

Nos. 09-1464 & 09-1537

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

DIVERSIFIED ENTERPRISES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

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

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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STATEMENT OF JURISDICTION

This case is before the Court on the petition of Diversified Enterprises, Inc. (“the Company”), to review an Order of the National Labor Relations Board (“the Board”). The Board has filed a cross-application for enforcement of its Order.

The Board had jurisdiction under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. § 151, 160(a)) (“the Act”). This Court has

jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), because the unfair labor practices occurred in West Virginia. The Board's Decision and Order, issued on March 26, 2009, is reported at 353 NLRB No. 120 (A 259-70.)¹ The Company filed its petition for review on April 21, 2009. The Board filed its cross-application for enforcement on May 6, 2009. (A 275.) Both the Company's petition for review and the Board's cross-application for enforcement were timely because Section 10(e) and (f) of the Act place no time limits on the filing of petitions for review or applications for enforcement of Board orders.

In *Narricot Indus., L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009), decided after the filing of the Company's brief in this case, this Court held that the plain and unambiguous text of Section 3(b) of the Act (29 U.S.C. § 153(b)) authorized two Board members, acting as a quorum of a three-member group to which the Board had delegated all of its authority, to issue a decision and order. *Narricot*, as the law of this Circuit, conclusively establishes that those two members (Chairman

¹ "A" refers to the pages of the joint appendix that was filed with the Company's brief. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

Liebman and Member Schaumber) properly issued the Board's decision here, and requires that the Company's contrary contention (Br 20-24) be rejected.²

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3) and (1) of the Act by demoting Robert Hornsby from his foreman position and taking away his privileges because of his union activities.

2. Whether substantial evidence supports the Board's findings that the Company violated Section 8(a)(1) of the Act by threatening employees with reprisals because they engaged in activities on behalf of the Union.

STATEMENT OF THE CASE

Based upon unfair labor practice charges filed by the Mid-Atlantic Regional Council of Carpenters, West Virginia District, United Brotherhood of Carpenters and Joiners of America ("the Union"), the Board's General Counsel issued a complaint, which alleged that the Company had violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)) by demoting and taking away the privileges of foreman Robert Hornsby because he openly supported the Union and committed

² The Supreme Court has granted certiorari in *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3245, where the issue is presented.

several violations of Section 8(a) (1) of the Act (29 U.S.C. § 158(a)(1)) by threatening employees because of their union activities. (A 260; 176-84.) After a hearing, an administrative law judge issued a decision and recommended order, finding that the Company had committed the alleged unfair labor practices. The Company filed exceptions to that decision and recommended order; the General Counsel filed limited cross-exceptions objecting to the remedy. The Board (Chairman Liebman and Member Schaumber) considered the parties' exceptions and decided to affirm the administrative law judge's decision and his recommended order, modifying it to a limited extent by striking a violation it found to be cumulative. (A 1.)

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background: the Company's Organization and Operations

The Company provides general contracting services mostly for public and private water and sewer projects. It employs between 600 and 800 employees, depending on the jobs it is working on. Its president is Andrew ("Jack") Whitaker. His brother, Bill Whitaker, is the Company's vice president. The two of them do all of the hiring, firing, and disciplining for the Company. They manage, among others, a group of three project superintendents--including Brian McMahan and

Jack Scott--and another 17 supervisors, including Warren Houchins.³ (A 260, 263 & n.12; 137, 199-202.)

In 2006, the Company was employed as a major contractor on the Cool Ridge Flat Top PSD project near Ghent, West Virginia. It was responsible for a couple of phases of that project, including the construction of concrete holding tanks. Houchins supervised a phase of the project, and under him worked foreman Robert Hornsby, who led a crew of four workmen. (A 261; 38, 41-42.)

B. Under the Supervision of Houchins, Hornsby Led a Crew of Workmen

Jack Whitaker hired Hornsby as a carpenters' foreman on September 11, 2001. Hornsby had worked for Whitaker before, in 1995-96, and was regarded as a top-notch concrete man. (A 261; 133.) Hornsby retained his foreman position until August 29, 2006, when he was demoted and stripped of foreman privileges--including a tire allowance, the use of a Company truck and cell phone, as well as a gasoline charge card, and partial reimbursement for out-of-town expenses--because of his union activities. (A 263; 38-39, 42, 43-44.)

As a carpenters' foreman, Hornsby led a crew of four, including three carpenters and laborers, and an equipment operator. The crew's principal job consisted of fabricating and erecting concrete structures (principally holding tanks)

³ McMahan was also Jack Whitaker's son-in-law. (A 53, 163.)

integral to the particular water/sewer project at hand; they were also involved in the construction of office buildings related to the project. Construction of a single tank could take two to three months, including construction of the formwork and making a pour in phases, about every two weeks. (A 261-62; 43, 44, 141.) The crew's work included excavating for the structure, erecting wood formwork to mold the concrete, setting and tying together steel reinforcement bars to strengthen the concrete, making the pour, and finishing the concrete. Once the concrete hardened, the crew was responsible for removing the formwork. (A 261-62; 43, 46-47, 48-49.)

With the exception of the equipment operator, the carpenter or laborer members of the crew performed identical tasks relating to the erection and disassembling of the formwork, the tying together of the steel, and the pouring and finishing of the concrete. (A 261-62; 43.) Beyond excavation, the operator's job was to supply the crew with material as needed. But during a concrete pour, all the members of the crew were involved to make sure the formwork was properly filled. (A 261-62; 46-47, 48-49.)

