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

RHEEM MANUFACTURING COMPANY

and **CASE 26-CA-088870**

ELIZABETH FERRELL, an Individual

William Hearne, Esq.,
for the Acting General Counsel.
Michael R. Jones, Esq. *and* ***Chris Woomer, Esq.,***
of Mountainberg, Arkansas, for the
Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Fort Smith, Arkansas, on June 17, 18, and 19, 2013. Elizabeth Ferrell, an individual, filed the charge in 26-CA-088870 on September 10, 2012,[1] and the Acting General Counsel[2] issued the complaint on March 29, 2013.

The complaint alleges that Rheem Manufacturing (Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by suspending Elizabeth Ferrell (Ferrell) on September 4 and terminating Ferrell on September 7, 2012, because she assisted the United Steelworkers, Local 7893 and engaged in concerted activities. Respondent filed an answer on April 11, and an amended answer on May 13, 2013.

On the entire record, including my observations of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and Respondent, I make the following

---

1 All dates are in 2012 unless otherwise indicated.
2 The Acting General Counsel is referenced as the General Counsel.

FINDINGS OF FACT

I. JURISDICTION

Annually, Respondent sells and ships from its Fort Smith, Arkansas facility goods that are valued in excess of $50, 000 directly to points outside the State of Arkansas. Annually, Respondent also purchases and receives good valued in excess of $50,000 at its Fort Smith, Arkansas facility directly from points outside the State of Arkansas. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3] Based on the record evidence and the parties' stipulation, I find that the United Steelworkers, Local 7893 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Respondent's operation

Respondent operates a manufacturing facility in Fort Smith, Arkansas, where it manufactures air-conditioning units, heating units, and gas furnaces for residential and commercial markets. In August 2012, Respondent employed approximately 825 bargaining unit employees who were represented by Local 7893 of the United Steelworkers. While Respondent operates three shifts, the majority of its employees work on first shift; a shift operating from 6 a.m. to 2:30 p.m. The employees working on first shift manufacture both the primary heating and air-conditioning units, as well as the parts used in the manufacturing process. Respondent's second shift primarily operates the press department and shear department and manufactures the component parts that are used for the manufacturing process at the Fort Smith facility and for Respondent's two other manufacturing facilities located in Nuevo Laredo, Mexico. Operating from 10 p.m. to approximately 6 a.m., the third shift performs primarily maintenance work. At the time of her discharge, Elizabeth Ferrell worked on the first shift and the events significant to this case occurred on Respondent's first shift.

[3] In its posthearing brief, Respondent challenges the jurisdiction of the Board and its power to act in this matter and asserts that the Board lacks a validly constituted quorum to act under the authority of the National Labor Relations Act. Respondent contends that three of the current five members of the Board were not validly appointed under the Recess Appointments Clause, as held by the U.S. Circuit Court of Appeals for the D.C. Circuit and cites *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), in support of its argument. Respondent acknowledges, however, that the Board has already rejected the holding in *Canning* and Respondent submits that its jurisdictional challenge is urged for the purpose of preserving the issue in the event of judicial review. Respondent's jurisdictional challenge is noted and rejected. As the Board has recognized, the authority of the General Counsel to investigate unfair labor practices and prosecute complaints derives not from any "power delegated" by the Board, but rather directly from the language of the National Labor Relations Act. *Bloomingdale's, Inc*., 359 NLRB No. 113 (2013).

2. The Union presence at Respondent's facility

The Union has represented the employees at the Fort Smith facility since 1971. Labor Relations Manager Donald Raines testified that Respondent and the Union have an amicable relationship. Since at least since 2004 and during the time that Raines has been involved in negotiating collective-bargaining agreements with the Union, there have been no strikes or work stoppages. The two union representatives who played a role in the events involved in this case are Kenneth Donelson and Starr Graham. In August 2012, Starr Graham served as the Union's grievance committee chairman. Kenneth Donelson served as the Area 3 Grievance Committeeman for the Union, as well as a steward for the Civil Rights Committee and the Union's financial secretary. Area 3 contains approximately 210 employees and it includes department 782; the department in which Ferrell worked prior to her termination.

