed that the employees did not invite the foremen because they were not considered to be "workers." (Tr. 532.) In addition to the foremen, Baer learned of the meeting on the next day. He testified that he thought Phillips told him about it. Santos also learned of the meeting on the following day. He gained his knowledge when an employee asked him if the shop would stay open. The question puzzled him, so he reported it to Baer. Baer then told him about the meeting at the pizzeria. Thus, it is apparent that the Company's officials had widespread knowledge of the meeting by the following day.

On the day after the meeting, the Union addressed a letter to the Company, informing it that the Union represented a majority of the workers and demanding recognition as exclusive bargaining agent. (R. Exh. 1.) Daloisio testified that he received this letter within the next couple of days. He then consulted with counsel.

The culminating event referred to in the General Counsel's complaint of unfair labor practices took place on October 11. Baer testified that on this day Pohubka arrived at work a few minutes late. He got a cup of coffee and paused to speak to at least two coworkers. Baer confronted him about his failure to begin performing work. Pohubka angrily responded that he was unable to begin working because he could not find Phillips in order to ascertain his next assignment. Baer responded that this could not be true, since Pohubka had a clear view of Phillips. Bear instructed Pohubka to report to Phillips, whereupon he entered his office. He testified that, 10 minutes later, Pohubka and Phillips arrived at his office. Phillips informed him that Pohubka had called Baer a f—king asshole. Pohubka did not deny making the comment, but grew angry and loud, complaining that he was being treated unfairly. Baer testified that, at this point, he told Pohubka that he was fired. He directed Pohubka to leave the plant.

Phillips testified that Pohubka had arrived late. Upon punching in, Pohubka "went right by me, and cut down the first aisle." (Tr. 486.) At that time, Phillips was engaged in assigning tasks to other employees. Within 5 to 10 minutes, Phillips observed Baer and Pohubka talking. Afterwards, Pohubka approached Phillips and told him that Baer was a f—king asshole. He accused Phillips of getting him into trouble. Phillips described Pohubka's attitude and his own opinion by noting that:

> [H]e felt like being as I didn't just grab him by the shoulder and bring him over there, and say "hey, do this, this, and this," then it was part my fault. And then, you know, that's bull crap because he should have stopped over and seen me instead of walking around.

(Tr. 496.) Phillips testified that Pohubka kept getting louder and louder. When he refused to calm down, Phillips took him to Baer's office. Pohubka and Baer "got into it again" and Baer fired him. (Tr. 488.)

Pohubka testified that he arrived at work a minute late due to ongoing car troubles. He proceeded to get a cup of coffee. He then walked to the back of the shop in order to find Phillips. He asked a couple of coworkers about Phillips' whereabouts. He encountered Earley and asked him if he had any work. Earley responded negatively and told Pohubka to find Phillips.[13] He then saw Baer and asked him what to do. Baer asked him why he wasn't working and Pohubka replied that it was due to his

[12] Pohubka testified that he did not speak with any union representatives prior to this meeting. VanNortwick handled all the contacts and arrangements.

[13] Earley does not corroborate this testimony. He indicated that he observed Pohubka walk past Phillips. He further testified that Pohubka also walked past him.

inability to locate Phillips. Pohubka testified that Baer became angry and told him that he was sick of his not working. Pohubka reports that within 30 seconds thereafter he located Phillips who was entering the building. He told Phillips that Baer was in a bad mood. Pohubka testified that Phillips responded by telling him that he was "sick of my attitude" and sent him to Baer's office. (Tr. 198.) Baer told him he was fired.

Although Pohubka's discharge is the ultimate allegation in the complaint, it is necessary to consider subsequent events. It will be recalled that Daloisio testified that, as of approximately October 12, he received the Carpenters Union's demand for recognition. Thereafter, Daloisio informed D'Antonio of the Carpenters' involvement at the shop. D'Antonio requested an opportunity to talk with the Company's employees and Daloisio agreed.

On October 18, the Company arranged for a representative of the Laborers Union to address the work force at the shop during work hours. One hour before this meeting, Daloisio addressed the employees. As described by Iannaco, Daloisio told them that he had contracts with both unions in other parts of the family of companies. According to Iannaco, he went on to say, "You vote what you feel is best. And he said he actually couldn't afford the Carpenters Union in there." (Tr. 284.) Daloisio testified that he told the employees that he had relationships with both unions, but added that, "I had a long term relationship with shop agreements with the Laborers. We did not have a shop agreement with the Carpenters." (Tr. 50.)

Daloisio also testified that during the meeting an employee asked him about the odds that the shop would stay open in the event of union representation. He told the employee that this would not be a problem "as long as we came to an agreement that was reasonable" but an unreasonable package from a union "would not be a long term viable operation for us." (Tr. 52–53.) He also testified that employees said that the Carpenters Union had promised them pay of $50 per hour. He responded by informing them that under his shop agreements with the Laborers, pay ranges from $14 to $17 per hour.

Shortly thereafter, a meeting with Derrick Weber of the Laborers Union was convened. Phillips testified that the workers were assembled along with himself, Earley, and Santos. Puza asked Phillips, Earley, and Santos to leave "so that the guys could talk to the Laborer guy." (Tr. 492.) A few minutes later, Phillips and Earley were told that they could attend the meeting. Santos was not given a similar invitation.

Santos confirmed that he did not stay for the substance of the meeting. However, he introduced Weber to the employees, telling them that Weber was there to "speak with the shop employees about, you know, an alternative union if the guys were interested." (Tr. 598.) After making this introduction, Santos left the room. During the meeting, authorization cards for the Laborers Union were passed to the attendees. Three days later, a second meeting with the Laborers Union was held at the shop on worktime.

On October 23, 25, and 30, a carpenter's union representative left voice mail messages for Daloisio, telling him "who I was with and what we were about." (Tr. 372.) Having received no response, on October 25, the Union filed a petition seeking certification as collective-bargaining representative. (GC Exh. 1(a).) On the same date, the Acting Regional Director mailed notice of this petition to the Company. (GC Exh. 1(c).)

The Company continued to provide the Laborers Union with access to its employees at the plant during working hours. On October 31, the Laborers filed a petition seeking representation of the Company's employees. (GC Exh. 1(d).) The Regional Director consolidated the two representation proceedings and issued an appropriate notice. (GC Exh. 1(f).) At approximately the same time, Daloisio again addressed the employees. According to VanNortwick, Daloisio stated that he was leaving it up to the employees as to whom they chose to represent them. However, he added that the Carpenters Union was "more—a little more expensive, in terms of their overall package, than the Laborers Union."[14] (Tr. 355.) Shortly thereafter, another meeting with a Laborers Union representative was held. Among those attending were Phillips and Earley. Authorization cards were passed out.

On November 4, a hearing was convened at the Regional Office regarding the representation petitions. All parties reached consensus as to a stipulated election agreement. In particular, two issues were addressed and resolved. The Laborers' petition had included "working foremen" within the proposed collective-bargaining unit. The Carpenters' petition did not. The parties agreed that the Carpenters reserved the right to challenge the ballots of the foremen if they voted in the election. The Carpenters also raised the issue of the provision of access to representatives of the Laborers Union on the Company's premises during working hours. It was agreed that the Carpenters would be given an opportunity to meet with the employees at the shop on worktime. The election was scheduled for later in the month.

VanNortwick testified that during this period leading up to the election, Earley discussed the union issue on an almost daily basis. He warned that the shop would close if the employees selected the Carpenters Union. As VanNortwick put it, Earley told them that, "Al would close, 'cause Al did not want a union in here." (Tr. 358.)

Puza testified that in accordance with the parties' election agreement, arrangements were made for the Carpenters to address the employees at the plant. The meeting never took place since the Carpenters' representatives got lost on their way to the facility and arrived after closing time. Puza indicated that VanNortwick then asked the Company to reschedule the meeting. The record does not reflect precisely what occurred, but it is uncontroverted that the Carpenters did not meet with the employees at the plant on company time. They did hold another meeting with employees at an employee's home.

The election was held on November 21.[15] Sixteen ballots were cast. There were 6 votes for the Carpenters, 5 votes against union representation, no votes for the Laborers, and 5

[14] This is quite consistent with Daloisio's testimony that "[o]verall for our construction activities, generally the Carpenter's benefits are significantly higher than the Laborer's benefits." (Tr. 62.) He also reported that the Carpenter's wages were higher, but that this gap was closing.

[15] There is some confusion in the record regarding the date of the election. I will adopt the date set forth by the Regional Director in her notice of hearing on challenged ballots. (GC Exh. 1(o).)

challenged ballots. Three days later, the Union filed an unfair labor practice charge arising from Pohubka's dismissal. This was supplemented by an amended charge filed on January 29, 2003.

B. Legal Analysis

1. Baer's alleged threat of plant closure

The General Counsel alleges that Baer warned an employee that the Company "would close the shop if the employees selected a union as their bargaining representative." (Complaint, par. 5, GC Exh. 1(m).) The approximate date of this conversation is alleged to have been during the first week of October 2002. As is customary, the complaint does not name the employee. At trial, counsel for the General Counsel confirmed that the employee alleged to have received this threat of plant closure was Pohubka. (Tr. 665–666.) It is contended that Baer's alleged statement violated Section 8(a)(1) of the Act.

In the course of 3 days of trial testimony, very little was elicited regarding this allegation. Counsel for the General Counsel asked Pohubka if he ever talked about union representation with a supervisor. Pohubka testified that he had such a conversation with Baer and Phillips in their office. He indicated that this happened in late September or early October. He described the conversation as follows.

