

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

NORTHSHORE SHEET METAL, INC.	Cases	19–CA–083657
and		19–CA–088465
		19–CA–092102
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 66		19–CA–094575
and		
PACIFIC NORTHWEST REGIONAL COUNCIL OF CARPENTERS		
and	Cases	19–CB–083623
		19–CB–094048
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 66		

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19–CB–094048

*Mara-Louise Anzalone, Esq.* and  
*Carolyn McConnell*, for the Acting General Counsel.  
*Selena C. Smith* and *Chris Hilgenfeld*,  
for the Respondent Employer.  
*Daniel M. Shanley* and *Judy H. Juang*,  
for the Respondent Union.  
*Daniel R. Hutzenbuiler*, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried in Seattle, Washington, on March 5–8, and 13, 2013. The Sheet Metal Workers International Association, Local 66 (Local 66, the Union, or Sheet Metal Workers) filed the original charge in Cases 19–CA–083657 and 19–CB–083623 on June 19, 2012, and an amended charge in Case 19–CA–083657 on August 31, 2012.<sup>1</sup> The Acting General Counsel issued an order consolidating these cases and a consolidated complaint on September 27. Respondent Pacific Northwest Regional Council of Carpenters (the Carpenters) and Respondent Northshore Sheet Metal (Northshore or

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<sup>1</sup> All dates are 2012, unless otherwise indicated.

the Company) filed answers, respectively, on October 10 and 11, denying all material allegations and setting forth defenses.

5 The Local 66 filed the original charge in Case 19–CA–088465 on August 31 and an amended charge on November 16. The Local 66 filed the charge in Case 19–CA–092102 on October 25 and an amended charge on January 23, 2013. The Local 66 filed the charge in Case 19–CB–094048 on November 30 and the charge in Case 19–CA–094575 on December 10. The Acting General Counsel, after further consolidating the charges and issuing consolidated complaints, issued its final consolidated complaint at issue here on February 6, 2013. The Respondents filed respective answers on February 20, 2013, each denying all material allegations and setting forth defenses.

15 The complaint alleges that Northshore violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) when it sent employees home early, laid off an employee, and denied an employee light-duty work. In addition, the complaint alleges that Northshore unlawfully assisted the Carpenters in violation of Section 8(a)(1) and (2) of the Act, and unlawfully recognized it as the 9(a) representative of its journeymen and apprentices in the absence of uncoerced, unassisted majority support. The complaint further alleges that Northshore made illegal promises of benefits and surveilled bargaining unit employees in connection with its illegal assistance to the Carpenters. With regard to the Carpenters, the complaint alleges they violated Section 8(b)(1)(A) and (2) by receiving such assistance and support from Northshore, and that they violated Section 8(a)(1) and (3) by attempting to cause or causing an employer to discriminate against its employees.

25 On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Local 66, the Acting General Counsel, the Company, and the Carpenters, I make the following

#### 30 FINDINGS OF FACT

##### I. JURISDICTION

35 Northshore, an architectural sheet metal contractor, with an office and shop in Everett, Washington, furnishes and installs architectural sheet metal and cladding on commercial buildings and manufactures products for sale to other contractors. During the past 12 months and at all material times, it received goods valued in excess of \$50,000 directly from points outside the State of Washington. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### 40 II. ALLEGED UNFAIR LABOR PRACTICES

##### A. BACKGROUND

45 Northshore was founded in 1986 by Dan Meyer (D. Meyer), who shortly thereafter took on Earl Millikan (Millikan) as a partner. Currently, Northshore's owners are Jeff Meyer (Meyer), Brian Elbert (Elbert), D. Meyer, Millikan, Karen Flatt, and Tina LaPeet-Hutchinson. Flatt and Meyer are D. Meyer's children. D. Meyer and Millikan serve on Northshore's board

of directors but do not take an active role at the Company.<sup>2</sup> Meyer and Elbert are the Company’s co-presidents.

5 Prior to the events culminating in the instant case, Northshore and the Local 66 had been parties to collective-bargaining agreements (CBAs) under Section 8(f) of the Act since 1997. Most recently, the Company’s foremen, journeymen, and apprentices (the unit employees) were covered by a CBA with the Local 66 effective June 1, 2009, through May 31, 2012. (Tr. 82–83; GC Exh. 30.) The Local 66’s hall and Northshore are in the same building complex, about 80 feet apart. (Tr. 272.)

10 The Local 66 administers a training program run by the joint training council (JTC). An interested worker applies for an apprenticeship with the Union, fulfills the Union’s requirements and attends school. The Union then appraises the worker. The Company has “journeyed out” an apprentice, meaning paid the apprentice journeymen’s wages even if the Union has not yet conferred journeyman status on him, based on skills or because the apprentice was needed at a job by himself. (Tr. 207.)

15 Elbert manages Northshore’s day-to-day operations. His direct reports are Superintendent Leslie (Dino) Johnson (Johnson), about four or five project managers, Shop Foreman Todd McBee (McBee), and Northshore’s accountant, Joel Gustafson (Gustafson). (Tr. 691.) Meyer manages contracts, handles disputes, and does some sales, but is not generally involved in the Company’s day-to-day operations. (Tr. 32.) Meyer does not have direct reports but as co-president has authority over the employees. Meyer, Elbert, and Johnson have offices on the second floor of Northshore’s main building.

25 Northshore has a shop located on the first floor of its main building where it fabricates architectural sheet metal and cladding. McBee, the shop foreman, manages shop production. He is a member of the bargaining unit, as are the shop’s drivers, programmers, and other workers.

30 In the field, Northshore’s journeyman and apprentice installers install architectural sheet metal at commercial construction sites. Superintendent Johnson is responsible for overseeing the crews in the field. (Tr. 37.) The Company handles both large and small jobs, with the number of workers required to staff a job ranging from one installer to a crew of about 80. The Company generally employs between 50 and 80 installers. (Tr. 34.) Any job with three union employees is overseen by a field foreman. (Emp. Exh. 6.) For jobs with fewer employees, a journeyman is designated as lead. An individual can be a field foreman on a job 1 week and a journeyman on different job another week, depending on the workflow. (Tr. 624–625.) Field foremen are part of the bargaining unit and pay dues. They get a truck, gas card, and extra pay. (Tr. 396, 455.)

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<sup>2</sup> D. Meyer and Millikan do not have offices at Northshore. (Tr. 68.) Abbreviations used in this decision are as follows: “Tr.” for transcript; “Emp. Exh.” for Employer’s exhibit; “Carp. Exh. for Carpenters’ exhibit; “GC Exh.” for Acting General Counsel’s exhibit; “Emp. Br. for Employer’s brief; “Carp. Br.” for Carpenters’ brief; “GC Br.” for the Acting General Counsel’s brief; “CP Br.” for the Charging Party’s brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

With the exception of administrative staff and managers, employees work either in the shop or at the jobsites out in the field. The typical workday starts at 6–7 a.m. and ends at 2:30–3:30 p.m. Apprentices who usually work in the field may be assigned to work in the shop if the field is slow and there is work available in the shop. If there is not enough work to keep the apprentices busy, they may be laid off until work picks up. Apprentices who come in from the field are the low men on the shop’s totem pole when it comes to layoffs. (Tr. 563.)

As shop foreman, McBee takes orders and organizes how they proceed through the shop. Based on input about priorities from Johnson, Elbert, and the project manager during weekly meetings, McBee organizes the labor to meet deadlines. The work at the shop consists of programming, manufacturing, and production. McBee shares an office on the second floor of Northshore’s main building with three programmers and the shipping manager. The programmers use computer-controlled machines to cut and form material as needed. If an order comes in that requires programming, McBee assigns it to a programmer. He assigns other orders directly to the shop floor to begin manufacturing and production. He spends his days between his office and the floor, weighted more heavily toward the office. He usually does not perform work in the shop but he does programming work alongside the programmers. On the shop floor, there are various machines, including punches, folders, CAC routers, a press break, a shearer, a panel bender and a power roll. When McBee took over as shop foreman, certain employees were trained to operate certain machines. McBee ensured the employees were cross-trained on each others’ machines, but nobody has changed assignment and moved to a different machine during his tenure. When Johnson authorizes overtime, McBee assigns it based on who is qualified to perform the task that needs to be done. McBee inspects the work of the machine operators. He can make an independent judgment that a product is faulty and order the employee to correct it. (Tr. 515–530, 554–555, 703.)

Prior to Northshore withdrawing recognition from Local 66, McBee filled out forms documenting the apprentice’s hours and performance which Local 66 used to evaluate the employee’s status. (Tr. 531; GC Exh. 24.) He does not do performance reviews for Northshore. (Tr. 558.) If an employee in the shop does something wrong, McBee is not blamed (Tr. 707.)

McBee is responsible for relaying information to management about Northshore’s shop operations. Meyer also relays his expectations for productivity in the shop through McBee. (Tr. 37–39.) Apprentice Yuriy Kosmin testified that when he complained to Elbert about a lack of training for shop work, Elbert directed him to raise that concern with McBee. (Tr. 203.)

McBee has participated in some interviews but he generally does not make hiring decisions. (Tr. 521.) Elbert and Meyer do not have the knowledge to know who would make a good programmer, so he provides subject matter expertise when interviewing for programmers. (Tr. 561, 827.) During the interviews, McBee asks questions of the candidate and, following the interview, provides his input on their suitability. (Tr. 521.) McBee believes his recommendations are taken seriously and are not ignored without a reason. (Tr. 586.) In approximately October 2012, he personally hired a driver for Northshore’s shop. (Tr. 523, 552–553.) During the relevant time period, McBee assigned work to Northshore’s driver. (Tr. 852–853.)

Elbert determines whether employees need to be laid off in the shop after checking with Johnson to see if he could use the employees in the field. (Tr. 706.) When Elbert has

determined layoffs are needed, McBee makes suggestions about who should be laid off. (Tr. 524.) Elbert will usually give McBee more help in the shop if he asks for it. (Tr. 730.) When Johnson asks for help in the field, McBee determines if he can spare an employee from the shop. If so, he will tell the employee to report to the field. (Tr. 523, 562.)

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Before work begins on a job in the field, Johnson, the project manager, the field foreman, and sometimes McBee and/or Elbert meet and discuss the scope of work. The field foreman is provided with a job submittal, blueprints, and a work order.<sup>3</sup> The job submittals and work orders are highly detailed. Field foremen are not permitted to change the work order without a change order, which requires approval from the project manager. Field foremen cannot change or alter blueprints or otherwise deviate from job submittals. Field foremen keep the jobs running and are the Company’s “eyes and ears” at the jobsite. If a field foreman calls and says he needs extra workers on a job, Johnson generally takes his word for it. (Tr. 124, 409, 631–635, 698–699, 792.) Field foremen assign work, measure and order materials, and turn in the employees’ time. The foremen fill out daily forms which lists who was on the jobsite and what work each employee performed. These are turned in to the general contractor and Johnson.<sup>4</sup> (Tr. 411–412, 478, 795, 812.)

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Field foremen relay messages from Johnson regarding personnel actions but do not have authority to make decisions about personnel actions. (Tr. 123, 284–285, 709–710, 746–7499.) Johnson or Elbert can determine if overtime will be authorized. Once authorized, the foremen can decide who on their crew receives overtime. (Tr. 352, 403.) Johnson directs layoffs and sometimes considers input from the field foremen regarding who should be laid off. He also decides if employees should transfer from one jobsite to another. (Tr. 354–359, 455.) The only individuals with authority to fire employees are Meyer, Elbert, and Johnson. According to Elbert, only he and Johnson discipline employees and they also do most of the layoffs. Johnson noted that foremen can issue discipline for safety violations, generally in the form of a verbal warning.<sup>5</sup> (Tr. 397, 640-41, 665–668.) Only Elbert and Meyer can give bonuses. If a job loses money, the field foreman is not held responsible. (Tr. 125, 644, 747.)

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Northshore’s field foremen typically are Roy Nakapaahu (Nakapaahu), Larry Lucas (Lucas), Travis Elliott (Elliott), Mike Cowger, Mike Campbell, Marvin Johnston (M. Johnston), Jeremy Gross, and Bruce Champeaux (Champeaux). Nakapaahu and Lucas are generally assigned the larger high profile jobs. (Tr. 625, 456, 664.)

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Field Foreman Nakapaahu has worked for Northshore 22 years. He was a superintendent from 2007 or 2008 until 2010, and his business card denotes “superintendent” with the word “field” handwritten before superintendent title. (Tr. 789–790, 811.) When a job begins, Nakapaahu usually works with tools at least half of the time. After the first 6 weeks he spends most of his time performing non-installation work, including measuring and problem-solving at the worksite. (Tr. 808–810.) Champeaux was one of Northshore’s first employees.<sup>6</sup> Has worked there for 27-1/2 years and has been a Local 66 member since 1997. When he works as a field foreman, he ensures the crew is working and being productive, the jobsite is

<sup>3</sup> Emp. Exh. 9 is an example of a job submittal.

<sup>4</sup> An example of a daily report is Emp. Exh. 16.

<sup>5</sup> Foreman Mike Cowger disciplined Marvin Johnston for illegal use of a ladder. (Tr. 353–354, 360.)

<sup>6</sup> Meyer’s mom and Champeaux’s dad are distantly related. Champeaux thinks they may be second cousins. (Tr. 772.)

prepared, and all supplies are ordered. He spends 80–90 percent of the day working with the crew. He can make minor decisions about the work without requesting a change order. (Tr. 742–750, 581–582.)

5 Meyer does not visit jobsites very often, and in the 6 months prior to the hearing had visited two or three jobsites. (Tr. 35.) Elbert, likewise does not visit jobsites very frequently. (Tr. 285.) Champeaux sees Johnson at the jobsite about once every week or two but they are in telephone contact regularly. (Tr. 775–776.)

