

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GUARDSMARK, LLC

and

3-CA-27082

NICHOLAS J. HORNBERGER

PLANT PROTECTION ASSOCIATION
NATIONAL AND PLANT PROTECTION ASSOCIATION,
LOCAL 104

and

3-CB-8907

NICHOLAS J. HORNBERGER

Aaron Sukert, esq.,
for the General Counsel
Rory G. Schnurr, esq.,
of New York, New York
for the Respondent Employer
Larry Daniel, president of PPAN
of Yesilantis, Michigan
for Respondent Labor Organizations

DECISION

Statement of the Case

Eric M. Fine, Administrative Law Judge. This case was tried in Buffalo, New York, on September 23 to 25, 2009.¹ The charge in Case 3-CA-27082, and amended charges thereto were filed on March 23, April 28, and June 25, respectively. The charge in Case 3-CB-8907, and amended charges thereto were filed on February 6, March 2, March 23, April 28, and June 25, respectively. The charge and amended charges in Case 3-CA-27082 were filed against Guardsmark, LLC (Guardsmark or the Employer). The charge in Case 3-CB-8907 was filed against the Plant Protection Association National (PPAN). The amended charges in Case 3-CB-8907 were filed against PPAN and the Plant Protection Association, Local 104 (Local 104). PPAN and Local 104 are jointly referred to as the Union. All charges and amended charges were filed by Nicholas J. Hornberger. The consolidated complaint alleges that: Local 104 violated Section 8(b)(1)(A) of the Act by on or about January 28, by Local 104 President James Wilk threatening an employee with unspecified reprisals because the employee asked to file a grievance and because the employee contacted PPAN about filing a grievance; and PPAN violated Section 8(b)(1)(A) and (2) of the Act and Guardsmark violated Section 8(a)(1) and (3) of the Act by maintaining and enforcing an agreement that provides for purposes other than layoff and recall preferential seniority to officials of PPAN and Local 104 other than those who must be on the job to accomplish duties directly related to contract administration or grievance

¹ All dates are 2009 unless otherwise specified.

processing. It is alleged that Local 104 violated Section 8(b)(1)(A) and (2) of the Act and Guardsmark violated 8(a)(1) and (3) of the Act by applying the aforementioned agreement to confer seniority upon William Sprague, Local 104's secretary-treasurer, an officer not involved in contract administration and/or grievance processing, so that he could engage in shift selection, a purpose other than layoff or recall.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs by the General Counsel, the Union and Guardsmark, I make the following³

Findings of Fact

I. Jurisdiction

Guardsmark, a corporation, with an office and place of business in Williamsville, New York, has provided security services to the Ford Motor Company Stamping Plant located in Buffalo, New York (the Plant). During the past 12 months, in conducting the described business operations, Guardsmark has performed services valued in excess of \$50,000 for Ford Motor Company, an enterprise directly engaged in interstate commerce. The Respondents admit and I find Guardsmark is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that PPAN and Local 104 are labor organizations within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Hornberger works for Guardsmark at the Ford Motor Buffalo Stamping Plant (the Plant). Robert Webster is Guardsmark's manager in charge of Guardsmark's operations at the Plant, and Ken Boehm is Guardsmark's site supervisor who reports to Webster. The record reveals there was an election at the Plant and PPAN was certified on October 2, 2007, as the collective-bargaining representative for the bargaining unit of which Hornberger is a member. Larry Daniel is the president of PPAN. James Wilk is the president of Local 104, and Paul Donahue is the vice-president of Local 104. The Respondents admit in their answers to the consolidated complaint, as amended at the hearing, that William Sprague was the treasurer of Local 104 from around 2007 to sometime in February 2009, at which time Sprague became the secretary-treasurer of Local 104. A collective-bargaining agreement was entered into evidence with an effective date of July 1, 2008. The collective-bargaining agreement is between PPAN and Guardsmark. It covers approximately 26 locations, describing each as separate bargaining units, one of which is the Buffalo Plant at issue here.

The collective-bargaining agreement provides in, pertinent part, in Article V, Representation:

Section 1: Selection of Committeeperson

For the handling of grievances in its behalf, the Union, from among the employees of

² Counsel for the General Counsel's unopposed "Motion to Correct Errors in Transcript" dated November 13 is granted.

³ In making the findings herein, I have considered all the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corporation*, 179 F. 2d 749, 754 (C.A. 2), reversed on other grounds 340 U.S. 474 (1951). Further discussions of the witnesses' testimony and credibility are set forth herein.

the unit, including those units comprised of more than one plant may elect a committeeperson for each shift.

The Union may appoint one committeeperson as Chairman of committeepersons to coordinate grievance procedures and to act as the committeeperson on the shift to which he is assigned. The President of a local Union shall act as such Chairman. The Company shall give to the Union a list of security supervisors, including their names and titles, and the Union shall give the Company a list of its representatives.

The president and committeepersons shall be so placed by the Company that they shall be reasonably accessible at all times to the employees for the presentation of grievances. If the National Union requests that the Chairman be given work on a different shift, the Company agrees to change him to that shift. If an elected committeeperson is bumped from the shift where he was elected this resulting in more than one elected committeeperson on a shift, only the committeeperson elected on the shift, or if he has also been bumped, a committeeperson designated by the Union will be recognized for purposes of representation under this agreement.

The provisions of the above paragraph may be waived by the local union upon written request and subsequent approval of the PPAN (National).

Section 2: Temporary Committeepersons

If any committeeperson shall be absent from the Plant, the President may appoint a temporary committeeperson in his place and stead and shall notify the Company of such appointment prior to the time temporary committeeperson is to act in this capacity.

The collective-bargaining agreement provides under Article VI, Grievance Procedure, that grievances at all stages in the grievance procedure shall be presented in writing, signed by the employee if available. It provides that the Union committeeperson may sign the grievance with the employee's consent if they are not available with the understanding that the required signature(s) will be obtained when the employee or employees are available, and all dispositions thereof shall also be made in writing. The grievance procedure provides that at the first stage of the grievance at the employee's option they may discuss the matter directly with the employee's immediate supervisor and committeeperson within 14 calendar days of when the employee knew or should have known about the matter. It states if the matter is not resolved, the committeeperson within 2 working days after the employee has discussed the matter with the immediate supervisor may file a written grievance. It states the grievance should be signed by the employee, or employees, if available, and submitted by the committeeperson or other appropriate Union representative. It appears from section 2 and 3 of the grievance procedure that if the grievance is not settled at the first stage then the Local President is to advance the grievance to the second and third stages of the grievance procedure. The fourth stage of the grievance procedure allows the grievance to be referred to PPAN for consideration to advance the grievance to the Company's Manager in charge of the Ford Account for consideration. It provides that PPAN may request that the president of the Local and/or chairperson of the unit and three representatives of PPAN meet with Company representatives. An appeal to arbitration of the grievance is based on a notification served by PPAN's Board of Governors. PPAN's constitution and by-laws provides the Board of Governors is composed of the national president, national vice president, and national secretary-treasurer. Section 8 of the grievance procedure is entitled general grievances, and it states that a grievance which affects employees in more than one unit may be initiated by the National President at the fourth stage of the grievance procedure.

Article VIII, Section 2 of the collective-bargaining agreement: Seniority Lists provides, in pertinent part:

- a. The Site Supervisor, or other Company representative designated by the Company,

within twenty (20) days of execution thereof, shall furnish to the Local Union, in writing, and post in the Security Office a complete list of employees showing their seniority determined in accordance with this Agreement. Any employee desiring to protest the correctness of the position on the seniority list shall file a protest in writing together with any written evidence or documentation in support thereof with his section supervisor, within twenty (20) days subsequent to the posting of said list. After such twenty (20) days, said list shall be considered as the seniority list, except as to any protest thereto filed by an employee which may be taken up as a grievance under the grievance procedure if said protest is not satisfactorily resolved.

- b. The seniority list shall be brought up to date each January 1, and June 30, thereafter, and a copy of each revision thereto shall be furnished to the Union, whereupon the provisions of Section 2 with respect to filing objections shall be applicable.

Article VIII, Section 3 of the collective-bargaining agreement: Preferential Seniority provides that, "Notwithstanding their respective positions on the seniority list, the National President, Vice President, and Secretary-Treasurer, and the Local President and Secretary-Treasurer, in the order named, shall have top seniority in the unit." Article VIII, Section 8: Shift preference provides that, "Seniority, provided the employee has the required skills and ability to perform the job, shall be the guiding principle as to the choice of shifts."

The Constitution and By-Laws of PPAN list the duties of the national president, national vice-president, and national secretary treasurer which all relate to internal union matters rather than grievance processing under the collective-bargaining agreement or contract administration.⁴ The bylaws of Local 104 were submitted into evidence. The copy entered was undated in terms of its effective date. The bylaws provide in Article IV, Section 1, that the Local Union executive officers are, "President, Vice-President and Secretary-Treasurer." Section 5 of the article provides that all vacancies for Local Union officers, except the President, shall be filled by election within 45 days, "provided the Local Union Executive Board may make a temporary appointment for the period pending the holding of the election." Section 8 of Article IV provides that "Committeemen may be elected by the Local Union's membership at the General Election." Under Article V of the bylaws setting forth the duties of officers there is no listing for the position of Secretary-Treasurer. Rather, there is a listing for the position of Treasurer. Under the duties of the position of Treasurer, there is no listing for grievance processing or contract administration related to activities at the Plant.

A. Hornberger's employment history

Hornberger was hired by Guardsmark in September 2006 as a part-time security officer. Hornberger testified when he was hired the duties of a part-time security officer were the same as those of the full time officer. Hornberger testified that before Guardsmark had fire officers at the Plant, it was the duty of a security officer to perform all the duties of the current fire officers. Hornberger testified the fire officer position came into existence at the Plant around October or November 2008.

Hornberger became a full-time security officer around the end of March 2008. He testified that, at that time, he worked Monday through Friday, 8 a.m. to 4 p.m. Hornberger

⁴ In Article II, Section 2 of the constitution and by laws there is a reference pertaining to the national president relating to points of law or grievances submitted to him. However, this appears to relate to grievances relating to internal union matters rather than contractual claims, as the following paragraph in that section talks about suspension of local union officers or the revocation of a Local's charter for failing to following the national president's directive.

testified he started to fill in as a lead officer shortly after he became full-time. Hornberger testified he served as lead officer when the shift or site supervisor was absent or unavailable. Hornberger testified that, during this period, the time he served as a lead officer varied from 0 to 40 hours a month. Hornberger testified he received no training for his serving as a lead officer, but he had to interview for the position. Hornberger's duties as a lead officer included: writing reports summarizing the events on his shift; reviewing truck passes for vehicles entering and leaving the facility; authoring incident reports; reporting to the managing officer if there was a problem on the shift; and keeping records of the number of hot work permits issued on his shift. Hornberger testified a lead officer can issue hot work permits. Hornberger testified there are two bridges at the Plant used as entrance ways for Ford employees. Hornberger testified security guards are posted at the bridges at the end of the Ford employees' shifts to prevent theft from the plant. Hornberger testified that when he served as a lead officer he would try to alternate the bridge duty assignments between the regular security officers.

Hornberger interviewed with Webster for the position of a full-time level 2 fire officer around the beginning of September 2008. Hornberger identified a list which was posted at the Plant, dated Sept 18, 2008, regarding, "Level 2 Fire Positions." It listed Ralph Spina, Wilk, Donahue, and Sprague as being chosen as "Full Time Level 2 Officers," and Hornberger and Scott Krisiak as being selected for back up fire officer positions. Hornberger saw the list posted shortly after the employees interviewed for the fire officer position.⁵

⁵ Guardsmark entered into evidence an agreement between PPAN and Guardsmark, which by its terms was effective August 1, 2008, although it was not signed by Guardsmark until December 8, 2008. The agreement provided Guardsmark would convert 50 level 1 positions to level 2 fire officer positions. The agreement stated the parties thereto acknowledge that "Shift selection is based solely on seniority among qualified employees." It states, "The right to assign work, among qualified employees, within a shift is the sole right of the Company. In the event that merit and ability are equal; seniority will be used as the deciding factor." The agreement states the converted positions will be such that "each Manufacturing facility ... will have one (1) Level II Fire Officer per shift, on a seven day per week 24 hour basis. The distribution by facility is shown on the attached, Schedule A." Schedule A was not entered into evidence. The agreement listed prerequisite training, and core training for level 2 fire officers, the latter of which had to be completed, with a specified exception, within 360 days of the agreement date. The agreement states it "shall have no precedential effect and shall not be referred to by the parties in other matters, except in proceedings to enforce the terms hereof."

Guardsmark entered into evidence a posting dated August 18, 2008, stating that according to an agreement with PPAN, Guardsmark will convert four level 1 positions at that Plant to level 2 positions. Hornberger signed up on the posting to be considered for the level 2 fire officer position. Guardsmark evaluation forms for the level 2 fire officer position were submitted into evidence showing that the applicants interviewed with Webster on September 18, 2008. The evaluations reveal that Hornberger, Krisiak, and Sprague received the same numerical score on Webster's point assessment. The evaluation form with his point total which Hornberger signed stated "Seniority will be the tiebreaker if there is a tie among candidates." Hornberger testified Sprague was considered to have greater seniority as of the September 2008 shift bid process for the level 2 fire officer. Hornberger testified he did not file a grievance at that time over his seniority placement.

Guardsmark introduced into evidence an email to Webster, dated October 16, 2008, from Peter Dobbin, the administrator for the Guardsmark's Dearborn office. The subject of the memo is level 2 training for the fire officers. The memo, under "Core Training" includes: Incipient Fire; SCBA use/Air Monitoring; Incident Command; Hazardous Material Operations; Technical Rescue; Confined Space Entry/Attendant; Confined Space Permit Issuer. There is a note stating the Core Training "must be completed within 360 days of the Agreement." Hornberger

Hornberger credibly testified that: Hornberger's schedule changed in October 2008 as a result of his becoming a back up fire officer. There was a shift bid at that time because there were fire officer openings on the schedule and they bid for them by seniority. Hornberger's testimony reveals the shift bid was conducted by Local 104 President Wilk. Wilk had a form with open shifts and a seniority list for Guardsmark employees at the Plant. The employees filled out the shifts they wanted on the sheet by seniority. Hornberger testified he selected Monday as a fire officer, Tuesday and Wednesday as a security officer, and Saturday and Sunday as a lead officer.⁶ Guardsmark's work schedules beginning November 9, 2008, were submitted into evidence. The schedules show that as of November 9, and thereafter, Guardsmark had listed Hornberger as qualified as a "P.T. Supervisor", "P.T. Fire Officer" and "Security Officer". The schedules show that from November 9, 2008 to February 7, 2009, Hornberger regularly worked as a "P.T. Supervisor" otherwise known as a lead officer on the 8 a.m. to 4 p.m. shift on Saturdays and Sundays, and that he served as a P.T. Fire Officer on Mondays on the 8 a.m. to 4 p.m. shift.⁷

Hornberger testified that when he worked on Mondays as a fire officer he performed all the duties of the fire officer, including; issuing hot work permits, and if time permitted performing fire extinguisher checks.⁸ Hornberger testified if there was ever a shutdown, Hornberger would

testified that at the time of the e-mail most of the officers did not have any of the listed training. Hornberger testified that as of the time of the unfair labor practice trial he had hot work order permit training, fire impairment, and hazmat training. He testified he had not received the training listed under core training.

⁶ Jt. Exh. 1, page 2, contains a seniority list dated September 8, 2008. It includes a reference to Ford BSP date, which stands for the date an employee began working at the Plant. Hornberger testified that was the operative date used for the seniority bid process. On the document, Sprague's seniority is listed as September 14, 2006, Hornberger's is listed as September 22, 2006, and Krisiak's is September 23, 2006.

⁷ The schedule for the week beginning November 9, 2008, shows that Spina, Sprague, Wilk, and Donahue were listed as "Fire Officers." Thus, Guardsmark had begun using level 2 fire officers at the Plant as early as November 9, 2008.

⁸ Hornberger testified that he performed the duties of the fire officer prior to September and October 2008, when he worked for the Guardsmark, and for a prior company that had the security contract. The collective-bargaining agreement Article XIII, Section 3, page 30, lists the duties of a fire officer. Hornberger testified he has performed most of them, except he has not had to go on a HAZMAT response, as it was never required when he was on duty. Hornberger testified he issues hot work permits, has performed fire system and equipment inspections including the manipulations of the systems. Hornberger testified he assumed incipient firefighting responses would be responding to a fire call, and he has responded to fires. Hornberger testified a HAZMAT response is a chemical spill. He testified he took a required training class on the internet for that. He testified he has handled fire impairments referring to a shutdown. Referring to the collective-bargaining agreement, Hornberger testified he has performed the duties listed therein for a lead officer. Hornberger testified that when he fills in for lead officer he does the same duties as a full-time lead officer. Hornberger testified he has never been informed by the Employer or Union that he is not qualified to serve as a fire officer or a lead officer. Hornberger testified he was never informed by the Union or the Employer that the level 2 officers have priority over level 1 fire officers in shift selection.

Guardsmark's records show Hornberger performed PIV valve inspections on January 26; SCV inspections on January 26, and dry pipe valve inspections on January 26. Hornberger testified fire officers perform this work. Guardsmark's records show Hornberger served as the desk officer for a weekly fire alarm test performed on January 4, 11, 18, 25, and February 8.

shutdown the PIV. Hornberger testified Guardsmark had three shifts at the Plant, with three to four security officers per shift depending on the day and hour of the shift. Hornberger testified that on each shift there is a shift supervisor or lead officer, a fire officer, and either one or two security officers. The Monday through Friday 8 a.m. to 4 p.m. and 4 p.m. to 12 p.m. shifts are each staffed with four officers. The 12 p.m. to 8 a.m. shifts have only three officers, as do the weekend shifts. Hornberger testified, and Guardsmark stipulated, that as a back up fire officer and substitute lead officer, Hornberger receives the full time contractual rate for those positions when he serves in them. The contract rate for a lead officer is higher than that of fire officer, and fire officer is paid at a higher rate than the level 1 security officers.

Hornberger testified he contacted PPAN President Larry Daniel around October or November 2008. Hornberger testified he told Daniel that Hornberger had concerns about issues at the Plant, that Hornberger had brought some things to Local 104 President Wilk's attention, and Hornberger was asking Daniel for guidance. Hornberger testified he told Daniel that he had concerns about a possible conflict with Wilk being a lead officer and the local union president at the same time. Hornberger testified the lead officer fills in for a supervisor position. Hornberger testified Daniel stated he would get back to Hornberger on it.