> POHUBKA: . . . I asked Bud [Phillips] and Gene [Baer] why they're not for the Union because it would actually benefit them more if they went for the Union?
>
> COUNSEL: How did Gene respond to this?
>
> POHUBKA: He told me that Al [Daloisio] would close down the shop if the Union got into RCC.
>
> COUNSEL: Did he say anything else?
>
> POHUBKA: No.
>
> COUNSEL: Did Bud have, did he make a comment?
>
> POHUBKA: No.

(Tr. 187.) Although Baer was not asked directly about this asserted conversation, he addressed it in general terms. Counsel for the Company directed Baer to Pohubka's allegation that Baer threatened plant closure during a conversation in April. Baer denied make such a statement at that time. Counsel then asked him,

> COUNSEL: Did you ever tell any employee in the shop at RCC Fabricators that Al [Daloisio] would close the shop if they brought a Union in?
>
> BAER: No I didn't.
>
> COUNSEL: Did you ever say anything like that to the employees?
>
> BAER: No.

(Tr. 406.) Nobody asked Phillips if he had any recollection of a conversation among Pohubka, Baer, and himself during the time period under consideration.[16]

It is evident from this sparse record that resolution of this unfair labor practice charge hinges entirely on assessment of credibility. Because I do not find Pohubka's uncorroborated claim to be credible or reliable, I cannot conclude that the General Counsel has met its burden of proving this charge by a preponderance of the evidence. Pohubka's account is implausible on its face and is further undermined by my general assessment of his credibility.

Pohubka claims that during the week immediately preceding the employees' first meeting with the Carpenters, he boldly interrogated his foreman and his foreman's supervisor regarding their opinions on the issue of union representation. He not only demanded to know their reasons for opposing the union, but also attempted to persuade them of the error of their views. One may give credence to such a conversation in circumstances where an employee and his supervisors share cordial and friendly relations. Indeed, the annals of labor law are replete with cases involving allegations of improper interrogation when a supervisor quizzes a subordinate who is also a friend.[17] I have no difficulty accepting the notion that a prounion employee would feel free to raise similar issues with supervisors with whom he or she shares a warm personal relationship. The difficulty here is that Pohubka's relationship with Phillips and Baer was adversarial, not friendly.

It will be recalled that several months earlier Baer had suspended Pohubka based on Phillips' report regarding his sleeping on company time and his insubordination when told to make up the lost time. Both Phillips and Baer testified credibly regarding their assessment of Pohubka. Phillips reported that, "more often than not" he would "spend half the day hunting" Pohubka in order to get him to perform his work. (Tr. 483, 485.) Baer testified to a variety of problems with Pohubka. He had a disrespectful attitude toward the foremen. He was late for work on a "[f]airly regular basis." (Tr. 412.) Baer warned him about this behavior continually. He would spend time talking to other employees at the beginning of his shift instead of getting to the tasks at hand. Again, Baer reported that he discussed this with Pohubka on a frequent basis. Finally, Baer reported that Pohubka would not stay on task. He observed that "it was just a matter of continually chasing him down, getting him back on the job." (Tr. 411.)

Whatever the accuracy of Phillips and Baer's criticisms of Pohubka's work attitude and performance, they certainly put Pohubka on notice that he was not highly regarded by these superiors. Interestingly, Pohubka was examined about his view of their attitude toward him. His testimony underscores my

[16] In certain circumstances, it is appropriate to draw an adverse inference from the failure to question a witness who was present during a disputed event. See *Daikichi Sushii,* 335 NLRB 622 (2001). However, such an inference is only applicable in circumstances showing that the witness "may reasonably be presumed to be favorably disposed to any party." *Queen of Valley Hospital,* 316 NLRB 721 fn. 1 (1995). Phillips testified that he was demoted immediately prior to his testimony in April and left the Company's employ under disputed circumstances immediately prior to his testimony in May. The evidence does not support a presumption that his testimony would be favorable to either side. Indeed, review of his entire testimony shows that it sometimes advanced the Company's cause and sometimes directly undermined it. I do not draw any inference from the failure of any counsel to question Phillips regarding Baer's alleged threat of plant closure.

[17] For example, in *Acme Bus Corp.,* 320 NLRB 458 (1995), enfd. 198 F.3d 233 (2d Cir. 1999), the Board held that a supervisor's friendship with employees increased the likelihood that his solicitation of information about the union from them would be coercive.

findings that his assertion about a threat of plant closure is implausible and his general credibility is suspect. Counsel for the Company asked Pohubka about his relationship with Baer during the summer of 2002. He estimated that the relationship was cordial. Even after his suspension, he continued to believe that the relationship remained cordial. However, he testified that, in late September, he concluded that the relationship "got a little weird." (Tr. 235.) He opined that this did not stem from any specific conversation, but arose after Pohubka began discussing the Union with coworkers. Upon additional questioning, he retreated somewhat from this position, stating he was having difficulty recalling and that it was "a possibility" that Baer's attitude "got weird." (Tr. 236.)

Pohubka's description of his relationship with Baer heightens my sense of the implausibility of the asserted conversation leading to the alleged threat of plant closure. It certainly appears that, as of the end of September, Pohubka had doubts about his standing with Baer. This is also supported by his testimony that when he discussed the Union with coworkers in late September, he did so "a little secretly." (Tr. 186.) Nevertheless, he contends that immediately thereafter he addressed both superiors in their office, questioning them about the reasons for their opposition to the Union and explaining the error of their views. Given the objective circumstances demonstrating that Pohubka's attitude and work performance were viewed unfavorably by these supervisors, and the subjective assessment that caused Pohubka to conduct his conversations with coworkers more covertly, I cannot credit his testimony that he interrogated and lectured his superiors about the benefits of the Union and received a threat of plant closure in return. I find this story to be unlikely and contrary to common perceptions of human behavior.

My conclusion that Pohubka's tale regarding this alleged threat of plant closure is implausible is further supported by overall doubts regarding his veracity when recounting events related to his discharge from employment. His demeanor as a witness conveyed a distinct impression that his testimony was clearly colored by his perception of self-interest. On key points, he was unable to present a coherent and consistent account. Thus, his testimony vacillated regarding whether he was an overt union activist or a covert union supporter. He was unable to clearly articulate whether he was viewed as being in good stead with his supervisors or was the subject of their unfavorable scrutiny. I have already related his inability to set forth a consistent account of his behavior on the day he was suspended for sleeping on the job. I cannot credit his testimony, except in circumstances where it is corroborated by independent evidence. Because of his unreliability as a witness and the inherent implausibility of his uncorroborated account, I do not find that Baer told him that the plant would close if the employees selected the Union as their representative.

2. Interrogation of employees by Phillips

On October 9, at a pizza restaurant, the Company's employees met with representatives of the Carpenters Union for the first time. The General Counsel alleges that, in the days following this meeting, Phillips interrogated employees regarding the reasons why he was not invited to attend the union meeting. He is also alleged to have interrogated employees regarding their union activities and sympathies and the union activities of their fellow workers. Phillips' behavior is asserted to have violated Section 8(a)(1) of the Act.

There is little, if any, dispute among the witnesses regarding these events. Pohubka testified that Phillips asked him "how the meeting went, what was said in the meeting."[18] (Tr. 192.) Another employee, Iannaco, testified that Phillips asked him why he wasn't invited to the meeting. He also "wanted to know who was there." (Tr. 278.) Phillips confirmed that he "probably" asked questions about the pizza party, including an inquiry about why he was not invited. (Tr. 491.) In addition, Earley confirmed that both he and Phillips asked, "how come we weren't invited." (Tr. 532.) Significantly, Earley testified that he asked this question because it was "my future I'm looking at." (Tr. 532.) He told the employees about the reason for his concern, noting that, "I really don't like Unions that much, because I had a few bad experiences with them, you know. And, I, I says I can't afford to be out of work." (Tr. 534.) Thus, two employees reported that Phillips questioned them about the meeting with the Carpenters Union, seeking to learn who attended and what was discussed. Both of the foremen confirmed this questioning, and Earley placed it in context by noting that he had articulated his concerns about the negative impact of union representation.

In its leading case on this subject, the Board observed that it would be unrealistic to contend that any instance of casual questioning about union sympathies would violate the Act. Noting that, "there are myriad situations in which interrogations may arise," it articulated a totality of circumstances standard for assessment of alleged illegal interrogations. *Rossmore House,* 269 NLRB 1176 fn. 20 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Among the key circumstances to be considered are the background to the questioning, the nature of the information sought, the identity of the questioner, and the place and method of the questioning. *Rossmore House*, supra, citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). The fundamental issue to be addressed by application of the totality of circumstances test is whether the questioning "would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights." *Multi-Ad Services,* 331 NLRB 1126, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). This is an objective standard, and it does not turn on whether the "employee in question was actually intimidated." *Multi-Ad Services,* supra at 1228.

Considering the totality of circumstances, the Company argues that Phillips' conduct was not unlawful. There is evidence that supports the Company's position. Phillips was a foreman, not a higher management official. His questions were asked in casual conversation, not in the more formal setting of an office interview. There is no evidence that the questions were posed in

[18] In this instance, I credit Pohubka's account. It is corroborated by the testimony of a coworker. Significantly, it is also corroborated by the testimony of both foremen. In this connection, the Board has endorsed the observation that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of a witness' testimony. *Daikichi Corp*., 335 NLRB 622, 622 (2001), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950). Such is the case here.

a hostile manner. While these factors are in the Company's favor, I conclude that they are outweighed by other relevant factors that direct a finding of reasonable tendency to interfere with, restrain, or coerce the employees.