10 In 2011 and early 2012, Northshore had to lay off employees due to the economy. Work was also slow the first half of 2012. (Tr. 463, 325, 710.) On March 30, Nakapaahu filed a petition with the NLRB to decertify Local 66. (Emp. Exh. 14.)

#### B. PRELIMINARY EVENTS IN MAY AND EARLY JUNE

15 Yuriy Kosmin works for Northshore as an apprentice. He mainly works out in the field, but in early 2012 he was assigned to work in the shop for about 9 months. He works Monday through Friday, 7 a.m. to 3:30 p.m. (Tr. 144–145.) Johnston is an apprentice installer with the same schedule. (Tr. 255.) Johnston also usually works in the field but was working in the shop in May and June because it was slow in the field. (Tr. 292–293.) Around the middle or end of  
20 May, rumors began to surface about Northshore trying to leave Local 66 to go with the Carpenters or go nonunion. Johnston started wearing his Local 66 T-shirts more frequently. (Tr. 259.) During this time period, Kosmin and Johnston wore T-shirts with a large Local 66 logo on the back 3 to 4 days per week. (Tr. 147–149, 259–260.) Apprentice T.J. Parrot, who was assigned to the shop at the time, also wore a Local 66 T-shirt on and off. (Tr. 298.)

25 At some point, possibly in May, Meyer called John Torkelson, a Carpenters representative, to set up a meeting. (Tr. 41.) Meyer could not recall the precise date, but the record reflects a May 9 email from Meyer to Ed Triezenberg, director of contract  
30 administration for the Carpenters, requesting a meeting.<sup>7</sup> Meyer wanted to keep the meeting confidential, and requested any venue other than Northshore’s offices. (GC Exh. 3.) Meyer, Elbert, Torkelson, and Triezenberg met on May 21 at 10 a.m. at the Carpenter’s hall for about an hour. They discussed whether the Carpenters could provide Northshore with labor. (Tr. 42–44.) Also, at some undetermined point in May, the same men met at the Keg restaurant. They discussed the possibility of a contract with the Carpenters to provide labor to Northshore.  
35 (Tr. 738–738.) On May 31, Meyer emailed his cell phone number to Triezenberg. (GC Exh. 4.)

On Saturday June 1, Triezenberg sent Meyer a draft of a generic shop agreement. (GC Exh. 5.) A series of email exchanges ensued. (GC Exhs. 6–19.) On June 3, Triezenberg sent a  
40 copy of a memorandum of understanding (MOU) to Meyer that included modifications they had discussed. Triezenberg instructed Meyer to take a look, and noted if they got the document finished that day, he and Torkelson could stop by and sign it Monday morning. On June 4, at 4:18 p.m., Meyer sent Triezenberg a modified draft of the agreement, pointing out the changes he made, noting that Northshore was postponing withdrawing recognition from Local 66 until the following day, and requesting a response as soon as possible. Triezenberg responded at

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<sup>7</sup> Triezenberg is mistakenly referred to as “Eric” rather than “Ed” in the email.

10:25 p.m., attaching some recommendations and stating that following their discussion, he was okay with Northshore’s changes to the MOU. (GC Exhs. 6–7.)

### C. THE JUNE MEETINGS AND SURROUNDING EVENTS

5 On June 5, shortly after 10:30 a.m., Meyer sent Triezenberg another draft, stating he had made just a few minor changes. The changes were modifications to the wage proposal. (GC Exh. 13.)

10 Later that day, Northshore called its workers to an all-employee meeting.<sup>8</sup> The only time all Northshore employees regularly meet is at the Company Christmas party. A few years prior to the hearing, there was an all-employee meeting in Bellevue.<sup>9</sup> (Tr. 752.) Elbert guessed there had been between 5 and 12 such meetings during his time at Northshore. (Tr. 734–735.) William Bailey (W. Bailey), a journeyman installer who has worked for Northshore for 14 years and served as foreman for roughly 3 years, had never been called to a companywide  
15 meeting. (Tr. 443.)

The varying accounts of the June 5 meeting’s start time are between 12 noon and 1:30 p.m. (Tr. 153, 261, 333.) Meyer thought it was his idea to call the meeting but could not recall when he made the decision. (Tr. 59.) Meyer instructed Johnson to have all the guys come in  
20 from the field, which Johnson did by calling the field foremen. McBee told the shop employees to attend the meeting. The meeting was in an office within shop 2, which is next to the main building and at the time was being used for storage. Meyer, D. Meyer, Millikan, and Elbert were present for management. Employees sat in chairs that were placed in rows.

25 There are different accounts of who spoke first. Meyer could not recall. (Tr. 62.) Several employees recalled Elbert starting the meeting with an update of the Company’s projects. (Tr. 155, 263, 335–356, 386, 752.) According to Elbert, management just brought everyone in and gave an update on work that was coming and talked a little bit about ongoing  
30 negotiations with the Sheet Metal Workers. He believed Local 66 had sent correspondence that demeaned management and he wanted to respond and encourage people to tell the Union to come to an agreement with them. Elbert did not recall anything else about the meeting. (Tr. 710–711.)

35 Meyer recalled giving a bargaining update and talking to the employees about how the Company had been having trouble competing with nonunion contractors and contractors using different trades. He stated, Northshore had been trying to get Local 66 to tell him about the funds it takes out of employees’ paychecks but he had gotten no response. Meyer said under the Company’s proposal they planned to take that money and put it back into the workers’  
40 paychecks. He also stated the Company wanted to have a cheaper and less skilled class of labor to help them compete with some of the other contractors. (Tr. 62–63.) McBee recalled Meyer talking about conflict with Local 66.<sup>10</sup> (Tr. 542.) Meyer thought D. Meyer and Millikan

<sup>8</sup> Johnson did not attend this meeting or the June 12 or 13 meetings. (Tr. 606.)

<sup>9</sup> Meyer testified it was not uncommon to have all-employee meetings (Tr. 57). This is clearly outweighed by witness testimony.

<sup>10</sup> According to Champeaux, employees had been receiving information with their pay stubs 3–4 months prior from both sides, so everyone had an idea it wasn’t a “rosy picture” between Northshore and Local 66. (Tr. 753.)

also spoke. By Meyer’s account, the general message conveyed was the employees should make sure they got a good fair agreement with Local 66 and management would not let them get taken advantage of or lose anything. (Tr. 63–64.)

5 Champeaux recalled discussion about how the Company was struggling to compete with other unions because of the benefits package. (Tr. 753.) According to Johnson, Elbert said other trades could take their work and Johnston asked why this could happen. Elbert instructed Johnston to look up the labor and industry statutes for his answer. Johnson thought Elbert seemed annoyed by his question. (Tr. 264.) Johnston recalled D. Meyer saying Local  
10 66 had been slinging a lot of mud, and encouraged the employees to trust them, noting the Company had always taken them on trips and given bonuses. According to Kosmin, he encouraged the younger guys who had doubts about whether to trust company management to talk to the older guys. (Tr. 156, 265.) Kosmin and Johnston recalled Millikan speaking next, echoing what was previously said. According to Johnston, Millikan talked about his dream of  
15 owning a company, and stated if they could bring in Carpenters at a lower wage and keep Sheet Metal Workers at the same wage they could be profitable. (Tr. 157, 266.) Employees asked how the negotiations with Local 66 were going, but the owners told them they weren’t allowed to talk about it further and that the employees should talk to their Union. (Tr. 336.)

20 On June 6, Local 66 Business Manager Eric Martinson faxed and sent Elbert a letter notifying him that Kosmin was appointed shop steward and asking him to allow Kosmin to attend upcoming negotiation meetings. (GC Exh. 20.) Prior to this, there was not a shop steward at Northshore. (Tr. 150.) A couple of days later, Kosmin was working in the shop. Johnson approached him and said, “Shop steward huh?” When asked what that meant, Kosmin  
25 said the steward was someone the guys could go to for questions about their rights or questions about how bargaining was going and keep an eye on management. Johnson replied, “Report on the evil empire, huh?” (Tr. 151.) According to Kosmin, they had smiles on their faces and he noted they often speak in a joking manner when discussing uncomfortable or serious topics. (Tr. 211–212.)

30 On June 11, Meyer sent Triezenberg another draft agreement with the subject line and attachment line entitled “Final Agreement sent 6-12 from Jeff.” The proposed changes reflected that having withdrawn recognition from a predecessor union under Section 8(f) of the Act and thereafter receiving a demand for recognition from the Carpenters and being presented  
35 with and accepting evidence of majority status, Northshore was acknowledging the Carpenters as the exclusive bargaining representative under Section 9(a) of the Act. (GC Exh. 17.)

On June 12, Johnston discovered a break-in at shop 2, necessitating a cleanup. (Tr. 267–268.) According to Kosmin, at around 10 a.m., McBee asked him to help Johnston cleanup and to try to finish in time to be sent home early at lunch. (Tr. 159–160.) Johnston recalled that  
40 around 11 a.m., McBee came by and said he was running out of work in the shop and they needed to be cleaned up and out by 12 noon. (Tr. 260, 321.) Kosmin testified that McBee sent him home at noon and said would text him if he had work for him the next morning. He did not. (Tr. 160–161.)

45 McBee thought he probably met with Elbert at some point and told him he had a couple guys that were just doing basic cleanup. According to McBee, Elbert directed him to send them home and they were sent home at 10 a.m. (Tr. 563–565.) Upon further examination,

McBee stated Elbert called him around 9 a.m. and said to send Kosmin and one other guy home. McBee chose Johnston because he was not performing production work. (Tr. 584–585.) McBee testified it was not unusual for apprentices to be assigned cleanup work at Northshore when there is not enough production work. (Tr. 563–564.) Elbert recalled making the decision to send two employees home around 10 a.m., and telling McBee to send Kosmin and someone else home. Elbert claimed to have learned of the all-employee meeting at around 12:30 p.m. that same day. (Tr. 719–721.)

Kosmin’s timecard shows he worked 6 hours on June 12 and was off work on June 13. He returned and worked full days June 14 and 15. His timecard has an annotation noting he did not attend the meeting per Todd, and it marks his time up through June 14 as “Local 66” and the time after June 14 as “Non-Union.” (GC Exh. 27.) Other employees did not attend the meeting. Nam Hoang, Zachary Still and Mark Corteau are shown as attending an apprentice class for the week. Anthony Ganiron had been laid off since April. Charles Smith is shown as absent for the week due to a nonwork-related injury. (Emp. Exh. 17; Tr. 330, 822–823.)

On June 12, there was another all-employee meeting in shop 2 to introduce the employees to the Carpenters. Employees were notified of the meeting in the same manner as the June 5 meeting. Meyer, Elbert, Millikan, and D. Meyer were present for management. Triezenberg and Torkelson were present for the Carpenters. Meyer could not recall whether he or Triezenberg decided to introduce the Carpenters to the employees. (Tr. 65.) The meeting began in the early afternoon, around 12:30 or 1 p.m. and ran until about 5 p.m.<sup>11</sup> Meyer mentioned the Company needed a more competitive advantage to be successful and be able to go on company trips, and said this was one option. Meyer said he was looking to get the same contract as Local 66, which he had received in the mail, but there would be a separate classification for architectural journeyman at a lower wage. (Tr. 338–339, 445, 491.) After introducing the Carpenters, the managers waited in the adjacent shop area. (Tr. 70, 733.)

Triezenberg said they would like to bring Northshore on as one of their signatory companies and asked the employees to sign authorization cards. He said their wages would remain the same, but new employees would be hired on as Carpenters at the pay rate in their apprenticeship program. (Tr. 340, 388, 570.) Triezenberg said that for Northshore to become signatory with the Carpenters the employees had to sign authorization cards and have a majority. Installer Matt Postma recalled Triezenberg saying they needed to sign the cards before Local 66 people were able to file their authorization cards or they would miss their chance. (Tr. 341.) Installer Scott Waxler recalled Triezenberg saying it would be best to have the cards signed that night. (Tr. 389.) While precise accounts vary, authorization cards were either passed out or made available on a table. (Tr. 342, 389, 447, 544, 800.) Nakapaahu signed a card at the meeting and handed it to one of the Carpenters representatives.<sup>12</sup> (Tr. 816–817.)

Foreman Travis Elliott and some other employees voiced concern about rushing into a decision. (Tr. 342–343.) Champeaux asked for time for employees to discuss the matter among

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<sup>11</sup> Installer Matt Postma noticed Kosmin was not there even though he had just been appointed shop steward.

<sup>12</sup> Nakapaahu thought Kosmin spoke at this meeting, but he clearly is confusing it with the meeting the next day. (Tr. 798.)

themselves, and the Carpenters left the room. Postma recalled Meyer and Elbert coming back into the room after Triezenberg spoke. W. Bailey recalled Meyer making a comment that it would be best if they could sign the Carpenters' authorization cards sooner rather than later, but he could not recall when this occurred. (Tr. 342, 448, 484.) Champeaux knew from the  
 5 Carpenters' presence at the meeting the direction Northshore wanted to go. (Tr. 770.) As the employee with the longest tenure at Northshore, Champeaux took it upon himself to voice his belief that going with the Carpenters was better than going nonunion, and explained to the younger guys that Northshore had always been very good to its employees. (Tr. 755–756.) He acknowledged that nobody likes change, but said he had worked there a long time, he trusted  
 10 the owners, and he would be behind them. (Tr. 343–344.) McBee recalled that Elliott and Waxler spoke up in support of Local 66. (Tr. 574–575.) W. Bailey saw the decision as life changing, and was not comfortable signing that night. (Tr. 449.) Champeaux noted the employees were facing a big decision and suggested they meet the next day. (Tr. 344–345, 760.) He offered to take cards at the meeting or at a later time and told Triezenberg to come  
 15 back the next day to collect the cards. (Tr. 345, 390–391.)