Hornsby worked under the direction of Supervisor Houchins. Houchins met with Hornsby every morning and gave him daily instructions concerning the expectations for Hornsby's crew. Sometimes the entire crew participated in the morning meeting with Houchins. As often as three days of the week, Houchins

assigned the members of the crew to specific tasks. On the other days, Hornsby made assignments to members of the crew according to whether the skills required for a particular task were those of a carpenter or an equipment operator. Hornsby had worked with most of the men on a previous job and knew “what they could and couldn't do.” (A 261, 266; 42-43, 45-46, 47.) Of the crew members, only Rodney Herndon was a full-time equipment operator, although Jody Satterfield would also operate equipment when needed. (A 261; 46.)

During the workday, Hornsby worked as a carpenter, alongside other crew members, performing all of the duties of that position, including, assembling and erecting the formwork, tying off the reinforcing steel, and finishing the concrete. If a problem arose on the job, Hornsby could reach Houchins on the company-provided cell phone. Houchins checked on the progress of the crew's work two or three times a day. He sometimes checked in during their lunch hour, but always at the end of the day. (A 261, 266; 43.)

C. Jack Whitaker Demotes Hornsby Because He Asserts He Is a Volunteer Organizer for the Union

In mid-August, Hornsby contacted the Union and spoke to Business Agent Luke Begovich. Hornsby spoke to employees on his crew about the Union. Also in mid-August, Hornsby went to the Union's office, accompanied by crew members Satterfield, Mike Ice, and Mark Treadway. Begovich gave Hornsby a letter, dated August 15, on the Union's letterhead stating Hornsby was a “volunteer

organizer,” and that he planned to exercise his “rights in regard to organizing.” (A 262; 50, 192.)

Hornsby gave the Union's letter to Jack Whitaker on August 29, when he arrived for work at the Company's PSD office in Ghent. Besides Whitaker, supervisors Houchins and McMahan were present. When Hornsby gave Whitaker the letter he told him, “You need to read this.” Whitaker “looked at it for a few minutes,” then told Hornsby that he “could not do that”-- he “was a supervisor.” Hornsby replied that he was not a supervisor, that he was a foreman and did not have the duties of a supervisor. Whitaker repeated that Hornsby “couldn’t do that,” then told Hornsby that he needed to turn in his company truck and company gas card. Whitaker then told Hornsby that he “needed to get out of his face before he went off on [his] ass.” Hornsby responded that he was not in Whitaker's face, then asked if he could take the truck to the worksite and unload the tools. Whitaker agreed and Hornsby left the office. (A 262; 51-54.)

After suffering a back injury in mid-September, Hornsby was off the job for six weeks. He quit his employment on December 14 and began other employment. (A 261; 69.)

D. Company Supervisors Threaten Employees Because of their Union Activities

After his August 29 meeting with Whitaker, Hornsby went to the worksite. As Hornsby and the crew were transferring tools between Hornsby's truck and the tool trailer, Houchins came up behind Hornsby, and said, "You didn't know what you was getting yourself into. Look what it's got you now, got you demoted." Houchins then gave the crew their assignments for the day and left. (A 262; 60-61.)

At around noon that same day, Supervisor McMahan drove up to where Hornsby and Treadway were working. Hornsby asked McMahan if Whitaker was in a bad mood when Hornsby gave him the letter. Within earshot of Treadway, McMahan responded, "No, he seemed like he was in a good mood." McMahan also said, "Well, Jack made it clear to Warren Houchins that he wants rid of you all." (A 262; 61-63.)

On Tuesday, September 5, Hornsby had a phone conversation with Construction Manager Jack Scott. Scott told Hornsby that Whitaker was "pissed off" and that Whitaker was going to put them on a \$15-an hour job and take them off the prevailing wage job they were on. At the time, prevailing wage jobs paid between \$30 and \$38 an hour. (A 67.) Hornsby asked if Whitaker could do that, and Scott replied, "He's the president of the company, he can pretty much do what he wants." (A 264; 66-68.) Scott also told Hornsby that Whitaker "was going to

do [them] like that to make [them] quit.” He added, “It got you demoted.” (A 264; 68.)

On September 5, Ice presented a copy of the Union’s letter listing him as volunteer organizer to Houchins. On September 6, during the work day, Ice asked Houchins why the Company had changed the crew’s schedule from working four 10-hour days to five 8-hour days. Houchins replied, “that was the way it was going to be.” Houchins also told Ice that the employees “had brought it on themselves because of the coming out letters” and that “it was Whitaker's way of showing them who was the boss.” (A 264; 102-04.)

II. THE BOARD’S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Member Schaumber) found, in agreement with the administrative law judge, that the Company had violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158 (a)(3) and (1)) by demoting foreman Hornsby because he engaged in union activities and violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by threatening employees because they engaged in activities on behalf of the Union. (A 259, 269.)

The Board’s Order requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by

Section 7 of the Act (29 U.S.C. § 157). (A 269.) Affirmatively, the Order requires the Company to make Hornsby whole for any loss of earnings and other benefits suffered as a result of his demotion. The Order also requires the Company to post copies of a remedial notice. (A 269.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that foreman Hornsby was not a supervisor, thus the Company violated Section 8(a)(3) and (1) of the Act by admittedly demoting him because of his union activities. As the proponent of Hornsby's supervisory status, the Company bore the burden of showing that he exercised at least one of the enumerated powers listed in Section 2(11) of the Act. The Company contends that Hornsby had the power to assign employees based on his own independent judgment and to responsibly direct them. The record does not bear out those claims.