I find that the background to the questioning is highly significant. The questions were posed immediately after the employees' first organizational meeting with the Carpenters Union. Thus, they came at a particularly delicate moment in the life of this workplace. Regarding the background, I have also considered whether the subjects of the questioning were open union supporters. As to Pohubka, the evidence is conflicting, in large measure due to credibility concerns regarding his own testimony. It is undisputed that he had questioned management about union pay rates for work being performed by the Company. He also contends that he openly discussed the union issue itself with management officials. This is disputed, and it is further undercut by his testimony that he had attempted to organize his coworkers secretly. It is simply unclear whether he was known to be a union supporter at the time Phillips questioned him. By contrast, there is no evidence whatsoever to suggest that Iannaco was an open union supporter.[19] It is also clear that there were other employees present when Phillips and Earley asked their questions.[20] There is nothing to show that such other employees had openly expressed any union sympathies. I conclude that the background circumstances show that the questions were posed immediately after the first organizational meeting and were addressed to employees, at least some of whom were not known to be active and open union supporters.

I also conclude that the nature of the questions posed strongly supports a finding of reasonable tendency to interfere with, restrain, or coerce the employees. The Board has recently underscored the importance of some of the employee rights directly implicated in Phillips' questions, including his questions about who attended the meeting. In *Guess?, Inc.,* 339 NLRB 432 (2003), the Board found a violation of the Act where an attorney for an employer who was deposing an employee asked for the names of persons who had attended a union meeting. The Board noted that,

> It is well settled that Section 7 of the Act gives employees the right to keep confidential their union activities, including their attendance at union meetings. . . . This right to confidentiality is a substantial one, because the willingness of employees to attend union meetings would be severely compromised if an employer could, with relative ease, obtain the identities of those employees.

Id. at 434. The Board went on to observe that this confidentiality interest would be even greater in the case of a union meeting held during an organizational campaign. Phillips' questions about what took place during the organizational meeting implicate these grave concerns. The answers to this question could have readily revealed information regarding the union sympathies of specific employees. As a result, I find that the nature of the information sought strongly supports a finding of interference with Section 7 rights.

Finally, I conclude that the context of the interrogation by Phillips was not innocuous, but rather was directly linked to the Company's opposition to the Carpenters' Union. I base this conclusion on Earley's testimony that during the conversation involving himself, Phillips, and the employees, he directly informed those employees that he viewed his own future as being at stake.[21] He elucidated this concept by describing his own negative experiences and opinions about unions. This placed a clear and pointed meaning on Phillips' inquiries that would reasonably tend to convey a message that the questioners were interested in the information about union sympathies and activities out of concern that the organizational campaign was harmful to their interests.

Based on the totality of circumstances, with particular emphasis on the nature of the questioning, as well as, the background, context, and timing of that questioning, I conclude that Phillips' questions reasonably tended to interfere with, restrain, and coerce the employees in their exercise of the rights granted them by Section 7 of the Act.

3. Phillips' status as supervisor and agent of the Company

A major component of the Company's defense to the allegation of unlawful interrogation of employees by Phillips is its contention that he was not a supervisor within the meaning of the Act. Section 2(11) of the Act defines the term "supervisor" as including an individual who has "the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees." Possession of any one of these powers is sufficient to qualify the person as a supervisor. However, in order to so qualify, the authority must involve more than simply routine or clerical duties. The statute requires that the authority be exercised through the application of independent judgment. The Act does not require that the individual exercise such authority on a regular or routine basis; it is the possession of this type of authority that mandates a finding of supervisory status. Finally, the burden of proving supervisory status is upon those who assert it.[22] In this case, that places the burden on the General Counsel and the Union.

In analyzing this issue, it is necessary to consider several general observations stemming from the Company's brief history. The evidence established that the lines of authority in this new enterprise have not yet crystallized. Managerial and supervisory employees continue to jostle for position and authority.

[19] Counsel for the Company concedes as much. See R. Br. at 49.

[20] Pohubka specifically mentioned an employee he knew as "Charlie H." (Tr. 192.) Earley also testified that the relevant conversations involved other employees.

[21] As will be discussed later in this decision, I have concluded that both Phillips and Earley were statutory supervisors. Earley's supervisory status lent great weight to his words in opposition to the Union. While Earley's statements are not the subject of any unfair labor practice charge, they form part of the vital context of Phillip's interrogation of the employees. The Board permits consideration of such evidence even in the absence of a formal charge when the evidence sheds light on the "underlying character of other conduct that is alleged to violate the Act." *American Packaging Corp*., 311 NLRB 482 fn. 1 (1993).

[22] This summary of the Board's standards for adjudication of the issue of supervisory status is adapted from the Board's recent discussion in *Arlington Masonry Supply, Inc.,* 339 NLRB 817, 818 (2003).

This reality is reflected in the relative lack of probative weight that can be given to job titles within the Company.[23] The owner, Daloisio, testified that he was "not big with titles." (Tr. 42.) Indeed, his own business card does not contain any title denoting his position in the Company. The ongoing fluidity of the situation was illustrated by Baer's testimony at trial. As late as the trial date, he indicated that he was "not real clear" as to Santos' position within the Company. (Tr. 408.) Thus, even within the ranks of the undisputed managers, the lines were blurry. Hence, it was no surprise that when the counsel for the General Counsel asked Phillips what his job title was, he responded that he was, "Leadman, foreman, you know, I mean you could call it leadman, foreman, supervisor, whatever you wanted to call it." (Tr. 139.) Despite this amorphous corporate structure, I note that there exists one type of documentary evidence that could shed considerable light on the issue of Phillips' supervisory status.

Phillips testified that he was told that he was a "working foreman," but at the same time he noted that he "had a resume that they [the Company] had done for me that said leadman supervisor on it." (Tr. 140.) Santos confirmed the existence of this document, but attempted to minimize its significance. He reported that it was prepared for submission to potential customers. He asserted that the Company simply took a resume prepared by Phillips and reformatted it for this use. He further contended that the document merely described Phillips' prior work experience before joining the Company. Despite these claims that the document would have limited probative value in assessing Phillips' responsibilities, the Company did not offer it into evidence so as to conclusively establish its contents. This is particularly striking since the Company did introduce a document describing Baer's job as shop superintendent. (R. Exh. 3.) Interestingly, that document is very specific in laying out the nature and quality of Baer's authority. Among other things, it empowers him to "[s]upervise shop operations" and be responsible for employees' "adherence to company policy and procedures." (R. Exh. 3, pars. 3 and 7.) Furthermore, contrary to the point Santos was trying to make, Puza, the Company's vice president, testified that "job descriptions" for the foremen did exist. (Tr. 651.) His testimony on this point is authoritative since he noted that he wrote the job descriptions himself.

The Board has long held that a party's failure to present evidence within its possession that may reasonably be assumed to be favorable to it raises an adverse inference regarding the factual issue that the evidence could have addressed. Thus, for example, the Board approvingly cited language from a treatise setting forth the rule that:

> [W]here relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him. [Citation omitted.]

Martin Luther King Sr., Nursing Center, 231 NLRB 15 fn. 1 (1997).[24] The document that Phillips' called his "resume" was uniquely within the possession of the Company, the organization that admittedly prepared it for use in its business operations. The nature of the document, coupled with the highly relevant contents of the similar document regarding Baer, leads me to infer that the Company failed to produce it because its contents would tend to support the existence of Phillips' supervisory status. As the Supreme Court has put it, "[t]he production of weak evidence [Santos' testimony about the document] when strong is available [the document itself] can lead only to the conclusion that the strong would have been adverse." *Interstate Circuit v. U.S.,* 306 U.S. 208, 226 (1939).

While on the subject of the Company's job descriptions for employees, it is instructive to note that Baer's written statement of duties and responsibilities indirectly addresses the duties and responsibilities of Phillips and his counterpart, Earley. Among Baer's duties is the requirement that he, "[s]upervise shop operations and provide direction to the two shop foreman [sic] in charge of equipment and steel fabrication." (R. Exh. 3, par. 3.) This supports the undisputed testimony that Earley and Phillips, the foremen, reported to Baer. It also supports the assertion that, by being "in charge of" the Company's two production processes, the foremen were vested with the sort of authority consistent with the exercise of independent judgment and supervisory responsibility.[25] Therefore, to the extent that the Company maintained any written policy regarding the nature and extent of Phillips' supervisory authority, I find that such written guidance supports the General Counsel and Union's position that Phillips was a statutory supervisor.

Turning now to the analysis of job duties required in order to assess supervisory status, I note that the parties have narrowed the issue. In their brief, counsel for the General Counsel assert that Phillips possessed two of the specific attributes of supervisory status enumerated in the Act, the powers to assign and discipline employees. It is further contended that these powers were sufficiently broad so as to require that Phillips exercise independent judgment in their application. The Company disputes these assertions.

In evaluating the Company's position, it is necessary to employ caution. The evidence demonstrates that management has been well aware of the legal issues involved and the tactical advantages of describing Phillips and Earley as nonsupervisory employees. For example, on October 18, the representative of the Laborers Union addressed the employees at the shop. Santos, Phillips, and Earley were present with the employees as the meeting commenced. Phillips testified that they were instructed to leave the meeting "so that the guys could talk to the Laborer guy." (Tr. 492.) A few minutes later, Phillips and Earley were told to return to the meeting. Santos was not invited to rejoin the meeting. It is apparent that the shift in management's posi-

[23] In any event, the Board has observed that it is "well settled" that supervisory status depends on an individual's duties, not his or her title. *Dole Fresh Vegetables,* 339 NLRB 785, 785 (2003).