Hornberger testified that at one point in time Joe Clunie was the union steward at the Plant for the Guardsmark employees. Hornberger testified he had a couple of discussions with Wilk about union stewards, which took place shortly after Clunie left the facility which was sometime in the Fall of 2008. Hornberger told Wilk that he was interested in taking over the steward position for Clunie. Wilk responded that position was already filled by Donahue. Hornberger said he kind of figured something like that would happen, and Wilk responded, "Why don't you call Larry." Hornberger testified Wilk was referring to calling Daniel. Hornberger testified he also told Wilk that he wanted to file a grievance about Wilk being lead officer and union president and he asked if he could file a grievance about that.

On December 2, 2008, Hornberger attended a meeting at the Plant with Webster, Boehm, Wilk, and Kriasiak. Webster initiated the meeting because Hornberger had a couple of conversations with Webster wherein Hornberger raised concerns. Hornberger testified one of the concerns was how Wilk could be a lead officer and union president at the same time. Hornberger testified that, at the meeting, Hornberger was told lead officers did not have the authority to write anyone up like a shift supervisor does. Hornberger testified another concern he had was around October or November, Guardsmark made Donahue and Sprague lead officers, and Hornberger was told it was to be on a one time fill in basis for the Thanksgiving and Christmas holidays. Hornberger testified that, prior to that time, Hornberger, Kriasiak, Spina, and possibly Wilk were the lead officers. Hornberger expressed a concern, at the meeting, that there might not be enough hours for the current lead officers, including him, now that Guardsmark had made Donahue and Sprague lead officers. He testified Webster apologized at the meeting, stating he had made a mistake, that once you make someone a lead officer you

Hornberger testified he was serving as a lead officer on these dates, and was operating the panel in the office while the fire officer in the plant pulled the alarms. Hornberger testified he participated in the fire alarm test while serving as a lead officer on Sundays. Hornberger identified two incident reports he filled out, one dated January 31, and the other on February 2. He testified he was a lead officer on January 31, and a fire officer on February 2. Hornberger testified the new schedule following the February 2009 shift bid at issue here did not start until February 13. Hornberger filed two other incident reports on March 13. Hornberger signed off on hot work permits on May 13, 16, 30, June 29, September 12 and 21. He testified this was the duty of a fire officer.

can not take it away from them. Hornberger testified Donahue and Sprague starting filling in as lead officers around Thanksgiving 2008. Hornberger testified the next day he was at work following the December 2, meeting, Hornberger had a conversation with Wilk about filing a grievance. Hornberger told Wilk that he would like to file a grievance with Wilk concerning Wilk
 5 being a lead officer, and Hornberger asked Wilk to file it. Hornberger testified Wilk said he would pursue it. Hornberger testified he did not have any knowledge of the grievance procedure and that based on Wilk's response he thought it was being taken care of.

10 On Guardsmark's posting concerning level 2 file officers, dated September 18, 2008, Spina, Wilk, Donahue, and Sprague were listed as full time level 2 fire officers with only Hornberger and Krisiak listed as backups. However, Guardsmark's work schedule for the week of January 25, 2009, showed it had expanded its list to six individuals as qualified to work as P.T. Fire Officer or backups, including Hornberger and Krisiak.

15 Hornberger credibly testified he phoned Daniel around January 28 using Hornberger's cell phone. Hornberger testified security officer Dan Asboth was present for and participated in the conversation by using the speakerphone setting, and that Hornberger and Asboth both spoke to Daniel. Hornberger testified he told Daniel that he asked Wilk to process the grievance, and Daniel asked Hornberger if he could start going through proper channels.
 20 Hornberger asked Daniel if he was going to come down and give them some guidance because Hornberger did not know the proper channels.⁹ Hornberger estimated the conversation took place early evening. The conversation ended when Daniel said he was going to talk to Wilk, and get back to Hornberger.¹⁰

25 Hornberger credibly testified that towards the end of the day on January 28, at the time of the shift change, Hornberger was in the office with security officer Spina.¹¹ Hornberger testified around 3:30 p.m., Wilk came into the office for Wilk's shift which started at 4 p.m. At that time, it was Hornberger, Spina, and Wilk in the office. Then Spina left. Hornberger testified that, as soon as Spina walked out the door, Wilk came up to Hornberger and started screaming
 30 at him telling Hornberger not to go over Wilk's head by calling Daniels. Wilk continued to yell and he told Hornberger he needed to start going through the proper procedures. Hornberger told Wilk not to talk to him like that and Wilk became irate. Hornberger testified he became frightened because he thought Wilk was going to hit him. Hornberger testified he grabbed his radio and called for his supervisor Boehm and Spina to return immediately. Hornberger testified
 35 Wilk was in his face pointing at him, screaming at him, and Hornberger was trying to step back to get out of his way. Hornberger testified Boehm and Spina came into the office, and Boehm told Wilk to get out of the office. Hornberger testified that as Wilk was leaving, he turned around and pointed at Hornberger and said "you have not seen nothing yet" in a very threatening manner. Boehm told Wilk to get out of the office and Wilk left. Boehm told Spina to stay in the
 40 office with Hornberger, and Boehm left to deal with a truck accident at the Plant.¹²

⁹ Hornberger testified that, prior to this conversation, he had between four to six conversations with Daniel, in which Daniel told Hornberger to contact Wilk, that Wilk would file a grievance if Hornberger was sure there was a contract violation. Hornberger testified he did
 45 contact Wilk and asked him to file a grievance concerning a couple of things that he had spoken to Daniel about, one was about Wilk serving as lead officer. Hornberger testified he thought Wilk had filed a grievance, but apparently it was not filed. Hornberger testified Wilk did not explain the grievance process to him during this period.

¹⁰ Hornberger testified Asboth is Hornberger's future brother in law, and the uncle of
 50 Hornberger's children. Hornberger helped Asboth to obtain his job at Guardsmark.

¹¹ Hornberger testified Spina is a security officer, lead officer and fire officer.

¹² Hornberger testified he is 28 years old, 5'11" and weighs 145 pounds. Wilk stated he is

Hornberger testified that on January 28, on his way home, he called Webster and told him what happened. Hornberger testified he told Webster he was frightened of what was going to happen, and he did not feel comfortable working with Wilk. On January 28, Hornberger also sent Webster an email describing the incident with Wilk. The email reads, in pertinent part:

I was in the office at a Buffalo stamping plant. It was about 3:30 pm on 1-28-2009, and we were dealing with a truck that got stuck at the entrance to Ford. Ralph Spina and I were in the office when Jim Wilk came in. Ralph left, and Jim Wilk started to yell at me. He was yelling about myself calling Larry, the national president, on some of the problems that I am having with grievances that I had Wilk file. The grievances were against him for changing the Lead officer's coverage for supervision, and the supervisor can take a day off or a vacation. I believe that this change only benefits him. Jim Wilk got very irate with me, and was getting in my face, yelling and pointing his finger at me threatening me. He told me not to call Larry and go over his head for issues dealing with him. I told him to stop yelling at me. He didn't stop, and I felt scared and threatened by him. I called Ken Boehm by radio, and Ralph to return to the office. I really thought that he was going to hit me. Ken returned, and I was trying to tell him what happened. He cut me off and asked if it was union business. We replied yes, and Ken told us to not be in the same room at the same time. Wilk said to me that, "You have not seen anything yet", in a threatening manner. Then he left the office and Ralph stayed with me. Ken called you and then went back to the incident with the truck..... I then called you to report what happened, and then it was 3:50 p.m.

On January 29, Hornberger sent a copy of the letter he had sent to Webster to Donna Smith, a vice-president of Guardsmark located in Guardsmark's corporate office in Memphis, Tennessee. Hornberger testified he thought he spoke with Smith on the phone on January 29, and that he told her about the January 28 incident and that he felt he was in an unsafe work environment if he had to work with an employee who he felt was going to hit him. Hornberger testified Smith asked if he would forward the email he had sent to Webster to her, which he did.

On January 29, Ryan Okerstrom, a relationship manager working for Guardsmark with authority over Ford manufacturing sites, forwarded Hornberger's email to Webster to Daniel, with a copy to PPAN Secretary-Treasurer Ken Pollack. Okerstrom labeled the subject of the email as "Buffalo Altercation". It is addressed to Daniel, and states, "Thought you should see this and maybe handle it internally. We told them both to take their union business off-site if it is going to lead to verbal altercations in the client facility." Daniel responded to Okerstrom by email on January 29, stating:

Thanks for the information. Unfortunately I have talked to Hornberger many times. He calls me to complain about a host of things on a regular basis. I called Jim Wilk (The Local President) and learned that Hornberger complains regularly without what seems like good cause and without filing specific grievances. I am told that he also does not follow the chain of command within Guardsmark. I have talked to both Jim and the site supervisor and it seems that Mr. Hornberger may be the source of the problem. I do not have the ability to hold Mr. Hornberger accountable for his actions or correct his behavior.

47 years old 5'6", and weighs 190 pounds. Hornberger testified that at the time of the confrontation he considered Wilk to be an imposing individual. He testified Wilk was right in his face, pointing at him, and that Hornberger was afraid to come back to work. Hornberger testified he did not raise his voice during the confrontation.

I have talked to Jim since the alleged incident. I feel certain he will keep control of his actions. Again thanks for the information.¹³

5 Hornberger testified that, shortly after Hornberger's January 28 conflict in the office with Wilk, Boehm told Hornberger that they had made a mistake concerning seniority and that Krisiak now had higher seniority than Hornberger. Hornberger asked how it was going to affect him, and Boehm responded he was not sure. Hornberger called Webster and asked how the change in seniority was going to affect Hornberger. Hornberger also asked Webster to look into Sprague's seniority vis a vis that of Hornberger's because he believed payroll records would show Hornberger had higher seniority than Sprague. Webster said he would look into it.

10 Hornberger testified Webster got back to him around the beginning of February. Webster told Hornberger that he was correct and that he had higher seniority than Sprague.¹⁴ Hornberger testified that around that time a new shift bid was going on. Hornberger testified he had a conversation with Boehm around February 6 and Boehm said Hornberger was going to be able to bid before Sprague. Hornberger identified a document he had seen posted in the security office. The heading includes the statement, "EMPLOYER CALL OUT LIST BY SENIORITY (as of 2/04/07)". It was stipulated that the document was created by Guardsmark and that the correct date of the document should read 2/04/09. The document lists six individuals at the "qualified level" for the position "Part Time Supervisor" in the following seniority order: Spina, Donahue, Wilk, Krisiak, Hornberger, and Sprague. Guardsmark also created another document entitled "Ford Motor Company Buffalo Stamping Plant Security Department Seniority List As of 02/04/09." The seniority order on this document using the Ford BSP date was: Spina, Donahue, Wilk, Krisiak, Hornberger, and Sprague for the first six individuals listed.¹⁵

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¹³ Daniel took the position in his January 29 email that Hornberger was not following the chain of command although Article VII, Section 2, of PPAN's constitution and by-laws provides that the national president has the authority to decide on all points of law or grievances submitted to him by the Local Unions or the membership thereof, with the authority to suspend a Local Union officer who does not follow the national president's directive. Clearly, Hornberger was seeking Daniel to intervene in grievances or complaints against Wilk, and it could have been reasonably foreseen by Daniel that referring Hornberger back to Wilk would not have resolved the problem. Nevertheless, by his January 29 email to management, Daniel labeled Hornberger as the problem. Moreover, it is obvious that Daniel informed Wilk of Hornberger's January 28 conversation with Daniel, which set Wilk off in the first place. Hornberger credibly testified he found a copy of the January 29 email exchange between Okerstrom and Daniel on January 31 or February 1 in open view in the security office. Hornberger identified Wilk's handwriting on the document with the words stating, "Did not receive any thing from Hornberger." Hornberger testified he did not think his email to Webster was any one else's business so he took the copy of the document.

¹⁴ Guardsmark's counsel Schnurr stated on the record that Krisiak, like Hornberger, came forward and objected to seniority and both of their seniority changed after an investigation to determine what the appropriate seniority was. Wilk stated on the record that Krisiak did not file a grievance with the Union over Krisiak's seniority. However, Wilk stated he was with Krisiak when Krisiak called Webster, they went back and started shuffling papers and came up with the seniority date that Krisiak agreed to. Wilk stated he was involved but Krisiak did not file a formal grievance. Schnurr stated Hornberger raised the issue of his seniority orally with management, it was looked into and an adjustment was made putting Sprague below Hornberger for on-site seniority.

¹⁵ Hornberger testified he was told Krisiak had the higher seniority because he was with Guardsmark longer than Hornberger. Hornberger testified the operative date for contract

Hornberger testified the shift bid that took place in February 2009 involved a seniority list attached to the form listing the shifts the employees were bidding on, the same as it was done in October 2008. The shift bid document reflected the available lead officer days, fire officer days, and security officer days for the employees to bid on by seniority. The document Hornberger saw showed that among Krisiak, Sprague, and Hornberger that they were to bid in the
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Hornberger credibly testified that, around February 13, he received call from Webster in which Webster told Hornberger to reselect his shift preferences because Sprague was using super seniority. Hornberger testified he came in and rebid his shifts on February 13. He testified he entered the office and either Sprague or Donahue handed Hornberger the shift bid sheet. The Union official told him he had to rebid as Sprague had entered his name for shifts Hornberger had wanted. Hornberger testified that the Union official who handed Hornberger the sheet also told Hornberger that Sprague had become secretary-treasurer of Local 104. Hornberger testified Sprague had taken the Friday and Saturday shifts Hornberger had previously bid for. As a result, Hornberger picked the days he was currently scheduled to work at the time of the unfair labor practice trial. He testified he was still able to work Monday, Tuesday, and Wednesday 8 to 4 as a security officer. He also chose a Friday 8 to 4 as a security officer, and Saturday 8 to 4 as a fire officer. Hornberger testified that because of the change in his shift bid status, he lost one day a week, Saturday, as a lead officer. Hornberger testified that at the time of the hearing he was still regularly scheduled as a fire officer, and he continued to serve as a lead officer on a fill in basis. Hornberger testified he was supposed to work as a substitute lead officer on the day of his testimony. He explained that, under his initial shift bid, he was guaranteed one day a week as a lead officer, but now he only works in that capacity when someone is on vacation, or otherwise absent.¹⁷

seniority is the Ford BSP date. If there is a tie, it went to the individual with the earlier Guardsmark date. There is no contention by the General Counsel here that Krisiak was not properly accorded seniority above Hornberger.

¹⁶ Hornberger testified he was told there was a shift bid in 2009 because certain employees were unhappy with their shifts and asked for another bid. However, Hornberger testified he was originally told the October 2008 shift bid was to be in effect for one year.

¹⁷ Hornberger testified he had phone call with Webster where Hornberger asked for a copy of Hornberger's payroll history. Hornberger told Webster that Hornberger's attorney needed the information relating to a workers compensation claim pertaining to Hornberger's prior employer. Hornberger credibly testified he never told Webster that Hornberger had any work limitations pertaining to Guardsmark. Hornberger estimated the phone conversation took place around 3 weeks before he received the letter from Webster with the requested payroll records. The payroll records Webster provided ended with the week of July 4, 2009. Hornberger credibly testified that, around a month prior to the unfair labor practice trial, he had a conversation with Webster where he told Webster that he did not have any physical limitations. Hornberger testified the conversation was in response to a rumor in the office that Guardsmark was going to

Asboth was called as a witness by the General Counsel. Asboth was hired by Guardsmark in March 2008, and he worked at the Plant at the time of his testimony. Asboth testified there was a shift bid conducted by Wilk in November 2008. Asboth testified employees started performing duties for the fire officer level 2 position after the November shift bid. Asboth testified his schedule changed in December 2008. At that time, he began working as a security officer on Sunday, Wednesday, Thursday, Friday from 8 to 4, and as a fire officer Saturday from 12:00 to 8. He testified he was the only fire officer on that shift. Guardsmark's shift schedules show Asboth was mistaken as to the date, and that he did not begin working as "P.T. Fire Officer" until the week of January 25, at which time he covered the Saturday 12 to 8 shift, and that Sprague also covered that shift as a lead officer. Asboth testified Sprague discussed the collective-bargaining agreement's preferential seniority clause with Asboth. The discussion took place on the 12 to 8 shift on a Saturday in the front office. Asboth credibly testified Sprague told him preferential seniority could be used in the case of a shift bid because union officers do not get paid anything, so it is kind of their compensation for working as a union officer. Asboth testified he responded that in his experience that preferential seniority is only in the case of a layoff or recall. Sprague responded the contract does not specify that it is only in the case of layoff and recall that all it says is that they have top seniority in the Union so they can use it during a shift bid.¹⁸

Asboth testified he had a conversation on a speakerphone with Hornberger and Daniel around the end of January 2009. Asboth testified Hornberger placed the call from the tower at work. Asboth testified the conversation was about some concerns with the local union as to whether they were getting fair representation. He testified there were a lot of issues brought up about new rules being put into place, and Wilk and Boehm were discussing more rules. Asboth testified he and Hornberger felt employees were not well informed as to the new rules. Asboth testified he asked Daniel if he had an answer about the last conversation they had because Asboth felt they needed a meeting between the union representatives, the company representatives and the members of the bargaining unit so they could all be on the same page as to the new rules and the way things were being run at the Plant. Daniel told him to talk to Wilk about it. Asboth testified that, during the call, most of the issues they talked about were not about rules, they were about union representation. Asboth testified he had concerns about the way the contract was written because it said at the second stage of the grievance procedure;

argue he was on light duty at the trial. I do not find that Hornberger had any work limitations preventing him from serving as a lead or fire officer. The information relating to his prior employer only came to Guardsmark's attention after the shifts from the February shift bid were assigned. Moreover, Guardsmark continued to have Hornberger serve as a fire officer on a weekly basis at the time of the trial, just on a different shift than Hornberger initially selected. Hornberger was also scheduled to serve on occasion as a lead officer during the same period.

¹⁸ Asboth testified he worked at several jobs in the past that had unions naming two prior employers where he thought they had preferential seniority provisions in the contract. Asboth testified he also had conversations with people who were in unions such as Spina concerning preferential seniority. Asboth could recall little else about the collective-bargaining agreements of his prior employers aside from the presence of super seniority provisions. Nevertheless, I found Asboth to be a credible witness, who testified in a forthright manner to the extent his memory would permit. Seniority in the instant case played an important part in the employees' schedule, assignments, positions held, and therefore it plays an important role in their income. As such, I do not find it implausible that Asboth had a recollection of his understanding of preferential seniority provisions at his prior employers, but could not specify other terms of those collective-bargaining agreements.

the local president could pull a grievance. Asboth testified Daniel kept telling them if they had any problems with Wilk they could file a grievance. He testified they were trying to understand because if Wilk did not like a grievance about himself he could pull it. Asboth testified Daniel told them Wilk would not be able to do that and they could still push it further in the procedure.