According to M. Johnston, the door between the meeting room and the shop where the managers were waiting was ajar, and Champeaux went into the room where the managers were three times during the meeting. When he came back he would ask the Carpenters a question or  
 20 tell the group how things would unfold. (Tr. 494–497.) Champeaux testified he went out of the room only once when he asked the Carpenters' representatives to come back in after the employees' discussion among themselves. (Tr. 760, 771.) McBee said the door was shut and when asked if it was soundproof said, “[Y]eah it’s a solid metal door, soundproof as these  
 25 doors would be here,” indicating the doors in the hearing room. (Tr. 570.)

Some of the employees decided Local 66 should be told what was happening. Chris Hobbs went over and got Business Manager Eric Martinson and Business Agent Aaron Bailey (A. Bailey) from Local 66. They came into the meeting room, went over their proposal,  
 30 informed the employees they were negotiating, and encouraged the members to hold strong and stick together. (Tr. 345–346, 391, 448.) Martinson started talking about the owners' good lifestyles, and W. Bailey perceived they were disrespecting the owners. McBee asked them to stop with personal attacks and things got back on track. (Tr. 449, 575.) Meyer returned at 5 p.m. to lock up the shop and said they could continue the meeting at Local 66's offices.

The next meeting was on June 13 at about 2:30 or 3 p.m. The field employees and Triezenberg were present, but Northshore management was not. Johnston arrived with about eight Local 66 T-shirts and Kosmin arrived with copies of Local 66's proposal to hand out,  
 35 talking points for a speech, and some questions to ask Triezenberg. (Tr. 184.) Champeaux addressed everyone briefly.<sup>13</sup> Triezenberg said the Carpenters had a lot to offer and encouraged them to sign cards. (Tr. 187, 347.) Champeaux recalled making a speech about needing to support the Company. (Tr. 764.) Johnston recalled T.J. Parrot spoke next urging the employees to stay solidified and support Local 66. Kosmin also spoke in favor of staying with Local 66. Johnston asked Triezenberg a question about organizing electricians in Florida. Triezenberg  
 40 responded that he would have known the answer had he been at the meeting the previous day. Kosmin voiced his concerns about the Carpenters undercutting other unions across the country. He also expressed support for Local 66 and concern that the Carpenters lack the training  
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<sup>13</sup> Champeaux recalled the Carpenters starting the meeting, and then Kosmin spoke. (Tr. 763.)

facility Northshore’s apprentices require. (Tr. 277, 188–189.) Champeaux spoke again and voiced his belief that the Carpenters’ contract could make Northshore more competitive. (Tr. 190.) Nakapaahu said he was going with Northshore and told his coworkers they could still be Sheet Metal Workers even if the Company went with the Carpenters. (Tr. 801.)

5

There was a stack of Carpenters’ authorization cards at the meeting. Champeaux handed out some cards and said he was going to sign a card, but others were free to do what they wanted. He collected about a dozen cards at the meeting. McBee said if employees weren’t comfortable signing cards at the meeting, they could leave the cards in his mailbox. Within the next 2 days, McBee collected four or five cards from shop employees and gave them to Triezenberg. (Tr. 190, 452, 544–546, 579–580, 760–768.)

10

The employees were paid for the meetings as well as travel time on June 5 and 12, but not for the meeting or travel time on June 13. (Emp. Exh. 15.)

15

According to Kosmin, after the meeting a group was discussing their points of view. During their conversation, Champeaux told Kosmin if he stuck around and signed a card, he could make him a journeyman. (Tr. 192.) When asked if he had ever promised to “journey someone up” (i.e., promote him to journeyman status), Champeaux responded, “I don’t believe so, no.” He said that if he had made such a promise, it would have been “tongue in cheek.” (Tr. 762–763.)

20

In a letter dated June 13, Martinson gave a bargaining update and urged the workers to stay with Local 66. (Carp. Exh. 1.)

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#### D. LOCAL 66 PETITION AND AGREEMENT BETWEEN NORTHSHORE AND THE CARPENTERS

Between 6:12 and 6:17 p.m. on June 13, the NLRB, Region 19, faxed a copy of Local 66’s petition to Northshore, as well as to Northshore’s outside counsel.<sup>14</sup> (Tr. 101–102, 104–105, 784–787; GC Exhs. 21, 29.) Where the petition form asks for the “unit involved” it states, “See unit description in attached collective bargaining agreement, Article 1, Section 1.” No collective-bargaining agreement was attached because of its length, but a hardcopy was mailed. (Emp. Exh. 11.)

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At 6:50 p.m. on June 13, Triezenberg forwarded a draft recognition agreement to Meyer, with language acknowledging the Carpenters had the support of a majority of the employees covered by the collective-bargaining agreement. (GC Exh. 18.)

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Another copy of the petition, with a portion of the CBA describing the bargaining unit, was faxed to Northshore on June 14 at 1:22 p.m. (GC Exh. 22.) Meyer testified he did not see either fax until the afternoon of June 14.<sup>15</sup> Northshore’s receptionist picks up faxes and places them in the managers’ in-boxes. (Tr. 106.) The receptionist does not regularly tell Meyer he has a fax waiting for him. Though the petition was sent to Elbert, it went to Meyer’s in-box

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<sup>14</sup> The Carpenters assert that GC Exh. 29 purports to be a mailed copy (see Carp. Br. p. 5) but this interpretation is plainly incorrect. (Tr. 670–671.)

<sup>15</sup> Elbert said he first saw the petitions on June 15. (Tr. 716.) Northshore’s attorney, Joseph Marra, saw them at 1:30 p.m. on June 14. (Tr. 785.)

because he had told the employees in the reception that anything from the NLRB, their attorney, or Local 66 should be given directly to him. (Tr. 99–102, 115–116.)

5 On June 14, at 10 a.m., Meyer asked Eric Knutson, a nonunion employee, to deliver a letter that he and Elbert had signed withdrawing Northshore’s recognition of Local 66 over to Local 66’s offices. According to Meyer, Knutson delivered it at 10:06 a.m. (Tr. 107, 111–112; GC Exh. 23.)

10 Meyer and Elbert had a 10 a.m. meeting scheduled with the Carpenters. Triezenberg was waiting downstairs and Meyer called him to his office until after he heard back from Knutson.<sup>16</sup> (Tr. 128, 714–715.) Gustafson, Northshore’s accountant, was also present. (Tr. 79.) Triezenberg presented Meyer with authorization cards. (Tr. 112.) Meyer did not count the cards, but he looked at them and determined there was a substantial stack that looked well over the majority of the bargaining unit employees.<sup>17</sup> He gave the cards back to Triezenberg and did not check names or signatures. During his affidavit testimony, Meyer said he recognized three or four names, but he could not recall any names at the hearing. (Tr. 78–80; Emp. Exh. 20.) Elbert did not handle the cards and nobody recalled Gustafson handling or counting the cards. (Tr. 715.) Triezenberg said he presented Meyer with 20 cards that day, but could vouch for the validity of only two or three. (Tr. 248–249.) According to Meyer, he and Triezenberg then bantered back and forth about some terms and came to an agreement, recognizing the Carpenters as the exclusive representative of its bargaining unit employees under Section 9(a) of the Act. (Tr. 112.) Elbert thought the contract was signed at around 11 a.m. (Tr. 724.)

#### E. JUNE 14 CONVERSATIONS WITH EMPLOYEES

25 Johnston was working at University Village with his father the morning of June 14. He got a call from Roy Nakapaahu around 8 a.m. According to Johnston, Nakapaahu said if he signed a Carpenters’ card, more likely than not Northshore would start paying him a journeyman’s rate. (Tr. 279–281.) Nakapaahu denied calling anyone to ask them to sign an authorization card. (Tr.802.)

30 Postma worked with Nakapaahu at Sea Tac on June 14. At around noon, Nakapaahu called Johnson on the phone and handed the phone to Postma. Johnson told Postma the Company liked him as a worker, they wanted him to stick around, and when things picked up he would probably be “running work” as a foreman. He said Northshore was probably going with the Carpenters so Postma needed to be on board with that. When Postma said this was a big decision, Johnson said there were enough cards signed, so the Company was going to stop paying into union benefits that day, and needed to know his decision by the end of the day so he could replace him if necessary. (Tr. 349, 369, 655, 663.) Postma expressed concern that things were happening so quickly and he thought there would be a vote. Johnson told him to call Meyer. According to Postma, Meyer said he was not sure if he would need to sign up with the Carpenters right then but he would need to soon. Postma told Meyer he had to think about it. (Tr. 348–350.) Postma called A. Bailey, and then called Johnson back and told him he was staying with Local 66. Johnson told him to turn in his tools, and when asked if he was being

<sup>16</sup> It is unclear who else was at the meeting. According to Elbert, he, Meyer, Triezenberg, and Torkelson were present. (Tr. 715.)

<sup>17</sup> Meyer thought there were 38 bargaining unit employees at the time. (Tr. 79.)

fired, Johnson said he would have to talk to Meyer. When Postma spoke to Meyer, he said, “See how it goes next week.” (Tr. 351.) According to Meyer, he said they had signed a new contract, but didn’t need to sign a card that day. Meyer felt like he was being pressured into saying Postma would be fired if he didn’t sign a card. (Tr. 839–841.)

5

Waxler, W. Bailey, and Foreman Travis Elliott were working at a medical building in Puyallup on June 14. At around 2 or 2:30 p.m., Meyer came to the jobsite and told them the Company had declined recognition of Local 66 and if they wanted to go along with the Carpenters they could be running work again. (Tr. 394, 452–453.) W. Bailey had seen Meyer at a jobsite four times in the 14 years he worked at Northshore.<sup>18</sup> (Tr. 453.) Meyer said he went to the jobsite because he knew the crewmembers were Local 66 supporters and he was worried they were going to quit. According to Meyer, he said they had reached an agreement with the Carpenters, assured them there would be no loss in pay, and told them there would not be as many fund deductions. He said the new agreement had a union-security clause so they’d probably eventually have to join the Carpenters but he was not pressuring them to sign cards. (Tr. 837–838.)

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On June 14 or 15, Elbert told a few people they needed to sign cards with the Carpenters because they had executed an agreement. (Tr. 723–724, 739.)

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#### F. LAYOFF OF JASON JOHNSTON

On June 15, Johnson told Johnston to meet Field Foreman Don Compton at the shop at 6 a.m. the following Monday, June 18. When Compton was not there, Johnston called him and was told the job was rained out and he should call Johnson. Johnson said to see if McBee had anything available in the shop. He did not, so Johnston called Johnson back and mentioned to him that M. Johnston had said they had 30 days to sign a Carpenters’ card or “that was it.” Johnson asked Johnston to come and talk with him, so Johnston went to Johnson’s office. According to Johnston, Johnson encouraged him to wait until the Carpenters’ wage package came out before making a decision. Johnston said he would absolutely not sign a Carpenters’ card ever, explaining he had fought hard to get back in the apprenticeship program and when he was laid off he would be in a good position to work HVAC (heating, ventilation, and air-conditioning).<sup>19</sup> According to Johnston, Johnson said there were no hard feelings, and told him to call to see if there was work the next day. Johnson initially told him there was no work available until the end of the week, and then on Friday told Johnston he was laid off for lack of work for approximately a month. (Tr. 287–290.) Johnston returned to work August 4. (Tr. 291, 302.)

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According to Johnson, Johnston told him he wanted to do HVAC because things were slow. After checking with McBee to confirm things were slow, he laid off Johnston. Johnson did not recall anyone else being laid off in June. (Tr. 591–592.) In his declaration, Johnson said McBee recommended Johnston could be laid off. (Tr. 503.) Johnson added, “Jason was sweeping floors. He wouldn’t have been laid off unless he asked. Jason laid Jason off.”

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<sup>18</sup> Meyer admittedly does not visit jobsites very often. (Tr. 35.)

<sup>19</sup> Johnston told the business agents at Local 66 that he wanted to pursue HVAC. They decided to wait for an apprenticeship rotation. Johnston has been doing HVAC at another company since January 4 2013. (Tr. 293–294.)

(Tr. 649.) He then explained that Johnston did not ask to be laid off, but just said he was interested in trying something different (Tr. 661.)

5 On June 22, Johnson sent M. Johnston an email regarding a metal panel install  
scheduled for the week of June 27. Johnson asked M. Johnston to let him know when he  
needed help, and said he was sending Josh Smith to start, and would send more workers if  
needed. On June 25, M. Johnston responded that hopefully he could also get Kosmin. Johnson  
replied he could if the shop did not need him. Johnson also stated that he laid off Johnston for  
10 two reasons: they were slow and he requested to go try HVAC. “It had nothing to do with  
anything else.” (Carp. Exh. 3.)

#### G. DENIAL OF LIGHT-DUTY WORK FOR YURIY KOSMIN

15 On June 25, Kosmin gave Chris Dudek, who was acting shop foreman for the week, a  
note from his doctor placing him on light duty due to a running injury. The letter stated Kosmin  
would be in a walking boot and could do no running, jumping, or prolonged standing. (Tr. 194;  
Emp. Exh. 1.) Dudek took it up the chain to Meyer, who passed down instructions for Kosmin  
to come back to work when he was healed. Kosmin came in the next day to get a signature for  
a request for temporary disability. Meyer responded that he would need to check with  
20 Northshore’s lawyers. The next day, Kosmin returned and Meyer said he would not sign the  
form but he would write a letter. Meyer wrote a letter verifying the last day Kosmin worked  
and stating the injury was not work related. On the way out, Kosmin stopped in Elbert’s office  
and said he was available for light duty. According to Kosmin, Elbert said he would get back to  
him. Kosmin also spoke with Johnson, who stated he did not lay anybody off and he laid off  
Johnston because he wanted to do HVAC work. This puzzled Kosmin. (Tr. 195–199.)