The Company failed to meet its burden of showing that Hornsby made any assignments using independent judgment. The record shows that Hornsby led a crew of experienced workers engaged in the repetitive task of constructing concrete holding tanks. In that process, Hornsby met with admitted supervisor, Houchins, daily. Among other things, Houchins regularly assigned tasks to the members of the crew, monitored the worksite, and observed the crew's progress as often as thrice daily. Given the repetitive nature of the work, the experience of the crew and the restraints imposed by Houchins' supervision, the Board reasonably found that Hornsby did not exercise independent judgment in making assignments to crew members.

The Company likewise did not show that Hornsby responsibly directed members of the crew. As the record shows, Hornsby was a skilled carpenter, who worked along side other crew members, performing the same, repetitive tasks of constructing and disassembling formwork, and pouring and finishing concrete as the other carpenters. Because the crew was experienced, it had no need for direction from Hornsby. More importantly, the Company did not show that Hornsby was held accountable for the performance of his crew as required to show that Hornsby responsibly directed them. Rather, the record shows that the Company evaluated Hornsby only once in four years and it did not assess him regarding the performance of his crew.

The Company does not dispute that its managers and supervisors made statements to its employees threatening reprisals for their union activity. Those threats of reprisal were clearly linked to the employees' union activity and were inherently coercive. The Company argues that the statements could not have tended to interfere with employees' rights because they were made by low-level supervisors and were not authorized by the Whitakers. The law is unanimously to the contrary.

STATEMENT OF THE STANDARD OF REVIEW

The determination of whether an individual is a supervisor calls upon the Board's "special function of applying the general provisions of the Act to the

complexities of industrial life.” *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). The Board has “a large measure of informed discretion” in making such determinations, particularly where it is called upon to decide whether the alleged supervisor responsibly directs other employees. *Marine Eng'rs Beneficial Assoc. v. Interlake Steamship Co.*, 370 U.S. 173, 179 n.6 (1962) (citation omitted).

Because the determination of supervisory status is a mixed question of fact and law, the Board's factual determinations regarding supervisory status should be overturned “only if there is not substantial evidence in the record as a whole to support its finding.” *Glenmark Associates, Inc. v. NLRB*, 147 F.3d 333, 338 (4th Cir. 1998).

Similarly, this Court recognizes the Board’s “special expertise” when it comes to evaluating the impact of supervisory statements on employees Section 7 rights (29 U.S.C. § 157). *Be-Lo Stores v. NLRB*, 126 F.3d 268, 292 (4th Cir. 1997). And finally, when it comes to the Board’s credibility findings, this Court has stated that it will not disturb those findings, absent “extraordinary circumstances.” *Narricot Indus., L.P. v. NLRB*, 587 F.3d 654, 663 (4th Cir. 2009). *Accord WXGI, Inc. v. NLRB*, 243 F.3d 833, 842 (4th Cir. 2001).

ARGUMENT

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT FOREMAN HORNSBY WAS NOT A SUPERVISOR, THUS THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY ADMITTEDLY DEMOTING HIM BECAUSE OF HIS UNION ACTIVITIES

A. Introduction

The Company admits that it demoted foreman Hornsby because he informed company president Jack Whitaker that he was a voluntary union organizer. It is settled that demoting an employee for being a union organizer violates Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)). *See NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 688 (7th Cir. 1982). The Company's sole defense to the violation is that Hornsby was a supervisor not covered by the protections of the Act. However, if, as we show below, the Board properly found (A 1, n.3) that Hornsby was not a supervisor, then the Company violated Section 8(a)(3) and (1) of the Act as alleged (29 U.S.C. § 158(a)(3) and (1)).⁴

⁴ Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to “discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” A violation of Section 8(a)(3) of the Act is also derivatively a violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise” of the rights guaranteed by Section 7, because such discriminatory conduct necessarily interferes with restrains

B. Applicable Principles

Determining whether individuals are “employees” or “supervisors” within the meaning of the Act is of critical importance because Section 7 of the Act (29 U.S.C. § 157) grants bargaining rights to “employees,” which do not extend to “supervisors.” Section 2(3) of the Act (29 U.S.C. § 152(3)) provides: “The term ‘employee’ . . . shall not include . . . any individual employed as a supervisor” Section 2(11) of the Act (29 U.S.C. 152(11)) defines “supervisor” as:

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

In enacting Section 2(11), Congress sought to distinguish between true supervisory personnel, who are “‘vested with genuine management prerogatives,’” and employees--such as “‘straw bosses, leadmen, [and] set-up men’”--who enjoy the Act’s protections even though they perform “‘minor supervisory duties.’” *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (citation omitted).

Accordingly, the Board has “a duty to employees to be alert not to construe

or coerces an employee’s right to engage in Section 7 activities. *See NLRB v. Air Contact Transport, Inc.*, 403 F.3d 206, 213 (4th Cir. 2005).

supervisory status too broadly because the employee who is deemed a supervisor is denied” the protections of the Act. *Westinghouse Elec. Corp. v. NLRB*, 424 F.2d 1151, 1158 (7th Cir. 1970). *Accord NLRB v. North Carolina Granite Corp.*, 201 F.2d 469, 470 (4th Cir. 1953). *Cf. Holly Farms Corp. v. NLRB*, 517 U.S. 392, 399 (1996) (Board and reviewing courts “must take care to assure that exemptions from [the Act’s] coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach”) (citations omitted).

Although the language of Section 2(11) lists supervisory powers in the disjunctive, it also contains the conjunctive requirement that the powers be exercised with “independent judgment” rather than in a “routine” fashion. *NLRB v. Hale Container Line, Inc.*, 943 F.2d 394, 396-97 (4th Cir. 1991).

As the Supreme Court noted in *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 713 (2001), employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,” and (3) their authority is held “[i]n the interest of the employer.”