5 Asboth did not recall what Hornberger said during the call because he did not get involved with Hornberger's part of the conversation. Asboth testified Daniel stated he might visit the Plant, but nothing definite was said. Daniel stated they needed to file a grievance locally for the Union to help them.

10 Asboth credibly testified Wilk informed him there was going to be a shift bid within the week it took place in February 2009. Asboth testified that, in February, Hornberger told Asboth that he had gotten Webster to change Sprague's seniority date. Asboth testified Hornberger filled out the bid selection on the date they changed Sprague's seniority date. Hornberger filled out the bid selection in Asboth's presence in the front office. Asboth recalled that Hornberger
15 took one fire officer shift and one lead officer shift each from 12 to 8. Asboth testified the day after Hornberger made the shift selection, Asboth had a conversation with Sprague about the bid process. Asboth testified this was during the first week of February. Sprague told Asboth that all the work Hornberger had done to get his seniority date changed was for nothing because Sprague is secretary-treasurer, and the contract says that he gets preferential
20 seniority. Asboth testified that he believed Sprague used the term super seniority in the conversation. Sprague also stated that as a full-time fire officer Hornberger would not be able to take his fire officer days anyway. Asboth responded that even if Hornberger could not take Sprague's fire officer days that still would not account for the fact that Sprague was taking the lead officer day. He testified Sprague said it would not matter either way because with
25 preferential seniority he would have been able to take it either way. Asboth testified this was the first time he learned Sprague was secretary-treasurer. Asboth identified a grievance he filed dated, February 19. He testified Sprague filed the grievance on Asboth's behalf. Asboth testified he filed two separate grievances which Sprague handed off to Wilk to process.

30 Asboth testified he had another conversation with Sprague pertaining to preferential seniority taking place around May 2009. Sprague told Asboth that he just found out preferential seniority does not count in a shift bid, but it would not matter because the Union's lawyer told him that if there is a shift that there is not a union representative on then they get to work on that shift. Asboth testified he responded he understood that you should be able to work on the shift
35 as a union representative, but if there is somebody qualified with higher seniority on that shift, they should be able to get the higher pay grade position. Asboth testified he had a conversation with Sprague relating to Wilk, which took place around July 2009. Asboth testified he stated he felt a lot of things Wilk was doing toward Hornberger were to get back at him and kind of a vendetta. Sprague responded Asboth was probably right.

40 Asboth testified that, as a fire officer, he has never been told by the Employer or the Union there are certain duties he could not perform. Asboth testified that, at the time of the hearing, he was serving as a fire officer on Saturdays and Sundays on the 12 to 8 shift. Asboth testified he has worked with Hornberger when he was serving as a lead officer. He testified it
45 was during November 2008 until February 2009. Asboth testified he witnessed the duties performed by Hornberger as a lead officer, and he worked with Sprague as a lead officer. He testified there was no difference in the job duties performed by Hornberger or Sprague in Asboth's presence. Asboth testified that, to his observation, the duties of a full-time fire officer do not differ from the duties that Asboth has performed as a fire officer. Asboth has not
50 received the training listed under core training for level 2 fire officers.

B. The Union's witnesses

5 Sprague testified there were Local 104 elections in October 2007 and Sprague was elected treasurer at that time. Sprague testified he never handled any grievances as treasurer. Sprague testified when he was elected to be Local 104 treasurer there were four union officers. Wilk was president, Sprague was the treasurer, Donahue was the secretary, and Joe Clunie was the steward. Sprague testified Clunie left in October or November 2008, and at that time three elected officials remained.

10 Sprague initially testified he became secretary-treasurer of Local 104 around October 2008, after Clunie left. However, Sprague testified his memory was vague as to dates. Sprague acknowledged he could have become secretary-treasurer in February 2009. Sprague testified Wilk brought up the idea of Sprague becoming secretary-treasurer. He testified they conferred with Donahue and agreed on Sprague's appointment as secretary-treasurer and
15 Donahue's appointment as vice-president. He testified there was no vote by the membership for the title changes, it was just the three members of the executive board Wilk, Donahue, and Sprague agreeing to it. Sprague testified that, as secretary-treasurer of Local 104, he has handled 3 or 4 grievances. Sprague testified Asboth came to him with a couple grievances, which did not go past the first step of the grievance procedure.

20 Sprague initially testified he did not believe he talked to Wilk about super seniority in October 2007, or at any time in 2007. However, Sprague testified in his pre-hearing affidavit, dated March 23, that "In or around October of 2007, I believe it was Wilk who told me that super seniority could be used by union officers for any situation involving seniority." Upon reviewing
25 his affidavit, Sprague testified Wilk discussed preferential seniority with Sprague when he ran for union office, and Wilk showed him the contract provision relating to preferential seniority. Sprague testified it is possible he talked about super seniority with other employees.

30 Sprague testified he was selected as a full time fire officer in September 2008, but he did not start performing the duties of the position until October 8, 2008. Sprague testified that, after he was selected for the position, he was then trained to do the work. Sprague testified that, at the time of the February 2009 shift bid, he was told by either Wilk or Boehm that Sprague's seniority was lower than Hornberger's. Sprague testified he initially bid prior to Hornberger. However, Hornberger had Sprague's seniority changed and Sprague had to rebid following
35 Hornberger. During the new bid, Sprague learned Hornberger had selected a Saturday shift for lead officer, and Hornberger had selected the overnight shift for fire officer. Sprague had previously selected both of these shifts. Sprague testified "I wasn't happy about what he was trying to do."

40 Sprague testified he ultimately claimed the disputed Saturday lead officer and fire officer shifts, even though Hornberger had selected those shifts, and Hornberger had higher seniority than Sprague. Sprague testified there was not a new bid after Hornberger had bid for the shifts. Rather, "I just put myself in." He testified "I just bid myself." Sprague testified he thought he had super seniority at the time based on the contract. He testified that was what led him take a
45 shift preference over Hornberger, even though Hornberger had higher seniority according to Guardsmark. Sprague testified he continued to work on the disputed shifts although he ultimately did not get them over Hornberger due to super seniority, although at the time of the assignment, he thought that was the reason.

50 Sprague stated the following in his March 23, affidavit:

I have been higher seniority than Hornberger since I started until about February 2009

when we did the shift bid. Hornberger complained that he thought he was higher seniority. It was either Boehm or Wilk who told me that I was lower in seniority. Hornberger chose his shift first. I didn't think it would be a problem since I chose overnights and they knew that he never requested to work overnights. I learned that he was going to take a fire officer and lead officer day. Since these were the days that I have normally been working, I was upset. Within a couple of days, I exercised my super seniority lead officer. Technically, I didn't have to exercise super seniority over the fire officer duty because I am a full-time firemen and Hornberger is part-time firemen this is the only time that I exercised super seniority over anyone. I could have filed a grievance because Hornberger did not complain about my seniority within the 22 days. Therefore, I should still be of higher seniority than him. However, I chose not to file a grievance because it would take too much time and would make everyone rebid the schedule. So, I didn't press the issue.

Sprague testified that he was told prior to his giving the March 23 affidavit that super seniority did not apply to the shift selection. He testified his statement in the affidavit is in the past tense. He testified "so, I'm saying that at the time I did it, I thought that I was exercising super seniority, when I bid the shift." However, Sprague testified that it was explained to him that he received the shifts in question because Sprague was a full time fire officer and Hornberger is not. He testified he received the lead officer position "because in order to be a lead officer, you have to be able to perform all the duties underneath you and I was more qualified." Sprague testified he first heard this explanation, "It was after I got -- after the shift bid." Sprague testified he originally thought he received the shifts based on super seniority, and that after Hornberger filed the unfair labor practice charge Sprague learned that super seniority could not be applied by talking to Wilk. Sprague testified he learned about it a little bit before giving the March 23 affidavit. Sprague testified, "Shortly after the shift bid and in between that and the affidavit, I found out that super seniority did not apply ...". He testified, "I think I just talked to Wilk about it and what was going on with the shift and everything, was originally, I was told that what they said in the contract, we had seniority. And then, as soon it was contested, I found out that I didn't have super seniority or preferential seniority. But I'm still on the shift."

Wilk is the president of local 104. Wilk testified he works as a full time fire officer level 2 and he serves as a lead officer on the weekends. He testified there are about 16 employees in the unit at the Plant, and the unit was certified on October 2, 2007. Wilk testified local 104 held elections for officers in the late fall of 2007. Wilk testified Local 104, initially had four elected officers, president, secretary, treasurer, and union steward. Wilk testified Ron Adler was the steward, Sprague was the treasurer, Donahue was the secretary, and Wilk was the president.

Wilk testified that, from 2007 to March 23, the date of his prehearing affidavit, Wilk processed 12 to 14 grievances. Wilk testified that during the period, he considered Sprague, "Not really involved in the process of grievance handling." Wilk testified that Donahue was also "not really" involved in grievance handling. Wilk testified that in his current position as vice president of the Local, Donahue is also "not really" involved in grievance processing. More specifically, Wilk testified that prior to February 2009 Sprague was not involved in filing any grievances. He testified the ones that were brought up Wilk handled. Wilk explained the change in Donahue and Sprague's elected Local 104 titles to their current titles by stating Wilk picked up a copy of PPAN's By-Laws around December 2008. He testified they decided to go to those By-laws which state you should have a president, a vice president, and the secretary-treasurer should be one position. He testified instead of having four Local Union officers, they decided to have three. Wilk testified Adler, the elected steward, retired in February 2008.

Wilk identified Guardsmark's August 18, 2008, posting for the four level 2 fire officer positions. He testified the posting did not list job qualifications in terms of required training. Wilk testified the posting just listed the requirements of the position that the successful
5 applicants had to be able to do to perform the job. Wilk applied for and was reclassified as a level 2 fire officer. Wilk testified he received some of the core training requirements for that position before he obtained the position, and he received some of the core training after he obtained it. Wilk testified that, at the time of the hearing, which was in September 2009, the four
10 level 2 fire officers still had not received the "Incipient Fire" training listed as part of the core training. Wilk testified he was working as a level 2 fire officer about 4 or 5 months before Guardsmark started sending the level 2 fire officers to classes. Wilk testified it was negotiated prior to winning the level 2 position, that since the men were going to be doing the job, they should be paid at the level 2 fire officer rate from the time they started performing the work, and he thought they had 360 days after assuming the position to complete the required training.
15 Wilk testified Guardsmark was to pay for the training and provide it. Wilk testified the back-up fire officers perform the same duties as a full-time level 2 fire officer. He testified if a backup fire officer did not have hazmat training, if there was a hazmat operation it would be up to the supervisor or lead officer of that shift to perform that function. Wilk testified that would apply to a full-time fire officer too because they might not have received that particular training at least
20 during the first 360 days.

Wilk testified the employees only work as lead officers during the weekends. He explained that they only have 48 hours on the weekend that is divided up between first, second, and third shifts for them to serve as lead officers. Wilk testified that Kriasiak and Hornberger
25 serve as lead officers although neither has taken the core fire officer training. He testified that the other employees who have served as lead officers have taken most of the core fire officer training, although it was given after they were appointed to the lead officer position.

Wilk testified that in the Fall of 2008, Hornberger made complaints to Wilk. Wilk was not
30 sure if the complaints related to the on call list for overtime, and or how someone was selected to do lead work on the weekends. Wilk testified that around December 2008, Hornberger complained about the way overtime was administered at the location. Wilk thought this was around the week before Christmas. Wilk testified Hornberger was upset when overtime procedures went into effect where the Union attempted to equalize the overtime.
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Wilk testified on January 28, he received a call from Daniel who informed Wilk that Hornberger had discussed his interactions with Wilk with Daniel. Wilk testified he had an argument with Hornberger on January 28. He testified the discussion was precipitated by the call Wilk had received from Daniel. Wilk testified as follows during his initial questioning by
40 counsel for the General Counsel about the January 28 incident:

Q Didn't you approach Mr. Hornberger on January 28 of '09?

A I was in the same room with him, yes.

45 Q Okay, and didn't you express to him, during the course of being in the same room with him, that you haven't seen anything yet?

A At the end of the conversation pertaining to other things, yes.

Q Okay. You made that statement?

A Yes.

50 Wilk was recalled as a witness after Boehm testified about the January 28 incident. Wilk then testified as follows concerning the incident: Wilk testified he received a phone call from Daniel stating he had spoken with Hornberger earlier that day. Wilk arrived at work at about 3:30 p.m.

He testified when he walked into the office he saw Spina walking out the other door. Wilk walked into the office and confronted Hornberger. He testified he was about 10 feet away from him, that Wilk was on one side of the office and Hornberger on the other. Wilk testified he stated, "I really don't mind you going over my head to talk with Mr. Daniel. But what I really do not appreciate is you coming right out and lying to him. You stated that I gave you files, and that I shredded those files in front of you." Wilk testified he confronted Hornberger again stating, "you had the balls to look me in the eye and say I gave this to you and you shredded them." Wilk testified he stated he could not believe Hornberger would do something like this. Wilk testified at that point Hornberger ran over and grabbed a radio and requested help. Wilk testified he thought he was walking out of the office when Boehm came in and said, "I want you to go wait in the back room, that if you guys are going to have an argument over Union business that, you know, your to do it out of this office." Wilk testified at that point, "I did state that you haven't seen nothing yet." Wilk went on to testify as follows:

15 JUDGE FINE: Who are you making that statement to?
THE WITNESS: I believe it was to either Nick or I believe Ken was there, was in the room, too. The statement was if somebody was to—

JUDGE FINE: Why would you have made it to Mr. Boehm?

20 THE WITNESS: He was in the room, too, but stating that —
BY MR. DANIEL:

Q Who were you directing to your —

A I believe it was to Nick Hornberger that he made the statement that like, "he lied to you". And then I found out later that after several calls he had finally admitted this had never happened, that he never gave me any documents that I shredded up in front of him.

25 Q Did you make any threats to him?

A No.

30 Wilk denied making any physical threats or motions to Hornberger. Wilk testified he never got any closer than 4 feet to Hornberger, and that he was 8 to 10 feet away most of the time. Wilk testified that, towards the end of the conversation, Wilk was sitting at his desk when Boehm and Spina came in and Hornberger was over by the radio calling. Wilk testified Hornberger told Daniel that Wilk had shredded grievances that Hornberger filed with Wilk. Wilk denied shredding documents stating he never received any written grievances from Hornberger.

35 Wilk testified he was not aware Krisiak's seniority changed in 2009, as Wilk never received any written confirmation of a change. Wilk testified supposedly there was a change in Sprague's seniority, but he was not aware of it and he never received anything in writing to confirm it. Wilk testified he learned through other employees that someone from the Employer had posted a schedule with the new seniority listed. Wilk testified he thought there was a change on the schedule concerning Krisiak's seniority and that it was posted around February. Wilk testified it was a posting from the Ford plant itself, and that it was the Ford seniority date and "I don't believe there was anything stating this was from Guardsmark." However, he testified it was posted where Guardsmark usually posted its seniority list. Wilk also testified Ford would have no reason to post anything about these employees as Ford had nothing to do with it. Wilk testified he assumed the posting was from Guardsmark, but there was nothing stating Guardsmark on it. Wilk testified he received other seniority lists that stated "This is Guardsmark seniority list for the Ford plant." Wilk testified that changed in 2009 and Ford was placed on the list, but the Union was never advised in writing that Sprague or Krisiak's seniority changed. However, Wilk admitted to seeing the list with their new seniority dates posted on the bulletin board where Guardsmark usually posts things.

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Wilk testified that in February 2009 he did not hand out the shift selection documents to employees for the shift bid. Wilk testified the shift bid was conducted by the site supervisor. He testified he was not there at the time. Wilk testified the Union had nothing to do with the employees selecting their shifts. He testified the Union was not involved in the shift bid process in that it was between the employees and Guardsmark. Wilk initially testified, at the hearing, that it was not true that Sprague used super seniority in the February 2009 shift bid to claim shifts Hornberger had previously bid on. However, Wilk provided an affidavit on March 23, in the presence of Union attorney Frank Guido. He stated in the affidavit, "I believe Sprague used his super seniority in February, 2008, for the shift bid. He has less seniority than Hornberger. I'm not aware of anyone else using super seniority for anything else." When asked at the hearing if the reference in the affidavit to February 2008 was a typo, that the correct date should have read February 2009, Wilk stated he was not sure. Yet, he admitted there have been no other February shift bids other than the one taking place in 2009. Wilk testified at the time he provided his affidavit he believed Sprague used super seniority to claim the shifts. Wilk tried to disavow the content in the affidavit during the following exchange:

JUDGE FINE: But see, you didn't mention anything about that in your affidavit, you just said, "I believe Sprague used to super seniority for the shift bid."

THE WITNESS: In that affidavit she was asking the questions, and if you tried to go -- deviate from that she cut you right off. I ask the questions, you tell me the answers. You don't ask any questions, and it was pretty clear that during this process here she was in total control of basically what she wanted to put down there. It was not a two way conversation.

Wilk testified he received an email from Kenneth Pollack, PPAN's secretary treasurer dated, March 31, regarding collective-bargaining agreement Article VIII, Section 3. Wilk testified when he received the email, he posted it on the Union bulletin board at the Plant for a period of around 3 or 4 weeks. The email is signed by Daniel, and he asks Pollack to forward it to all of the local officers. The email reads:

A number of locals have recently inquired as to the proper application of Article VIII, Section 3 of the collective bargaining agreement, pertaining to "Preferential Seniority," which is commonly referred to as a "Super seniority" provision. The pertinent portion of the contract clause applicable to the local associations, states, "Notwithstanding their respective positions on the seniority list,... the Local President and Secretary-Treasurer, in the order named, shall have top seniority in the unit."

Current rulings from both the NLRB and the Courts state that super seniority provisions are valid as to layoff and recall situations, however, use in other circumstances is only valid if the union can show that the application of the super seniority meets the test of necessity, defined as furthering the effective administration of bargaining agreements by encouraging the continued presence of a union officer on the job (i.e., bargaining, contract administration, grievance handling, etc.)