[24] The Board recently reaffirmed these observations, including reference to the *Martin Luther King Sr., Nursing Center* case, in *Daikichi Sushii,* supra at 622 fn. 4.

[25] In addition, the document also sheds light on the precise job title possessed by Phillips and Earley. In testimony, they were identified with various titles, most commonly that of "working foremen." However, it appears that their actual formal title was that of "shop foremen."

tion as to the foremen's status as possible bargaining unit members reflected a perception of advantage in having them participate. Similarly, the Company manipulated its position regarding Phillips in another respect. The evidence shows that Phillips was exempted from the requirement that production employees punch a timeclock. He testified that this changed, noting that "[w]hen all this stuff came about," he was ordered to punch the clock. (Tr. 141.) This was basically confirmed by Santos who testified that he complained about Phillips' exemption from this requirement. As a result, by December 2002 or January 2003, Puza directed that Phillips punch the clock. Once again, I conclude that management made decisions to alter the appearance of Phillips' status for tactical advantage.

With these considerations in mind, I will assess and resolve the conflicts in the evidence regarding Phillips' role. Phillips' immediate superior, Baer, testified regarding Phillips' ability to assign work to employees. When asked if Phillips assigned "people working on one job to another job," he first responded that he "wouldn't say that." (Tr. 94.) Shortly thereafter, he retreated from this position, noting that, as "a spontaneous thing," the foreman may assign a worker on his own authority rather than attempting to "track me down." (Tr. 94.) Under examination by counsel for the Union, Baer agreed that Phillips and Earley "directed the groups that worked with them."[26] (Tr. 116.) Baer also testified that he would hold informal meetings with Phillips and Earley to decide which employees would work on each of the current jobs. After these meetings, the foremen would inform the employees of their assignments.

Phillips and the employees presented a different picture of the foremen's authority to assign work. Phillips reported that he would make the decisions to assign employees from one completed task to another job that needed to be done. Typically, this would occur twice daily. The employees who testified supported his description of the nature and extent of his authority. Pohubka, Iannaco, and Duane Ashcraft all reported that Phillips made their work assignments, often on a daily basis. VanNortwick put it this way:

> Once we finished a project, we would either find Bud [Phillips] or Butch [Earley] to see what needed to be done next; and then they would assign you to the next task.

(Tr. 338.) Indeed, the actual operation of this management practice is well illustrated by the events immediately preceding Pohubka's termination. On that day, Baer confronted Pohubka because he was angry that Pohubka had walked past Phillips. Phillips was in the process of assigning employees to their tasks. Baer admonished Pohubka and directed him to report to Phillips for job assignment. All of this is consistent with the practices outlined by Phillips and the employees in their testimony. I find that Phillips played a key role in making job assignments to employees on a regular basis.

I also find that Phillips employed independent judgment in making job assignments. As noted, the preponderance of the credible evidence establishes that Phillips' role was far more than merely making ad hoc transfers of employees from one simple task to another when Baer was unavailable. Rather, Phillips was a primary participant in the daily process of determining which employees would undertake the necessary tasks involved in the entire production process for railroad components. Even the picture presented by management witnesses confirms this arrangement. Baer conceded that he had regular meetings with the foremen to work out the assignments. Puza agreed that the foremen could select workers for tasks, but added that this was "[o]nly after discussion with Gene [Baer]." (Tr. 651.) At a minimum, the evidence establishes that Baer, Phillips, and Early formed a troika responsible for the assignment of all job tasks in the production process. This troika made complex and sophisticated judgments. I conclude that Phillips possessed the authority to assign employees and that the breadth and complexity of his authority encompassed the power and duty to make independent judgments as to those assignments.

In reaching the conclusion that Phillips possessed the supervisory authority to assign work contemplated in the language of the Act, I have considered the precedents cited by counsel for the General Counsel and for the Company, as well as, other cases addressing supervisory status. It is clear that the cases turn on their unique facts. To the extent that any precedent is helpful, I find that *Richardson Bros. Co.,* 228 NLRB 314 (1977), bears considerable resemblance to the circumstances involved here. In *Richardson,* the issue was whether an employee characterized as a "leadman" or "assistant foreman" was a statutory supervisor. As part of his job, he "reassigns the department's 22 employees among the various jobs to meet workflow demands." 228 NLRB at 314. The Board found that he possessed supervisory status, observing that

> [I]n carrying out his duties in connection with monitoring and reassigning the work in a department as large as the finishing department, [he] must of necessity make judgments which are more than routine in nature.

228 NLRB at 314. The same is true of Phillips.

The General Counsel contends that Phillips also possessed the power to impose discipline. Puza testified that the foremen were not empowered to impose discipline, not even the issuance of a written warning. Baer made the same assertion. Nevertheless, on examination by counsel for the Union, he conceded that it was "very possible" that a foreman could sign a corrective action notice on the line indicated for supervisors. (Tr. 125.) Once again, the employees testified that the foremen were more powerful figures than described by the management witnesses. Iannaco agreed with counsel's contention that they had the "authority and power to discipline." (Tr. 288.) VanNortwick was of the same opinion.

I find that the conflicting testimony is best resolved by consideration of the documentary evidence, the corrective action notices themselves. A substantial number of these notices were signed by Baer, Phillips, and Earley together. (GC Exh. 4, pp. 1, 9, 13, 14, 25, 29, 30, 40, 42, and 43.) Baer contended that he liked to have Phillips and Earley join him in signing these forms because they could serve as witnesses to the discipline being meted out. The first difficulty with this contention is that the forms do not show them to be signing as witnesses. In fact,

[26] Baer also confirmed that the foremen "worked along with" other employees. (Tr. 116.)

when Earley did sign one such form as a mere witness, he was careful to annotate the form to this effect. (GC Exh. 4, p. 28.) Furthermore, there was no evidence of any company requirement that such forms be witnessed. In fact, Baer issued corrective action notices that contained only his own signature. (GC Exh. 4, pp. 8, 22, 24, and 33.) Other management officials also issued corrective action notices or other disciplinary letters containing only their own signatures. (GC Exh. 4, pp. 16, 38.) Some disciplinary notices were even signed by one manager acting on behalf of another manager who did not sign the form. (GC Exh. 4, pp. 7, 21, 39.)

Events involved in the issuance of one particular disciplinary form emphatically undercut Baer's contention that Phillips and Earley were simply witnesses. On November 13, 2002, Iannaco was issued a corrective action notice for using abusive language. Baer signed the notice on November 13. Phillips and Earley signed the same notice on the following day. As a result, they could hardly be signing as witnesses. Indeed, when questioned about this document, Baer testified that he could not recall why they had signed it. He went on to report that "when I talked to Mr. Iannaco about this particular offense, that it was in the presence of Mr. Dave Puza." (Tr. 127.) Yet, although he was a bona fide witness, Puza did not sign the form. I do not credit Baer's testimony that Phillips and Earley signed corrective action notices as mere witnesses.[27]

If Phillips and Earley did not sign these disciplinary forms as witnesses, in what capacity did they sign the forms? To answer this question, it is helpful to recall that the evidence has already established that Baer, Phillips, and Earley often acted as a troika in making work assignments. I find that this pattern is repeated as to the issuance of discipline. The three men often acted together and used their signatures on the corrective action notices to demonstrate their consensus to the offending employee. In drawing this conclusion, I place great weight upon Phillips' testimony as to this precise issue. When asked about the meaning of his signature on the corrective action forms, he responded that:

> Sometimes I did them, you know, I signed them myself. And sometimes I signed them as a witness . . . I mean, what it was it was me, Butch [Earley] and Gene [Baer] would agree on, you know, we all showed, signed it, showing that we agreed with whatever was happening. If it was, you know, this corrective action notice or another corrective action notice, then you know, so we were all in agreeance [sic].

(Tr. 489.) Phillips' explanation that the presence of the three signatures on corrective action notices represented confirmation to the employee that the three persons in charge of plant operations had reached agreement as to the imposition of the disciplinary action is consistent with the evidence regarding their pattern of exercise of joint authority in running those operations. In addition, I have generally found Phillips to be a reliable witness regarding the events involved in this matter. His general reliability is reinforced on this point since he provided this testimony in May, after he had left the Company's employ. By then, he had no apparent reason to curry favor with any party to this litigation.

Although my conclusion that Phillips possessed supervisory authority within the meaning of the Act is grounded upon the evidence regarding his exercise of independent judgment while assigning work and disciplining employees, I have also considered the secondary indicia of supervisory status to the extent mandated by the Board.[28] Phillips' possession of significant secondary indicia lends additional support to a finding of supervisory status. Puza testified that when considering whom to lay off due to decline in work, top management asked Phillips and Earley for "a characterization of all the people" in order to ascertain "who were good workers, who were marginal workers." (Tr. 648.) Phillips and Earley were also regular participants in the weekly production meetings. These were attended by Tanzola, Puza, Santos, and Baer. The purpose of the meetings was to assess each ongoing work order, including schedules, targets, delivery goals, assignment of workers, and authorization of overtime. The foremen not only attended the meetings, they were active participants. Indeed, Baer testified that during the meetings, they would frequently "know where they stood on a particular project better than I did." (Tr. 452.) In addition, Phillips shared use of Baer's office and had his own desk in that office.[29] He used this for sophisticated work tasks that included drawing schematics and ordering thousands of parts for the production process. He had the authority to order such parts based on his own judgment and initiative. He also possessed the power to sign timecards for employees when their duties prevented them from punching in personally. He testified that the other persons who possessed this power were Santos, Tanzola, Baer, and, perhaps, Earley. In addition to signing corrective action notices, Phillips and Earley joined Baer in signing a notice informing an employee that he was being laid off. (R. Exh. 2.) Phillips was issued a Company credit card that he used for purchases on the Company's behalf.