25 Northshore provides light duty for injuries sustained on the job, but not for off-the-job  
injuries. (Tr. 120; 273.) Don Compton injured his knee playing soccer and was not given light  
duty. (Tr. 567, 855.) On July 13, Kosmin brought in a letter stating he could return to work  
without restriction starting July 16. (Tr. 121; Emp. Exh. 2.) Shortly after Kosmin returned to  
30 work, he sustained an on-the-job injury and was provided with light-duty work. (Tr. 211.)

#### H. POST NORTHSHORE-CARPENTERS AGREEMENT ENFORCEMENT AND HIRING

35 Northshore has not terminated any employees for failing to sign up with the Carpenters.  
Local 66 employees still work for Northshore and have not been required to become  
Carpenters. Northshore continues to hire members of Local 66. (Tr. 117–118.)

40 Since June 14, Northshore has hired individuals from the Carpenters and Local 66, but  
has not utilized the Carpenters’ hiring hall. (Tr. 132.) Johnson calls Torkelson to get  
Carpenters. He has about 25 employees from Local 66 and 20–30 from the Carpenters.  
(Tr. 619, 646.)

45 On July 16, 2012, Triezenberg sent Meyer a letter confirming their agreement that  
Northshore has never had and will never have a union-security obligation to the Pacific  
Northwest Regional Council of Carpenters. The letter instructs Northshore to continue to  
contribute to Sheet Metal Workers’ employee benefit plans, pay wages owed under that  
contract, and refrain from collecting dues from bargaining unit members. (Emp. Exh. 19.)

## III. DECISION

## A. JUNE 12 DISCRIMINATION ALLEGATIONS

5           The complaint, at paragraph 6, alleges that on June 12, 2012, McBee: (a) assigned Kosmin and Johnston less desirable work duties, and (b) reduced their work hours, because of their union affiliation and/or to discourage employees from engaging in union activity or affiliation, in violation of Sections 8(a)(1) and (3) of the Act.

10           Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.” Rights guaranteed by Section 7 include the right to engage in union activities and “concerted activities for the purpose . . . of mutual aid or protection.” Section 8(a)(3) provides that it is an unfair labor practice for an employer “by discrimination in regard to hire or tenure  
15 of employment or any term or condition of employment to encourage or discourage membership in any labor organization.”

          In assessing whether an action has been taken against an employee for unlawful reasons, the Board applies the framework set forth in *Wright Line*, 251 NLRB 1083, 1089  
20 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under *Wright Line*, the Acting General Counsel must first prove, by a preponderance of the evidence, that the employees’ protected conduct was a motivating factor for the Company’s adverse action. Once the Acting General Counsel makes a showing of discriminatory motivation by proving the employees’ protected activity, the Company’s knowledge of that  
25 activity, and the Company’s animus against the protected conduct, the burden of persuasion shifts to the Company to demonstrate that it would have taken the same action even in the absence of the protected conduct. See *DirectTV U.S. DirectTV Holdings, LLC*, 359 NLRB No. 54, slip op. at 4 fn. 18 (2013).

30           It is undisputed that Kosmin and Johnston were known Local 66 supporters. As detailed above, they both wore Local 66 T-shirts 3 to 4 days per week starting in middle to late May. Johnston’s testimony that he spoke up at the June 5 meeting and asked Elbert how other trades could take the Sheet Metal Workers’ work is unrefuted, despite the fact that Elbert testified at the hearing. Finally, Kosmin was appointed as the union steward on June 6, and this  
35 was conveyed to management. These factors establish protected activity and the Company’s knowledge.

          A discriminatory motive or animus may be established by: (1) the timing of the employer’s adverse action in relationship to the employee’s protected activity; (2) the presence  
40 of other unfair labor practices, (3) statements and actions showing the employer’s general and specific animus; (4) the disparate treatment of the discriminatees; (5) departure from past practice; and (6) evidence that an employer’s proffered explanation for the adverse action is a pretext. See *Golden Day Schools v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) (timing); *Mid-Mountain Foods, Inc.*, 332  
45 NLRB 251, 260 (2000), *enfd. mem.* 169 LRRM 2448 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534 (1993) (other unfair labor practices); *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1473–1474 (6th Cir. 1993); *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999) (statements); *Naomi*

*Knitting Plant*, 328 NLRB 1279, 1283 (1999) (disparate treatment); *JAMCO*, 294 NLRB 896, 905 (1989), affd. mem. 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991) (departure from past practice); *Wright Line*, 251 NLRB at 1089; *Roadway Express*, 327 NLRB 25, 26 (1998) (disparate treatment). The Board will infer an unlawful motive or animus where the employer’s action is “‘baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive.’” *J.S. Troup Electric*, 344 NLRB 1009 (2005) (citing *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995)); see also *ADS Electric Co.*, 339 NLRB 1020, 1023 (2003); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

Turning first to the reduced work hours, I find the timing of events highly suspicious. McBee initially testified, very equivocally, that he probably met with Elbert at some point and mentioned he had a couple of guys doing cleanup work. More definitely, he then stated that at Elbert’s direction, he sent Kosmin and Johnston home at 10 a.m. (Tr. 564–565.) Later in his testimony, he said that Elbert called him at 9 a.m. and told him to send Kosmin and one other guy home. (Tr. 584.) Elbert recalled that at around 10 a.m., McBee called him and said they were down to “sweeping up” so Elbert told him to send Kosmin and someone else home. (Tr. 719–721.) Curiously, neither McBee nor Elbert mentioned the break-in.<sup>20</sup> Even when specifically asked why Johnston and Kosmin were doing cleanup that day, McBee did not reference the break-in. I further note that testified not as to what actually occurred, but rather as to what Kosmin and Johnston would have been doing if no production work was available. I credit Kosmin and Johnston’s more specific and detailed testimony, set forth in the statement of facts, over either Elbert’s or McBee’s testimony, which was less consistent, detailed, or certain. As current employees testifying against their own pecuniary interests, I find their testimony to be particularly reliable. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Div. of Unarco Industries*, 197 NLRB 489, 491 (1972). Moreover, Kosmin’s timecard shows he worked 6 hours that day. With the workday at Northshore starting between 6 and 7 a.m., it is clear Kosmin and Johnston were sent home around lunchtime, consistent with their testimony.

Kosmin and Johnston were sent home very shortly before the June 12 meeting was announced to employees. The admonition to get done and go home at the lunch break deprived them of the same paid workday afforded all other employees who showed up that day: Work in the morning, eat lunch, then attend the meeting in the afternoon. I find McBee’s and Elbert’s attempts to avoid admitting this casts considerable doubt on Northshore’s version of the chain of events that day, including Elbert’s testimony that Meyer did not inform him of the decision to hold the meeting until 12:30 p.m. It is undisputed that Elbert is in charge of overseeing the day-to-day operations in the shop and in the field. For Meyer to call an immediate stop to all work unilaterally without coordinating with Elbert beforehand is simply implausible. The presence of Millikan and D. Meyer at the meeting is another indicator that management did not set it up at the last minute.

As noted above, neither Elbert nor McBee mentioned the break-in at shop 2. According to Elbert, McBee characterized the work Kosmin and Johnston performed that morning as “just sweeping up.” This means that neither Elbert nor McBee recalled the break-in when testifying

<sup>20</sup> I note that, in their briefs, Northshore and the Carpenters both assert that Johnston and Kosmin were instructed to clean up after the break-in. (Emp. Br. 37; Carp. Br. 15.)

about what occurred the morning of June 12, or they were deliberately omitting reference to it in order to better characterize Kosmin and Johnston’s cleanup duties as makeshift work rather than an unusual assignment required by an unforeseen event. Somehow, however, between noon on June 12 and start time on June 13, work materialized for Johnston. Aside from the afternoon of June 12, Johnston has stayed on the job despite a professed lack of production work. As will be discussed more fully below, even though Superintendent Johnson observed that Johnston was just “sweeping floors,” Johnson would not have laid off Johnston on June 22 unless Johnston himself asked to be laid off. (Tr. 649.) Kosmin was kept off work June 12 and 13, though he attended the June 13 meeting, but by June 14 there was enough work for him to return. (GC Exh. 20.) That same week, 25 of the 34 bargaining unit employees worked overtime.<sup>21</sup> (GC Exh. 34; Emp. Exh. 20.)

It is also clear from the evidence that Northshore’s management was displeased with how negotiations with Local 66 were proceeding. Champeaux characterized the bargaining updates employees received with their paycheck stubs as both sides “kind of going back and forth at each other” and stated, “I think everybody could kind of realize that it wasn’t a rosy picture between the two sides.” (Tr. 753.) In addition, during the June 5 meeting, D. Meyer said that Local 66 had been slinging a lot of mud, and McBee recalled Meyer talking about conflict with Local 66.

Based on the foregoing, I find that the Acting General Counsel has established that Kosmin and Johnston’s support of Local 66 was a motivating factor in Northshore’s decision to send them home at lunchtime on June 12. As such, the burden shifts to Northshore to prove it would have taken the same action even in the absence of the protected conduct.

Northshore argues that other employees not working on June 12 were also absent from the meeting that day. These employees, however, were not present at work that very morning. Three of them were in an apprentice class for the week, one had been laid off in April, and one was absent for the week due to an injury. Northshore also points out that other employees wore T-shirts in support of Local 66 but were not laid off. I find, however, that Kosmin’s recent appointment as steward and Johnston’s verbal challenge at the June 5 meeting set them apart. Postma’s surprise about not seeing Kosmin at the meeting underscores that there was no need to take action as drastic as laying off all known Local 66 supporters that day to convey what direction the Company intended to take. In addition, aside from being very blatant, it seemingly would have been difficult to lay off all known Local 66 supporters given the overtime worked that week.

Turning to the allegation that Kosmin and Johnston were assigned less desirable duties on June 12, I find that regardless of any protected conduct, assigning them to clean up shop 2 did not violate the Act. It is undisputed that Johnston discovered the break-in. It is also undisputed that Kosmin generally works in the field but was assigned to the shop because work in the field was slow. Kosmin testified that McBee asked him to go help Johnston after he had finished up what he had been working on the day before. (Tr. 159.) The Acting General Counsel relies on Kosmin’s testimony that cleanup work was generally the responsibility of lower-paid materials handlers. Johnston, however, acknowledged that the work was menial but it needed to be done that day. Moreover, the work went beyond cleanup. Northshore wanted

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<sup>21</sup> According to Superintendent Johnson overtime work is pretty rare. (Tr. 603.)

the windows to be blocked, which required the use of a forklift to move a large pressure tank, requiring a driver and a spotter. (Tr. 269.) Under these circumstances, assigning this task to Johnston, who discovered the break-in, and Kosmin, who had completed his previous assignment, does not raise an inference of unlawful motive. Accordingly, I recommend dismissal of complaint allegation 6(a).

#### B. SUPERVISOR AND AGENCY STATUS OF FOREMEN

Because some of the complaint allegations involve Field Foremen Bruce Champeaux and Roy Nakapaahu and Shop Foreman Todd McBee, who are not admitted supervisors or agents, I will first address their respective statuses.<sup>22</sup>

##### 1. Supervisory status legal standards

The party asserting supervisory status must prove it by a preponderance of the evidence. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003); *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999). In this case, that burden rests with the Acting General Counsel. The Act, at Section 2(11), defines a supervisor as:

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

“Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their ‘exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,’ and (3) their authority is held ‘in the interest of the employer.’” *NLRB v. Kentucky River Community Care, Inc.* 532 U.S. 706, 713 (2001) (quoting *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573–574, (1994); See also *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

The term “assign” means “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Id.* at 689. To be considered a supervisor with “responsibility to direct,” there must be accountability on the supervisor’s part if the directed task is not performed properly. *Id.* at 691–692.

In *Kentucky River*, *supra* at 713, the Supreme Court rejected the Board’s previous interpretation of “independent judgment” which excluded exercising “ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards.” Following *Kentucky River*, the Board explained that it will assess the degree of discretion the putative supervisor exercises when determining if he or she

<sup>22</sup> Larry Lucas, Marvin Johnston, and Don Compton are also alleged to be supervisors at complaint par. 4. Because none of the alleged violations concern these individuals, this decision does not address whether they are supervisors.

uses independent judgment. A decision that is “dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement” is not independent. *Id.* at 693.

5           The Board recognizes that some individuals may spend part of their time as a unit employee and part of their time as a supervisor. In such cases, supervisory status will be found if the individual spends a “regular and substantial” part of his or her workday performing supervisory functions. *Id.* at 694; see also *Brown & Root, Inc.*, 314 NLRB 19, 21 (1994). “[R]egular means according to a pattern or schedule, as opposed to sporadic substitution.”  
10 *Oakwood, supra; Rhode Island Hospital*, 313 NLRB 343, 349 (1993) (individual supervising every fourth weekend is a supervisor). There is no strict numerical threshold for supervisor work to be considered “substantial,” and the Board has found supervisory status based on an employee serving in a supervisory role for 10–15 percent of the total worktime. *Rhode Island Hospital, supra.*

15           Job titles are not dispositive. Rather, “[t]he status of a supervisor under the Act is determined by an individual’s duties, not by his title or job classification.” *T. K. Harvin & Sons, Inc.*, 316 NLRB 510, 430 (1995); see also *RCC Fabricators, Inc.*, 352 NLRB 701 (2008) (field foremen found to be statutory supervisors); *Suburban Electrical Engineers/Contractors, Inc.*, 351 NLRB 1 (2007)(field foremen found not to be statutory supervisors).

*a. Shop Foreman Todd McBee*

25           For the reasons set forth below, I find McBee functioned as a statutory supervisor during the relevant time period. I note that the Acting General Counsel and the Charging Party have argued that McBee had authority to hire or effectively recommend the hiring of employees and to assign tasks. Accordingly, I will address these criteria.