In applying *Kentucky River*, the Board has stated: “[T]o exercise ‘independent judgment,’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation

by discerning and comparing data.” *Oakwood Healthcare Center*, 348 NLRB 686, 691 (2001). “[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.* at 693. “The authority to effect an assignment . . . must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the ‘routine or clerical.’” *Id.* *Accord Loparex LLC v. NLRB*, ___ F.3d ___, WL 5150046 at *8-*9 (7th Cir. 2009).

The burden of proving supervisory status rests upon the party asserting it. *Kentucky River Community Care*, 532 U.S. at 712. Moreover, because a supervisor is “one who shares the power of management,” *NLRB v. Southern Bleachery & Print Works, Inc.*, 257 F.2d 235, 239 (4th Cir. 1958), it is relevant whether the alleged supervisor was informed of his authority to exercise supervisory power. *See Hale Container Line, Inc.*, 291 NLRB 1195, 1197 (1988), *enforced*, 943 F.2d 394 (4th Cir. 1991). In addition, as discussed above (pp. 12-13), the Board's factual determinations regarding supervisory status should be upheld if supported by substantial evidence in the record, and the reviewing court must sustain the Board's application of the law to the facts if it is reasonable and consistent with the Act.

C. The Board Reasonably Rejected the Company's Claim that It Was Privileged to Retaliate Against Hornsby Because He Was a Statutory Supervisor

The record amply demonstrates, and the Company does not dispute, that Hornsby did not have the authority to hire, fire, promote, lay off, reward or recall employees, adjust their grievances, or to effectively recommend such personnel actions. Rather, as the record shows, those powers were vested exclusively in the hands of the Company's president, Jack Whitaker, or his brother, vice president Bill Whitaker. Thus, the only question raised by the Company's claim that Hornsby was a supervisor is whether the Company carried its burden of showing that Hornsby, when acting as a foreman, used independent judgment in assigning his crew when constructing holding tanks, or that he responsibly directed his crew in carrying out the tasks at hand. As we show below, the limited duties that the Company conferred upon Hornsby as a foreman did not elevate him to a statutory supervisor.

1. Hornsby did not use independent judgment in assigning employees

Turning to the assignment function, as the Board noted here (A 265), the statutory authority to "assign" refers to "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." It may also refer to the "designation of significant overall duties

to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task.” (A 265.) The record makes clear that Hornsby did not have such significant assignment functions.

To begin, as the Board reasonably found (A 266), although “Hornsby gave his crew members individual tasks[,] those assignments were repetitive in nature[,]” and routine, not involving the exercise of independent judgment. The record fully supports that finding.

As described above (pp. 5-7), Hornsby and his crew worked under the direct supervision of Houchins, an acknowledged supervisor. Houchins met with Hornsby every morning, and all the members of the crew on some mornings. Houchins brought a set of blueprints to the meeting and gave Hornsby and the crew daily instructions concerning what was to be done that day. At least twice, and as often as three days a week, Houchins assigned the members of the crew specific tasks to perform. During the day, Houchins checked on assignments and the progress of the crew’s work by visiting the worksite as often as three times a day. Houchins “would come in and tell [the crew] what [they] needed to do and that’s what [they] would work on Houchins would tell [the crew] what he wanted done[.]” (A 44.) Upon receipt of Houchins’ assignments, the crew would “just split up and do that work.” (A 45.)

On other days, when Hornsby made assignments to crew members, he did so based on instructions given to him by Houchins and such elementary characteristics as which men possessed the carpenter's or operator's skills required for a particular task. Of the crew members, only Herndon was a full-time equipment operator, so he generally operated the equipment. (A 261; 46.) The Board, affirmed by the court, has held that assignments made on the basis of such obviously distinctive characteristics do not reflect independent judgment. *See NLRB v. McEver Eng. Inc.*, 784 F.2d 634, 643 (5th Cir. 1986) (where working foreman assigned "men to various jobs, 'depending on whether [the job] called for a welder or a fitter or a helper . . .[.]'" he was not a supervisor).

As to the assigning of carpenters, Hornsby had worked with most of them on a previous job and knew "what they could and couldn't do." (A 261, 266; 42-43, 45-46, 47.) For example, he knew who was better at handling a bull float. Generally, however, the carpenter members of the crew performed all of the tasks required to pour and form the concrete for the holding tank with little distinction among them. That is, each of them, all of whom had at least a year's job experience (A 43, 44-45, 47, 99, 109, 114), was qualified to perform the various carpenter's tasks from erecting the formwork, tying off the steel, finishing the concrete, to disassembling the formwork. The Board has held that a foreman who merely makes assignments among "equally qualified" workmen has not

demonstrated the requisite independent judgment to make him a genuine supervisor. *See American Directional Boring, Inc.*, 353 NLRB No. 21, *22-*23 (2008).

Here, the routine nature of Hornsby's assignment of carpenters is underscored by the repetitive nature of the task the crew was assigned. As discussed above (pp. 5-7), the crew constructed one concrete holding tank after another, using the same methods. *See NLRB v. Hilliard Development Corp.*, 187 F.3d 133, 146 (1st Cir. 1999) (supervisory power not vested where assignments were seldom changed and "the matching of skills to requirements was essentially routine[]"). *Accord Alois Box Co. v. NLRB*, 216 F.3d 69, 75 (D.C. Cir. 2000). *See also Shaw, Inc.*, 350 NLRB 354, 355-56 (2007) (where employer's projects involved "tasks which are recurrent and predictable . . . carried out in conformance with supervisors' specifications and oversight," it could not establish that its foremen assigned work using independent judgment).