Contrary to the Company's assertions, the evidence shows that Phillips possessed key primary and secondary indicia of supervisory status.[30] The General Counsel also contends that, apart from the issue of supervisory status, Phillips was an agent of the employer within the meaning of the Act. The Board applies common law principles of agency in making this determination. An employer is responsible for the conduct of an employee if that employee acted with apparent authority with re-

[27] By the same token, I do not credit Earley's testimony in support of Baer on this point. His testimony is fatally undermined by the fact that he carefully noted that he was signing as a witness when that was actually his role. (GC Exh. 4, p. 28.)

[28] The Board holds that secondary factors should only be considered if primary indicia of supervisory status enumerated in Sec. 2(11) have been found to exist. Compare: *J.C. Brock Corp.,* 314 NLRB 157, 159 (1994), with *McClatchy Newspapers, Inc.*, 307 NLRB 773 (1992).

[29] Earley was offered a similar arrangement, but declined. He testified that he was "not a desk person" and disliked even going into offices. (Tr. 505.)

[30] By not inviting the foremen to their organizational meeting at the pizza restaurant, the employees demonstrated their view that the men were supervisors. In his testimony, one employee, VanNortwick, summarized his reasons for drawing this conclusion by noting that the foremen issued discipline, attended production meetings, and assigned work. The factors he identified are all deemed probative by the Board.

spect to the conduct. Apparent authority results from a manifestation by the employer that creates a reasonable basis for the employee to believe that the employer has authorized the alleged agent to perform the acts at issue. A key aspect of the analysis is whether the employer has used the employee in question as a conduit for transmitting information from management to other employees.[31]

Phillips testified that in addition to attending the weekly production meetings, he would convey decisions made at those meetings to the employees. This is quite significant. In *Ready Mix, Inc.,* 337 NLRB 1189 (2002), the Board noted that it has held that employees were conduits from management

> [W]here they attended daily production meetings with top management, from which they returned to communicate management's production priorities and were the "link" between employees and upper management.

Id., citing *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 428 (1998). Such was the case regarding these foremen.

Phillips also asked Iannaco if he would consent to a voluntary layoff. Both foremen asked the employees if they were available to work overtime. Indeed, counsel for the Company concedes that by asking about overtime, the foremen were "relaying messages from management to the employees." (R. Br. at 23.) Although Earley attempted to minimize his role as a supervisor in his trial testimony, he emphasized his role as a conduit of information. As he put it,

> I work and help keep the guys busy, whatever Mr. Baer gave me to do. I told the guys, I relayed the message. I'm just like a messenger boy. I relay the message, but I also did my job.

(Tr. 501.)[32] I find that, at a minimum, the foremen were regularly used by the Company to serve as conduits of important employment information to the production employees. They passed out work assignments, signed disciplinary notices, inspected employees' work, conveyed management decisions made during the production meetings, and asked employees about their willingness to work overtime or accept temporary layoff. From all this, I conclude that the General Counsel has met its burden of establishing that the foremen, including Phillips, possessed actual and apparent authority to speak on behalf of management regarding work-related questions. See *Mid-South Drywall Co.,* 339 NLRB 480 (2003).

4. The impression of surveillance charge

The General Counsel contends that the Company created an impression that it was engaging in surveillance of the employees' union activities. Specifically, it is asserted that Phillips' discussions with Pohubka and Iannaco about the organizational meeting at the pizza restaurant created this impression of surveillance. (GC Br. at 33.) Having found that Phillips was a supervisor and agent of the Company, it is necessary to evaluate the impact of his conversations regarding the pizza meeting.

The Board has recently described the standard involved in this evaluation, observing that

> In order to establish an impression of surveillance violation, the General Counsel bears the burden of proving that the employees would reasonably assume from the statement in question that their union activities had been placed under surveillance.

Heartshare Human Services of New York, 339 NLRB 842, 844 (2003). The concept underlying the prohibition of this type of employer conduct is that Section 8(a)(1) of the Act protects employees from fear that "members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Fred'k Wallace & Son,* 331 NLRB 914 (2000).

In his conversations with Pohubka and Iannaco on the day after the organizational meeting, Phillips clearly indicated to these employees that he was aware of the meeting. I conclude that his comments would reasonably cause those employees to assume that their union activities had been placed under surveillance. In reaching this conclusion, I note that the Board has not required employees to keep their activities secret before an employer can be found to have created an improper impression of surveillance. *United Charter Service, Inc.,* 306 NLRB 150, 151 (1992). Thus, the fact that other employees may have told Phillips about the meeting does not serve to excuse his statements to Pohubka and Iannaco that suggested surveillance of their attendance at the pizza meeting. In *United Charter Service,* the Board also noted that it was significant that the employees chose to conduct their union business at an off-site restaurant. Id. at 151.

Finally, of decisive importance in these circumstances, I note that Phillips' comments creating an impression of surveillance were made at the same time that he engaged in questioning of the employees regarding the events that transpired at the meeting and the names of other employees who attended. The Board has observed that the context of comments alleged to have created an impression of surveillance is highly probative. In *Flexsteel Industries,* 311 NLRB 257, 258 (1993), it held that comments suggestive of surveillance made in the context of an unlawful interrogation would lead an employee to conclude that his behavior was under observation and would tend to discourage his participation in protected activity. The circumstances presented here are quite similar to those in *Newlonbro, LLC (Connecticut's Own),* 332 NLRB 1559 (2000), where the Board affirmed an administrative law judge's conclusion that an employer had created an impression of surveillance when a manager told an employee that he "understood" that the employee had attended a union meeting. Id. at 1571. In reaching his conclusion that the statement was unlawful, the judge noted that it was coupled with other comments found to constitute an improper interrogation.

[31] This summary of the Board's standard for analysis of the issue is paraphrased from the recent decision in *D&F Industries,* 339 NLRB 618, 619 (2003).

[32] On the witness stand, Earley conveyed a clear impression that he was (understandably) profoundly grateful to the Company for hiring him and promoting him after the closure of his prior long-term employer who had occupied the same factory complex. His gratitude colored the accuracy of his testimony. Even so, at the same time that he described himself as a mere "messenger boy," he conceded that, as the foreman, he "run[s] the shop for RCC." (Tr. 501.)

Phillips' comments to Pohubka and Iannaco indicating that he knew they had attended the organizational meeting, made during the same conversations in which he asked improper questions about that meeting, created an unlawful impression of surveillance. As a result, the Company violated Section 8(a)(1) of the Act.

5. The discharge of Pohubka

The General Counsel's final unfair labor practice charge embodies the contention that the Company discharged Pohubka because he "supported and assisted the Union." (GC Exh. 1(m).) This is alleged to have violated Section 8(a)(1) and (3) of the Act. In order to evaluate this charge, I must apply the Board's analytical framework set forth in *Wright Line*.[33] This requires that the General Counsel show that Pohubka was engaged in protected activity, that the Company was aware of his activity, and that the activity was a substantial or motivating factor for the decision to terminate him. If the General Counsel fulfills these requirements, the burden shifts to the Company to demonstrate that it would have terminated Pohubka even in the absence of his protected conduct. I will address each factor in turn.

While there is some disagreement about the precise nature and extent of Pohubka's union activity, there is no doubt that he did engage in some forms of protected conduct.[34] Pohubka testified that he began speaking to coworkers about union representation within approximately 1 month after being hired by the Company.[35] It is undisputed that, at a company meeting in April 2002, he raised the issue of union level compensation. Finally, in late September 2002, he testified that in response to VanNortwick's steps to obtain representation by the Union, he escalated his efforts to urge such representation.[36] He reported that he spoke to virtually all of his coworkers in support of this idea. In addition, he attended the meeting at the pizza restaurant and signed an authorization card at that time. I readily conclude that Pohubka engaged in concerted activity of the type that is protected by the Act.

I also find that the Company's management officials were aware that Pohubka supported and was participating in the campaign to secure representation of the employees by the Carpenters Union. Puza, the Company's vice president, confirmed that during a meeting in April 2002, Pohubka raised the issue of union pay for the work being performed at the facility. Thus, shortly after Pohubka was hired, he chose to address management regarding an issue that touched on union representation. It is true that Pohubka indicated that his efforts to persuade coworkers to support the Carpenters Union were done "a little secretly." (Tr. 186.) On the other hand, Pohubka attended the pizza meeting and was interrogated by his foreman regarding the meeting on the following day. The foreman testified that he was aware that Pohubka had attended this meeting, noting that "lots of people" were talking about the meeting. (Tr. 491.) A probative illustration of the extent of upper management's knowledge about this meeting was given by Santos. He testified that on the day after the pizza meeting an employee asked him if the Company would remain in business. He was perplexed by the question and reported it to Baer. Baer then told him about the Carpenters Union's organizational meeting. Based on the evidence, I conclude that officials at all levels of management were aware of Pohubka's union sympathies and activities, including his attendance at the organizational meeting held by the Carpenters Union.[37]

Having found that Pohubka engaged in protected activities and that his involvement was known by management, I must address the issue of the Company's motivation in reaching the decision to discharge him. In my view, this presents a close question. On balance, I conclude that the General Counsel has shown that Pohubka's support for the Carpenters Union constituted one of several factors in the decision to discharge him.