Proofs which will satisfy the test include a showing that application of super seniority will provide greater accessibility to co-workers, for example, making sure that different officers are on different shifts to assist coworkers in the event grievance issues arise or employer investigations occur. The test will be satisfied if the proofs show that the application of the super seniority provision will at least enhance the ability to represent employees; consequently, the proofs need not show that the greatest or maximum amount of access will be achieved, before justifying the exercise of the super seniority right.

If you intend to exercise the super seniority provision at your local (for circumstances other than layoff and recall-which are, of course, automatically allowed) contact the

PPAN office so that we can assist you in reviewing whether the factual circumstances at your local meet the test, in the event the National on behalf of the local union must prove such entitlement in a proceeding brought by the NLRB.

5 Daniel is the president of PPAN. He testified he has been a national officer for around 27 years, and national president for close to 20 years. Daniel testified the "Preferential Seniority" provision in dispute in this proceeding has been in the contract since the outsourcing of the security work from Ford to Guardsmark. He testified that the "Preferential seniority" language was in the predecessor Ford or Guardsmark agreement with PPAN for at least the 22
10 or 23 years that he was aware of. Daniel testified it is his understanding that the purpose of the preferential seniority provision was to ensure that the Union's presence if there was a layoff, to allow them to administer the contract and handle grievances.

C. Guardsmark's witnesses

15 Boehm is Guardsmark's site supervisor at the Plant. He testified that in September 2008, there was an interview process for fire officers. Boehm testified it was not until the winter of 2008 that employees began performing the work of the level 2 fire officer. Boehm testified that, prior to September 2008, the only thing Guardsmark's employees were doing concerning
20 fire officer duties was checking fire extinguishers. Boehm testified from September 2008, and thereafter, level 1 security officers filled in as fire officers on particular shifts.

Boehm testified he was at the Plant on January 28, the day of the confrontation between Wilk and Hornberger. Boehm testified he was directing traffic for a truck accident at the Plant
25 when Boehm heard a call over the radio from Hornberger asking for help, and Boehm returned to the office. Boehm testified Hornberger stated, "I need help here at the office. I need help. I feel I'm being threatened." Boehm testified when he arrived at the office he found Wilk sitting behind the supervisor's desk, and Hornberger sitting at the counter.¹⁹ Boehm testified he was between them and they were about 10 feet apart. Boehm testified there was a desk separating
30 Wilk and Hornberger when Boehm arrived. He testified he was back to the security office within 25 seconds of receiving Hornberger's distress call. Boehm testified Spina also responded to Hornberger's call. Boehm testified Wilk and Hornberger were quiet when Boehm entered the room. Boehm asked what was going on. Hornberger stated Wilk had been yelling at him, and then Wilk and Hornberger started to bicker. Hornberger said Wilk had threatened him. Wilk
35 responded he was trying to talk to Hornberger. Boehm testified he accused them of acting like children stating he wanted them to stop and they need to grow up. Boehm testified Wilk stated, "well, you ain't seen nothing yet." Boehm testified he thought the remark was directed at Boehm because he was telling Wilk he needed to grow up and he was acting like a child. Boehm testified Wilk was looking at Boehm when he made the statement. Boehm testified at that point
40 he raised his voice and said he wanted the two of them in separate rooms. Wilk went into the back room and Hornberger remained in the office. Boehm testified the conversation between Hornberger and Wilk did not become loud while Boehm was there.

Boehm testified he immediately reported the incident to Webster, who is Boehm's
45 supervisor. Boehm testified he told Webster he had an incident between two guards and Hornberger had stated he felt threatened. Boehm testified he told Webster that he separated them, and he wanted Webster to investigate the matter. Boehm testified that he did not report Wilk's "you ain't seen nothing yet" remark to Webster. Boehm testified he is friends with Wilk.

50 Boehm testified he was involved with the February 2009 shift bid. He testified he

¹⁹ Boehm later testified Hornberger was standing next to the phone when Boehm arrived.

created a blank schedule. He testified Wilk would take that along with the seniority list and go to the bargaining unit employees, according to their seniority, and allow them to fill in their schedule up to 40 hours. He testified that when the February 2009 bid began, they were using the old seniority list which included the seniority order of Sprague, Hornberger, and then Krisiak.

5 Boehm testified he gave the Union the old seniority list to take around for the bid. He testified a day into the February shift bid, Wilk came to Boehm and said there was a complaint that somebody bid on the shift too early. Boehm testified Krisiak made a complaint as to his seniority placement contending it should have been ahead of Hornberger's. Boehm informed Hornberger that Krisiak had more seniority than Hornberger, and Hornberger told Boehm that

10 Hornberger thought he had more seniority than Sprague. At some point, Boehm confirmed to Hornberger that Hornberger had more seniority than Sprague. Boehm testified on both occasions he called Webster and they went through Guardsmark's records and corrected any mistakes that had been made. He testified the seniority was corrected during the bid process, and everyone below Donahue and Spina had to rebid their shifts. Boehm testified the new

15 order of the bidding was Spina, Donahue, Krisiak, Hornberger, and then Sprague. Boehm testified he provided Wilk with a copy of the new list including the changes. Boehm testified he generated the seniority list on February 4, and he provided it to Wilk on February 5 or 6.

Boehm testified that, after Hornberger bid based on the new corrected seniority order,

20 Wilk came to Boehm and said there was a problem that Hornberger put in his bid. Boehm testified Wilk said you are going to have to take a look at this as Hornberger filled himself in as a full-time fire officer which is a level 2 fire officer. Boehm testified he went to Hornberger and explained to him that he could not just promote himself by filling in spaces for a job that he had not yet been qualified for.

Boehm testified that, in February 2009, Boehm was responsible for compiling data necessary for the shift bid based on seniority. Boehm testified he provided the data to the Union. Boehm testified the Union officials passed out the sheet for the shift bid, and then turned it back to Boehm for review. Boehm then testified as follows:

30 JUDGE FINE: Who makes the actual shift selection?

THE WITNESS: The employees.

JUDGE FINE: Well, what do you mean they make, who determines who, the employees bid on a shift, correct?

35 THE WITNESS: Uh-huh.

JUDGE FINE: You have to say yes or no.

THE WITNESS: Yes.

JUDGE FINE: Then the shift bids are given to you from the Union, correct?

THE WITNESS: Correct.

40 JUDGE FINE: And what if there is a conflict, what if more than one person bids on a shift?

THE WITNESS: That has not even been an issue yet. Generally what, the way that I have done it was I made a blank schedule and you would start with the senior most person, and he would fill in his 40 hours that he would like. And as, as you work your way down, obviously the second person could have any shift that they were qualified for with the exception of the 40 hours that the first guy took.

45 JUDGE FINE: So, you do it in the order of seniority in terms of placing the bid and filling out the sheet.

THE WITNESS: Correct.

50 JUDGE FINE: The Union has seniority dates for these individuals?

THE WITNESS: Correct.

Boehm identified a document entitled, "Confidential Draft/for Settlement Purposes Memorandum of Agreement" between Guardsmark and PPAN with an effective date of August 1, 2008. The agreement states Guardsmark will convert 50 level 1 security officer positions to level 2 fire officer positions, the distribution of which is that each manufacturing facility will have one level 2 fire officer per shift, on a seven day per week 24 hour basis. Section 2.6 of the agreement states the core training requirements for a fire officer level 2 fire officer must be completed within 360 days of the Agreement, or as provided. Items (a) through (e) are listed as the core training requirements in Section 2.6. Boehm estimated it would take between 6 and 9 months for an ordinary security guard to complete all of the required core training. He testified there is almost 300 hours of course work. Boehm testified there had been issues concerning the availability of trainers because the courses are from Michigan State. Boehm testified at the Plant at issue, Guardsmark personnel became level 2 fire officers in September 2008. He testified that as of September 2009, their core training was still not completed.

Boehm testified the core training referenced in the settlement agreement was not available for backup fire officers at the time of the hearing. He testified that, at that time, it was Guardsmark's priority to have the level 2 fire officers complete the training. Boehm testified employees have been serving as fire officers even though they are not level 2 fire officers. He testified they are working as backup fire officers. Boehm testified Hornberger continued to serve as a backup fire officer on a particular shift. Boehm testified the training will eventually be offered for backup fire officers. Boehm testified that by the end of 2009, all of Guardsmark's level 2 officers should have completed the training, thereby opening spots for other employees. Boehm testified that in addition to Hornberger, Krisiak and Asboth were serving as backup fire officers on a regularly scheduled shift. None of the three had the level 2 fire officer core training.

Webster is the manager in charge of Guardsmark's Buffalo branch, and the Plant at issue is one of his nine accounts in the Buffalo area. Webster is responsible for Guardsmark's staffing, supervision, and mandatory training at the Plant. Webster testified he approves the final schedules. Webster testified Guardsmark's 63 security officers in the Buffalo area have Webster's cell phone number to call him directly for any issues. Webster testified Hornberger called him for a period of time quite frequently during off hours regarding a multitude of issues, including Hornberger's relationship with the Union, some things Hornberger felt were unfair, as well as about personal issues including a vacation request. Webster testified he told all of the guards, including Hornberger, that Webster could not get involved with issues they had with the Union. Webster testified in terms of hierarchy that he is the third level removed from Hornberger. Webster testified Boehm is below Webster and there are two shift supervisors below Boehm. Webster testified the first person Hornberger should have contacted concerning his vacation day request was Boehm. Webster testified Hornberger will bypass the chain of command continuously to come to Webster with issues.

Webster testified the duties, qualifications, and training requirements for level 2 fire officers are outlined in the collective-bargaining agreement, and the settlement agreement between Guardsmark and PPAN. Webster also identified an email dated, October 16, 2008, from Okerstrom listing pre-requisite and core training for level 2 fire officers. Webster testified that in September 2008, Webster, with input from the site supervisor and Wilk, put together an evaluation process on how to select the four best candidates for the then opening up level 2 fire officer positions at the Plant. He testified that following the selection of the four individuals there were no grievances as to who was selected. Webster testified there is a 300 hour core training requirement for level 2 fire officers. He testified Guardsmark has paid for the selected individuals Spina, Donahue, Sprague and Wilk to take the core training for the level 2 position. Webster testified that under the collective-bargaining agreement at page 30, a lead officer has

to have knowledge of the level 2 fire officer position, and knowledge of the level 1 security position. Webster testified the core training was to be completed within 360 days from the implementation of the position.

5 Webster testified the announcement of the level two fire officer position was in September 2008. The interviewing was done in September, and they started getting everything going around December or January concerning implementing the position. Webster testified that, since December 2008, level 1 officers have served as fire officers on a particular day of the week on a regular basis. Webster testified the purpose of the backup fire officer position is that
10 people get sick, and they take days off. Webster testified as follows:

Q So, the purpose is that someone who is put in the backup fire officer position would have been qualified to serve as the fire officer?

A Correct.

15

Webster testified that to his knowledge, Hornberger has never presented to Boehm that he completed the five listed items for prerequisite training to be a level 2 fire officer. Webster testified the prerequisite training is available to Hornberger. Webster testified he would prefer to have someone serve as lead officer who had more complete fire officer training, with "more
20 qualified documents for that position."

20

Webster testified he was not involved in the February shift selection concerning the dispute between Hornberger and Sprague. When asked, who made that selection, Webster replied "Well, that was a bid for a shift." Webster testified, "Was I directly involved in the shift
25 selection? No." Webster went on to testify as follows:

25

JUDGE FINE: Well, sir, let me ask him another question. Who made the shift selection?

THE WITNESS: Well –

JUDGE FINE: Who made it?

30

THE WITNESS: The officers picked their shift.

* * * *

JUDGE FINE: You were not involved in determining who got the shifts in February, correct?

35

THE WITNESS: No, sir. The only, the only activity that I was involved with that is putting up the, okay in the blank schedule of what coverage needs to be done for the week.

JUDGE FINE: Right. So, who determined that Mr. Sprague would get the shift as opposed to Mr. Hornberger?

THE WITNESS: It was done by seniority.

40

When Webster was later asked who determined that Hornberger would not receive the Friday and Saturday slots he was originally seeking for lead and fire officer, he responded, "It's my understanding it was based on seniority." When asked if that was the sole determination, Webster responded, "Yes." Webster testified he was not involved in the shift selection at the site, that it was Boehm who was involved, along with Wilk and the officers.
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D. Credibility

I found Hornberger and Asboth to have testified in a logically consistent and credible fashion considering their demeanor. Asboth, although having familial ties with Hornberger, was
50 testifying against the interest of his Employer and the Union. Asboth's testimony as to his conversations with Sprague was credible and undenied by Sprague, who in fact admitted Wilk told him about the contractual super seniority provision early on, and that it was possible

Sprague discussed the provision other employees. Asboth regularly worked with Sprague serving to confirm that Sprague had the discussions with him as Asboth testified.

5 Hornberger credibly testified he phoned Daniel on January 28 by speaker phone and Asboth was present for the call. Hornberger testified he told Daniel that he asked Wilk to process a grievance, and Daniel asked Hornberger if he could start going through proper channels. Hornberger asked Daniel if he was going to come down and give them some guidance because Hornberger did not know the proper channels. Hornberger testified he had contacted Wilk and asked him to file a grievance concerning a couple of things that he had spoken to Daniel about, one was about a possible conflict with Wilk serving as lead officer and local union president. Hornberger testified he thought Wilk had filed a grievance, but apparently it was not filed. Hornberger testified the conversation ended when Daniel said he was going to talk to Wilk, and get back to Hornberger.

15 Hornberger credibly testified that around 3:30 p.m. on January 28, Hornberger was in the security office. He testified Wilk entered the office and came up to Hornberger and started screaming at him telling Hornberger not to go over Wilk's head by calling Daniels. Wilk continued to yell and he told Hornberger he needed to start going through the proper procedures. Hornberger told Wilk not to talk to him like that and Wilk became irate. Hornberger testified he became scared because he thought Wilk was going to hit him. Hornberger testified Wilk was in his face pointing at him, screaming at him, and Hornberger was trying to step back to get out of his way. Hornberger testified he grabbed the radio and called for help. Hornberger testified that his supervisor Boehm and Spina came into the office, and Boehm told Wilk to get out of the office. Hornberger testified, as Wilk was leaving, he turned and pointed at Hornberger and said "you have not seen nothing yet" in a very threatening manner. Boehm told Wilk to get out of the office and Wilk left. Hornberger is a slightly built individual and Wilk outweighs him by about 45 pounds. Hornberger reported the incident to Webster the day it occurred, telling him he was afraid of what was going to happen, and he did not feel comfortable working with Wilk. Hornberger sent an email to Webster that same day detailing and confirming his account of the incident. On January 29, Hornberger sent a copy of the email to Smith, a vice-president of Guardsmark.

35 I did not find the testimony of Boehm or Wilk to be very credible concerning the January 28, exchange. Boehm testified he heard a distress call over the radio from Hornberger asking for help. Boehm, an admitted friend of Wilk, testified Hornberger stated, "I need help here at the office. I need help. I feel I'm being threatened." Boehm testified he reported back to the office, and following, statements by Hornberger and Wilk, Boehm testified he accused them of acting like children stating he wanted them to stop it and that they need to grow up. Boehm testified Wilk stated, "well, you ain't seen nothing yet." Boehm testified he thought the remark was directed at Boehm because he was telling Wilk he needed to grow up and he was acting like a child. Boehm testified he felt Wilk was challenging Boehm's authority by saying, "Hey, you ain't seen nothing yet if you think I'm acting like a kid now." However, Boehm admitted Wilk did not say "you think I'm acting like a kid now". Boehm claimed Wilk was looking at Boehm when he made that statement. Boehm testified he immediately reported the incident to Webster stating there was an incident between two guards, and Hornberger had stated he felt threatened. Boehm testified he told Webster he wanted Webster to investigate the matter. Boehm testified he did not report Wilk's "you ain't seen nothing yet" remark to Webster.

50 Wilk testified that on January 28, he received a call from Daniel who informed Wilk that Hornberger had discussed Hornberger's interactions with Wilk with Daniel. Wilk testified he had an argument with Hornberger on January 28, which was precipitated by the call Wilk had received from Daniel. Wilk initially testified that, towards the end of the conversation with

Hornberger, Wilk made the remark to Hornberger that he had not seen anything yet. Wilk's admission undercuts Boehm's claim that he thought the remark was directed towards Boehm and not Hornberger, and confirms Hornberger's testimony that the remark was directed towards him as he understood it to be. Moreover, although Boehm claimed he told Webster that he wanted him to fully investigate the matter, he admitted he never reported the remark to Webster. Whether Boehm thought the remark to be made to himself or Hornberger, I find his testimony to be clearly disingenuous that he asked Webster to investigate the incident without reporting the remark to him. More than that, I find as Wilk originally admitted and as Hornberger credibly testified, the remark was directed to Hornberger, and that contrary to Boehm's claims, he knew it was directed to Hornberger. I do not credit Boehm's claim that he demanded the matter be investigated as no investigation took place, save Guardsmark's reporting to Daniel that the incident occurred.

I also do not find Wilk's account of the January 28 incident to be credible. I do not find that Hornberger told Daniel that Wilk had torn up grievances as Wilk claimed. Daniel, who testified, did not corroborate this claim. I do find that Hornberger had approached Daniel about problems he had in getting Wilk to file a grievance. Hornberger credibly testified Wilk got right in his face during the January 28, incident, while Wilk claimed he was no closer to Hornberger than 4 feet. Again considering their demeanor, and Hornberger's hurried calls for help, I have credited Hornberger's account. Moreover, there was a subtle change in Wilk's testimony. Before Boehm testified, Wilk freely admitted he made the you have not seen anything yet remark directly to Hornberger. However, after Boehm testified stating Wilk had made the remark to Boehm, when Wilk returned to the stand and was asked who he made the remark, Wilk replied, "I believe it was to either Nick or I believe Ken was there, was in the room, too." I found Wilk to be prone to ambiguous answers when it served his purpose. Accordingly, I have credited Hornberger's testimony as to the events on January 28.

Hornberger credibly testified that, shortly after January 28, Boehm told Hornberger that they had made a mistake concerning seniority and that Krisiak had higher seniority than Hornberger. Since Boehm could not explain how this change would impact Hornberger, Hornberger called Webster to ask that question. Hornberger also asked Webster to look into Sprague's seniority vis a vis that of Hornberger's because Hornberger thought he had higher seniority than Sprague. Hornberger testified Webster got back to him around the beginning of February and told Hornberger that he had higher seniority than Sprague. Hornberger testified that around that time a new shift bid was taking place. Hornberger testified he was told there was a shift bid in February 2009 because certain employees were unhappy with their shifts and asked if there could be another bid. However, Hornberger testified he was originally told the October 2008 shift bid was to be in effect for one year. Hornberger testified he had a conversation with Boehm around February 6 and Boehm said Hornberger was going to be able to bid before Sprague in the February shift bid.