Clearly, the latitude Hornsby had with respect to the assignment of tasks was severely circumscribed. When Houchins made the initial assignments, Hornsby was confined to making "suggestions." (A 73.) While if Hornsby made an assignment, then any problem that arose could be resolved by Houchins, who Hornsby could reach at all times with his company-supplied cell phone. *See Alois Box Co.*, 216 F.3d at 75.

In short, even when Hornsby made task assignments to members of his crew, his input did not reflect the exercise of independent judgment. For the judgment needed to make the assignments was circumscribed by the repetitive nature of the tasks, the instructions given to Hornsby by Houchins, and the experience level of the members. In these circumstances, the Board reasonably found (A 8) that “the level of judgment Hornsby used in assigning tasks did not rise above the level of routine.” *See Iron Workers Local 28 (Virginia Assn. of Contractors)*, 219 NLRB 957, 961 (1975) (working foremen were not statutory supervisors when acting “within a very limited sphere in giving instructions to employees, bounded by the blueprints and instructions from the contractor or . . . supervisor”). *See also NLRB v. Don’s Olney Foods, Inc.*, 870 F.2d 1279, 1283 (7th Cir. 1989) (supervisory status not found “where day manager left a list of chores to be done on the Saturday night shift . . . [and the employees to whom the alleged supervisor] assigned work were familiar with their jobs and did not require significant supervision”); *George C. Foss Co.*, 270 NLRB 232, 234-35 (1984) (employee who ran the job and made work assignments was not a supervisor when he appeared to act as a conduit and not to exercise substantial independent judgment), *enforced*, 752 F.2d 1407 (9th Cir. 1985).

The cases cited by the Company (Br 30, 32-33) do not, as it claims, stand for the proposition that an employee, who makes even routine assignments, is necessarily engaged in the exercise of independent judgment. In *Glenmark Assoc.'s, Inc. v. NLRB*, 147 F.3d 333, 340 (4th Cir. 1998), this Court rejected the Board's nonsupervisory finding not because the employees made routine assignments but because, in the Court's view, they had "the independent authority to exercise their own judgment to discipline and assign" certified nursing assistants. Similarly, in *Monongahela Power Co. v. NLRB*, 657 F.2d 608, 613 (4th Cir. 1981), this Court disagreed with the Board concerning the supervisory status of certain employees, not because those employees made routine assignments, but because they were empowered to direct other employees in "[e]mergencies," that allowed no time for a shift superintendent to arrive. Likewise, in *Dynamic Machine Co. v. NLRB*, 552 F.2d 1195, 1201 (7th Cir. 1977), the court agreed with the Board, in deference to its expertise, that the foreman's assignment of work was hardly routine in light of his authority to assign "difficult or rush work." Here, by contrast, Hornsby's assignments were of a repetitive nature and monitored by Houchins on a daily basis.

2. Hornsby did not responsibly direct the members of his crew

The Board also reasonably rejected the Company's claim (Br 28-29) that Hornsby had the authority to responsibly direct the crew. The authority

“responsibly to direct” arises “[i]f a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ provided that the direction is both ‘responsible’ . . . and carried out with independent judgment.” *Oakwood Healthcare Center*, 348 NLRB 686, 691 (2006). “[F]or direction to be ‘responsible,’ the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly.” *Id.* at 691-92. “Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” *Id.* at 692. *Accord Loparex LLC v. NLRB*, ___F.3d ___, WL 5150046 at *7 (7th Cir. 2009).

In this case, the Board found (A 267) that there was “no showing Hornsby was vested with the authority to take corrective action if his directives were not followed, or that Hornsby was aware of or subject to any adverse consequences based on the lack of performance by his crew members.” Indeed, the Company’s own business records confirm that Hornsby was not held responsible for the performance of his crew members. As the Board noted (A 267), those records

show that “Hornsby was only evaluated once in 4 years, [and] none of the criteria in the evaluation were tied to the performance of his crew[.]” *See Entergy Gulf States, Inc. v. NLRB*, 253 NLRB 203, 209 (5th Cir. 2001) (“[t]o direct other workers responsibly, a supervisor must be ‘answerable for the discharge of a duty or obligation’ or accountable for the work product of the employees he directs[.]”) (citation omitted). *Accord Edward Street Daycare Center, Inc. v. NLRB*, 189 F.3d 40, 47 (1st Cir. 1999); *NLRB v. Grancare, Inc.*, 158 F.3d 407, 414 (7th Cir. 1998).

In its brief to this Court, the Company makes only the feeblest attempt to support its claim that Hornsby responsibly directed the crew. Relying exclusively on Jack Whitaker’s testimony that, “If I had a major concrete pour to make, I always wanted . . . [Hornsby] there[.]” the Company argues (Br 29) that Whitaker’s testimony alone shows that “Hornsby had the power and ability to responsibly direct other employees, particularly when [the Company] had a major concrete pour.” The Company’s argument is completely meritless, however, because it fails to address the crucial element of the responsibly to direct criteria—namely, that Hornsby was held accountable for the work of his crew on such concrete pours. The record shows otherwise. In four years he was only evaluated once and that evaluation did not include an assessment of the performance of his crew. (A 195-98.)