In his testimony, the Company's owner, Daloisio, went to considerable lengths to demonstrate that he does not harbor antiunion animus. He noted that the family of companies associated with RCC Fabricators has 27 union agreements. He has served as trustee and representative for a variety of union-management organizations. Furthermore, he discussed the issue of union representation with a representative of the Laborers Union very shortly after the Company commenced its operations.

While all of Daloisio's assertions may be accurate, they miss the point. The General Counsel contends, and I find, that Daloisio harbored specific animus against the Carpenters Union's effort to organize this workplace. This is reflected in his vigorous attempts to deflect the employees from this option by presenting the alternative of the Laborers Union. In this connection, he testified that he went so far as to tell the employees that "the Carpenters were more—a little more expensive, in terms of their overall package, than the Laborers Union." (Tr. 355.) Indeed, he noted that the employees told him that the Carpenters were promising wages of $50 per hour. He responded by informing them that the Laborers had shop agreements with some components of the RCC family of companies and generally received between $14 and 17 per hour. He coupled this with the pointed admonition that union representation would not be a problem so long as any resulting agreement was "economically advantageous to keep the company going." (Tr. 50.) His explicit preference for the Laborers was further reinforced by the powerful implicit message conveyed by his direction that the employees be authorized to attend meetings with the Labor-

[33] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S 393 (1983).

[34] The Company concedes that "Pohubka was engaged in protected activity under the Act." (R. Br. at 32.)

[35] During the same period, Pohubka also claimed to have spoken to Baer, Phillips, and Earley about his interest in the Union. This claim is disputed, and I do not credit it.

[36] Coupled with this testimony, Pohubka again asserted that he also discussed the benefits of union representation with his superiors. They denied such conversations and I have found that their denials are credible.

[37] In this regard, I agree with counsel for the General Counsel's argument that the quantum of evidence showing management's general knowledge about the organizational meeting supports an inference that it knew of Pohubka's specific involvement. See *Montgomery Ward & Co.,* 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996).

ers on work premises during working hours.[38] I further infer that Daloisio's strong preference for the Laborers Union was conveyed to his managers in at least as clear a fashion as it was conveyed to the rank and file employees. As a result, it is realistic to find that the desire to thwart the Carpenters' organizational effort formed a factor in the determination to discharge Pohubka, an employee who was active in that organizational effort.[39] I, therefore, conclude that the General Counsel has carried its initial burdens and the focus of the inquiry must shift to assessment of the Company's defense.

In evaluating the Company's defense to this unfair labor practice charge, I have been mindful of the overall context, including the labor-relations history just discussed. By the same token, I have also considered the general background of Pohubka's employment history with the Company as this also provides essential context for assessment of the crucial events regarding his termination. The record strongly demonstrates that he was far from an exemplary employee. There was overwhelming evidence that he was generally seen as an unmotivated worker who was difficult to supervise effectively. For example, Baer testified that Pohubka was not attentive to work tasks and "it was a matter of continually chasing him down, getting him back on the job." (Tr. 411.) In addition, Baer reported that he had "a disrespectful attitude towards the Foremen." (Tr. 411.) Earley testified that Pohubka was "[n]ot a very good worker," that he spent too much time "getting coffee, walking around talking to people," and engaging in loud, cursing speech "[a] couple of times a week at least."[40] (Tr. 522, 526.) Phillips also reported that "sometimes I would spend half a day hunting him." (Tr. 483.) Santos colorfully characterized Pohubka's pattern of lack of attentiveness to his work as being similar to that of "a very slow moving pinball, going side to side in the shop." (Tr. 580.)

I found it noteworthy that the managers' unfavorable overall impression of Pohubka's work attitudes and behavior was echoed by those coworkers who were called upon to comment. For example, Ashcraft testified that he requested not to have to work with Pohubka because,

> He would, you know, walk away and be talking or he would [be] too hard to keep track of. There was like I had to work, you know, I had to do the job of two people then.

(Tr. 623.) Iannaco reported similar behavior by Pohubka. His testimony was impressive since it was obvious that he was uncomfortable in reporting his observations about a coworker. The overall impression of Pohubka's work history was of an employee whose behavior was characterized by inattentiveness to his duties and a pattern of disrespect for his supervisors, sometimes expressed in a loud and profane manner. Thus, this case does not present the picture of an otherwise exemplary (or even merely satisfactory) employee who is suddenly discharged on the basis of a single alleged infraction. To the contrary, the evidence established that prior to the events immediately preceding his discharge, Pohubka already stood out as a problem employee.[41]

Turning now to the events of October 11, 2002, the day began with Pohubka's late arrival at work. It is undisputed that, although he arrived late, he stopped to get a cup of coffee. I credit the testimony that he then resumed his pattern of wandering in the shop instead of proceeding to obtain a work assignment from his foreman. Baer observed this misbehavior. Rather than imposing any formal discipline, Baer merely expressed his displeasure at Pohubka's conduct and directed him to report to the foreman for assignment of duties. Upon reporting to Phillips, Pohubka elected to revert to his pattern of loud and profane insubordination. He told Phillips that Baer was a fucking asshole.[42] Phillips described what occurred next:

> I said no, Dan, calm down, you know, just stay calm. And, we would, you know, we would go on to work.
>
> Well, he just kept on getting louder and louder and louder and louder and louder. . . . And, he just kept on. And finally, I said "That's it, go to the office." (Tr. 487.)

Upon reporting to Baer, Pohubka continued his insubordinate behavior. In response, Baer terminated his employment.

Counsel for the General Counsel argue that the Company's decision to terminate Pohubka was unlawful since management had acquiesced in Pohubka's pattern of poor performance and behavior until the Carpenters Union's organizational campaign came to a head. The record does not support this conclusion. It will be recalled that VanNortwick first contacted a representative of the Carpenters Union in late September 2002. Almost 3 months before the initiation of such contact, management disciplined Pohubka for conduct and attitude problems that were virtually identical to those displayed on October 11. On that

[38] While Daloisio eventually agreed to permit a similar meeting with the Carpenters, this was only done as part of a negotiated agreement to facilitate the representation election.

[39] On the other hand, I do not accept the General Counsel's reliance on the timing of Pohubka's discharge as evidence of illegal motivation. Although Pohubka was discharged only 2 days after the pizza meeting, for reasons shortly to be discussed, I agree with counsel for the Company's assertion that "the timing of Pohubka's discharge was dictated by Pohubka and not the Company." (R. Br. at 33.)

[40] Earley's opinion was particularly significant because he gave me the impression that he was a rather mild-mannered individual who was inclined to give others the benefit of the doubt. As a foreman, he was far from being a stickler for perfection.

[41] For this reason, counsel for the General Counsel's reliance on *Naomi Knitting Plant,* 328 NLRB 1279, 1283 (1999), is inapposite. The Board described the discharged employee in that case as having a "good employment record" and no history of prior discipline. As a result, the context in which the events occurred was quite different.

[42] The Board has recently sustained the discharge of an employee for engaging in workplace profanity of this type. In *Aluminum Co. of America*, 338 NLRB 20 (2002), the employee engaged in a "tirade" during which he referred to "chicken s– bosses" and supervisors who were "mother f—kers." Id. at 21. The Board found that such profane speech was not protected within the meaning of the Act, and that application of the analysis required by *Wright Line* was unnecessary. The parties have not suggested that *American Aluminum* should govern the result in this case. Given that the events here took place during an organizing campaign, I have applied the *Wright Line* analysis with its requirement that employer motivation be assessed. Nevertheless, I certainly recognize that in *American Aluminum*, the Board has condemned the sort of profane workplace speech indulged in by Pohubka.

occasion, Pohubka and Mace were discovered to be sleeping on work time. They were simply instructed to make up the lost time at the end of their workday. Mace readily complied and was issued only a warning. An additional notation further softened this warning, noting that he deserved commendation for his compliant response to the discipline. (GC Exh. 4, p. 15.) Unlike Mace, Pohubka responded to the discipline by growing angry, dropping a heavy piece of metal, and resorting to expletives. He was issued a corrective action notice for "[m]isconduct/insubordination" and "[i]adequate work performance." (GC Exh. 4, p. 24.) I find that the supervisors cited inadequate work performance because of his conduct in sleeping on the job. I further find that they cited insubordination due to his refusal to comply with the directive that he make up the lost time and because of his loud and abusive conduct directed at his supervisors.

The corrective action notice issued to Pohubka on July 2, 2002, clearly informed him of the precise nature of the discipline being imposed. The form lists three types of disciplinary sanctions: warning, suspension, and termination. He was informed that the discipline imposed at that time consisted of both a warning and a suspension. It was apparent from the manner in which the form was completed that the only remaining sanction was termination. Despite this, less than 4 months later, Pohubka committed essentially identical disciplinary infractions. As in July, he was observed to be avoiding work during his scheduled work time. When the shop superintendent attempted to impose the mildest of discipline, simply ordering him to obtain a work assignment, Pohubka responded by engaging in loud and profane disparagement of the manager. It was a clear repetition of the same types of misconduct for which he had been sanctioned by all steps short of termination in July. Therefore, I find it logical, consistent, and reasonable that the resulting sanction in October consisted of his termination. In other words, I conclude that the Company would have terminated Pohubka for this recidivist pattern of severe misconduct regardless of his participation in the Carpenters Union's organizational campaign.[43]

To summarize, I find that the General Counsel established that Pohubka engaged in protected, concerted activity and that his participation in such activity was known to management officials. Additionally, I infer that Pohubka's involvement in the Carpenters Union's organizational effort formed one of the factors in his discharge. Finally, I determine that the Company has proven by preponderance of the credible evidence that Pohubka's poor work performance, including his loud and profane insubordination, would have resulted in a decision to terminate his employment regardless of his union sympathies and activities. As a result, the Company did not commit any violation of the Act in terminating his employment.