30           Turning first to assignment of work, the evidence shows that McBee gives “significant overall duties, i.e., tasks,” to employees. *Oakwood, supra* at 689. McBee attends weekly meetings with Elbert, Johnston, and the project managers each Monday morning, as detailed above. Based on what he learns in the meeting, throughout the week he prioritizes the work on the floor at the different stages of production. Though the determination of who will work on many of the machines is largely a function of which employee(s) have the ability to use a  
35           particular machine, McBee assigns tasks to the machine operators based on which jobs are priorities. In addition, McBee inspects the work of the machine operators, can make an independent judgment that a product is faulty, and instruct the employee to fix it. Aside from the more specialized machine operators, McBee employs independent judgment when making other assignments. McBee interfaces with Superintendent Johnson, who likewise reports to  
40           Elbert, to coordinate labor assignments between the shop and the field. The evidence shows that installers regularly perform work in the shop when the work in the field is slow. When this occurs, Johnson checks with McBee to see if he has work in the shop. If so, McBee assigns work to them. In addition, Meyer and Elbert admittedly lack subject matter knowledge about programming. It follows that McBee uses independent judgment when determining if an order  
45           needs programming and then assigning the work to the programmers. Finally, when overtime is authorized, McBee assigns it by “appointing an employee to . . . a[n] overtime period.” *Id.*

Both Respondents argue that the assignments McBee gives are ministerial in nature. Citing to *Shaw Inc.*, 350 NLRB 354 (2007), the Carpenters assert that McBee’s assignments are routine and based on training. As noted above, this is true for some but not all assignments in the shop. Moreover, in *Shaw*, assignments were carried out with significant supervisory oversight, with managers visiting the jobsite at least once a day. The work performed was “subject to close scrutiny by higher management” and monitored regularly. Here, McBee is the only person regularly on the shop floor monitoring the work, and the only person capable of monitoring the programmers’ work, aside from the programmers themselves. I find the instant case is more in line with *RCC Fabricators, Inc.*, supra, because the evidence shows McBee is “a primary participant in the daily process of determining which employees would undertake the necessary tasks involved in the entire production process” of the shop.<sup>23</sup> 352 NLRB at 713.

With regard to hiring, the evidence establishes that McBee has the authority to effectively recommend who Northshore hires as programmers. During interviews for programmers, McBee asks questions of the candidates and, following the interview, provides input to management. Because Elbert and Meyer do not have knowledge about programming sufficient to determine if a candidate is qualified, they rely on McBee’s recommendations, based on his independent judgment, about the candidates’ qualifications before making a hiring decision.<sup>24</sup> Accordingly, I find McBee effectively has the authority to recommend the programmers Northshore hires.<sup>25</sup>

The Carpenters assert that McBee has not recommended which programmers to hire. McBee, however, testified otherwise, and also stated that his recommendations on who should be hired are taken seriously. The Carpenters also minimize the nature of McBee’s participation at interviews, stating that McBee was there simply to ensure an applicant knew how to program. McBee’s testimony and common sense belie this, however. It is clear that programming is specialized enough such that Elbert and Meyer cannot evaluate a candidate’s suitability. This leads me to conclude that McBee actually made effective recommendations, and did not, in rote fashion, simply state which candidates could program and which could not, as if he were passing on some basic capability rather than the qualifications comprising the essence of a specialized position. Northshore, in a footnote, states that Mc Bee sat in on interviews to provide his expertise and ensure he could get along with the applicant. The evidence shows that he did more than “sit in” on interviews. He questioned the applicants about programming, evaluated their qualifications to be a programmer, and made critical recommendations about who should be hired. Accordingly, I find that McBee’s use of independent judgment to effectively recommend who Northshore hires as programmers confers supervisory status on him.

The Charging Party points to evaluation forms McBee filled out for shop employees as indicia of supervisory status. These evaluations were generated and used by Local 66, not

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<sup>23</sup> At the very least, McBee was part of a small group decisionmaking process as in *RCC Fabricators*.

<sup>24</sup> Meyer testified that another programmer could also be present in an interview for a programmer, but there is no evidence this ever occurred.

<sup>25</sup> There was also evidence that McBee hired a driver based on explicit instructions from Meyer on qualification criteria, and that he provided input into the hiring of the shipping manager. These events are not sufficient, by themselves, to confer supervisory status on McBee.

Northshore. Accordingly, this argument fails. See, *Adco Electric, Inc.*, 307 NLRB 1113, 1125 (1992).

5 The Acting General Counsel and the Charging party cite to other authority they allege confers supervisory status on McBee, such as recommending and/or implementing layoffs, contacting the hiring hall and having employees dispatched to the shop or rejecting them, and ordering employees to go to meetings. In addition, the Acting General Counsel points to secondary indicia of McBee’s supervisory status, such as attending management meetings and being viewed by employees as a supervisor. I consider these criteria in conjunction with the authority to assign and recommend hires, set forth above, both as supporting that McBee performed supervisory functions and that those functions comprise a “regular and substantial” part of his workday.

15 I further note that McBee is the only person in Northshore’s organizational hierarchy between the shop employees and Company Co-President Elbert. If he has no supervisory authority, the only person to effectuate or effectively recommend any of the statutory supervisory functions is Co-President Elbert. Without McBee’s effective input, it is unclear how Elbert, who does not know the specifics of what the shop employees are doing from day-to-day, would make his decisions.

20 Based on the foregoing, I find McBee is a statutory supervisor.

#### *b. Field foremen*

25 I need not resolve supervisory status with regard to the field foremen because it is sufficient if the evidence shows they were Northshore’s statutory agents at the time of the alleged unlawful conduct. *Fleming Cos.*, 336 NLRB 192, 196 (2001); see also *Industrial Construction Services*, 323 NLRB 1037 (1997). Their status as agents is discussed below.

#### 2. Agency legal standards

30 Individuals who do not meet the criteria to be a statutory supervisor may still be considered agents of the employer. The burden of proving agency falls on the party asserting it. *In re Pan Oston Co.*, 336 NLRB 305, 306 (2001).

35 Before the definition of “agent” was included in the Act, the Supreme Court in *Machinists Lodge No. 35 v. NLRB*, 311 U.S. 72, 80 (1940), had held that employers “may be held to have assisted the formation of a union even though the acts of the so-called agents were not expressly authorized or might not be attributable to him on strict application of the rules of respondent superior.” Section 2(13) of the Act now states that “[i]n determining whether any person is acting as an ‘agent’ of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.” In other words, an individual need not be actually authorized by the employer to take the actions at issue if it appears he or she possesses such authority. In determining whether an individual has apparent authority, the Board applies common law principles which it summarized in *Mastec Direct Tv*, 356 NLRB No. 110, slip op. at pp. 1–2 (2011):

Apparent authority “results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe the principal has authorized the alleged agent to perform the acts in question.” . . . “Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that his conduct is likely to create such a belief.” [Citations and internal punctuation omitted.]

Moreover, under the common law of agency, a principal may be responsible for its agent's actions if the agent reasonably believed from the principal's manifestations to the agent that the principal wished the agent to undertake those actions. See Restatement 2d, *Agency*, § 33. The Board has found the question of whether the employee serves as a conduit of information to employees particularly useful in determining agency status. *A. D. Conner, Inc.*, 357 NLRB No. 154, slip op. at 21 (2011), and cases cited therein.

*a. Shop Foreman Todd McBee*

Assuming McBee does not meet the criteria to be considered a statutory supervisor, it is clear he acted as Northshore's agent. McBee was the person who generally communicated information to the shop employees on management's behalf, and the record contains numerous examples of this. As in *Hausner Hard-Chrome of Kentucky, Inc.*, 326 NLRB 426, 428 (1998), where the Board found department heads to be agents, McBee was “the link between employees and upper management.” In addition, Elbert's direction to Kosmin to talk to McBee about training in the shop conveys that McBee had the apparent authority to act on Northshore's behalf in this regard.

Specifically as it pertains to the issues in this case, McBee directed the employees to attend the June 5 and 12 meetings on the employer's behalf and unlocked the door to the meeting room. After the June 5 meeting where Northshore's owners criticized Local 66 for slinging mud, stated they were having trouble competing because of Local 66's benefits package, and encouraging employees to trust them and talk to some of the older employees who had been around a long time, it became clear Northshore was dissatisfied with Local 66. In fact, according to Champeaux, it was clear relations had soured before this based on bargaining information employees received with their paychecks. After the June 12 meeting, where management invited and introduced the Carpenters' representatives (and did not invite Local 66), it was clear Northshore favored the Carpenters. The encouragement to sign cards that day or as soon as possible underscores that this introduction was not to be one of many. On the heels of this, McBee offered to collect Carpenters' authorization cards, and proceeded to do so. Under these circumstances, I find McBee was “emulating the example set by the management” and was acting as its agent. *Machinists*, supra at 81.

*b. Field Foreman Bruce Champeaux*

I find Champeaux was an agent of Northshore. Though Champeaux usually worked smaller jobs, he always acted as the senior person at the jobsite, whether technically a foreman or not. Superintendent Johnson in fact noted that Champeaux was typically considered a

foreman, and Johnson only visited Champeaux’s jobsites once every week or two.<sup>26</sup> (Tr. 775–776.) He was, like McBee and the other foremen, “the link between employees and upper management.” *Hausner*, supra. Having the longest tenure at Northshore, he was an “old and trusted” employee, similar to the assistant foremen in *Machinists*, supra. He acknowledged his leadership role at Northshore when he decided to voice his support for the Company at the June 12 meeting, noting that as the longest employee at Northshore, he felt it was his duty to speak up and take the lead. This followed D. Meyer’s statement at the June 5 meeting encouraging the younger employees who had doubts about whether to trust the Company to talk to the older guys. Champeaux was thus “placed by management in the strategic position where employees could reasonably believe [he] spoke in its behalf.” *B-P Custom Building Products*, 251 NLRB 1337 (1980); see also *Machinists*, supra at 80; *Carl’s Jr.*, 285 NLRB 975, 981 (1987).

Champeaux’s offer to collect Carpenters’ authorization cards, his instruction to the Carpenters’ representatives to leave the room while the employees talked, his subsequent instruction for the Carpenters’ representative to come back the next day for cards, and his spearheading the June 13 meeting at same meeting space the Company used further support the conclusion that Champeaux was acting as Northshore’s agent. There were no managers present during the June 13 meeting, and from the employees’ standpoint Champeaux took the lead. Like the owners, he invited the same representatives from the Carpenters to attend the June 13 meeting (and receive signed authorization cards) but did not invite a Local 66 representative.

The Acting General Counsel also asserts that Champeaux “shuttled back and forth” between the meeting and adjacent room where the four owners were waiting. M. Johnston testified about this, but he also testified he did not know what, if anything, Champeaux said to the owners. Champeaux denied getting information from Meyer to relay to the Carpenters. Johnston thought Champeaux was standing during the meeting but could not really recall. Postma recalled that when Champeaux asked for time for the employees to meet with each other he was sitting. I find, therefore, that the Acting General Counsel has failed to prove that Champeaux shuttled information back and forth to the owners during the meeting. Nonetheless, based on his other activities, I find he was Northshore’s agent.

*c. Field Foreman Roy Nakapaahu*

For many of the same reasons, I find Nakapaahu was Northshore’s agent. The evidence shows that Nakapaahu acted as a conduit of information between management and the apprentices he oversaw at the jobsites. He was the person that communicated management’s directives to the employees working on his crew. Nobody in a higher position in Northshore’s hierarchy was at the jobsites on a consistent basis, so communication from managers to employees necessarily fell to Nakapaahu. In addition to day-to-day communications, Nakapaahu informed the employees working on his crew about the June 5 and 12 meetings.

Nakapaahu, who had previously served as superintendent, still carried a card that said “field superintendent.” I find employees reasonably could believe that Nakapaahu acted on management’s behalf.

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<sup>26</sup> Johnson and M. Johnston also testified that even when foremen are running smaller jobs and herefore not entitled to foreman’s pay under the contract, they are still referred to as foremen.

## C. UNLAWFUL ASSISTANCE

Paragraphs 7–9 of the complaint allege that Northshore gave assistance to the Carpenters in violation of Section 8(a)(1) and (2) of the Act. Specifically, the complaint alleges unlawful assistance when Meyer, Elbert, and D. Meyer: (1) on or around June 12, required employees to attend a meeting with and listen to a presentation from the Carpenters’ representatives, who Meyer introduced, at Northshore’s facilities; (2) informed employees that Northshore preferred the Carpenters; and (3) surveilled its employees from a small room adjacent to the meeting room. The complaint further alleges that, on or about June 12, Meyer and Champeaux solicited employees to sign Carpenters’ authorization cards. Next, the complaint alleges that on or around June 13, Meyer, Elbert, and D. Meyer required employees to attend a meeting with the Carpenters at Northshore’s facilities, and at that meeting McBee offered to collect Carpenters’ authorization cards and solicited employees to put signed authorization cards in his work mailbox. At the hearing, I granted the Acting General Counsel’s motion to amend the complaint to include an allegation that, on or about June 14, 2012, McBee gave assistance and support to the Carpenters by offering to collect authorization cards and soliciting employees to place signed cards in his mailbox.<sup>27</sup> (Tr. 547.) The complaint alleges that on or around June 13, Champeaux solicited employees to sign Carpenters’ authorization cards and promised employees increased wages in return. Finally, the complaint alleges that on June 14, Nakapaahu and Meyer solicited employees to support the Carpenters, and Johnson threatened discharge if employees did not sign a Carpenters’ card.

Under Section 8(a)(2) of the Act, it is unlawful for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.” An employer may, however, express a preference for a particular union over its rival as long as it does not interfere with the employee’s free choice. *Alley Construction Co.*, 210 NLRB 999 (1974).