The Union and the Respondent have a collective bargaining agreement that was ratified on September 30, 2010, and it expires on September 30, 2013. The agreement provides for a grievance procedure with binding arbitration. As the labor relations manager, Raines hears grievances at the second step and he attends the third step meetings. Prior to about March 2012, the plant manager was the responsible official for Respondent who had the authority to resolve grievances at the third step of the grievance procedure. Since about March 2012, Human Resources Director Sharon Reeder has had the authority as decisionmaker for step 3 grievances. Reeder is also the management official who authorized the termination of Elizabeth Ferrell. The collective-bargaining agreement provides that the Union may appeal a grievance to binding arbitration if the grievance issue is not resolved at the third step of the grievance procedure. Although the Respondent's plant rules are not included as a part of the collective-bargaining agreement, the enforcement of the rules is subject to the Respondent's progressive discipline policy and the grievance procedure. The grievance that was filed on behalf of Ferrell concerning her discharge was not resolved at the third step and it is scheduled for arbitration.

3. Respondent's management representatives

In 2012, Respondent's manufacturing operations were overseen by Plant Manager Randy Layne. Jim Fesperman, who served as the employee relations manager, has had an expansive career at Respondent's Fort Smith facility. He has been the employee relations manager for 12 years and has been employed with Respondent for over 37 years. He began his work with Respondent as a production employee and progressed as a press operator and group coordinator. He worked for 14 years in the bargaining unit and also served as a shop steward for the Union. As employee relations manager, Fesperman informed Elizabeth Ferrell of Respondent's decision to terminate her employment.

At the time of Elizabeth Ferrell's discharge, Stephen Lee was the superintendant over department 782, as well as over the portion of the facility that builds furnaces and all the corresponding departments that support the furnace manufacturing. Department 782 produces metal housings that are referred to as "jackets" for the heating units or furnaces that are manufactured by Respondent at the Fort Smith facility. The assembly process in this area is

also referred to as the "jacket line." During the early part of 2012, Warren Porter directly supervised the employees working in department 782. When Porter left Respondent's employment in May 2012, the employees reported directly to Lee. In August 2012, Bryan Moore was a production foreman for department 782 and a member of the safety committee.

Garry Wayne Archer (Archer) has worked for Respondent for 38 years. For more than 30 years, Archer has been the group coordinator in department 782 working with the jacket line. As group coordinator, Archer controls the flow of production, trains employees, and assigns employees to jobs in the department. Archer is not a supervisor and he is represented by the Union.

B. The Work Performed on the Jacket Line

The jacket line is the first stage of the assembly process for the manufactured furnace units. The line is approximately 125 feet long and it produces a part every 22 seconds. Archer estimated that if there is an interruption in the jacket line for as long as 15 to 20 minutes the entire production of the furnace unit can potentially be stopped. In August 2012, the first shift hourly employees in department 782 consisted of group coordinator Archer, four setup operator A's, two setup operator C's, and one production worker. Elizabeth Ferrell was the only production employee.

C. Elizabeth Ferrell's Work History

Elizabeth Ferrell worked for Respondent for 12 years before her discharge on September 7, 2012. During an unspecified period of time prior to 2004, Ferrell served as a union steward and she was also a member of the Union's bargaining committee. She never ran for union office. In 2004, Ferrell resigned her membership in the Union.

Ferrell worked in department 782 from 2010 until the time of her discharge in September 2012. Ferrell had two primary workstations in department 782. One of her jobs involved working on a freestanding press machine that is known as the Toggle Loc or base pan machine. Ferrell had worked on the base pan machine since 2010. The machine is a mechanical press that, when cycled by the operator, attaches two metal parts to make a combined, finished part for use in the furnace jackets. The finished part is created by affixing a small metal filter clip to a long, rectangular metal base pan and the finished part is known as a "base angle" part. In performing the job, Ferrell stood or sat at the machine. The unfinished parts were contained in a large wire basket to her right and the finished parts were placed in a similarly-sized wire basket on her left. An operator on this machine was required to put the unfinished products into the press of the machine and then remove the finished parts and place them in the finished parts basket to the left of the machine. A manual counter that is bolted to the left side of the base pan machine records the number of finished parts or base angles that are processed. The number of parts are recorded when the mechanical arms and springs move with the press cycle. The counter can also be moved forward by manually pulling a lever even when the machine is not in operation. The counter contains a dial that allows the machine to be manually reset and the counter to be cleared.