[43] In this regard, my ultimate conclusion mirrors that of the Appeals Examiner for the New Jersey Department of Labor who concluded that Pohubka's "actions in shouting and acting in an insubordinate manner . . . were the cause of [his] discharge." (Appeals Tribunal Decision, p. 2.) I recognize that the Department of Labor's decision may not reflect knowledge of the larger context. However, while the labor-relations portion of that context raises concern regarding management's motivations, the full history of Pohubka's employment by the Company provides compelling support for the conclusion that he was terminated for insubordinate behavior. Overall, the context reinforces the accuracy of the Appeals Examiner's characterization of what occurred.

III. THE CHALLENGED BALLOTS

On November 21, 2002, a representation election was held. 16 ballots were cast. Six bargaining unit members voted for the Carpenters Union as their representative. Five voted against any union representation. Nobody voted for representation by the Laborers Union. Three ballots were challenged administratively since those voters' names did not appear on the list of eligible voters. In addition, the Carpenters Union challenged the ballots of two voters, contending that they were not proper members of the bargaining unit. As is apparent, the disposition of these ballot challenges could be determinative of the election result.

The five challenged ballots fall into three categories. One ballot was challenged because the individual did not appear on the list of eligible voters since he had previously been terminated from employment. The eligibility of two voters is challenged due to the contention that, as shop foremen, they are statutory supervisors. Two ballots are challenged because the voters did not appear on the list of eligible employees since they had been laid off. I will address each of these issues in turn.

A. The Discharged Employee's Ballot

Daniel Pohubka cast one of the challenged ballots. If, as the General Counsel contended, Pohubka's discharge had been unlawful under the Act, then he would have retained the status of an eligible member of the bargaining unit. For reasons already discussed, I have concluded that Pohubka's discharge was lawful. As a result, he was no longer employed by the Company and was ineligible to vote in the election. I will recommend that the challenge to his ballot be sustained.

B. The Ballots Cast by the Foremen

The Company's two shop foremen, Phillips and Earley, cast ballots in the election. The Union challenged their ballots on the basis that they are supervisors within the meaning of the Act and are not properly included in the bargaining unit.[44] I have already engaged in extensive analysis of the issue of Phillips' supervisory status since resolution of this question was required in order to adjudicate alleged unfair labor practices. Having found that Phillips possessed the power to assign and discipline employees and was required to exercise independent judgment while doing so, I have concluded that he was a supervisor within the meaning of the Section 2(11) of the Act. As a consequence, I will recommend that the challenge to his ballot be sustained.

The issue of Earley's status has not yet been resolved. In grappling with this question, I note at the outset that there was general agreement that Phillips and Earley had the same job. Phillips was the shop foreman for the railroad component portion of the facility and Earley was the shop foreman for the

[44] Although the shop foremen had been included in the description of the bargaining unit written before the election, the parties agreed that the Carpenters Union remained entitled to challenge the inclusion of the foremen. (Tr. 393–395, 463–464.)

structural steel side of the operation. As Earley put it in his testimony, he and Phillips were "even," meaning that, "I would be a foreman as much as he was a foreman." (Tr. 541.) Both Puza and Santos confirmed that the two foremen possessed the same responsibilities. Bargaining unit members who were asked to comment expressed the same conclusion. Therefore, the record fully supports counsel for the Company's characterization as follows:

> Earley performed the majority of his work on the structural steel side of the RCC Fabricators facility. Phillips performed the majority of his work on the railroad side. However, at all relevant times, they performed the same work and had the same functions and responsibilities. [Citations to the transcript are omitted.]

(R. Br. at 12.) For this reason, I have considered the material portions of the record pertaining to Phillips' status in evaluating Earley's eligibility to vote.[45]

I have earlier noted when evaluating Phillips' status that Puza testified that he had written job descriptions for Phillips and Earley. Despite this testimony, the Company failed to introduce these documents. As with Phillips, I draw the inference that this failure to present documentary evidence uniquely within the possession of the Company means that Earley's job description would tend to show that he possessed the type of authority contemplated by the definition of supervisory status contained in the Act. This conclusion is reinforced by consideration of the job description prepared for Baer. That document noted that the shop foremen were "in charge of" the Company's two production processes. (R. Exh. 3.) Such language is also suggestive of the possession of the degree of authority required by the Act. I have also noted that the Company's assertions regarding the foremen's status must be viewed with reservations since management officials attempted to manipulate the evidence in support of their position. Such manipulation directly involved Earley's status. It will be recalled that Earley was initially excluded from attending the organizing meeting conducted by the Laborers Union. This position was abruptly reversed and management authorized Earley to attend the meeting. I conclude that this was done because it was perceived that his participation in the bargaining unit would convey a tactical advantage even though it was initially clear to the higher managers that he was a supervisory employee. Thus, circumstantial evidence and the associated inferences support a conclusion that the Company's position is not credible and that the foremen were, in fact, statutory supervisors.

Turning to the direct evidence, I have found that, as a shop foreman, Phillips possessed the power to assign and discipline employees. He exercised independent judgment while performing these functions. The same is true of Earley. Employees testified that Earley made job assignments related to the structural steel manufacturing process. For example, Iannaco testified that Earley gave out such assignments a couple of times each day. VanNortwick reported that Earley gave out assignments and monitored his work. He also solicited overtime from VanNortwick. VanNortwick summarized his view of Earley's power to assign work by observing that, "Once we finished a project, we would either find Bud [Phillips] or Butch [Earley] to see what needed to be done next, and then they would assign you to the next task." (Tr. 338.) Baer also confirmed that Earley formed a part of the troika that met regularly to determine job assignments. He also attended and was an active participant in the weekly production meetings where important decisions were reached. I conclude that Earley had the authority to assign work.

As to the issue of exercise of independent judgment in making work assignments, I find that the evidence of the exercise of such discretion is even better established than in the case of Phillips. This is so because Earley ran the structural steel operation. He testified that this was the more difficult of the two operations and involved more potential hazard to employees due to the dangers involved in moving heavy pieces of steel. As a result, it is evident that the assignment process required exercise of a highly significant degree of independent judgment in order to assure safe and efficient operations.

Like his counterpart Phillips, Earley also possessed the power to discipline employees. In reaching this conclusion, I note that the evidence is virtually identical to that discussed with reference to Phillips. In particular, consideration of the documentary evidence shows that Earley signed substantial numbers of corrective action notices and, for reasons discussed earlier in this decision, I have concluded that he signed those notices as a participant in the tripartite disciplinary decision-making process.[46]

One further matter requires comment. I have already noted that I credit Phillips' expansive view of the nature of his duties and authority. In large measure, this is due to his independent status after having left the Company's employ. He does not appear to have any remaining interest in maintaining a relationship with the employer or employees.[47] By contrast, since Phillips' departure, Earley has assumed the status of sole foreman in charge of both sides of the Company's production processes. In addition, his testimony clearly demonstrated that his loss of prior long-term employment and rescue through employment by this employer has inspired deep feelings of loyalty and gratitude. I conclude that these emotions have affected his objectivity in describing his role as foreman. As a result, I do not credit his testimony that his duties were limited to those of a mere "messenger boy." (Tr. 501.) Nor do I credit his other attempts to support his employer's position in this litigation by minimizing his duties and authority as shop foreman. Indeed, the reliability of his assessment is directly undercut by his own recognition that, as foreman, he "run[s] the shop for RCC." (Tr. 501.)

[45] It also follows that, where appropriate, I have considered the evidence regarding Earley in determining that Phillips was a supervisor within the meaning of the Act.

[46] There is one exception, the corrective action notice that Earley annotated by noting that he was merely signing as a witness. (GC Exh. 4, p. 28.) The old adage that an exception sometimes proves the rule applies to this document.

[47] It will be recalled that Phillips came to New Jersey from his home in North Carolina in order to work for the Company. Having severed this tie, he has no evident connection to any of the persons associated with this case.

For these reasons, I place greater reliance on Phillips description of the foreman position that he shared with Earley.

Because Earley's duties as shop foreman included the authority to assign and discipline employees and required the exercise of independent judgment in so doing, I find that he is a supervisor within the meaning of the Act. As a result, he is not properly included in the bargaining unit and I shall recommend that the challenge to his ballot be sustained.

C. The Ballots Cast by Laid-Off Employees

In September 2002, the Company hired two brothers, Maurice and George Lopez.[48] These men were laid off on October 22. The men cast ballots in the November 21 election. Their ballots are challenged administratively since their names did not appear on the list of eligible voters. (Jt. Exh. 1.) The Union asserts that their ballots should be counted because the layoff was temporary and the men possessed a reasonable expectation that they would be recalled to work in the foreseeable future. The Company disputes this, arguing that the men were terminated from employment and had no such reasonable expectation of regaining employment in the foreseeable future.