In determining whether a pattern of unlawful assistance exists, the Board examines the totality of the circumstances, including conduct occurring both before and after recognition of the union. *Farmers Energy Corp.*, 266 NLRB 722, 722–723 (1983); *Dairyland USA Corp.*, 347 NLRB 310 (2006); *Garner/Morrison, LLC*, 356 NLRB No. 163, slip op. at 7 (2011). As the Supreme Court stated in *Machinists*, 311 U.S. at 80:

We are dealing with a clear legislative policy to free the collective bargaining process from all taint of an employer's compulsion, domination, or influence. The existence of that interference must be determined by careful scrutiny of all the factors, often subtle, which restrain the employees' choice and for which the employer may fairly be said to be responsible.

Whether an employer actually intended to interfere with the employees' selection of a bargaining representative, or whether employees actually felt coerced by their employer's actions does not matter—the gravamen of the violation is whether the employer's assistance reasonably tends to coerce the employees in the exercise of their organizational rights. *NLRB v.*

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<sup>27</sup> I find the allegation is closely related to the allegations in the charge and the original complaint, *Payless Drug Stores*, 313 NLRB 1220, 1221 (1994).

*Link-Belt Co.*, 311 U.S. 584, 588 (194); *NLRB v. Midwestern Personnel Services*, 322 F.3d 969 (7th Cir. 2003).

I find, based on the totality of the evidence, that the Acting General Counsel has established Northshore engaged in a pattern of unlawful assistance to the Carpenters. As Chairman Miller noted in his dissent in *Longchamps, Inc.*, 205 NLRB 1025, 1026 (1973), “Board precedent in this area is hardly a model of clarity.” In reviewing the numerous cases cited in the four briefs I considered, as well as other case law on the point, the one apparent consistency I drew is that analysis of this issue is extremely fact-specific. Though the parties’ recitations of the case law cited in their briefs is accurate in a general fashion, there are various unreferenced permutations in each case cited that would tend to weaken their respective arguments. The instant case likewise has some facts that point to unlawful assistance and others that do not. Considering all the facts, I conclude that employees were coerced in the exercise of their organizational rights.

1. Events before certification

*a. The June 5 all-employee meeting*

The rarity of such an event and the presence of four of Northshore’s owners, including its founder D. Meyer and longtime business partner/Co-Owner Millikan, both of whom are almost never seen at the facility, conveyed to the employees the meeting’s importance. The fact that all work was shut down and employees were paid to travel to the meeting and attend it likewise highlighted its importance. Meyer conveyed that the Company was having trouble competing and said he was having problems getting Local 66 to explain some of its deductions. D. Meyer said Local 66 had been slinging mud and encouraged employees to trust Northshore’s management, referencing prior employee bonuses and Company-paid trips to Mexico and Hawaii. He encouraged the newer employees to talk to some of the older guys if they had doubts about whether to trust the Company. Millikan said if Northshore could bring in the Carpenters, they would be profitable.

Neither Millikan nor D. Meyer testified. The employees’ testimony about what was said is generally consistent and unrefuted, and I credit it. Johnston’s specific recollection of Millikan’s comment about bringing in the Carpenters and his testimony about asking Elbert how other trades could take their work is likewise unrefuted. I credit this testimony based both on its plausibility and on Johnston’s demeanor, which was forthright and confident. I note that Elbert could recall little about the meeting. Meyer knew Millikan and D. Meyer spoke, but could not recall what they said. Johnston’s testimony comports with the events that were unfolding, including Meyer and Elbert’s recent meetings with Triezenberg, the exchanges of draft agreements, and the contract proposal Meyer sent to the Carpenters earlier that morning.

*b. The June 12 all-employee meeting*

As noted above, Kosmin, who had been appointed Local 66’s steward on June 6, was excluded from the meeting. Johnston, who had spoken up at the June 5 meeting, was also excluded. My findings that this was discriminatory are relevant here because they were excluded to discourage employees from supporting Local 66.

The previous day, June 11, Meyer had emailed Triezenberg a draft “final agreement” which contained new language from Northshore referring to withdrawal of recognition from a predecessor labor organization and identifying the Carpenters as the 9(a) representative. Triezenberg responded that evening, attaching a “Recognition Agreement,” that included language stating the Carpenters had majority support among the unit employees, had demanded recognition from Northshore and had made a showing of majority support to the Company.

A single all-employee meeting was rare; Champeaux recalled one other occurrence in the past few years.<sup>28</sup> That there were two such meetings within a week’s time, at the same place and time of day, and called in the same manner, underscores that the two meetings were related and were extremely important. The same four owners present at the June 5 meeting were present at the outset of the June 12 meeting, to the same effect. Meyer opened the meeting by saying the Company needed to stay competitive and the deal they were discussing with the Carpenters was an option that would achieve this. He then introduced Triezenberg and the owners waited in shop 2 outside the meeting room. The sole purpose of the meeting was to introduce the Carpenters and have its employees listen to Triezenberg solicit the members. Here, as in *Price Crusher Food Warehouse*, 249 NLRB 433, 438 (1980), Northshore “summoned its employees to a meeting, and turned over the meeting to the [u]nion for the purpose of soliciting union membership.” The Board affirmed the administrative law judge’s finding in *Vernitron Electrical Components*, 221 NLRB 464, 465 (1975), that “considerable indirect pressure was placed upon employees by their being directed, and paid, by their Employer to attend union meetings during worktime.”

Northshore points out that it paid for employees to meet with both the Carpenters and Local 66. Though this is true, it was clear to the employees that Northshore only intended the Carpenters to be present at the meeting. Local 66’s presence was entirely employee-driven.<sup>29</sup>

Triezenberg emphasized the need to act quickly. He said that for the Company to become a signatory with the Carpenters, a majority of the employees needed to sign authorization cards to stay ahead of Local 66, and the cards needed to be signed that day. When employees voiced concern over the rush to make a decision, Champeaux took the lead, asked Triezenberg to leave the room, and encouraged the employees to trust the owners. He offered to take cards, suggested they meet the following day, and instructed Triezenberg to come back the following day to collect the signed cards.<sup>30</sup> Foreman Nakapaahu signed a card during the meeting.

Northshore’s need to get a majority of employees to sign the Carpenters’ cards is apparent from the draft agreements the Company and the Carpenters exchanged on June 11. The June 5 and 12 meetings sent employees a clear message from Northshore’s highest level owners that failure to sign the Carpenters’ authorization cards would make the Company less

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<sup>28</sup> References were made to the annual Christmas party. I do not find it necessary to analyze the differences between a Christmas party and the meetings described in this decision.

<sup>29</sup> Elbert testified he did not know Local 66 representatives attended the meeting until he and Meyer went back in the room to close the shop.

<sup>30</sup> The Carpenters assert that Postma saw Champeaux exit the same door as management. Postma did not testify to this, however; M. Johnston did. The Carpenters further assert that Champeaux testified he informed Meyer employees wanted to meet the following day and Meyer agreed. Nowhere in Champeaux’s testimony does he indicate he asked for or received Meyer’s acquiescence.

competitive and put at risk the bonuses and perks to which the employees were accustomed. There is no record evidence that any Northshore unit employee sought representation from the Carpenters prior to the June 12 meeting. It is thus clear that the Company was the impetus behind the steps leading to recognition of the Carpenters. See *NLRB v. Midwest Personnel Services, Inc.*, 322 F.3d 969, 978 (9th Cir. 2003). The exclusion of Kosmin and Johnston conveyed a message that opposition to the Company’s viewpoint came with consequences. Considered in tandem with Triezenberg’s pressure to sign cards that day, Nakapaahu’s signing of a card, and Champeaux’s offer to collect cards, I find the effect was to restrain the employees’ free choice. This finding is strengthened by what occurred subsequently.

The Acting General Counsel asserts that at some point during the meeting Meyer returned and told employees they should sign the cards sooner rather than later, within the next couple days. I note, however, that both witnesses who testified about this, Postma and W. Bailey, were equivocal in their responses, with W. Bailey admitting his testimony on the matter could be mistaken. No other witnesses corroborated Meyer’s re-entry into the room other than at the end of the meeting to close the shop.<sup>31</sup> While normally testimony of current employees against their own pecuniary interests is considered reliable, the uncertain nature of both witness’ recollections of Meyer’s statements renders their testimony unreliable.

The Acting General Counsel also contends that Elbert and Meyer unlawfully surveilled its employees from the room adjacent to the meeting room on June 12, arguing Champeaux served as a conduit of information to and from the owners. For the reasons set forth fully above, I reject this argument. The mere presence of the owners in an adjacent room, without more, would not cause employees to reasonably assume that their activities were placed under surveillance. See *Register Guard*, 344 NLRB 1142, 1145 (2005); *LM Waste Service, Corp.*, 357 NLRB No. 194, slip op. at 10 (2011).

*c. The June 13 meeting*

The employees were neither required nor paid to attend this meeting. Both the Carpenters and Local 66 proponents voiced their opinions at this meeting. The Acting General Counsel argues that Triezenberg’s mocking of Johnston for asking a question that he would have been able to answer had he attended the June 12 meeting nullifies this balance. I disagree, as the Acting General Counsel has presented no proof that Triezenberg knew who Johnston was, much less why he was not at the June 12 meeting.

I find, however, that McBee offering his mailbox as a repository for authorization cards that he would then deliver to the Carpenters was part of a pattern of unlawful assistance, as was Champeaux’s repeat offer to collect cards. McBee’s continued efforts of walking around the shop while the employees were working and offering to collect cards after the meeting, either that afternoon or the next day, extended the unlawful assistance. (Tr. 545.) See *Stevenson Equipment Co.*, 179 NLRB 865, 866 (1969); *A.M.A. Leasing*, 283 NLRB 1017 (1987) (supervisor participation in solicitation, either implicit or explicit, is coercive and unlawful).

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<sup>31</sup> The Acting General Counsel asserts that Waxler also corroborated this. (GC Br. 38 fn. 10.) This is not the case.

There is conflicting testimony regarding what occurred just after the meeting. Kosmin testified that Champeaux said he would make him a journeyman. Champeaux said he did not think he had ever promised to “journey someone up” but if he did so, it would not have been “tongue in cheek.” Journeyman Don Compton said he did not hear anyone, including  
 5 employees or foremen, promise increased benefits for signing a Carpenters’ card. (Tr. 856–857.) McBee likewise denied hearing any such statement, though he was sitting in his truck. Kosmin’s recollection was specific and detailed. His demeanor was forthright and he appeared sincere. Moreover, as noted above, Kosmin is a current employees testifying against his own pecuniary interests, and I find this makes his testimony particularly reliable. Champeaux was  
 10 not asked specifically about what occurred after the June 13 meeting. When asked if he ever promised to make someone a foreman, his response was somewhat equivocal. Accordingly, I credit Kosmin and find Champeaux made the comment attributed to him.<sup>32</sup>

## 2. Recognition and agreement with the Carpenters

15 It is undisputed that at some point on June 14, Meyer received Local 66’s petition for representation, which the NLRB, Region 19, had faxed the prior evening. This is dealt with below.

20 Just after Northshore withdrew recognition from Local 66, Triezenberg presented Meyer with 20 authorization cards. Meyer did not count the cards or check names, but thought the stack looked well over the majority of the 34 bargaining unit employees. Elbert, who was present at the meeting when the cards were presented, did not handle the cards, nor did Northshore’s accountant, who was also present. At around 10:45 a.m., Northshore and the Carpenters signed a 9(a) agreement. This hasty recognition occurred with only a cursory  
 25 review by one of the two co-presidents in the room and “without any attempt being made to obtain verification by a neutral party of the Union’s alleged majority status.” *Vernitron*, supra at 465; see *NLRB v. Vernitron Electrical Components, Inc.*, 548 F.2d 24, 26 (1st Cir, 1977) (Employer’s “speedy recognition . . . locked in majority support which otherwise might have eroded after the employer-assisted organizing ceased.”) I find this is another factor indicative  
 30 of unlawful assistance.

## 3. Worksite conversations with employees

Johnston testified Nakapaahu called around 8 a.m. on June 14, and told him that if he signed a Carpenters’ card, Northshore would probably start paying him a journeyman’s wage.  
 35 Johnston believed Nakapaahu, opining that it “wouldn’t be a far leap” to pay him a journeyman’s wage, especially if he did them a favor. (Tr. 281.) Nakapaahu denied calling anyone to ask them to sign an authorization card and said he never promised, or heard anyone else promise, to promote an apprentice to journeyman if he signed an authorization card. I credit Johnston for a couple of reasons. First, his testimony was more open-ended and less  
 40 directed than Nakapaahu’s. Johnston’s demeanor was confident, open, and straightforward. In addition, I credit Johnston’s testimony because he has nothing to gain or lose by being forthcoming and truthful. He left Northshore voluntarily to pursue another job. Though he

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<sup>32</sup> The Carpenters attempted to impeach Kosmin’s testimony based on a prior theft conviction. Nothing in the present record, however, suggests a connection between this conviction and the veracity of Kosmin’s testimony.

clearly was not happy with Northshore’s recent actions of laying him off and pursuing a contract with the Carpenters, there is nothing to show this caused him to be untruthful.<sup>33</sup> Finally, Johnston’s version of events is consistent with the actions of other Northshore owners and agents that occurred throughout the day, as detailed in the statement of facts and the analysis below.

Northshore speculates that Johnston may be remembering an earlier conversation with Nakapaahu in March when Nakapaahu was collecting signatures for the decertification petition. Johnston recalled the conversation took place “the very next day” after the meeting. (Tr. 279.) Johnston’s specific recollection in this regard is unrefuted, and I credit it. I therefore find the conversation occurred as alleged.