Hornberger credibly testified the February shift bid involved a seniority list attached to the form listing the available shifts. Hornberger testified the first time he entered his bid selection was February 6 and at that time his seniority was above Sprague's. Hornberger testified Wilk operated the shift bid and handed Hornberger the document. Hornberger testified he requested, at that time a fire officer position on the Friday 12 midnight to 8 a.m. shift and a lead officer position on Saturday 12 midnight to 8 a.m. shift. Hornberger testified that, around February 13, he received a phone call from Webster where Hornberger was told to reselect his shift preferences because Sprague was using super seniority. Hornberger rebid his shift on February 13. He testified he entered the office and either Sprague or Donahue handed Hornberger the shift bid sheet. Hornberger testified the Union official told him he had to rebid a shift, as Sprague had entered shifts Hornberger had wanted. Hornberger testified that the

Union official who handed Hornberger the sheet also told Hornberger that Sprague had become Secretary-treasurer of Local 104. Hornberger testified Sprague had taken the Friday and Saturday shifts for fire officer and lead officer Hornberger had previously bid for.

5 I did not find Wilk's testimony to be convincing relating to the February shift bid. Wilk testified he was not involved in the selection process for the February 2009 shift bid in that he was not there. Wilk testified he was not aware that Kriasiak's seniority changed in 2009 stating he never received anything in writing about it. Yet, Wilk had previously represented on the record that he was with Kriasiak when Kriasiak called Webster concerning a requested change in
10 Kriasiak's seniority. Wilk stated that, at that time, they started shuffling papers and came up with the seniority date that Kriasiak agreed to. Wilk similarly testified that while supposedly there was a change in Sprague's seniority Wilk never received any formal written notification of the change. However, Wilk finally admitted he saw a posting in February on the bulletin board where Guardsmark customarily posts information to employees showing the change in Sprague
15 and Kriasiak's seniority dates. Wilk testified he assumed the posting was from Guardsmark. Wilk testified he did not hand out the February shift bid selection documents to employees. However, I have credited Hornberger over Wilk and concluded Wilk did pass out the February shift bid documents. Thus, Wilk was more involved in the shift bid process than he was willing to admit, as he helped Kriasiak jump over Hornberger as to their seniority dates shortly before the
20 process began, and despite his protests to the contrary, I find Wilk was aware that Guardsmark had changed Kriasiak, Hornberger and Sprague's relative seniority during the course of the bid process.

25 Wilk initially testified, at the hearing, that it was not true that in the February 2009 shift bid Sprague used super seniority to claim shifts that had originally been bid on by Hornberger. However, Wilk's testimony here contradicted that of his pre-hearing affidavit, wherein he stated "I believe Sprague used his super seniority in February, 2008, for the shift bid. He has less seniority than Hornberger. I'm not aware of anyone else using super seniority for anything else." Wilk admitted there was no shift bid in February 2008, and I have concluded the affidavit
30 contained a typo as to the date which should actually read February 2009. Wilk is a bright and tough minded individual. He was also represented by counsel while giving his statement. I do not credit his claim that the Board agent pressured him into signing an affidavit which he felt was incorrect. Along these lines, Sprague testified he claimed the disputed shifts from Hornberger, although Hornberger had higher seniority. Sprague testified there was not a new
35 bid after Hornberger had bid for the shifts. Rather, "I just put myself in." He testified "I just bid myself." Sprague testified he thought he had super seniority at the time based on the contract. He testified that was what led him take a shift preference over Hornberger, even though Hornberger had higher seniority according to Guardsmark.

40 Boehm testified he was involved with the February 2009 bid process. He testified he creates a blank document for the schedule and Wilk would take that along with the seniority list to the bargaining unit employees, according to their seniority, and allow them to fill in their schedule up to 40 hours. Boehm testified for the February shift selection he gave the Union a seniority list to take around. He testified a day into the February shift bid, Wilk came to Boehm
45 and said there was a complaint that somebody bid on the shift too early. Boehm testified Kriasiak made a complaint as to his seniority placement contending it should have been ahead of Hornberger's. Boehm testified he went to the employees and found there was a discrepancy between Hornberger and Kriasiak's seniority. Boehm testified Hornberger came to Boehm and said he knew and understood that to be true, but there was a problem with Sprague's seniority.
50 Boehm testified on both occasions he called Webster and they went through the records at Guardsmark in the branch office, and they corrected any mistakes that had been made. Boehm testified that the new order of the bidding was Kriasiak, Hornberger, and then Sprague. Boehm

testified he provided Wilk with a copy of the new list including the changes. Boehm testified he generated the seniority list on February 4, and he provided it to Wilk on February 5 or 6. Thus, Boehm's testimony confirms Wilk was more involved with the shift bid than he was willing to admit, that Wilk brought about the complaint leading to Kriasiak's change in seniority over
5 Hornberger's, and that in fact Wilk was presented with a copy of the new seniority list, despite his claims to the contrary.

I do not credit Boehm's claim that, after Hornberger bid based on the new seniority order, Wilk told Boehm that there was a problem with Hornberger's bid in that Hornberger filled himself in as a full-time fire officer which is a level 2 fire officer. I also do not credit Boehm's claim that he explained to Hornberger that he could not promote himself by filling in spaces for a job that he had not yet been qualified for. The testimony of Sprague and admissions by Wilk and Sprague in their pre-hearing affidavits reveal that the disputed shifts were taken away from
10 Hornberger and given to Sprague because Sprague exercised what he believed to be his contractual right of preferential seniority. As Sprague admitted, it was only after Hornberger filed the unfair labor practice charge that the Respondents came up with the contractual argument that Hornberger should not get the shifts because he was not qualified as a level 2 fire officer. In this regard, Hornberger credibly testified Webster told Hornberger that Sprague was given the disputed shifts because he exercised his super seniority. I do not credit Boehm's
15 claim that he ever gave Hornberger any other explanation for the loss of those shifts, or that Hornberger willingly accepted any other explanation.
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Webster testified he was not involved in the February shift selection concerning the dispute between Hornberger and Sprague. However, Webster then testified he was involved in
25 determining the schedule that needed to be covered by the shift bid. When asked who determined that Sprague would get the disputed shifts over Hornberger, Webster replied, "It was done by seniority." When Webster was later asked who determined that Hornberger would not receive the Friday and Saturday slots he was originally seeking for lead and fire officer, he responded, "It's my understanding it was based on seniority." When asked if that was the sole
30 determination, Webster responded, "Yes." I find Webster's testimony further undermines Boehm's claim that he told Hornberger that Hornberger did not get the shifts because Hornberger was not qualified as a level 2 fire officer. Moreover, I find that Webster was more involved in the February shift bid than Webster was willing to admit. In this regard, Hornberger credibly testified he called Webster to ask how Kriasiak's change in seniority would affect
35 Hornberger, and that Hornberger asked Webster to look into Sprague's seniority vis a vis that of Hornberger's because Hornberger thought he had higher seniority than Sprague. Hornberger credibly testified Webster got back to him around the beginning of February and told Hornberger that he had higher seniority than Sprague. Boehm also testified he reviewed the relative seniority of Kriasiak, Hornberger, and Sprague with Webster. Moreover, Hornberger credibly
40 testified that, around February 13, after Hornberger had bid and selected the two disputed shifts, Hornberger received a phone call from Webster in which Hornberger was told to reselect his shift preferences because Sprague was using super seniority. Thus, contrary to his testimony, I find Webster was involved with the February shift bid from the start to finish, including his ordering Hornberger to rebid his schedule because Sprague had claimed some of
45 Hornberger's shifts based on super seniority.

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E. Analysis

1. Legal Principles

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In *Dairylea Cooperative, Inc.*, 219 NLRB 656, 658-659 (1975), enfd. 531 F.2d 1162 (2nd Cir. 1976), the Board held that super seniority clauses in collective bargaining agreements “which are not on their face limited to layoff and recall are presumptively unlawful, and that the burden of rebutting that presumption (i.e., establishing justification) rests on the shoulders of the party asserting their legality.” The rationale of this holding is that broad super seniority discriminates against employees, who in the exercise of their Section 7 rights, prefer to refrain from an active role in their union. The Board sanctioned super seniority, which is restricted to layoff and recall, based upon a finding that it “furthers the effective administration of bargaining agreements...by encouraging the continued presence of the steward on the job.” Thus, the Board also concluded that such super seniority redounds to the benefit of all unit employees. In *Dairylea*, the Board majority found a super seniority clause making the steward the senior employee in the craft in which he was employed to be unlawful. At that time, the clause was used by the steward to bid on obtain a truck route over a more senior employee, thereby allowing the steward to obtain greater income because he had received the route. The Board held the union there had not alleged, much less established any justification for the broad reach of the super seniority clause in various contracts with parties at interest and the respondent company. The Board found, in the circumstances there, the maintenance of the clause by the union and company violated the Act, and by their actions they discriminated against the more senior employee in violation of Act.

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In *International Union of Electronic, Electronic, Salaried, Machine and Furniture Workers, (Kidder Inc.)*, 333 NLRB 1149, 1151-1152 (2001), the Board approved the judge’s finding that a union violated the Act by demanding the Employer interpret the parties’ contractual super seniority clause in a manner which would accord union officials super seniority for terms and conditions of employment not limited to layoff and recall and not otherwise required to further the effective administration of the collective-bargaining agreement. There the judge noted, that:

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The Board has found that it is an overly broad use of super seniority to allow a steward to retain a particular job, not merely any job, on the relevant shift, see *Mechanics Educational Society Local 56 (Revere Cooper)*, 287 NLRB 935, 936 (1987), and super seniority cannot lawfully be used to prevent downgrading (and a possible diminishment of pay) within the same area of representation because this is beyond the minimum extent necessary for the union representative to carry out his or her representational duties. See *Joy Technologies*, 306 NLRB 1 (1992), where a union’s demand that a vacant higher paying position be transferred from one plant to another so that the position could be awarded to the union’s committeeman in order to accommodate his desire to remain committee person in that plant was improper.

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Here, there is no showing that the Employer’s placement of the union president’s job position on the layoff list, the requirement that the officer either bump another employee or move to a vacant position, or the fact that the Employer pays to the officer the wage rate of the position he bumps into would cause any disruption in continuity of representation. Moreover, this Employer has a small work force where 5 of 35 (or less), unit employees are union officials and it is not a situation where no union official would be available or a large work force is involved and where a union steward might be required to spend his time entirely or substantially on union matters.

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In *A.P.A. Transport Corp.*, 239 NLRB 1407, 1408 (1979), the super seniority provision granted stewards super seniority for all purposes including layoff, rehire, bidding, and job preference. In finding the mere maintenance of the provision without its enforcement to be unlawful, the Board rejected the argument that the provision was lawful because it had been in successive contracts for at least 20 years.²⁰ The Board held that when the clause at issue extends beyond layoff and recall the burden of rebutting the presumption created in *Dairylea* rests “on the party asserting the legality of the provision” and requires the party to demonstrate that it is justified because “it serves legitimate statutory purpose and benefits all of the unit employees and does not merely serve the impermissible aim of giving union stewards special economic or other on-the-job benefits solely because of their position in the Union.” It was noted that the respondents did not offer any facts to justify maintenance of the clause with respect to super seniority for “all purposes” or “job preference.”

In *Preston Trucking Company, Inc.*, 236 NLRB 464, 465 (1978), enfd. 610 F.2d 991 (D.C. Cir. 1979), the disputed super seniority clause provided in pertinent part:

Stewards shall be granted super-seniority for all purposes, including layoff, rehire, bidding and job preference, if requested by the Local Union within sixty (60) days after the effective date of this Agreement; but only one (1) steward shall have super-seniority for such purposes.

The union steward used the provision to bid on and obtain a truck route over an employee with higher seniority. In finding the maintenance and application of the clause to be unlawful, the Board stated:

The justification offered is not sufficient. It does not matter whether “all purposes” is followed by qualifying language since, at best, it is ambiguous. It also does not matter that the clause's broad mandate has not been applied, nor that some justification was offered for a specific enforcement of the clause. The provision grants stewards super seniority for all purposes, and the enumeration of some of the purposes does not detract from the effects of that forceful statement. Communicating that provision to employees via the collective-bargaining agreement necessarily conveys to the employee the impression, without regard to whether the present steward is enjoying any benefits by virtue of the clause, that he can obtain special benefits only if he becomes the union steward. This impression can only have the effect of encouraging union activism since being steward is determinative as regards access to various benefits under the super seniority clause. Thus, it is not controlling whether adequate justification was offered as regards “bidding and job preference” because adequate justification for maintaining the clause in its entirety was not forthcoming.^[FN5] Moreover, Local 20's concession that under the clause Steward Rupp could claim an even better route serves to demonstrate that “[w]hile a steward *might* conscientiously attempt to exercise that preference in a manner benefiting the unit employees, he also might not.”^[FN6]

Nor is the justification offered for enforcing the clause for job bidding adequate to overcome the presumption of illegality. There is no indication that Steward Rupp had not satisfactorily carried out his responsibilities without exercising the job preference option.

²⁰ In *Teamsters Local 293 (Lipton Distributing)*, 311 NLRB 538 (1993), the Board held that Section 10(b) of the Act did not bar a finding of a violation of the Act since the maintenance of a contract provision that unlawfully favored stewards, akin to an unlawful super seniority provision, constituted a continuing violation of the Act. See also, *U.S. Steel Corp.*, 288 NLRB 1074 fn. 2 (1988); and *Arvin Automotive*, 285 NLRB 753 (1987).

In *Mechanics Educational Society of America, Local 56, AFL-CIO (Revere Copper)*, 287 NLRB 935, 937 (1987), the Board found a super seniority provision unlawful where it was stated, “The contract thus contains an overly broad super seniority provision because it protects a steward against any bumping regardless of whether the protection is necessary to keep the steward on the job in his area of representation.” The Board also held that the evidence did not support the union’s contention that it attempted to change its position concerning the application of the clause in that the evidence showed the union attempted to enforce the provision in the past, there was no contention the union ever informed the employer of a change in position, or that it sought to negotiate any change with the employer. It was noted that the union had effectively enforced an overly broad super seniority provision through the maintenance of a contract containing such a provision. It was stated:

Protecting a steward against bumping by an employee otherwise entitled to the job is presumptively unlawful as a job-related discrimination based on union activity that goes beyond layoff and recall.^[FN8] The presumption can be rebutted by showing that the particular instance of discrimination is essential to providing a grievance-handler on that shift, but the Respondent has not carried that burden here.

Finally the Respondent argues that Lince should have pursued the matter through the grievance and arbitration procedures. Because Lince was aware of the Respondent’s position that individuals covered by super seniority could not be bumped, it would have been futile for Lince to file a grievance; the Respondent’s, as well as the Employer’s, interests conflict with Lince’s. The Board does not require an employee to use contractual grievance and arbitration procedures in such circumstances. *Kansas Meat Packers*, 198 NLRB 543 (1972); cf. *United Aircraft Corp.*, 204 NLRB 879 (1972) (the union’s conduct did not render the use of grievance and arbitration machinery “unpromising or futile”).

Similarly, in *Laborers Local 380 (Mautz & Oren)*, 275 NLRB 1049 (1985), the application of a super seniority provision to afford a steward seniority for Saturday overtime was found to be unlawful. It was noted the respondents had not established that circumstances existed requiring the presence of a steward on the job at all times. In *Gulton Electro Voice*, 276 NLRB 1043 (1985), the Board concluded that by maintaining a super-seniority clause according the union president and chief steward protection against job bumping, the union violated the Act because those individuals did not need to be on any particular job in order to perform their plant-wide grievance handling duties.

The Board has also found it unlawful to grant super seniority to union officials even with respect to layoff and recall where their positions with a union did not involve grievance processing or on the job contract administration responsibilities. In *Gulton Electro-Voice, Inc.*, 266 NLRB 406 (1983), enfd. 727 F.2d 1184 (D.C. Cir. 1984), the Board found unlawful a contractual provision granting super seniority for layoff and recall to union officers who do not perform steward or steward-like functions; i.e., grievance processing or other on-the-job contract administration responsibilities, in particular where the provision granted super seniority to the unions financial secretary-treasurer and recording secretary. In *Wayne Corp.* 270 NLRB 162, 163 (1984), enfd. 727 F.2d 745 (7th Cir. 1985), the granting of super seniority to certain union officials with respect to layoff and recall was found unlawful in that none of the duties for a union’s recording secretary, trustees, sergeant at arms, or guide involved the performance of steward like functions or on-the-job administration of the collective-bargaining agreement. It was noted that the recording secretaries occasional engaging in substitute grievance processing in the president and vice-president’s absence did not “warrant a finding that such an individual has steward-like duties sufficient to legitimize an award of super seniority under the standards set forth in *Gulton*, above.” In *United States Steel Corp.*, 268 NLRB 1187 (1984), the

5 maintenance of a collective-bargaining agreement provision granting super seniority in layoff and rehire to the union's financial secretary, who did not participate in either grievance processing or on the job contract administration was found to be unlawful. A violation of the Act was found although the provision had never been applied, wherein the Board stated, "The Board has previously held that the mere maintenance of an overly broad super seniority provision violates the Act." See also *International Harvester Co.*, 268 NLRB 966 (1984), and *U.S. Steel Corp.*, 288 NLRB 1074 fn. 2 (1988).

10 2. The current case

15 The credited testimony and evidence reveals: Hornberger was hired by Guardsmark in September 2006 as a part-time security officer. Hornberger became a full-time security officer around the end of March 2008. Hornberger was interviewed for and began to fill in as a lead officer shortly after he began working full-time. Hornberger served as lead officer when the shift supervisor or site supervisor were unavailable. As a lead officer Hornberger: wrote reports summarizing the events on the shift; reviewed the truck passes for vehicles entering and leaving the facility; authored incident reports; kept records of the issuance of hot work permits; gave security officers bridge duty assignments; and if there was a problem on his shift he was contacted by the management officer.