Group coordinator Archer is the employee who is ultimately responsible for moving baskets of component and finished parts to and from the base pan machine. Archer testified that he controls the scheduling of the parts for the base pan machine. He not only sets the machine for the specific part to be produced, but he is also responsible for bringing in the new component parts to be used and he arranges for the finished parts to be taken away from the machine.

In addition to working on the base pan machine, Ferrell also occasionally worked in an area of the department referred to as the "platform" where she performed a process in conjunction with another employee. The machine on which she worked was identified as the "90-plus" machine. She moved to the platform from the base pan machine when the department 782 production line switched to making jackets for "90+" efficiency furnaces. The process involved inserting side angles or pieces of sheet metal that were 13 inches by an inch and a half into a machine.

At the time of her termination, her supervisors in department 782 were Stephen Lee and Bryan Moore. Gary Archer held the position of group coordinator. As the group coordinator, Archer is responsible for making sure that the parts on the base pan machine have appropriate components; both base pans and filters. Archer is also responsible for planning the production of the completed base pans with the filter clip on a daily basis for his department 782. The raw parts are placed at the base pan machine by either Archer or the setup operator responsible for running the floor on that side of the department. In a daily "jacket" schedule, Archer notifies the operators as to what raw parts he wants delivered to the base pan machine for processing. Archer performs all of these functions as a member of the bargaining unit.

D. *Ferrell's Complaints to the Union and Management*

1. December 2011 and January 2012

In December 2011, Ferrell complained to Union Steward Kenny Donelson that she was being harassed by group coordinator Archer. Ferrell complained that she was behind in production because she was not getting parts in a timely manner. In response to her complaints, Donelson arranged for her to meet with Department Superintendant Kelly Blake and then to later to meet with Labor Relations Manager Raines to discuss her concerns.

When she met with Blake, Ferrell told him that she was behind in production on the base pan job and she felt that she was being sabotaged. Blake told her that the situation about which she complained was plantwide because Respondent did not want to run more parts than was needed. Donelson testified that during this same period of time the Company was experiencing changes in inventory and operation and that there was a disruption throughout the plant because of the changes. Donelson testified that the disruption was plantwide and was not unique to Ferrell's situation in her department. Donelson recalled that during the meeting Blake explained to her that the Company was making an effort to reduce inventory

and that parts were only being built as they were needed. Blake explained to Ferrell that everyone in the plant was experiencing these same kinds of delays because of the reduced inventory.

Following Ferrell's meeting with Blake, Donelson also conducted his own investigation to determine if there was any attempt to sabotage Ferrell personally. This investigation was based on Ferrell's complaint to Donelson that she was not receiving the parts she needed because of racial discrimination. Although Ferrell had not given Donelson any specific information that led him to believe that any individuals harbored any racial animus toward her, he spoke with the operators and the group coordinator who worked in department 783; the department that made the raw base pan parts that Ferrell used at her machine. Donelson discovered no evidence of racial animus. He learned that the elimination of overtime in the department making the raw base pan parts had affected the number of parts produced in that department. Donelson testified that management later authorized overtime work in department 783 to alleviate the shortages.

Ferrell recalled that when she spoke with Raines, she told him that she had safety concerns in addition to telling him about the insufficient number of parts that she was receiving. Raines recalled that Ferrell told him that she felt that she was being harassed and sabotaged by her group coordinator. He recalled that Ferrell told him that Archer was keeping her behind in parts to make her look bad and that he had asked her to speed up her work. Raines testified that he had asked Ferrell what she wanted him to do and she told him that she just wanted peace.

Following his meeting with Ferrell, Raines spoke with Warren Porter, who was Ferrell's supervisor at that time. Raines asked Porter to look into Ferrell's complaints. When Porter reported back to Raines, he confirmed that Archer had said something to Ferrell about the need to stay busy. Porter had also reported to Raines that he personally had no problems with Ferrell's work and that she was producing the requisite number of parts. When Raines later met with Ferrell, he told her that he had not found anything to substantiate that she was being harassed or sabotaged. He told her that her supervisor thought highly of her and had no issues with her work. Raines testified that he told Ferrell that if she felt that he had not given her the resolution that she needed she could talk with the Civil Rights Committee at the facility; a group that is composed of representatives from both union and company representatives. Raines also testified that he had reminded Ferrell that even if Archer had asked her to work faster she had not received any formal discipline from the Company.