Postma recalled that during a telephone conversation at around noon on June 13, Johnson told him the Company liked him and wanted to keep him as an employee, and said that when things picked up he would probably be running work as a foreman. Johnson then said Postma needed to be on board with the Carpenters, and he needed to know his decision by the end of the day. Postma called Meyer, who informed him that he did not need to sign with the Carpenters that day, but he needed to do so soon. When, after talking to Meyer and A. Bailey, Postma told Johnson he was staying with Local 66, Johnson instructed him to turn in his tools. Northshore asserts, with no citation to the record, that Postma was informed of the meaning of a union-security clause and its effect on him.<sup>34</sup> (Emp. Br. 32.) If the security clause was the issue, it is curious that this was not just explained to Postma during this attempt to keep him with the Company. Northshore and the Carpenters both point out that this conversation occurred after Northshore had signed with the Carpenters. However, as previously noted, the Board has held that “facts and circumstances occurring after the execution of the collective-bargaining agreement” may “further manifest a pattern of assistance.” *Windsor Health Care*, 310 NLRB 579, 582 (1993), enfd. in relevant part 13 F.3d 619 (2d Cir. 1994). Finally, Northshore notes that Meyer thought Postma was being coached by A. Bailey. Even if he was, this does not help Northshore. Postma turned to A. Bailey because it appeared to him, based on his conversations with Johnson and Meyer, that he may not be able to continue working with Northshore if he did not sign a Carpenters’ authorization card.

At the hearing, Elbert admitted meeting with groups of employees in Northshore’s main shop on either June 14 or 15 and informing them that they needed to sign Carpenters’ cards if they wanted to remain employed with Northshore. (Tr. 723–724, 739–740.) Regardless of Elbert’s intent, the message sent to employees was that to keep their jobs, they needed to sign a card.

Later that day, Meyer came to visit the jobsite in Pullayup where Waxler, W. Bailey, and Foreman Travis Elliott were working. According to W. Bailey, Meyer said they were good employees and if they could try to go with the Carpenters, he could possibly get W. Bailey and

<sup>33</sup> I note he openly admitted he could not recall parts of the June 13 meeting because he was angry about what was occurring.

<sup>34</sup> Northshore cites to some of Postma’s testimony to imply that he was required to sign up with the Carpenters because of the security clause. The referenced testimony does not establish this. During Meyer’s rebuttal testimony, he said he explained the meaning of a union-security clause to Waxler, W. Bailey, and Elliott, but did not reference the security clause when recounting his conversation with Postma.

Waxler back into their foremen positions. Waxler’s recollection is similar. He testified that Meyer said if they decided to go along with the Carpenters they would be running work again. Neither recounted reference to a security clause during any part of their respective testimony. Meyer testified that he informed the crew at Pullayup about the union-security clause and this  
 5 meant they would probably eventually have to join the Carpenters, but they did not have to do anything right now. (Tr. 838.) I credit the corroborative testimony of Waxler and W. Bailey. As current employees testifying against their own pecuniary interests, I find their testimony to be particularly reliable. Their version of events is also in line with what other employees reported that same day. Finally, their accounts are consistent with Triezenberg’s July 16 letter  
 10 to Meyer confirming that Northshore has never had and will never have a union-security obligation to the Pacific Northwest Regional Council of Carpenters. (Emp. Exh. 19.) Northshore asserts that the letter “informs” the Company that it will not enforce its union-security clause. The plain language of the letter, however, shows it “confirms” an understanding that Northshore never had union-security obligations and would not have them  
 15 in the future.

An employer who promises benefits to induce employees to sign a union’s authorization cards violates Section 8(a)(2), as does an employer who threatens discharge. See *Midwestern Mining & Reclamation*, 277 NLRB 221 (1985); *Dairyland*, 347 NLRB at 310–311. I find the  
 20 conversations on June 14 were further manifestations of Northshore’s pattern of unlawful assistance.

#### 4. Conduct considered as a whole

This case bears many similarities to *Midwestern Personnel Services*, 331 NLRB 348  
 25 (2000), *enfd.* 322 F.3d 969 (7th Cir. 2003). In that case, the employer contracted to do a job that required union labor. The employer held an after-hours meeting at a restaurant near the workplace, where a high-level manager took attendance and introduced representatives from the union it favored. The manager stayed for the first part of the meeting and then left the room. At the meeting, the manager informed the employees they had to be union to work the  
 30 job in question, and said that if they signed a union card, they would have a job, but if they did not, they would not have a job. While attendance was not taken at the June 12 meeting in the instant case, the Northshore employees were still on the clock as part of their regular workday. All work had been shut down in the field and the shop, and the foremen were in the meeting. As such, employees could not attend to their regular work. The Carpenters assert that the  
 35 meeting was voluntary, but this ignores the fact that the employees were told to attend it, and the only other option would be to clock out short of a day’s work. This is at least as effective as taking attendance. Moreover, the owners’ actions of shutting down all work would convey to a reasonable employee that the Employer placed great value on Triezenberg’s appearance at Northshore and his message to employees. Finally, an employee who decided to leave the  
 40 meeting would be confronted by the presence of four Northshore owners waiting outside the meeting room. In one regard, *Midwest Personnel*, *supra*, is somewhat less compelling than the instant case, in that no manager exerted direct pressure on employees to sign a card during the meeting under threat of losing work. That pressure was asserted during the days that followed, however. Moreover, the record is clear that employees felt pressured after Triezenberg’s  
 45 admonition to sign cards quickly. In another respect, the instant case points more toward unlawful assistance because in *Midwest Personnel* there was no other union vying to represent the employees. In any event, the Board affirmed the judge’s finding that even in the absence of

threats, the actions of the company in arranging and attending the union meeting as well as taking roll there constituted unlawful assistance to the union.

5 The presence of Northshore’s owners at the June 5 and 12 meetings, including its founder, D. Meyer, and longtime business partner/Co-Owner Millikan, both of whom are rarely seen at the facility, is telling. It sent a strong message that management, from its highest levels, wanted its employees to sign Carpenters’ cards. A reasonable employee would believe that the owners encouraged Triezenberg’s solicitation efforts.

10 Northshore points to *Longchamps, Inc.*, 205 NLRB 1025 (1973), for support, arguing that the instant case presents similar facts. While employees in both this case and *Longchamps* were paid to attend a meeting where union representatives touted the benefits of membership and distributed cards, there are significant differences. Most notably, there was no other union seeking to represent the workers in *Longchamps*. In addition, the employer did not recognize the union as the collective-bargaining representative until its majority status was verified by an outside governmental authority. Finally, the employer made no threat of reprisal or promise of benefits (implicitly or explicitly) to the employees based on whether they decided to join the union. Likewise, in *Tecumseh Corrugated Box Co.*, 333 NLRB 1 (2001), on which Northshore also relies, the Board adopted the administrative law judge’s findings that the evidence failed to show the company’s unit employees knew about a rival union prior to signing authorization cards for another union. The judge also found that the union approached the company to organize the unit, not vice-versa. Moreover, there was a 2-1/2-week hiatus between the date the authorizations were solicited and the date recognition was granted.

25 The Carpenters cite *NLRB v. Brown Co.*, 160 F.2d 449 (1st Cir. 1947), arguing that permitting one union to recruit members on its plant on company time was not an unfair labor practice in the absence of evidence that the rival union requested and was denied similar privileges. In *Brown Co.*, a union that represented some of the company’s workers sought to organize the office workers. In response, a couple of employees started an association and began soliciting on behalf of the association and against the union. Both the Board and the First Circuit found that the union had been granted similar privileges in the past, and therefore the association was not receiving preferential treatment. In the instant case, there is no evidence that management extended an invitation to Local 66 to hold a mandatory all-employee meeting. It is the employees who went and got Local 66 representatives after Triezenberg’s presentation and expressions of concern among some of the employees about the pressure they were feeling to quickly sign a Carpenters’ authorization card during the June 12 meeting. Management had nothing to do with the decision to have Local 66 present. In fact, Elbert said he did not realize Local 66 was at the meeting until he went back into the meeting room at 5 p.m. to close down the shop. (Tr. 714.) Importantly, the association’s solicitation efforts were employee-driven. Here, the June 12 meeting for which employees were paid to listen to Triezenberg, who management introduced, was management-driven. Moreover, in *Brown Co.*, supra, the company did not recognize the rival association, and there was no evidence of hostility toward the union.

45 The Carpenters also rely on *Alley Construction Co.*, 210 NLRB 999 (1974), where the Board held the employer’s statements supporting one union over its rival did not violate the Act. They assert the testimony shows that at the June 5, 2012 meeting, Northshore’s management merely pointed out its objective assessment that the Company was losing business

to other Carpenters Union’s signatory companies. (Carp. Br. 28.) The vice president and general manager in *Alley*, however, made repeated assurances that it would negotiate in good faith with whichever union the employees chose. He also pointed out specific contractual differences between the rival unions and made objective statements about how these would impact the employees. Finally, he indicated that he would try to negotiate to change some of the less favorable terms of the contract with the union he disfavored, and offered to show the employees the competing contracts. These differences, along with the other conduct, distinguish *Alley Construction Co.* from the instant case.

Based on the foregoing, I find that Northshore engaged in a pattern of unlawful assistance to the Carpenters in violation of Section 8(a)(1) and (2).

#### D. UNLAWFUL RECOGNITION

An employer violates Section 8(a)(2) when it extends recognition to a union that does not represent an uncoerced majority of employees. *Ladies Garment Workers v. NLRB (Bernhard-Altman)*, 366 U.S. 731 (1961). In a rival union situation, where no petition has been filed, “an employer will be free to grant recognition to a labor organization with an uncoerced majority, so long as it does not render assistance of the type which would otherwise violate Section 8(a)(2) of the Act.” *Bruckner Nursing Home*, 262 NLRB 955, 958 (1982).

In the instant case, I have found that Northshore engaged in unlawful assistance by virtue of a variety of its actions. The Board has held that a “pattern of assistance can be sufficient to invalidate all cards.” *Famous Castings Corp.*, 301 NLRB 404, 408 (1991); see also *Dairyland USA Corp.*, 347 NLRB 310, 312 (2006). I find, based on the totality of the circumstances, that Northshore’s conduct tainted the Carpenters’ majority status. See *Clock Electric, Inc.*, 338 NLRB 806, 827 (2003); *Garner/Morrison*, supra. Accordingly, I find Northshore’s actions in assisting the Carpenters in negotiating with and recognizing it in the absence of an uncoerced majority, and in entering into a collective-bargaining agreement with it, violate Section 8(a)(2) of Act.

The Acting General Counsel also argues that Northshore was on notice of Local 66’s petition when it signed with the Carpenters. Once an employer is on notice that a union has filed a valid election petition, it may not grant recognition to a rival union. *Bruckner*, supra; See also *Incisa, U.S.A., Inc.*, 327 NLRB 563 (1999). Resolution of this issue turns on whether, when it entered into the 9(a) agreement with the Carpenters on June 14, Northshore was on notice of Local 66’s petition by virtue of the facsimile Region 19 sent to it at 6:19 p.m. on June 13. To support its position, the Acting General Counsel cites to *Clow Water Systems Co.*, 317 NLRB 126 (1995), enf. denied 92 F.3d 441 (6th Cir. 1996), for the proposition that a fax communication during regular business hours is sufficient to place an employer on notice of petition. The Board held, however, in *In Re: B & C Contracting Co.*, 334 NLRB 218, 219 (2001), and *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001), enf. sub nom. *NLRB v. Hardesty Co.*, 308 F.3d 859 (8th Cir. 2002), that an employer’s demonstrated receipt of a fax creates a presumption of notification which can be rebutted.

In the instant case, Meyer testified he did not see the fax until he checked his inbox after lunch on June 14. He stated that per regular office procedures, the receptionist places faxes in their recipients’ respective mailbox. Though the petition was addressed to Elbert, Meyer said

he had notified the office staff that any correspondence from the NLRB, their attorney, or Local 66 should be given to him. The Acting General Counsel has not come forward with evidence to refute Meyer’s testimony. Though I view Meyer’s testimony with some skepticism, particularly considering all that was going on at the time, I find the Acting General Counsel has failed to meet its burden to prove Northshore had knowledge of Local 66’s petition when it signed with the Carpenters. Because of my conclusion that Northshore’s unlawful assistance tainted the entire process, however, I find the Acting General Counsel has met its burden to prove that Northshore’s recognition of the Carpenters was unlawful.

#### E. ACCEPTANCE OF UNLAWFUL ASSISTANCE AND RECOGNITION

A union that accepts unlawful assistance or unlawful recognition from an employer violates Section 8(b)(1)(A) of the Act. *In Re Duane Reade, Inc.* 338 NLRB 943 (2003); *Sweater Bee by Banff, Ltd.*, 197 NLRB 805 (1972); *Garner/Morrison*, supra. In addition, a union violates Section 8(b)(2) when it enters into, maintains, and enforces a collective-bargaining agreement with a union-security clause at a time when it does not represent an uncoerced majority of employees. See *Sav-On Drugs, Inc.*, 267 NLRB 639 (1983).

It is clear that the Carpenters accepted unlawful assistance from Northshore. In addition to what has already been discussed above, the Acting General Counsel points out that before the intervention of Northshore managers, no unit member sought the Carpenters’ representation. Triezenberg took advantage of the June 12 meeting to solicit Northshore’s employees and rush them into making a representation. In addition, Northshore and the Carpenters entered into a collective-bargaining agreement with a union-security clause. Northshore and the Carpenters agreed not to enforce the security clause, as stated in the July 16 letter from Triezenberg to Meyer. It is not clear when this agreement was reached, other than it was obviously on or before July 16. As of the date the agreement was signed, however, the parties were enforcing a collective-bargaining agreement with a union-security clause. Accordingly, I find the Carpenters violated the Act as alleged in the complaint.