20 Hornberger interviewed with Webster for the position of a level 2 fire officer around the beginning of September 2008. On September 18, 2008, a list was posted at the Plant, stating Spina, Wilk, Donahue, and Sprague were chosen as "Full Time Level 2" fire officers, and Hornberger and Kriasiak were selected for back up fire officer positions. Wilk, Donahue, and Sprague were elected officials of Local 104. Sprague, Kriasiak, and Hornberger received the same evaluation score from Webster during the interview process for the level 2 position, the tie was supposed to be broken by seniority. While at the time of the hearing, it was generally conceded that the correct seniority order was Kriasiak, Hornberger, and then Sprague, no grievance was filed over Sprague's being given the full time level 2 position, and his appointment to the position is not in dispute here. While Guardsmark took the position at the hearing that employees required certain core training to serve as level 2 fire officers, by its work schedule of January 25, 2009, it listed six individuals qualified to serve as part time fire officers, up from the original two it had qualified for that position in September 2008.

35 Hornberger's schedule changed in October 2008 as a there was a shift bid because there were fire officer openings on the schedule which were bid for by seniority. Hornberger's credited testimony reveals the shift bid was conducted by Wilk. Wilk had a form with open shifts and a seniority list for Guardsmark employees at the Plant. The employees selected their shifts by seniority. Hornberger selected shifts on Monday as a fire officer, Tuesday and Wednesday as a security officer, and Saturday and Sunday as a lead officer. Guardsmark's work schedules beginning November 9, 2008, were submitted into evidence. The schedules show that as of November 9, and thereafter, Guardsmark had listed Hornberger as qualified as a "P.T. Supervisor", "P.T. Fire Officer" and "Security Officer". The schedules show that from November 9, 2008 to February 7, 2009, Hornberger regularly worked as a "P.T. Supervisor" otherwise known as a lead officer on the 8 a.m. to 4 p.m. shift on Saturdays and Sundays, and that he served as a P.T. Fire Officer on Mondays on the 8 a.m. to 4 p.m. shift.²¹ Hornberger testified that when he worked on Mondays as a fire officer he performed all the duties of the fire officer.²²

50 ²¹ The schedule for the week beginning November 9, 2008, shows that Spina, Sprague, Wilk, and Donahue were listed as "Fire Officers." Thus, Guardsmark had begun using level 2 fire officers at the Plant as early as November 9, 2008.

²² The collective-bargaining agreement Article XIII, Section 3, page 30, lists the duties of a

The record reveals that when Hornberger worked as fire officer or lead officer he received the full contractual pay rate for serving in those positions.

Hornberger contacted PPAN President Daniel around October or November 2008. Hornberger told Daniel that Hornberger had concerns about issues at the Plant, that Hornberger brought some things to Local 104 President Wilk's attention, and Hornberger was asking Daniel for guidance. Hornberger told Daniel that Hornberger was concerned about Wilk being a lead officer and the local union president at the same time thereby creating a conflict of interest. Daniel stated he would get back to Hornberger.

On December 2, 2008, Hornberger attended a meeting with Webster, Wilk, Boehm, and Krisiak. Webster initiated the meeting because Hornberger had a couple of conversations with Webster about concerns Hornberger had at the Plant. Hornberger testified one of the concerns was how Wilk could be a lead officer and union president at the same time. At the meeting, Hornberger was told lead officers do not have the authority to write anyone up like a shift supervisor does. Hornberger testified another of his concerns was that around October or November, Guardsmark made Local 104 officials Donahue and Sprague lead officers, and Hornberger was told it was on a temporary basis for the approaching Thanksgiving and Christmas holidays. Hornberger testified Donahue and Sprague starting serving as lead officers around Thanksgiving 2008. Hornberger testified that, prior to that time, Hornberger, Krisiak, Spina, and Wilk were the only lead officers. Hornberger stated at the meeting that there might not be enough hours for the current lead officers, including himself, now that Guardsmark had made Donahue and Sprague lead officers. Webster responded that once he made someone a lead officer he could not take it away from them.

Hornberger credibly testified that shortly after December 2, 2008, Hornberger had a conversation with Wilk about filing a grievance. Hornberger told Wilk that he would like to file a grievance concerning Wilk being a lead officer, and Hornberger asked Wilk to file it. Wilk said he would pursue it. Hornberger testified he did not have any knowledge of the grievance procedure and that based on Wilk's response he thought it was being taken care of.

a. Wilk's January 28 threat to Hornberger

Hornberger phoned Daniel on January 28. Security officer Asboth was present for and participated in the call via speaker phone. Hornberger's credited testimony reveals that, during the conversation, he told Daniel that he asked Wilk to process a grievance. Daniel asked Hornberger if he could start going through proper channels. Hornberger asked Daniel if he was going to come down and give them some guidance because Hornberger did not know the proper channels. The conversation ended when Daniel said he was going to talk to Wilk, and get back to Hornberger.

Hornberger credibly testified to the following: Towards the end of the day on January 28, at the time of the shift change at around 3:30 p.m., Hornberger was in the security office with Spina. Wilk came into the office and, as soon as Spina left, Wilk came up to Hornberger and started screaming at him telling Hornberger not to go over Wilk's head by calling Daniels. Wilk continued to yell and he told Hornberger he needed to start going through the proper procedures. Hornberger told Wilk not to talk to him like that and Wilk became irate. Hornberger became frightened because he thought Wilk was going to hit him. Wilk, though shorter in

fire officer. Hornberger testified he has performed most of them, except he has never had to go on HAZMAT response, as it was never required when he was on duty. Hornberger testified that when he fills in for lead officer he does the same duties as a full-time lead officer.

5 stature than Hornberger, is a strongly built individual who outweighed Hornberger by about 45 pounds. Hornberger testified Wilk was in his face pointing at him, screaming at him, and Hornberger was trying to step back to get out of his way. Hornberger grabbed the radio and called for help and his supervisor Boehm and Spina came into the office in response to Hornberger's call. Boehm told Wilk to get out of the office. As Wilk was leaving, he turned around and pointed at Hornberger and said "you have not seen nothing yet" in a very threatening manner. Boehm told Wilk to get out of the office and Wilk left.

10 On Hornberger's way home on January 28, he called Webster, reported the confrontation with Wilk, and Hornberger told Webster he was afraid of what was going to happen, and he did not feel comfortable working with Wilk. On January 28, Hornberger also sent Webster an email describing the incident. The email reads describes the incident as described in Hornberger's testimony above, and stated Wilk was yelling at Hornberger for calling Daniel on problems pertaining to grievances Hornberger had Wilk file concerning changing the lead officers coverage in a way that benefited Wilk. Hornberger noted in the email that Wilk told him "You have not seen anything yet," in a threatening manner. On January 29, Hornberger sent a copy of the email to Smith, a vice-president of Guardsmark. Hornberger also spoke to Smith and told her about the incident on January 29, stating he felt he was in an unsafe work environment if he had to work with an employee who he felt was going to hit him.

20 In *Consolidated Bus*, 350 NLRB 1064, 1066, enfd. 577 F.3d 467 (2nd Cir. 2009), it was stated that, "Under Section 8(b)(1)(A), a union agent's subjective intent is irrelevant. Rather, the appropriate test is 'whether the remark can reasonably be interpreted by the employee as a threat.'" In *Consolidated Bus*, the Board found a union official's statement constituted a thinly veiled threat of assault in violation of Section 8(b)(1)(A) of the Act. In the instant case, Hornberger contacted Daniel and complained about the way Wilk handled what Hornberger understood to be grievances, although said grievances had never been filed. Hornberger had in the past complained to Daniel about a perceived conflict in Wilk's capacity to serve as local president and a shift leader for Guardsmark. Hornberger's January 28 email to Webster revealed Hornberger had more recently told Daniel that Wilk was using other procedures that had been instituted at the Plant to Wilk's own benefit, at the expense of other employees in the unit. Daniel informed Wilk of Hornberger's call, and shortly thereafter Wilk became incensed, got very close to Hornberger and started screaming out him telling him not to go over Wilk's head by reporting to Daniel. Wilk's action frightened Hornberger, who immediately called his supervisor for assistance. When the supervisor arrived, he ordered Wilk out of the room. As he was leaving, Wilk pointed at Hornberger stating you have not seen nothing yet. Given Wilk's actions to that point, Hornberger reasonably interpreted Wilk's statement as a thinly veiled threat of physical or other reprisal for Hornberger's union activities, and I find Wilk to have violated Section 8(b)(1)(A) of the Act. See also, *McClellan Trucking Company*, 257 NLRB 1349, 1355 (1981), where a union steward was found to have violated Section 8(b)(1)(A) by threatening an employee with unspecified reprisals if the employee filed a grievance over his complaint about an alternate steward; and *Service Employees Local 144 (Sands Point Nursing Home)*, 321 NLRB 399 (1996), where a union was found to have violated Section 8(b)(1)(A) of the Act by a threat of unspecified reprisals when a union agent told employees that the union "had their ways." Moreover, as set forth below, Wilk appears to have acted upon his open ended threat to Hornberger.

b. The February shift bid

From the time an October 2008 shift bid through February 7, 2009, Hornberger was regularly scheduled as a lead officer on the 8 a.m. to 4 p.m. shift on Saturdays and Sundays, and a fire officer Mondays on the 8 a.m. to 4 p.m. shift. He was also being paid the higher contractual rate when he performed in each of those positions. Hornberger had been told that the October 2008 shift bid was supposed to be in effect for one year.

On January 29, Guardsmark official Okerstrom forwarded Hornberger's email to Webster complaining about Wilk's conduct on January 28, to PPA President Daniel. Daniel responded to Okerstrom by email on January 29, stating, in part, "I have talked to both Jim (Wilk) and the site supervisor and it seems that Mr. Hornberger may be the source of the problem." Shortly, after Daniel had labeled Hornberger as the source of the problem to Guardsmark's officials, there was a new shift bid, Hornberger's seniority was reduced relative to Kriasiak's, Sprague's title was changed from treasurer to secretary-treasurer to allow him to exercise super seniority over Hornberger, and Hornberger's schedule was changed following the new shift bid wherein Hornberger lost his two prior shifts as lead officer, and the higher pay that went along with it.

In this regard, Hornberger credibly testified that, shortly after Hornberger's January 28 conflict with Wilk, Boehm told Hornberger that they had made a mistake and that Kriasiak now had higher seniority than Hornberger. Boehm confirmed Hornberger's testimony concerning the change in seniority. Boehm testified that a day into the February shift bid, Wilk came to Boehm and said there was a complaint made by Kriasiak who contended his seniority placement should have been ahead of Hornberger's. Similarly, Wilk admitted on the record he was with Kriasiak when Kriasiak called Webster concerning a requested change in Kriasiak's seniority. Wilk stated that, at that time, they started shuffling papers and came up with the seniority date that Kriasiak agreed to. Thus, the record reveals, that shortly after he had threatened Hornberger with the statement that Hornberger had not seen anything yet, Wilk was instrumental in having Hornberger's seniority reduced vis a vis Kriasiak's. Wilk, as Union president, was likely aware that the contract provided time limits for Kriasiak to protest his seniority which was within 20 days of the posting of the seniority list, and pursuant to the contract the list should have been brought up to date as of January 1. So, it is likely that under the contract that Kriasiak's claim pertaining to his seniority was untimely made, although it was advanced by Wilk, the Local Union president.²³

Upon receiving an unsatisfactory answer from Boehm about the impact of Kriasiak jumping over Hornberger in seniority, Hornberger called Webster and asked how the change in seniority was going to affect Hornberger. Hornberger also asked Webster to look into Sprague's seniority vis a vis that of Hornberger's because he believed payroll records would show Hornberger had higher seniority than Sprague. Webster said he would look into it. Hornberger's credited testimony reveals Webster got back to him around the beginning of February and Webster told Hornberger that he had higher seniority than Sprague.

²³ Counsel for the General Counsel stated at the hearing that he was making no claim as to Kriasiak's seniority vis a vis Hornberger's. Accordingly, the change in seniority is not before me, and I make no findings as to whether it was unlawfully motivated. I am merely pointing out the sequence of events as background to the ultimate issues as set forth in the complaint. I would also point out that Sprague raised the contention in his pre-hearing affidavit that Hornberger's complaint about his relative seniority vis a vis that of Sprague was untimely under the collective-bargaining agreement. Sprague elected not to grieve the change. I would note that Hornberger's challenge to Sprague's seniority status was brought about directly by Wilk and Kriasiak's similar complaint with respect to Hornberger.

Hornberger testified that around the beginning of February a new shift bid was taking place. Hornberger testified that, around February 6, Boehm told Hornberger that he was going to be able to bid before Sprague. The first time Hornberger entered his bid selection for the
5 February shift bid was on February 6. Hornberger testified that, at that time, his seniority was above Sprague's. Hornberger's credited testimony reveals Wilk operated the shift bid and handed Hornberger the document. Hornberger requested, at that time, that his schedule include a fire officer position on the Friday, 12 midnight to 8 a.m. shift and a lead officer position on the Saturday, 12 midnight to 8 a.m. shift.

10 Hornberger's credited testimony reveals that, around February 13, he received a call from Webster who stated Hornberger had to reselect his shift preferences because Sprague exercised super seniority. Hornberger rebid his shifts on February 13, at which time either Sprague or Donahue handed Hornberger the shift bid sheet. The Local Union official told him
15 he had to rebid because Sprague had entered shifts Hornberger had wanted. The Union official who handed Hornberger the sheet also told Hornberger that Sprague had become secretary-treasurer of Local 104. Hornberger testified Sprague had taken the Friday and Saturday shifts Hornberger had previously bid for. As a result, Hornberger picked the shifts he was currently scheduled to work at the time of the unfair labor practice trial. All of Hornberger's shifts were as
20 a regular security officer, except Saturday 8 to 4 where he was able to bid for and serve as a fire officer. Hornberger lost one day a week as a regularly scheduled lead officer because Hornberger had to rebid his shift selection. Hornberger, thereafter, continued to serve as a lead officer on a fill in, rather than on a regularly scheduled basis.

25 Similarly, Asboth credibly testified that the day after Hornberger made his initial February shift selection, Asboth had a conversation with Sprague about the bid process. Sprague told Asboth that all the work Hornberger had done to get his seniority date changed was for nothing because Sprague is secretary-treasurer, and the contract says that he gets preferential seniority. Asboth asked Sprague if up until that point Donahue was the secretary and Sprague
30 was the treasurer. Sprague responded Sprague was always the secretary-treasurer and Donahue was the vice president. Sprague also stated that as a full-time fire officer Hornberger would not be able to take his fire officer days anyway. Asboth responded that even if Hornberger could not take Sprague's fire officer days that still would not account for the fact that Sprague was taking the lead officer day. Sprague said it would not matter either way because
35 with preferential seniority he would have been able to take it either way. Asboth testified this was the first time he learned Sprague was secretary-treasurer and Donahue was vice president.

40 Sprague testified he was elected treasurer of Local 104 in October 2007. He admitted that he never handled any grievances as a treasurer. Sprague stated in his pre-hearing affidavit that around October 2007, Wilk told him that super seniority could be used by union officers for any situation involving seniority. Along these lines, Asboth credibly testified that around December 2008 or January 2009, Sprague told Asboth that preferential seniority could be used in the case of a shift bid as a means of compensation for working as union officers since they were not paid anything for performing that task.

45 Sprague initially testified his title was changed to secretary-treasurer around October 2008, after steward Joe Clunie left. However, Sprague admitted he was unsure of the date as to when he obtained the new title, admitting that he could have become secretary-treasurer in February 2009. Sprague testified he obtained the new title by agreement between Wilk,
50 Sprague, and Donahue, and he was not elected to the position of secretary-treasurer. He testified he has handled three or four grievances as secretary-treasurer, two of which were filed by Asboth, but they did not go past the first step of the grievance procedure.

Sprague testified he ultimately claimed the Saturday lead officer shift, and the fire officer shift, even though Hornberger had selected those shifts, and Hornberger had higher seniority than Sprague. Sprague testified there was not a new bid after Hornberger had bid for the shifts. Rather, "I just put myself in." He testified "I just bid myself." Sprague testified he thought he had super seniority at the time based on the contract. He testified that was what led him take a shift preference over Hornberger, even though Hornberger had higher seniority according to Guardsmark. Sprague testified he ultimately did not get the disputed shifts over Hornberger due to the exercise of super seniority, although at the time, he thought that was the reason. He testified "so, I'm saying that at the time I did it, I thought that I was exercising super seniority, when I bid the shift." Sprague testified it was explained to him after he received the shifts in question that he received them because Sprague was a full time fire officer and Hornberger is not. He testified he received the lead officer position "because in order to be a lead officer, you have to be able to perform all the duties underneath you and I was more qualified." Sprague testified he first heard this explanation, "It was after I got -- after the shift bid." Sprague testified he originally thought he received the shifts based on super seniority, and that after Hornberger filed the unfair labor practice charge Sprague learned from Wilk that super seniority could not be applied. Sprague obtained this information shortly before giving the March 23 affidavit. Sprague testified, "Shortly after the shift bid and in between that and the affidavit, I found out that super seniority did not apply ...". He testified, "I think I just talked to Wilk about it and what was going on with the shift and everything, was originally, I was told that what they said in the contract, we had seniority. And then, as soon it was contested, I found out that I didn't have super seniority for preferential seniority. But I'm still on the shift."

While Hornberger and Sprague testified Clunie was elected steward, Wilk testified Ron Adler was the steward. However, no one by the name of Adler appears on Guardsmark's work schedules during the period of November 2008 to February 2009, and Wilk admitted Adler retired in 2008. The schedules also reveal that Clunie last worked for Guardsmark during the week of November 26, 2008. Wilk testified that, prior to February 2009, Sprague was not involved in filing any grievances, and Wilk had handled any grievances up until that time. Wilk testified in his pre-hearing affidavit, "I believe Sprague used his super seniority in February, 2008, for the shift bid. He has less seniority than Hornberger." I have concluded the February 2008 date in the affidavit was a typo and should read February 2009. Wilk testified he agreed at the time he provided his affidavit that he believed Sprague used his super seniority. Similarly, Webster testified "It was done by seniority," when asked who determined that Sprague would get the disputed shifts over Hornberger. When asked if that was the sole determination, Webster responded, "Yes."