3. There is no merit to the Company's claim that Hornsby possessed sufficient secondary indicia of supervisory authority to establish his supervisory status

The Company argues (Br 33) that “[s]upervisory status may also be found on the basis of various secondary indicia of such authority, such as whether the employee is perceived by co-workers as a supervisor and whether a . . . finding that an individual is not a supervisor would create an unreasonable ratio of employees to supervisors.” It is true that there is some authority for the reliance on such secondary indicia. However, such secondary indicia of supervisory status is only relevant if there is at least “one primary indicator [as specified in Section 2(11)] of supervisory status.” *NLRB v. Dole Fresh Vegetables, Inc.*, 334 F.3d 478, 488 (6th Cir. 2003) (discussing cases). *Accord Billows Elec. Supply of Northfield, Inc.*, 311 NLRB 878, 878 n.2 (1993). Here, as shown, the Company did not and cannot establish that Hornsby had any of the requisite powers embodied in Section 2(11), so it can hardly turn to nonstatutory criteria to make up for that deficiency.

Therefore, contrary to the Company's suggestion (Br 34), its case is not enhanced by pointing out that Hornsby's crew members may have looked to him for advice in navigating the Company's bureaucracy, or that Hornsby received a truck, cell phone, and other privileges not available to the other members of his crew. That evidence merely shows that Hornsby was an experienced lead man, respected by fellow employees and relied on by the Company to perform some

additional duties, such as hauling heavy equipment to and from the worksite.

More important than that ambiguous evidence, the Board noted (A 265, 266) that until presented with the union-organizer letter, Whitaker had never told Hornsby that he was a supervisor. Notably, Hornsby did not attend supervisory meetings, nor did the Company list Hornsby among its supervisors in its telephone directory. (A 265, n.12; 199-202.) *See Hale Container Line, Inc.*, 291 NLRB 1195, 1197 (1988) (recognizing that an employee can only be a supervisor if he is informed that he has such authority), *enforced*, 943 F.2d 394 (4th Cir. 1991). *Accord NLRB v. Southern Seating Co.*, 468 F.2d 1345, 1347 (4th Cir. 1972).

4. Whitaker was not a credible witness

Finally, the Company could not meet its burden of proof regarding Hornsby's supervisory status because Jack Whitaker, on whose testimony the Company predicated its defense, was not a credible witness. Indeed, his testimony was riddled with contradictions. Whitaker claimed, on the one hand, that Hornsby was not a supervisor, but an acting superintendent, or a superintendent in training. (A 150-51.) Thus, in his prehearing affidavit, Whitaker stated, among other things: "I would not consider Hornsby a supervisor with any authority over those he worked with because he was in training. If Hornsby wanted someone to do a specific job, he would go to Houchins and request it and Houchins would tell the employee what to do." (A 152.) Whitaker also stated in the affidavit that,

Hornsby was “like the lead guy on the crew and his experience enabled him to tell others what needed to be done.” Whitaker acknowledged further that he could not give examples of what type of instructions, if any, Hornsby gave, and that “[m]ostly Hornsby just worked and they [the crew] followed.” (A 266; 151, 152.)

Indeed, Whitaker did not identify any supervisory function that Hornsby was authorized to carry out. Rather, he claimed that Hornsby was a supervisor because he was permitted the use of a company truck. (A 264; 150.) However, he also contradicted that claim by asserting that he only gave Hornsby use of the truck because he felt sorry for him. (A 264; 149.)

Moreover, despite the judge’s warning, company counsel sought to elicit Whitaker’s testimony concerning the supervisory status of Hornsby through leading questions. The judge reasonably determined that such testimony was not entitled to much weight. (A 138, 167-68.)

Contrary to the Company’s contention (Br 27-28), “[i]t was [not] patently unfair for the ALJ to discredit Whitaker’s sworn testimony based upon the contents of a pre-hearing affidavit that was not entered into evidence” Here, Whitaker’s prior sworn statement was properly used to impeach his testimony at the hearing. As this Court has recognized, “the general rule is that . . . [t]he pretrial statement is usable on cross-examination[] for purposes of impeachment” *Community Counseling Serv., Inc. v. Reilly*, 317 F.2d 239, 243 (4th Cir. 1963).

Accord Sam's Club, a Div. of Wal-Mart Stores, Inc. v. NLRB, 173 F.3d 233, 241 (4th Cir. 1999) (affidavit that was not entered into evidence during the hearing was “properly used by the General Counsel as impeachment evidence . . . []”).

In these circumstances, the Board was well warranted in rejecting the Company's affirmative defense that Hornsby was a statutory supervisor whom it could demote for his union activities. Accordingly, the Company violated Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3) and (1)).

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY THREATENING EMPLOYEES WITH REPRISALS BECAUSE THEY ENGAGED IN ACTIVITIES ON BEHALF OF THE UNION

A. Applicable Principles

Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees” in their union and other protected concerted activities.⁵ Proof of an unlawful effect is not required to establish a violation of Section 8(a)(1); all that is required is a finding

⁵ Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) affords protection to the “exercise” of rights guaranteed employees in Section 7 of the Act (29 U.S.C. § 157)—namely, “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” or to refrain from such activities.

that an employer's conduct would reasonably tend to interfere with or coerce employees in the exercise of their Section 7 rights. *See NLRB v. Transpersonnel, Inc.*, 349 F.3d 175, 185 (4th Cir. 2003); *Standard-Coosa-Thatcher Carpet Yarn Div., Inc. v. NLRB*, 691 F.2d 1133, 1138 (4th Cir. 1982). “[A]s a general rule, the law gives the Board, not the courts, the authority to examine the circumstances, to find the facts, and to decide whether the remarks, in context, amount[] to an unlawful threat.” *Shaw Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 35 (1st Cir. 1989).