The legal standard for assessment of this issue is clear. As the Board has put it,

> The voting eligibility of laid-off employees depends on whether objective factors support a reasonable expectancy of recall in the near future, which establishes the temporary nature of the layoff. The Board examines several factors in determining voter eligibility, including the employer's past experience and future plans, the circumstances surrounding the layoff, and what the employees were told about the likelihood of recall.

Apex Paper Box Co., 302 NLRB 67, 68 (1991).[49] I will now address these factors.

As RCC Fabricators is in its corporate infancy, the Company has had no prior layoffs. As a result, there can be no evidence regarding the employer's past experience with such events. In *Sol-Jack Co.,* 286 NLRB 1173, 1174 (1987), the Board made a passing reference to the absence of a prior history of layoffs as constituting an objective factor arguing against a reasonable expectancy of recall. Absent a clearer exposition of this less than self-evident concept, it would appear to me that the Company's lack of history or policy regarding layoffs is simply a neutral factor.[50]

I will now address the evidence regarding the circumstances of the layoff. Baer testified that the Lopez brothers were hired in order to meet increased staffing needs for a job involving the production of rail cars for the Port Authority. Although this contract had been awarded to the Company, the Port Authority subsequently "pulled it" due to lack of funds. (Tr. 421.) Baer continued by noting that the Company kept the brothers on the payroll for a week by giving them duties such as sweeping the shop floor. This was done because the Company was "trying to hold on as long as we could." (Tr. 117.) After a week, it was apparent that there was no work for the men and "we had to lay them off." (Tr. 117.) There is no evidence to suggest that the men were laid off for any reason other than an unanticipated loss of business. The Board treats this factor as evidence cutting against a reasonable expectancy of recall. See *Heatcraft,* 250 NLRB 58 (1980), and *Osram Sylvania, Inc.,* 325 NLRB 758 (1998). Indeed, relying on these Board decisions, the Sixth Circuit observed that evidence of a downturn in orders and loss of customers "compellingly" indicates that laid-off employees lacked a reasonable expectancy of recall. *NLRB v. Seawin, Inc.,* 248 F.3d 551, 555–556 (6th Cir. 2001). I find that the reason for the layoff, the unexpected loss of the contract that had justified the workers' hiring, supports a conclusion that there was no reasonable expectancy of recall.

The remaining factors to be considered involve the evidence of the employer's future plans and what the employees were told about the likelihood of recall. The evidence regarding these factors is intertwined and it is appropriate to address the factors together. Baer testified that on October 22 he intended to personally inform both men of the layoff. Unfortunately, George was not at work, having been required to attend to a matter in court. As a consequence, Baer met with Maurice alone. He testified that he told Maurice that both men had been satisfactory employees. Maurice confirmed that Baer indicated that the layoff was solely due to work being "slow." (Tr. 314.) Both men agree that Baer also made some statements indicative of a desire to hire the men in the future. Baer reported that he probably said that "I hoped things did pick up, and if they did we'd consider using them again." (Tr. 118.) Later in his testimony he amplified this, indicating that he told Maurice that "if, or when work picked up, you know, I'd see what we could do about calling them back." (Tr. 424–425.) Maurice described Baer's remarks as indicating that the layoff "was just going to be temporary; I wasn't going to be fired; and that, you know, just call him up to see if there was any job available." (Tr. 314.) Later in his account, Maurice seemingly contradicted this description. At that point, he testified that Baer told him that "as soon as he gets more jobs, he was going to call me." (Tr. 319, 321.)

There is one additional item of evidence that sheds light on what transpired during the conversation between Baer and Maurice Lopez. Both men agree that Baer asked Maurice to sign a form documenting the layoff.[51] The form noted that the presenting problem was that Maurice's "[s]ervices are no

[48] For clarity, I will sometimes refer to the two men by their first names.

[49] These standards have been reiterated very recently in *MJM Studios of New York, Inc.,* 338 NLRB 980 (2003), and *Laneco Construction Systems,* 339 NLRB 1048 (2003). In *MJM Studios,* it was also noted that the determination of eligibility is based on the circumstances as of the payroll eligibility date and the date of the election, with the burden of proof placed on the party seeking to exclude the challenged individuals. Id. at 980.

[50] As the Sixth Circuit has observed in the case of a company with no prior history of layoffs, "Of course, the absence of a prior policy of recalling laid-off employees does not prove that they did not have a reasonable expectancy of recall. Thus, we must focus our attention on other factors." *NLRB v. Seawin, Inc.,* 248 F.3d 551, 555 (6th Cir. 2001).

[51] The form employed was the corrective action notice. Although not really appropriate to the situation, the form was used since the Company lacked a layoff form.

longer required due to lack of work." This explanation was handwritten on the form. Using a checklist, the form went on to advise him that it was to be considered as notice of "[t]ermination." (R. Exh. 2.) Maurice Lopez, Baer, Phillips, and Earley signed the form. In his testimony, Maurice disputed that the checklist designation for termination had been marked when he signed the form. However, he conceded that he did recall the language regarding lack of work being written on the form. I find that both of these items were on the form as tendered to him. It is natural that his attention would be directed to the handwritten notation on the form rather than to the checkbox at the bottom of the document. There is nothing to suggest that the Company's officials have altered the appearance of the form after it was signed.

After this meeting, Maurice told George that they had been laid off. George testified that Maurice told him the reason for the layoff was that "there was no more work for us." (Tr. 308.) Several days later, George telephoned Baer who told him he was sorry about the layoff. This was the extent of their conversation. Maurice testified that for approximately 2 months he continued to call the Company regarding return to employment. During these conversations, he was never given any indication that he would be called back to work. After 2 months, he found new work and stopped calling.

In resolving the disputes regarding this matter, I generally credit the Company's version. Baer's account is supported by the documentary evidence showing that Maurice Lopez was given a written explanation that he was being terminated from employment due to lack of available work. There is no doubt that Baer expressed a desire to consider the brothers for future employment. The Board has realistically noted that such expressions are common in this type of unfortunate situation and reflect a desire on the part of the bearer of ill tidings to soften the blow. Thus, the Board has held that a supervisor's "equivocal statement" of this sort "expresses a possibility more likely expressed to lend hope to the laid-off employee than to give a realistic assessment of his being recalled to work." *Sol-Jack Co.*, supra at 1174. As a result, such statements do not provide an adequate basis for a finding of reasonable expectancy of recall. Such is the situation here. Even if Baer made the statements in the precise manner attributed to him by Maurice Lopez, they were merely expressions of vague hopefulness and cannot be seen as constituting any indication of a return to employment in the foreseeable future.

Considering the factors outlined by the Board, I conclude that the Company has carried its burden of establishing that the circumstances of the layoff, the evidence regarding the Company's future plans, and the statements made to the laid-off employees failed to create any reasonable expectancy of recall. As the Board said in its leading case,

> In the absence of evidence of past practice regarding layoffs, where an employee is given no estimate as to the duration of the layoff or any specific indication as to when, if at all, the employee will be recalled, the Board has found that no reasonable expectation of recall exists.

Apex Paper Box Co., supra at 69. That is the situation here. Accordingly, I find that George and Maurice Lopez could not have had a reasonable expectation of recall to employment in the foreseeable future. As a result, I must recommend that the challenges to their ballots be sustained.

CONCLUSIONS OF LAW

1. By interrogating employees regarding their protected, concerted activities and the protected concerted activities of other employees, the Company violated Section 8(a)(1) of the Act.
2. By creating an impression that employees' protected, concerted activities were under surveillance, the Company violated Section 8(a)(1) of the Act.
3. The Company did not violate the Act in any other manner alleged in the complaint.
4. Having been lawfully discharged from employment, Daniel Pohubka was not eligible to vote in the representation election held on November 21, 2002. The challenge to his ballot should be sustained.
5. Having been laid off without reasonable expectation of recall in the foreseeable future, George and Maurice Lopez were not eligible to vote in the representation election held on November 21, 2002. The challenges to their ballots should be sustained.
6. James Phillips and Ronald Earley were supervisors within the meaning of Section 2(11) of the Act. As a result, they were not eligible to vote in the representation election held on November 21, 2002. The challenges to their ballots should be sustained.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I conclude that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that the Company be ordered to post notices in the usual manner.

Having found that none of the challenged ballots should be counted, I recommend that an appropriate Certification of Results of Election be issued.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[52]

Certification of Representative

It is certified that a majority of the valid ballots have been cast for Piledrivers Local 454 a/w Metropolitan Regional Council of Carpenters, Eastern Pennsylvania, State of Delaware and Eastern Shore of Maryland, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit:

> All full time Layout Men, Machinists, Mechanics, Shop Laborers, Welders, and Welders/Fitters employed by the Employer at its 2035 State Highway 206 South, Southampton, New Jersey facility, but excluding all other employees, in-

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

cluding clerical employees, guards, and supervisors as defined in the Act.

ORDER

IT IS ORDERED that the Respondent, RCC Fabricators, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees regarding their union sympathies or their participation in protected concerted activities or regarding the union sympathies or participation in protected concerted activities of other employees.

(b) Creating an impression that its employees protected concerted activities are under surveillance.

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

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

(a) Within 14 days after service by the Region, post at its facility in Southampton, New Jersey, copies of the attached notice marked "Appendix."[53] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 10, 2002.

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

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

[53] 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.

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 coercively question you about your union support and activities or the union support and activities of other employees.

WE WILL NOT create an impression that your union activities are being placed under surveillance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

RCC FABRICATORS, INC.