Respondent PPAN argues in its brief that Sprague was not accorded shift preference over Hornberger due to super seniority. Rather, Sprague was given the preferred shifts based on his holding the position of Level 2 fire officer and Hornberger only being a Level 1 security officer under the collective-bargaining agreement. PPAN also cites a provision in PPAN and Guardsmark's settlement agreement of August 2008, Section 2.2 stating that a level 2 fire officer must be assigned to each shift. PPAN argues at page 22 of its brief that, "The bottom line after the testimony and exhibits were presented, is that if there is any complaint to be made it is the fact that Charging Party Hornberger should never have even been allowed to temporarily act as a back up or otherwise perform any Fire Officer Level II or lead officer work, because to do so is contrary to the collective bargaining agreement and settlement agreement between PPAN and Guardsmark, hence, Hornberger has no basis to raise a complaint in this case." PPAN states that it specifically states in the referenced settlement agreement at Section 2.4 that shift selection is based solely on seniority among qualified employees. Similarly, Guardsmark argues in its brief that Hornberger's February shift bid was invalidated by his

bidding in the wrong classification in that individuals who were previously appointed to Level 2 fire officers had preference for fire officer slots during the shift bid.

I reject Respondents' claims that Sprague was not given the preferred shifts here based on super seniority. Hornberger's credited testimony reveals that, after Hornberger had initially bid his shift preferences, Webster called Hornberger on February 13, and told Hornberger he had to rebid his shift preferences because Sprague had exercised super seniority.²⁴ Wilk testified in his pre-hearing affidavit, "I believe Sprague used his super seniority in February, 2008 (9), for the shift bid." Wilk testified he agreed at the time he provided his affidavit that he believed Sprague used his super seniority. Sprague testified there was not a new bid after Hornberger had bid for the shifts. Rather, "I just put myself in." He testified "I just bid myself." Sprague testified he thought he had super seniority at the time based on the contract. He testified that was what led him take a shift preference over Hornberger, even though Hornberger had higher seniority according to Guardsmark. Sprague testified that he was told prior to his March 23 affidavit that super seniority did not exist. He testified "so, I'm saying that at the time I did it, I thought that I was exercising super seniority, when I bid the shift." Sprague testified it was explained to him after he received the shifts in question that he received them because Sprague was a full time fire officer and Hornberger is not. Sprague testified he originally thought he received the shifts based on super seniority, and that after Hornberger filed the unfair labor practice charge Sprague learned from Wilk that super seniority could not be applied.

Thus, Hornberger's credited testimony, as well as admissions by Respondents' witnesses, reveals that Sprague bid on and was given the preferred shifts over Hornberger based on Guardsmark and the Unions' reliance on the contractual super seniority provision. It was only after Hornberger filed the unfair labor practice charges and in defense of those charges did the Respondents abandon their claims that it was granted on the basis of super seniority, and assert it on the basis that Sprague was a level 2 fire officer and Hornberger was not and therefore was not qualified to perform the work. Moreover, I find the Respondents' contractual arguments not to be supported by the record as set forth below.

Hornberger became a full-time security officer around the end of March 2008 and shortly after that time he started to fill in as a lead officer. In August 2008, PPAN and Guardsmark reached a grievance settlement concerning the creation and use of level 2 fire officer positions at Guardsmark's various locations. Guardsmark entered into evidence a posting dated August 18, 2008, stating that according to an agreement with PPAN, Guardsmark will convert four level 1 positions at that Plant to level 2 positions. Hornberger signed up on the posting to be considered for the level 2 fire officer position. On September 18, 2008, Guardsmark posted at the plant that Spina, Wilk, Donahue, and Sprague as being chosen as "Full Time Level 2 Officers," and Hornberger and Krisiak were selected as back up fire officer positions. Thus, despite Guardsmark and PPAN's claims at the hearing that Hornberger was not qualified to work as a fire officer, Guardsmark posted at the plant on September 18, 2008 that both Krisiak and Hornberger were to serve as back up fire officers. Moreover, when Hornberger performed as a fire officer he was given the contractual rate of a full time level 2 fire officer, and he received the contractual rate as a lead officer when he served in that capacity.

There was a shift bid in October 2008, and the bid was based on seniority. As a result of the October 2008 shift bid, Hornberger was given a Monday shift as a fire officer, and a Saturday and Sunday shift as a lead officer. Guardsmark's work schedules beginning

²⁴ Similarly, Webster testified the February shift bid "was done by seniority," when asked who determined that Sprague would get the disputed shifts over Hornberger. When asked if that was the sole determination, Webster responded, "Yes."

November 9, 2008, were submitted into evidence. The schedules show that as of November 9, and thereafter, Guardsmark had listed Hornberger as qualified as a "P.T. Supervisor", "P.T. Fire Officer" and "Security Officer". The schedules show that, from November 9, 2008 to February 7, 2009, Hornberger was regularly scheduled and worked as a "P.T. Supervisor" otherwise known as a lead officer on the 8 a.m. to 4 p.m. shift on Saturdays and Sundays, and that he served as a P.T. Fire Officer on Mondays on the 8 a.m. to 4 p.m. shift. Thus, despite the August 2008, grievance settlement, Hornberger bid for in October 2008, and received regularly scheduled shifts as a fire officer and lead officer. While PPAN argues in its brief that, pursuant to the grievance settlement that Hornberger was not qualified to perform this work, and Guardsmark advances a similar argument no grievance was filed by either party for Hornberger's performing this work which was broadcast to all unit employees on Guardsmark's work schedules, which specifically listed Hornberger as qualified to work as at "P.T. Supervisor" or lead officer, and "P.T. Fire Officer." Moreover, despite Respondent's claims that only level 2 fire officers were qualified to serve as fire officers and lead officers, Kriasiak who was not a level 2 fire officer, like Hornberger had been listed on Guardsmark's schedule as P.T. Supervisor and P.T. Fire Officer, and like Hornberger, Kriasiak had regularly received assignments in that capacity. The absurdity of Respondent's arguments that employees had to receive core training to perform as a fire officer or lead officer is that by November 2008, Guardsmark's work schedules had added Cycon and Smith to its list of back up fire officers and Guardsmark was scheduling them to perform that work as the sole fire officer on the shifts in which they worked. By the week of January 25, Guardsmark had increased the number of back up fire officers to six employees, all of whom were being scheduled to perform fire officer work. It is an odd argument for Guardsmark and PPAN to make as Guardsmark was increasing the number of security officers who performed fire officer work, without objection from the Union, but at the unfair labor practice trial neither party considered them qualified to perform the work. In particular, neither party considered Hornberger qualified to do the work, although he had been regularly scheduled to do it, and I have concluded they have taken this position solely because Hornberger had the temerity to challenge the Local Union officers. In fact, Sprague was not listed on Guardsmark's schedules as qualified to work as a P.T. Supervisor until the week of December 28, 2008, and there was no showing that he received any assignments in that capacity until the week of January 25. Thus, at the time of the February shift bid, Hornberger clearly had more on the job experience as a lead officer than Sprague.

On January 28, Hornberger complained to Daniel about Wilk's actions as Local 104 president, and about inaction concerning grievances Hornberger thought Wilk had filed on his behalf. Wilk became irate and confronted Hornberger on that same date in a physically threatening way. Wilk ended the meeting by stating to Hornberger you have not seen anything yet. Shortly, thereafter Wilk was instrumental in having Kriasiak's seniority changed to the detriment of Hornberger. This was done, although no formal grievance was filed, and although as Sprague stated in his pre-hearing affidavit, Kriasiak's complaint was likely untimely under the contract. Hornberger responded by complaining about Sprague's seniority concerning his own, resulting in Sprague's seniority being reduced. As a result of Kriasiak's new seniority status, Guardsmark's schedules in February 2009, reveal he was able to successfully bid for a P.T. Supervisor or lead officer position on Saturday and Sundays from 8 a.m. to 4 p.m., and a fire officer position on Tuesdays and Fridays from 8 a.m. to 4 p.m. The Saturday and Sunday lead officer positions had previously been occupied by Hornberger prior to the February shift bid. Kriasiak, like Hornberger, was only a backup fire officer. He had not received the core training under the grievance settlement that Respondents argue was necessary for Hornberger to perform the work of a fire officer. Yet, the Union, Wilk in particular, was instrumental in allowing Kriasiak to bid for and receive the shifts, they are now claiming Hornberger is not qualified to work.

I have concluded, that despite the grievance settlement and its core training requirements, that both PPAN and Guardsmark considered on the job training as effective and sufficient for security officers to perform fire and lead officer work as evidenced by six security officers being assigned fire officer shifts without that training, and Krisiak and Hornberger being listed as qualified and being assigned work as lead officers without receiving that training. This conclusion is substantiated by Webster's admission that back up fire officers were qualified to perform as fire officers. Moreover, the core training that Respondents claim separates Sprague from Hornberger was supposed to take place over a period of a year, and Wilk's testimony reveals that it had barely begun at the time of the February shift bid, in that he testified he was working as a level 2 fire officer about 4 or 5 months before Guardsmark started sending the level 2 employees to classes. He testified the training still had not been completed as of September 2009. Thus, I have concluded Respondents' claims that Hornberger was not qualified to perform as a fire or lead officer are pretextual, in that they were advanced only when they concluded they could not sustain Sprague's shift preference based on the contract's preferential seniority provision. Moreover, Guardsmark's assignment of Krisiak and Hornberger to perform as lead officers and fire officers, although they were not selected as level 2 fire officers, constitutes an admission that Respondents viewed them as qualified to perform the work. The collective bargaining agreement Article VIII, Section 8 provides seniority will rule for shift preference provided the employee has the required skills and ability to perform the job. It does not say the assignment is to be given to the most qualified employee, just that the employee has to be qualified.²⁵

Thus, I have concluded Guardsmark awarded Sprague the disputed shifts over Hornberger based on the collective-agreement's super seniority provision. The contractual provision as written reads, "Notwithstanding their respective positions on the seniority list, the National President, Vice President, and Secretary-Treasurer, and the Local President and Secretary-Treasurer, in the order named, shall have top seniority in the unit." The contractual provision is presumptively unlawful in that it is not limited to layoff and recall. See, *Dairylea Cooperative, Inc.*, 219 NLRB 656 (1975), enfd. 531 F.2d 1162 (2nd Cir. 1976); *International Union of Electronic, Electronic, Salaried, Machine and Furniture Workers, (Kidder Inc.)* 333 NLRB 1149, 1151-1152 (2001); and *A.P.A. Transport Corp.*, 239 NLRB 1407, 1408 (1979). Here, the Respondents offered no justification for the breath of the clause as written, which on its face covers all aspects of the employment relationship where seniority could possibly apply.

I do not find the March 31, email Wilk received from PPAN, which he claims to have posted on the union bulletin board to employees constitutes a defense to the maintenance of the collective-bargaining agreement's super seniority clause. Rather, the March 31 email

²⁵ To the extent the PPAN argues that the August 2008 settlement agreement required across the board coverage by a level 2 fire officer on every shift, this agreement was not being applied in that fashion by PPAN and Guardsmark. For example, Hornberger served as lead officer on November 2, 9, 26, 30, 2008, December 7, 14, 28, 2008, January 25, 2009, February 1, 2009, for the 8 a.m. to 4 p.m. shift, and Cycon worked as the fire officer. Thus, there was no level 2 fire officer on that shift for those dates. Those same dates, Krisiak was the lead officer for the 12 midnight to 8 a.m. shift and Smith worked as fire officer. Thus, no level 2 fire officer was assigned that shift. This type of scheduling continued after the February 2009 shift bid. For example on February 15, 22, March 8, 15, 22, Krisiak served as the lead officer on the 8 a.m. to 4 p.m. shift and Asboth served as the fire officer. Thus, there was no level 2 fire officer working on those shifts. On February 21, March 7, 14, 21, 28, Krisiak served as the lead officer from the 8 a.m. to 4 p.m. shift and Hornberger worked as the fire officer. Thus, there was no level 2 fire officer working on those shifts. PPAN's raising this argument is clearly part of its action to retaliate against Hornberger.

constitutes a tacit admission that the clause is overly broad. The email excludes discussion of super seniority as applied to the three named national officers in the clause. As it pertains to local officers it provides a guide to local unions for usage of the clause to serve as a legal defense for future claims that it has been unlawfully applied. The test and its application, as
 5 posited in the email, would clearly be ambiguous to lay employees who were trying to understand their rights under the contract. Moreover, PPAN made no request to Guardsmark to alter the contract provision published to employees the maintenance of which is presumptively unlawful, and no justification was offered for the continued maintenance of the provision in the collective-bargaining by PPAN or Guardsmark. See, *Mechanics Educational Society of America, Local 56, AFL-CIO (Revere Copper)*, 287 NLRB 935, 937 (1987), where under similar
 10 circumstances the maintenance of a super seniority clause was found to be unlawful. In fact, the email which Wilk posted makes no mention that the provision had been unlawfully applied to Hornberger, did not repudiate its application, the posting was ambiguous, and it gave no assurances to employees that the Union and Guardsmark would not engage in any further
 15 proscribed conduct; or that they would not interfere in the future with employees in the exercise of their Section 7 rights. See, *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-139 (1978). Thus, I do not find that the posting remedies the unfair labor practices I have found here. As set forth above, the contractual preferential seniority provision went beyond layoff and recall and is presumptively unlawful. PPAN and Guardsmark failed to establish that the
 20 provision, as written, was necessary for grievance processing or contract administration, and therefore I find that the maintenance and enforcement of the provision was unlawful under Section 8(b)(1)(A) and (2) and 8(a)(1) and (3) of the Act.

Aside from the fact that the preferential seniority provision went beyond layoff and recall,
 25 it is also alleged in the complaint that the referenced provision accorded preferential seniority to officials of PPAN and Local 104, other than those officials who must be on the job to accomplish duties which are directly related to contract administration and/or grievance processing. The preferential seniority provision accorded across the Board preferential seniority to PPAN's
 30 national president, vice president, and secretary treasurer. Yet, there was no showing that any of these individuals had to be on the job for access to employees to perform grievance or contract administration functions. PPAN's Constitution and By-Laws makes no reference to any grievance or contract administrative functions for the named individuals. PPAN and
 Guardsmark's collective-bargaining agreement only provides for their participation, if any, at the fourth stage of the grievance procedure. The collective-bargaining agreement applies to some
 35 26 bargaining units located at different facilities. By its terms, due to the multiple locations of the unit, it cannot be said that the national officials need to be working at any particular location for access to employees to perform their contract administration duties with respect to bargaining unit employees which remain uniform under the collective-bargaining agreement
 pertaining to all 26 locations. Accordingly, I find the maintenance and enforcement of a super
 40 seniority provision pertaining to the named national officers to be violative of Section 8(b)(1)(A) and (2) and 8(a)(1) and (3) of the Act. See, *United States Steel Corp.*, 268 NLRB 1187 (1984); *Gulton Electro-Voice, Inc.*, 266 NLRB 406 (1983), enf. 727 F.2d 1184 (D.C. Cir. 1984); *Wayne Corp.* 270 NLRB 162, 163 (1984), enf. 727 F.2d 745 (7th Cir. 1985); *International Harvester Co.*, 268 NLRB 966 (1984); and *U.S. Steel Corp.*, 288 NLRB 1074 fn. 2 (1988).

Regarding the granting of super seniority to Sprague concerning the February shift bid because he held the position of Local 104 secretary-treasurer the timing is clearly suspect. Both Hornberger and Asboth credibly testified they were not notified Sprague was secretary-treasurer until right about the time of the February shift bid. In fact, Wilk admitted that Sprague
 50 never handled any grievances until February 2009. The Unions also admitted in their answer to the complaint that Sprague did not become secretary-treasurer until February 2009. Wilk, Donahue, and Sprague had originally been elected to their positions as local officers in 2007, at

which time Sprague was elected to the position of treasurer. Yet, Sprague by what I have concluded was more than a coincidence was appointed to the position of secretary-treasurer right at the time of the February 2009 shift bid. I have concluded this was done to allow Sprague to claim super seniority under the contract's preferential seniority provision because he now had the position of local secretary-treasurer, which was listed under that provision. In order for Sprague to obtain that position, Local 104's by laws which provide for the election, not appointment, of officers were not followed. Temporary appointments were allowed, pending an election within 45 days. Yet, Sprague received a permanent appointment to a new position. In the swift creation for this new position, there was apparently not sufficient time to list the duties of the position in Local 104's by-laws. Rather, the only duties listed were for those of treasurer, Sprague's old and elected position, and the duties there had nothing to do with grievance processing or contract administration.

Local 104's officers created a new position for Sprague right around the time of the February shift bid, appointed him to the position, and gave him grievance processing authority. Yet, there is no grievance processing authority listed for the position of secretary-treasurer in Local 104's by-laws or in the collective-bargaining agreement. There is an elected position of committeeman designated in the by-laws and that position is specifically designated in the collective-bargaining agreement for the processing of grievances. However, giving Sprague the position of committeeman would not have granted him any preference under the contractual preferential seniority provision. So Sprague was appointed to a newly created position, and given grievance processing authority although there was no provision for such under the Local's by laws or under the collective-bargaining agreement. In view of the timing of his appointment, I have concluded it was not necessary for contract administration or grievance processing, but rather it was a sham to accord him a claim of super seniority rights in the shift bid to cancel out Hornberger's new seniority status.

I also do not find Sprague's appointment was necessitated by the elected steward's leaving. First, Sprague and Wilk could not agree on who the steward was with one stating it was Clunie, and the other stating it was Adler. Either way, Clunie left in November 2008, and Adler left a year earlier. There was no showing that the departed steward processed a significant amount of grievances, or that some emergency existed that required Sprague's appointment three months after Clunie left, rather than running an election in the unit, for what was an elected position. Per Wilk's testimony there were only 16 employees in the unit, and Guardsmark provided a list to employees of each others radio numbers so there was an easy way to communicate between employees. The collective-bargaining agreement also provided 14 days for the filing of a grievance from the time that an employee was aware of an incident. Thus, there was no showing that a union official had to work any particular shift for grievance handling or contract administration. Assuming Wilk and Sprague had grievance processing authority, there was not a union representative with such authority working on every shift, and since the shifts were similarly staffed it made no difference what shift Wilk or Sprague worked on in terms of ease of grievance handling and contract administration.²⁶ In fact, following the

²⁶ Unlike the position of local union secretary-treasurer, the collective-bargaining agreement provides the local union president is chairman of the committeepersons, who are specifically designated under the agreement to handle grievances. Moreover, Wilk credibly testified that he processed grievances during the duration of his term as local president. Thus, I find it appropriate to provide the local union president with preferential seniority. However, since all the shifts are similarly staffed, the Respondent Union has not established that seniority for the local president is necessary beyond layoff and recall as required by the Board in *Dairylea Cooperative, Inc.*, 219 NLRB 656, 658-659 (1975), enfd. 531 F.2d 1162 (2nd Cir. 1976). Accordingly, I find the maintenance and enforcement of the contract's preferential seniority

February shift bid, both Wilk and Sprague elected to work on the Sunday 4 p.m. to 12 midnight shift demonstrating that they were more concerned about personal gain and convenience than making themselves available for grievance handling. Moreover, it is likely that Sprague had sufficient seniority to bid on the disputed shifts between himself and Hornberger and work at those time slots as a security officer, rather than a lead or fire officer, if Sprague's presence was truly needed at that time for grievance processing. This was not done, because it was the intent of the Local Union officials to accord Sprague with super seniority so he could outbid Hornberger for higher paying positions even though he did not have the regular seniority to do so. I have concluded his ability process grievances had nothing to do with his actual shift selection. As Asboth credibly testified, Sprague told Asboth that he viewed the use of the preferential seniority as a reward for his being a non paid union officer, rather than as a vehicle to further service the bargaining unit. Accordingly, I find that by causing Sprague to receive the disputed shifts over Hornberger premised on super seniority, PPAN and Local 104 violated Section 8(b)(1)(A) and (2) of the Act, and Guardsmark violated Section 8(a)(1) and (3) of the Act by granting Sprague those shifts.²⁷

CONCLUSIONS OF LAW

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

2. Plant Protection Association National (PPAN) and Plant Protection Association, Local 104 (Local 104) are labor organizations within the meaning of Section 2(5) of the Act.