B. The Company Unlawfully Threatened Employees With Reprisals Because of Their Union Activities

The Board found that immediately following the employees' presentation of their voluntary organizer letters, the Company through its management and supervisors committed several violations of Section 8(a)(1) of the Act by threatening employees with reprisals--from physical harm to loss of jobs and job opportunities. We discuss each of these violations separately below and show that substantial evidence supports each of the Board's findings.⁶

⁶ The Company continues to contest (Br 42) the administrative law judge's finding that the Houchins' "can of worms" statement amounted to another, independent violation of Section 8(a)(1) of the Act. However, the Board found it

1. Threat of physical harm

As shown in the Statement of Facts, at the beginning of the workday on August 29, Hornsby handed company president Jack Whitaker a letter stating that Hornsby was a voluntary organizer for the Union. Besides demoting Hornsby and taking away his foreman privileges in reaction to the letter, Whitaker angrily told Hornsby that “he needed to get out of his face before he went off on [his] ass.” The Company does not deny that Whitaker made this statement. It is clear that President Whitaker’s threat of bodily harm to Hornsby because he self-identified as an organizer for the Union is, on its face, coercive and violative of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). *See NLRB v. U.S.A Polymer Corp.*, 272 F.3d 289, 293 (5th Cir. 2001).

The Company’s only rebuttal is that the administrative law judge made the wrong credibility finding. It contends (Br 39-40) that the judge should have credited Whitaker instead of Hornsby because Whitaker would not likely make such a threat. More specifically, the Company argues that Whitaker, an experienced manager, presumably familiar with the restraints of the Act, would not have been so reckless. Nor would he have made such a threat in front of witnesses, including supervisors McMahan and Houchins, thus exposing the Company to

“unnecessary to pass on” that finding because it would be merely “cumulative of other threats found in this case.” (A 259 n.3.)

liability. The Company's defense is baseless.

There is no evidence that Whitaker, despite his ownership of the Company, was familiar with, or at all times adhered to, the proscriptions of the Act. There is also no evidence that McMahan and Houchins would not have followed the company line as laid down by Whitaker. Indeed, as shown above (pp. 9-10), and as argued below, (pp. 34-37) that is precisely what they did. They reiterated, but in different words, Whitaker's threat to lash out at employees because of their union activities. Significantly, the Company did not present either McMahan or Houchins as witnesses in support of Whitaker's version of events. In the circumstances, the Board was warranted in rejecting Whitaker's self-interested and uncorroborated testimony. *See Aloix Box Co. v. NLRB*, 216 F.3d 69, 75-76 (D.C. Cir. 2000) (drawing adverse inference from employer's failure to call witness to clarify record). And the Company has not supplied this Court with any "extraordinary circumstances" requiring rejection of that credibility finding. *See Narricot Indus., L.P. v. NLRB*, 587 F.3d 654, 663 (4th Cir. 2009).

2. Threat of demotion

As shown in the Statement (pp. 8-9), shortly after Whitaker demoted Hornsby following his presentation of the voluntary organizer letter, Hornsby left the construction trailer and went to the worksite. Supervisor Houchins followed. There, in the presence of other members of the crew, Houchins told Hornsby "You

didn't know what you was getting yourself into. Look what it's got you now, got you demoted.” Under settled law, Houchins’ threat was highly coercive because it was made in the immediate aftermath of Hornsby’s actual demotion and conveyed to the other members of the crew that they risked the same fate by consorting with the Union. *See RGC (USA) Mineral Sands, Inc. v. NLRB*, 281 F.3d 442, 452 (4th Cir. 2002) (a supervisor’s telling employees that mechanics were assigned to more onerous work shift because of “bullshit” at union hall and the employees vote on employer’s contract proposal was unlawful threat); *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001) (finding unlawful supervisor’s statement to employee that: “[I] don’t believe you. After what happened to your wife [her demotion from supervisory position], you’re still pushing the union . . . Are you going to make me fire you?”).

There is no merit to the Company’s contention (Br 41) that employees would not have viewed Houchins’ statement as coercive because they would have understood that the statement did not reflect the Company’s attitude but only Houchins’ personal opinion. Houchins did not testify. Nor does the testimony of any of the employees who overheard Houchins’ statement support the Company’s baseless argument. In any event, the law does not relieve the Company of its responsibility, for even if Houchins were expressing only his personal opinion regarding the reason for Hornsby’s demotion, that would not undercut the tendency

of Houchins's threat to coerce the other members of the crew. *See Garvey Marine, Inc. v. NLRB*, 245 F.3d 819, 823-24 (D.C. Cir. 2001) (Board could find that employees would be coerced by supervisor's threats despite the employer's vice president's assurances against reprisals). In addition, as we discuss below (pp. 37-40), the Company's related contention that the Company should not be held liable for Houchins' statement because his conduct was that of a low-level supervisor and was unauthorized, is baseless.

3. Threat to get rid of employees

The Company also does not dispute that on August 29, the day of Hornsby's demotion, Supervisor McMahan went to the worksite where Hornsby and Treadway were working. During a conversation between Hornsby and McMahan concerning Whitaker's reaction to Hornsby's presentation of the voluntary organizer letter, McMahan told Hornsby, within earshot of Treadway, that Whitaker told Houchins that "he wants rid of you all."

The Company does not contend that McMahan's remark would have been understood as other than referring to the employees' union activities. Indeed, the Company has no evidentiary basis for such a challenge, for, like the other supervisors who conveyed coercive threats, McMahan did not testify. Nor can the Company credibly contend, as it baldly does (Br 40-41), that McMahan was a low-level supervisor. In the Company's telephone directory, McMahan is listed as one

of the Company's three "Project Manager[s]." (A 199-200.) Moreover, McMahan's report of Whitaker's views would have been particularly compelling because of their close personal relationship. He was, after all, Whitaker's son-in-law.