#### F. JOHNSTON’S LAYOFF

Paragraph 10(a) of the complaint alleges that Johnson discharged Johnston on June 22 in violation of Section 8(a)(1) and (3).

The *Wright Line* analysis, set forth above, applies to Johnston’s layoff. I incorporate my findings as to Johnston’s protected conduct, Northshore’s knowledge of it, and animus. In addition to the afore-referenced protected conduct, on June 18 Johnston also told Johnson that he would never sign a Carpenters’ card, as detailed above.

The Board will infer an unlawful motive or animus where the employer’s action is “baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive.” *J. S. Troup Electric*, 344 NLRB 1009 (2005) (quoting *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995)). It is difficult to conceive of an action more unreasonable than laying off an employee simply because he expresses a desire to do different work in the future. Johnson, on cross-examination, admitted that Johnston never asked to be laid off, even though he had also testified, “Jason laid Jason off.” The lack of any meaningful rationale, coupled with the fact that no other employees were laid off, and employees worked overtime during the time

Johnston was laid off, are strong evidence of pretext.<sup>35</sup> I find, therefore, that Northshore violated Act as alleged when it laid off Johnston.

G. DENIAL OF LIGHT-DUTY WORK FOR KOSMIN

5 Paragraph 10(b) of the complaint alleges that on June 25, Meyer denied Kosmin a light-duty assignment in violation of Section 8(a)(1) and (3).

10 Applying the *Wright Line* analysis, I find the Acting General Counsel has failed to establish that Kosmin was denied light-duty work based on his support for Local 66. My findings regarding Kosmin’s protected activity, Northshore’s knowledge of it, and animus with regard to being sent home on June 12 are hereby incorporated.

15 Meyer and Elbert testified that Northshore does not provide light-duty work for employees whose injuries were sustained off the job. Another employee, Don Compton, was injured playing soccer and was not given light-duty work. Once Kosmin brought in a letter from his doctor clearing him for work, he was promptly returned to work. When he sustained a work-related injury shortly thereafter, he was provided with light-duty work. Under these circumstances, I find Northshore would have taken the same action even in the absence of Kosmin’s protected conduct.

20 H. DISPATCHING WORKERS THROUGH THE CARPENTERS’ HIRING HALL

25 Paragraphs 11 and 12 of the complaint allege that the Carpenters and Northshore have violated the Act, respectively, by the Carpenters’ dispatching members through its hiring hall to work for Northshore and Northshore’s use of the Carpenters’ hiring hall to hire employees. The Acting General Counsel failed to present evidence that the Carpenters dispatched any workers to Northshore through its hiring hall. Meyer’s testimony that Northshore has not used the Carpenters’ hiring hall and Johnson’s testimony that he calls Torkelson to get labor, is unrefuted. Accordingly, I recommend dismissal of these complaint allegations.

30 CONCLUSIONS OF LAW

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

35 2. Respondent Carpenters is a labor organization within the meaning of Section 2(5) of the Act.

40 3. By sending Yuriy Kosmin and Jason Johnston home early on June 12 because of their membership in or activities on behalf of the Sheet Metal Workers International Association, Local 66, Respondent Northshore violated Section 8(a)(1) and (3) of the Act.

4. By its owners’ actions of requiring and paying its employees to attend meetings at its facility where agents from the Carpenters solicited membership, its supervisors and agents’

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<sup>35</sup> During the hearing, Northshore was directed to provide information concerning layoffs, and the record remained open to receive it. No evidence of layoffs for June or July was provided.

actions of offering to collect and collecting employees' signed Carpenters' authorization cards, its owners, supervisors, and agents' actions of promising increased wages in exchange for signing a Carpenters' authorization card, and its supervisors' actions of threatening employees with discharge if they did not sign a Carpenters' authorization card, Respondent Northshore provided unlawful assistance and support to Respondent Carpenters, in violation of Section 8(a)(1) and (2) of the Act.

5. By recognizing and entering into a collective-bargaining agreement containing a union-security clause with Pacific Northwest Regional Counsel of Carpenters at a time when that labor organization did not represent an uncoerced majority of the employees in the recognized unit, Respondent Northshore violated Section 8(a)(1) and (3) of the Act.

6. By accepting unlawful assistance and recognition from, and entering into a collective-bargaining agreement containing a union-security clause with Northshore, the Carpenters violated Section 8(b)(1)(A) and (2) of the Act.

7. By laying off employee Jason Johnston on June 22, 2012, based on his membership in or activities on behalf of the Sheet Metal Workers International Association, Local 66, Respondent Northshore violated Section 8(a)(1) and (3) of the Act.

8. Except as found herein, the Respondents have not violated the Act in any other manner alleged in the complaint.

9. The violations found to have been committed in this case, affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

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

Having concluded that Northshore is responsible for unlawfully sending home Jason Johnston and Yuriy Kosmin before the end of the workday on June 12, and having concluded that Northshore is responsible for unlawfully laying off Jason Johnston from June 22 to August 3, Northshore shall make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F. 3d 1137 (D.C. Cir. 2011).<sup>36</sup> Respondents shall also be required to remove from their respective files any and all references to these unlawful actions and to notify the employees in writing that this has been done and that the unlawful actions will not be used against them in any way.

<sup>36</sup> As there is no potential for a backpay period to exceed 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012), is not implicated.

It is recommended that Northshore be ordered to withdraw and withhold recognition from the Carpenters and to cease and desist from giving force or effect to any collective-bargaining agreement covering those employees, unless and until the Carpenters are certified by the Board as the collective-bargaining representative of the employees. However, nothing herein shall be construed to require the Employers to vary any wage or other substantive terms or condition of employment that has been established in the performance of the contract.

It is further recommended that the Carpenters be ordered to cease and desist from acting as the bargaining representative of the aforesaid employees or giving effect to its contract with Northshore unless and until it is certified by the Board as the collective-bargaining representative of the employees.

It is finally recommended that Northshore be ordered to reimburse all present and former employees who joined the Carpenters for all initiation fees, dues, and other moneys which may have been exacted from them together with interest thereon as set forth in *Florida Steel Corp.*, 231 NLRB 651 (1977).<sup>37</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>38</sup>

#### ORDER

A. The Respondent, Northshore Sheet Metal, Inc., Everett, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Sending employees home from work early because of their membership in or activities on behalf the Sheet Metal Workers International Association. Local 66, or any other labor organization.

(b) Laying off employees because of their membership in or activities on behalf the Sheet Metal Workers International Association, Local 66, or any other labor organization.

(c) Requiring and paying employees to attend meetings in order to get support for the Carpenters or any other union.

(d) Offering to collect and collecting Carpenters' authorization cards.

(e) Promising increased wages in exchange for signing a Carpenters' authorization card.

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<sup>37</sup> I note Northshore contends the Acting General Counsel alleged Northshore withheld dues and initiation fees, there is no such allegation in the complaint or elsewhere. Though Meyer provided some testimony on the topic, it is properly addressed as a compliance matter at the compliance stage.

<sup>38</sup> 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.

(f) Threatening employees with discharge if they do not sign a Carpenters’ authorization card.

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

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

10 (a) Within 14 days from the date of this Order, make Jason Johnston and Yuriy Kosmin whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

15 (b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful actions against these employees and within 3 days thereafter, notify them in writing, that this has been done and that these actions will not be used against them in any way.

20 (c) 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 back pay due under the terms of this Order.

25 (d) Within 14 days after service by the Region, post at its facilities in Everett, Washington, copies of the attached notices marked “Appendix A.”<sup>39</sup> Copies of the notices, on forms provided by the Regional Director for Region 19, 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. In addition to physical posting of paper notices, notices shall be distributed  
30 electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in  
35 these proceedings, the Respondent shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 12, 2012.

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

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<sup>39</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

B. The Respondent, Pacific Northwest Regional Council of Carpenters, its officers, agents, and representatives, shall

1. Cease and desist from

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(a) Acting as the collective-bargaining representative of the employees of Northshore Sheet Metal, Inc., unless and until it is certified by the Board as the collective-bargaining representative of such employees.

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(b) Maintaining or giving any force or effect to any collective-bargaining agreement between it and Northshore Sheet Metal, Inc., until it is certified by the Board as the collective-bargaining representative of such employees.

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

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

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(a) Jointly and severally with Northshore Sheet Metal, Inc., reimburse all former and present employees for all initiation fees, dues, and other moneys which may have been exacted from them with interest thereon in the manner provided in the remedy section of this decision.

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(b) Within 14 days after service by the Region 19, post at its offices and meeting halls, copies of the attached notice marked “Appendix B.”<sup>40</sup> Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent Carpenters’ authorized representative, shall be posted by it immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent Carpenters to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent Northshore Sheet Metal, Inc. has gone out of business or closed the facility involved in these proceedings, or sold the business or the facilities involved herein, the Carpenters shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Northshore Sheet Metal at any time since June 12, 2012.

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(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Northshore Sheet Metal, Inc. at all places where notices to employees are customarily posted.

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<sup>40</sup> See fn. 39, supra.

(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 has taken to comply.

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

10 Dated, Washington, D.C. July 25, 2013



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Eleanor Laws  
Administrative Law Judge

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## APPENDIX A

### NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

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

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

**WE WILL NOT** do anything to prevent you from exercising the above rights.

**WE WILL NOT** assist Pacific Northwest Regional Council of Carpenters (the Carpenters), or any other union, in obtaining union authorization cards from you.

**WE WILL NOT** hold meetings in order to get you to support the Carpenters or any other union.

**WE WILL NOT** recognize the Carpenters, or any other union, as your collective bargaining representative at a time when they do not represent an uncoerced majority of you.

**WE WILL NOT** maintain, enforce or give effect to our 2012–2013 collective-bargaining agreement with the Carpenters covering you unless and until we have been certified by the Board as your collective-bargaining representative, although we will not diminish any wages or benefits that you are receiving under that agreement.

**WE WILL NOT** enter into or give effect to a collective-bargaining agreement with the Carpenters, at a time when the Carpenters does not represent an uncoerced majority of you.

**WE WILL NOT** threaten you with discharge or loss of benefits based on your union activity or affiliation.

**WE WILL NOT** ask you to sign an authorization card for the Carpenters or any other union.

**WE WILL NOT** inform you that you may turn in signed authorization cards for the Carpenters, or any other union, to our shop foreman.

**WE WILL NOT** attempt to enforce any unlawful union-security clause against you by telling you that you have to sign a Carpenters' authorization card or, be fired.

**WE WILL NOT** promise you increased benefits and/or promotions to journeyman or foreman positions in exchange for signing a Carpenters' authorization card, or to discourage you from supporting Local 66.

**WE WILL NOT** temporarily lay you off or reduce your hours because you are a member of, or support, Local 66.

**WE WILL NOT** in any like or related manner interfere with your rights under Section 7 of the Act.

**WE WILL** pay Jason Johnston and Yuriy Kosmin wages and other benefits lost because we sent them home early on June 12.

**WE WILL** pay Jason Johnston for the wages and other benefits he lost because we laid him off.

**WE WILL** remove from our files all references to sending Jason Johnston and Yuriy Kosmin home early on June 12 and the lay-offs of Jason Johnston, and **WE WILL**, notify them in writing, within 14 days that this has been done and that these actions will not be used against them in any way.

**WE WILL**, jointly and severally with the Carpenters, reimburse all of you who joined the Carpenters on or after June 14, 2012, for initiation fees, periodic dues, assessments, or any other moneys, which may have been paid or which may have been withheld from your pay pursuant to our 2012–2013 agreement, with interest. However, reimbursement does not extend to those employees who voluntarily joined and became members of the Carpenters prior to June 14, 2012.

**WE WILL** withdraw and withhold all recognition from the Carpenters as your exclusive collective-bargaining representative unless and until they have been duly certified by the Board as your collective-bargaining representative.

NORTHSHORE SHEET METAL, INC.

\_\_\_\_\_  
(Employer)

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](http://www.nlr.gov).

915 2nd Avenue, Room 2948, Seattle, WA 98174-1078  
(206) 220-6300, Hours: 8:15 a.m. to 4:45 p.m.

**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, (206) 220-6284.

**APPENDIX B**

**NOTICE TO EMPLOYEES AND MEMBERS**

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

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

**FEDERAL LAW GIVES YOU THE RIGHT TO**

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

**WE WILL NOT** do anything to prevent you from exercising the above rights.

**WE WILL NOT** accept unlawful assistance from Northshore Sheet Metal, Inc. (Northshore) in obtaining union authorization cards from you.

**WE WILL NOT** accept recognition from Northshore, as your 9(a) exclusive collective-bargaining representative at a time at a time when we do not represent an uncoerced majority of you.

**WE WILL NOT** enter into or give effect to a collective-bargaining agreement with Northshore, at a time when we do not represent an uncoerced majority of you.

**WE WILL NOT** maintain, enforce or give effect to our 2012–2013 collective-bargaining agreement with Northshore covering you unless and until we have been certified by the Board as your collective-bargaining representative.

**WE WILL NOT** in any like or related manner restrain or coerce you in the exercise of your rights under Section 7 of the Act.

**WE WILL** immediately cease referring our members to work for Northshore unless and until we have been certified by the Board as your collective-bargaining representative.

**WE WILL**, jointly and severally with Northshore, reimburse all of you who joined our labor organization on or after June 14, 2012, for initiation fees, periodic dues, assessments, or any other moneys, which may have been paid or which may have been withheld from your pay pursuant to our 2012–2013 agreement, with interest. However, reimbursement does not extend to those employees who voluntarily joined and became members of our labor organization prior to June 14, 2012.

**PACIFIC NORTHWEST REGIONAL COUNCIL OF  
CARPENTERS**

\_\_\_\_\_  
(Labor Organization)

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](http://www.nlr.gov).

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