3. By threatening an employee with reprisals for speaking to officials of PPAN about grievances and other matters related to union activities, Local 104 has violated Section 8(b)(1)(A) of the Act.

4. By maintaining and enforcing a provision in its collective-bargaining agreement with Guardsmark according PPAN's National President, Vice President, and Secretary-Treasurer, and Local Unions' President and Secretary-Treasurer top seniority under said collective-bargaining agreement PPAN has engaged in unfair labor practices in violation of Section 8(b)(1)(A) and (2) of the Act because PPAN has not demonstrated the need for preferential seniority for the National President, Vice President, and Secretary-Treasurer, and the Local Unions' Secretary-Treasurer for grievance processing and/or contract administration; and has not demonstrated the need for preferential seniority for the Local Union President beyond layoff and recall.

5. By enforcing the above-described preferential seniority provision in favor of Local 104's nominal Secretary-Treasurer for shift preference to the detriment of Nicholas J. Hornberger, a more senior employee, PPAN and Local 104 have violated Section 8(b)(1)(A) and (2) of the Act.

6. By maintaining a provision in its collective-bargaining agreement with PPAN according PPAN's the National President, Vice President, and Secretary-Treasurer, and the Local Union's President and Secretary-Treasurer top seniority, and enforcing said provision in favor of Local 104's nominal Secretary-Treasurer for shift preference to the detriment of Nicholas J. Hornberger, a more senior employee, Guardsmark has engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act.

provision as it applies to the local union president beyond layoff and recall to be violative of Section 8(b)(1)(A) and (2) and 8(a)(1) and (3) of the Act.

²⁷ While Sprague acted as an official of Local 104 when he asserted super seniority to take the shifts away from Hornberger, it was PPAN that maintained the contractual provision allowing Sprague to make the claim, PPAN has since sent the local unions an email directing them to advise PPAN in advance concerning the use of super seniority, and PPAN's has elected to defend Local 104's conduct in these proceedings signaling that it has condoned Local 104's actions.

7. The forgoing unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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Having found that Respondents have engaged in certain unfair labor practices, Respondents must cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

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Having found that the preferential seniority clause in dispute is unlawful, I shall require in my recommended order that PPAN and Local 104 cease and desist from maintaining and enforcing such a clause in their bargaining agreement with Respondent Guardsmark.²⁸ I have found that the unlawful super seniority clause was applied to deny Nicholas J. Hornberger, certain shifts he bid on, on or about February 6, 2009, at Guardsmark's location at the Ford Motor Company Stamping Plant located in Buffalo, New York (the Plant), including a fire officer position for the Friday 12 midnight to 8 a.m. shift, and the Saturday lead officer position for the 12 midnight until 8 a.m. shift. Consequently, I shall order that the Respondents jointly and severally make Hornberger whole for any loss of earnings he may have sustained as a result of the discrimination against him.²⁹ Backpay shall be computed in accordance with *F. W.*

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Woolworth Co., 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).³⁰ Also, in order to remedy fully the effects of the Respondents' unlawful conduct, I shall order that Guardsmark assign Hornberger, if he so desires it, the shifts he would hold based on his February 6, 2009, shift bid but for the unlawful granting of super seniority to Sprague, and that PPAN and Local 104 each notify in writing both Guardsmark and Hornberger that they have no objection to Guardsmark's assigning Hornberger such shifts.³¹ Guardsmark's backpay obligation shall run from the effective date of the discrimination against Hornberger, to the time it makes such offer of the new shifts to Hornberger, while PPAN and Local 104's backpay obligation shall run from such effective date of the discrimination against Hornberger to the date of when each notifies Guardsmark and Hornberger that it has no objection to such assignment to Hornberger. I shall also order that the

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²⁸ The collective-bargaining agreement between PPAN and Guardsmark contains the same preferential seniority clause which by the terms of the collective-bargaining agreement applies to approximately 26 bargaining units set forth in the collective-bargaining agreement. Yet, the General Counsel, as per his consolidated complaint and post-hearing brief, is only seeking a cease and desist order and notice posting for the bargaining unit located at the Ford Motor Company Stamping Plant in Buffalo, New York.

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²⁹ In ordering this remedy, I note that Hornberger upon being required to rebid his shift request received a fire officer position on Saturday's from 8 a.m. to 4 p.m., which he had not originally requested. Thus, Hornberger was able to work for the most part at least one regularly scheduled day per week as a fire officer, but at a different day and shift time than he originally requested. It appears from the forgoing that he in fact only lost pay for one day a week as a lead officer due to the discrimination against him, since he was regularly assigned one day a week as a fire officer resulting from his rebid. His ability to perform on a weekly basis as a fire officer on one scheduled shift, should be taken into account in any backpay calculations. However, Hornberger is entitled to be offered the shifts and times he initially bid and would have received but for the discrimination against him.

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³⁰ The General Counsel asks that I alter traditional Board remedies pertaining to the calculation of interest. I find this is a matter for the Board to decide.

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³¹ I see no reason here to require Hornberger to rebid the shifts he initially accepted. If his acceptance of those shifts as a result of the Order herein bumps employees with less seniority, they can rebid their shifts, as necessary, from any resulting dislocations.

Respondents cease and desist in any like or related manner from interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³²

ORDER

The National Labor Relations Board orders that:

A. Respondent, Guardsmark, LLC, with an office and place of business in Williamsville, New York, and providing security services to the Ford Motor Company Stamping Plant located in Buffalo, New York, and Guardsmark's officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Maintaining, enforcing, or otherwise giving effect to Article VIII, Section 3, in its collective-bargaining agreement with the Plant Protection Association National (PPAN), according to PPAN's National President, Vice President, and Secretary-Treasurer, and the Local Unions' President and Secretary-Treasurer top or super seniority since it has not been demonstrated that the provision is required to further the effective administration of the collective-bargaining agreement or grievance processing.

(b) Discriminating against Nicholas J. Hornberger or any other employee regarding shift preference or any other term and condition of employment by according top seniority to Plant Protection Association, Local 104's Secretary-Treasurer for shift preference where Local 104's Secretary-Treasurer did not in fact have more seniority than Hornberger in terms of length of employment as calculated by the parties under the applicable collective-bargaining agreement.

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

2. Take the following affirmative actions necessary to effectuate the policies of the Act

(a) Within 14 days from the date of this Order, offer Nicholas J. Hornberger, the shifts for fire officer and lead officer he had bid for on or about February 6, 2009, displacing any employees occupying those positions.

(b) Jointly and severally with PPAN and Plant Protection Association, Local 104 make Nicholas J. Hornberger whole for any loss of earnings or other benefits, plus interest suffered as a result of his failing to receive the shifts he bid for on or about February 6, 2009, as provided for in the remedy section of this decision.

(c) Within 14 days from the date of this Order, expunge from its records all references to the unlawful actions taken against Nicholas J. Hornberger pertaining to the February 2009 shift bid, and advise him in writing that this has been done and that these actions shall not be used against him in any way.

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

(e) Within 14 days after service by the Region, post at its Ford Motor Company Stamping Plant located in Buffalo, New York, location, copies of the attached notice marked "Appendix

³² 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.

A.³³ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure 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 is no longer providing services at the facility involved in these proceedings, it 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 that facility at any time since January 28, 2009. Similarly, Respondent shall duplicate and mail, at its own expense copies of the attached notice to all employees who are on layoff, and former employees who have left Respondent's employ who worked at that facility on or after January 28, 2009.

(f) 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 Guardsmark has taken to comply.

B. Respondent Union Plant Protection Association National (PPAN), its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Maintaining, enforcing, or otherwise giving effect to Article VIII, Section 3, in its collective-bargaining agreement with the Guardsmark, LLC, according PPAN's National President, Vice President, and Secretary-Treasurer, and the Local Union's President and Secretary-Treasurer top or super seniority because PPAN has not demonstrated the need for preferential seniority for the National President, Vice President, and Secretary-Treasurer, and the Local Unions' Secretary-Treasurer for grievance processing and/or contract administration; and has not demonstrated the need for preferential seniority for the Local Union President beyond layoff and recall.

(b) Causing or attempting to cause Respondent Guardsmark to discriminate against employees in violation of Section 8(a)(1) and (3) of the Act.

(c) In any like or related manner restraining or coercing the employees of Guardsmark in the exercise of their rights protected by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act:

(a) Jointly and severally with Respondent Guardsmark and Respondent Plant Protection Association, Local 104 make Nicholas J. Hornberger whole for any loss of earnings or other benefits suffered, plus interest, as a result of his failing to receive the shifts he bid for on or about February 6, 2009, such lost earnings to be determined in the manner set forth in the remedy section of this decision.

(b) Notify Respondent Guardsmark and Nicholas J. Hornberger in writing that PPAN has no objection to awarding Hornberger the shifts he would now have but for the unlawful assignment of super seniority to Local 104's secretary-treasurer.

(c) Post at all its offices in addition at meeting halls used by or frequented by its members and employees it represents at Respondent Guardsmark's Buffalo, New York, Ford Motor Company Stamping Plant location and at the Plant itself copies of the attached notices marked "Appendix B." Copies of said notice, on forms provided by the Regional Director for Region 3, shall be posted by Respondent PPAN after being signed by the Respondent PPAN's authorized representative immediately upon receipt thereof. The notices shall be maintained by Respondent PPAN for 60 consecutive days after posting in conspicuous places where notices

³³ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in all the notices ordered herein 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."

to the above-described members and employees are customarily posted. Reasonable steps shall be taken by Respondent PPAN to insure that the notices are not altered, defaced, or covered by any other material.

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

C. Respondent Union, Plant Protection Association, Local 104 (Local 104), its, officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Threatening employees with reprisals for speaking to officials of PPAN about grievances and other matters related to union activities.

(b) Enforcing, or otherwise giving effect to Article VIII, Section 3, in its collective-bargaining agreement with the Guardsmark, LLC, according PPAN's National President, Vice President, and Secretary-Treasurer, and the Local Union's President and Secretary-Treasurer top or super seniority because PPAN has not demonstrated the need for preferential seniority for the National President, Vice President, and Secretary-Treasurer, and the Local Unions' Secretary-Treasurer for grievance processing and/or contract administration; and has not demonstrated the need for preferential seniority for the Local Union President beyond layoff and recall.

(c) Causing or attempting to cause Respondent Guardsmark to discriminate against employees in violation of Section 8(a)(1) and (3) of the Act.

(d) In any like or related manner restraining or coercing the employees of Guardsmark in the exercise of their rights protected by Section 7 of the Act.

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

(a) Jointly and severally with Respondent Guardsmark and Respondent Plant Protection Association National make Nicholas J. Hornberger whole for any loss of earnings or other benefits suffered, plus interest, as a result of his failing to receive the shifts he bid for on or about February 6, 2009, such lost earnings to be determined in the manner set forth in the remedy section of this decision.

(b) Notify Respondent Guardsmark and Nicholas J. Hornberger in writing that Local 104 has no objection to awarding Hornberger the shifts he would now have but for the unlawful assignment of super seniority to Local 104's secretary-treasurer.

(c) Post at its office and meeting halls used by or frequented by its members and employees it represents at Respondent Guardsmark's Buffalo, New York, Ford Motor Company Stamping Plant location and at the Plant itself copies of the attached notices marked "Appendix C." Copies of said notices, on forms provided by the Regional Director for Region 3, shall be posted by Respondent Local 104 after being duly signed by Local 104's representatives, immediately upon receipt thereof. The foregoing notices shall be maintained by Respondent Local 104 for 60 consecutive days after posting in conspicuous places where notices to the above-described members and employees are customarily posted. Reasonable steps shall be taken by Respondent Local 104 to insure that the notices are not altered, defaced, or covered by any other material.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent Local 104 has taken to comply.

Dated, Washington, D.C. May 21, 2010

Eric M. Fine
Administrative Law Judge

APPENDIX A
NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
5 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.

10 FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist any 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.

15 WE WILL NOT maintain, enforce, or otherwise give effect to Article VIII, Section 3, in our collective-bargaining agreement with the Plant Protection Association National (PPAN), according PPAN's National President, Vice President, and Secretary-Treasurer, and the Local Union's President and Secretary-Treasurer top or super seniority because PPAN has not
20 demonstrated the need for preferential seniority for the National President, Vice President, and Secretary-Treasurer, and the Local Unions' Secretary-Treasurer for grievance processing and/or contract administration; and has not demonstrated the need for preferential seniority for the Local Union President beyond layoff and recall.

25 WE WILL NOT discriminate against Nicholas J. Hornberger or any other employee regarding shift preference or any other term and condition of employment by according top seniority to Plant Protection Association, Local 104's Secretary-Treasurer for shift preference where Local 104's Secretary-Treasurer did not in fact have more seniority than Hornberger in terms of length of employment as calculated under our collective-bargaining agreement with PPAN.

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

35 WE WILL within 14 days of the Board's Order, offer Nicholas J. Hornberger, the shifts for fire officer and lead officer he had bid for on or about February 6, 2009, and should he accept one or both of those shifts in those positions, we will displace any employee occupying those shifts in those positions, and allow that employee and any employee subsequently impacted to rebid their shifts based on their appropriate seniority.

40 WE WILL jointly and severally with PPAN and Plant Protection Association, Local 104 make Nicholas J. Hornberger whole for any loss of earnings or other benefits suffered as a result of his failing to receive the shifts he bid for on or about February 6, 2009, plus interest.

5

WE WILL within 14 days from the date of the Board's Order, expunge from our records all references to the unlawful actions taken against Nicholas J. Hornberger pertaining to the February 2009 shift bid, and notify him in writing that this has been done and that these actions shall not be used against him in any manner.

10

GUARDSMARK, LLC

15

(Employer)

Dated _____ By _____
(Representative) (Title)

20

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

25

130 S. Elmwood Avenue
Suite 630
Buffalo, New York 14202
Hours: 8:30 a.m. to 5 p.m.
716-551-4931.

30

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.

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APPENDIX B
NOTICE TO MEMBERS AND EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

5

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

10

FEDERAL LAW GIVES YOU THE RIGHT TO
Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

15

WE WILL NOT Maintain, enforce, or otherwise give effect to Article VIII, Section 3, of our collective-bargaining agreement with Guardsmark, LLC, granting Plant Protection Association National's National President, Vice President, and Secretary-Treasurer, and the Local Union's President and Secretary-Treasurer top or super seniority because we have not demonstrated the need for preferential seniority for the National President, Vice President, and Secretary-Treasurer, and the Local Unions' Secretary-Treasurer for grievance processing and/or contract administration; and have not demonstrated the need for preferential seniority for the Local Union President beyond layoff and recall.

20

WE WILL NOT cause or attempt to cause Guardsmark, LLC to discriminate against employees in violation of Section 8(a)(1) and (3) of the Act.

25

WE WILL NOT in any like or related manner restrain or coerce the employees of Guardsmark, LLC in the exercise of their rights protected by Section 7 of the Act.

30

WE WILL jointly and severally with Guardsmark, LLC and Plant Protection Association, Local 104 make Nicholas J. Hornberger whole for any loss of earnings or other benefits suffered as a result of his failing to receive the shifts he bid for on or about February 6, 2009, plus interest.

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WE WILL, within 14 days of the Board's Order, notify Guardsmark and Nicholas J. Hornberger in writing that the Plant Protection Association National has no objection to Guardsmark awarding Hornberger the shifts he would now have but for the unlawful assignment of super seniority to Local 104's secretary-treasurer.

5

PLANT PROTECTION ASSOCIATION NATIONAL

(Union)

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Dated _____ By _____
(Representative) (Title)

15

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

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APPENDIX C
NOTICE TO MEMBERS AND EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

5

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

10

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Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

15

WE WILL NOT threaten employees with reprisals for speaking to officials of Plant Protection Association National (PPAN) about grievances and other matters related to union activities.

20

WE WILL NOT enforce, or otherwise give effect to Article VIII, Section 3, of the collective-bargaining agreement between the Plant Protection Association National and Guardsmark, LLC, granting Plant Protection Association National's National President, Vice President, and Secretary-Treasurer, and the Local Union's President and Secretary-Treasurer top or super seniority because PPAN has not demonstrated the need for preferential seniority for the National President, Vice President, and Secretary-Treasurer, and the Local Unions' Secretary-Treasurer for grievance processing and/or contract administration; and has not demonstrated the need for preferential seniority for the Local Union President beyond layoff and recall.

25

WE WILL NOT cause or attempt to cause Guardsmark, LLC to discriminate against employees in violation of Section 8(a)(1) and (3) of the Act.

30

WE WILL NOT in any like or related manner restrain or coerce the employees of Guardsmark in the exercise of their rights protected by Section 7 of the Act.

35

WE WILL jointly and severally with Guardsmark, LLC and Plant Protection Association National make Nicholas J. Hornberger whole for any loss of earnings or other benefits suffered as a result of his failing to receive the shifts he bid for on or about February 6, 2009, plus interest.

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WE WILL within 14 days of the Board's Order notify Guardsmark and Nicholas J. Hornberger in writing that the Plant Protection Association, Local 104 has no objection to Guardsmark awarding Hornberger the shifts he would now have but for the unlawful assignment of super seniority to Local 104's secretary-treasurer.

PLANT PROTECTION ASSOCIATION, LOCAL 104

(Union)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

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