The Board was clearly warranted in finding that a threat, emanating from the Company's president, that he wanted to fire or get "rid" of employees because of their union activities was coercive and violative of the Act. *See Tasty Baking Co. v. NLRB*, 254 F.3d 114, 125 (D.C. Cir. 2001); *Kinney Drugs, Inc. v. NLRB*, 74 F.3d 1419, 1430 (2d Cir. 1996) (threat of discharge unlawful when not disavowed by higher management). As noted above, the Company offers a common defense that the threats uttered by its supervisors were not unlawful because they came from low-level supervisors and were unauthorized. We show below (pp. 37-40) that the Company's common defense is meritless.

4. Threat to reduce employees' pay

Substantial evidence also supports the Board's finding that on September 5, Construction Manager Scott told Hornsby that Whitaker was "pissed off" about recent events and had threatened to take the employees off their prevailing-wage jobs, paying \$30 to \$38 an hour, and reassign them to jobs paying \$15 per hour. Scott told Hornsby that, "[Whitaker is] the president of the [C]ompany. He can pretty much do what he wants[,] [and he is] going to do like that to make [the

employees] quit.” (A 67.)

Again, the Company offered no rebuttal to Hornsby’s testimony because Scott did not testify. Even before this Court, the Company offers no specific challenge to the Board’s finding regarding Whitaker’s threat conveyed through Scott. It merely contends that Scott was not within the chain of command to make the threat meaningful. That argument ignores that Scott--a project manager, not a low-level, front-line supervisor as the Company suggests (Br 40-41)--was not reporting what he intended to do, but what company president Whitaker intended in retaliation for the employees’ union activity. In the circumstances, the Board was warranted in finding that the Company committed a further violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). *See Power, Inc. v. NLRB*, 40 F.3d 409, 415, 418 (D.C. Cir. 1994); *NLRB v. Almet, Inc.*, 987 F.2d 445, 451-52 (7th Cir. 1993).

5. Threat of schedule change

Finally, substantial evidence also supports the Board’s finding that Houchins conveyed another unlawful threat to employee Ice when he complained about the schedule change from a 4-day, 40-hour workweek to a 5-day, 40-hour workweek. In response to Ice’s inquiry concerning the reason for the change, Houchins replied that the employees “had brought it on themselves because of the coming out letters [, and] that . . . it was Whitaker's way of showing them who was the boss.” (A

264; 103-04.)

Again, the Company failed to call Houchins to testify to rebut Ice's testimony. The Board had an ample basis for finding that such an explicit threat, as made by Houchins, tying the loss of a favorable shift to the employees' union activities was a violation of the Act.

C. The Company's Remaining Contentions Lack Merit

As noted above, the Company asserts a common defense to the threats conveyed by supervisors/managers Houchins, McMahan, and Scott. It contends (Br 40-44) that the Company should not be held liable for their threatening statements because they were low-level supervisors, expressing personal opinions, without the authority to carry out any of the threats conveyed. The Company's argument is meritless for several reasons.

First, as already noted, neither McMahan nor Scott was a low-level, front-line supervisor. Rather, each was classified according to the Company's directory as one of three "Project Manager[s]." By contrast, that same chart or directory lists 17 persons, including Houchins, as company supervisors. (A 199-202.) Thus, even if there were legal merit to the Company's defense, it would apply only to Houchins' statements, and not to the arguably far more coercive statements of McMahan and Scott that Whitaker intended to "rid" himself of the union adherents and to force them to "quit." (A 62, 63, 121.)

Furthermore, as explained, the Company's argument is baseless because, without an evidentiary basis, it assumes that employees must have been aware that the supervisors/managers were allegedly expressing their personal opinions rather than Whitaker's intention. Scott and McMahan's statements, in particular, refer not to surmise, but to company president Whitaker's expressed intention to retaliate against the employees.

Finally, the Company fares no better in arguing that it is relieved of liability for the coercive statements because they were not authorized by one of the Whitakers, who had exclusive authority to make decisions regarding employment, pay, and the scheduling of the workforce. As the Board noted in rejecting the Company's contention (A 267), Houchins, Scott, and McMahan, each occupied a position in which they were responsible for conveying Jack Whitaker's orders to employees and, in particular, his discipline and discharge decisions. Thus, their coercive statements regarding his views concerning their job security would appear to be highly credible. *See NLRB v. Grand Canyon Mining Co.*, 116 F.3d 1039, 1045 (4th Cir. 1997) (employer violates Section 8(a)(1) of the Act "regardless" of the statement's truth, when it tells an employee that the mine would close because of union support because "[t]he impact of [the] statement . . . is significant, whether or not . . . it was true[]"). *Accord Federated Logistics & Operations v.*

NLRB, 400 F.3d 920, 924 (D.C. Cir. 2005) (the employer’s “statements do amount to a threat . . . , whether or not they are true is inapposite[]”); *General Elec. Co. v. NLRB*, 117 F.3d 627, 634 (D.C. Cir. 1997) (employees will necessarily perceive a supervisor’s threatening statement as representative of the views of management unless they have some expressed indication to the contrary).

In any event, the law is clear that even low-level supervisors, who do not have the requisite power, can convey unlawful threats. *See John W. Hancock, Jr., Inc.*, 337 NLRB 1223 (2002), *enforced*, 73 Fed. Appx. 617 (4th Cir. 2003). Therefore, the Company’s argument should be rejected and the Board’s Section 8(a)(1) findings upheld.

CONCLUSION

For the foregoing reasons, the Board respectfully submits that the Company's petition for review should be denied and that the Board's Order should be enforced in full.

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**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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