In his testimony, Donelson initially recalled only that Ferrell complained to him in 2011 about not getting sufficient parts in a timely manner. He could not recall the dates or specific content of their discussions. Donelson's memory was refreshed with his notes from a December 1, 2011 meeting with Ferrell in Raines' office. Donelson's notes reflect that during the meeting Ferrell complained that Archer was harassing her and pressuring her to hurry. She complained that someone was "keeping her behind on purpose." She complained that while she felt that Archer was responsible she also felt that "everyone" was responsible.

Donelson documented that when Raines asked Ferrell what she wanted him to do to fix the problem she replied that she didn't know how or what could be done; but she wanted peace.

Superintendant Lee also recalled that in early 2012 Ferrell had spoken with him about her feelings that she was being harassed. She told Lee that Archer had told her that she had to speed up her work and she felt that he was harassing her. Archer acknowledged to Lee that he had told Ferrell to speed up. Archer had explained that there had been problems getting the necessary raw parts for the production process on which Ferrell was working. Lee learned that Archer had told Ferrell that once she had the parts that had been slow in getting to her, she needed to speed up, and "knock them out." Lee testified that because he had not found any indication of harassment he had not spoken further with Ferrell about Archer.

Archer recalled that not long after Ferrell began working in the department he noticed a problem with her work pace. When he asked her if she felt that she was producing the requisite number of parts, she told him that she thought that he was picking on her. He testified that he had asked her this question because the jacket line was "starving' for the parts that Ferrell was making and he had been forced to hand carry the parts to get them to where they were needed on the line. Archer testified that he had not wanted to get into an argument with Ferrell. He told her that if she thought that he was picking on her, she should go to supervision and they could direct him as to what he needed to do.

Ferrell testified that at some point after her earlier conversation with Blake, she noticed that she was not only getting her parts on time, but she was getting even more than she needed.

2. Ferrell's June 2012 complaints

In June 2012, Ferrell met with Donelson and discussed some concerns about her work on the platform on the jacket line. She told Donelson that she was having shoulder problems because of the work and she told him that she felt that she was being harassed and sabotaged. She reported that she felt that Lee was "bird-dogging" her, or standing immediately behind her as she worked. During this time, she also complained to Lee that she was having difficulty performing the work on the platform because of shoulder pain resulting from a previous on-the-job injury.

During June 2012, Ferrell had also planned to use some of her vacation time to visit her brother in Texas. Ferrell testified that it was her intention to work for one of her vacation weeks in order to have the funds to make the trip to Texas. When Ferrell completed her vacation form, she completed it in such a way that there was confusion as to whether she intended to take her vacation for that week or to work through her vacation for the additional pay. After giving the form to Lee, she learned from another employee that she had incorrectly completed the form. When Ferrell went back to Lee to ask him to complete another form for her, there was still confusion about what she was requesting. When she told Lee that she wanted him to complete the form correctly, he became annoyed with her and she requested to see her union representative.

Donelson testified that Respondent has a process by which employees can work through their scheduled vacation and this process is usually understood as selling back a week of vacation. Donelson testified that the way in which Ferrell worded her vacation request was actually a request for both the vacation week and the pay for another week of vacation. He explained that it was necessary for Ferrell to resubmit her vacation request form in order to clear up the confusion about what she was seeking.

In response to Ferrell's request for his assistance, Donelson conducted an investigation and spoke with Archer, Lee, and Fesperman. In his investigation, he learned that Ferrell was actually just trying to get her vacation pay early. When Donelson cleared up the confusion for Lee, Lee told him that he would have processed the request in that way if he had known what Ferrell was actually requesting. After Donelson intervened, the vacation leave form was prepared correctly and submitted for approval.

Following approval of her leave form, Ferrell nevertheless asked Donelson to file a grievance for her, contending that Fesperman, Lee, and Archer had provided incorrect information to her for preparing her leave form. These same individuals each told Donelson that Ferrell had incorrectly explained what she wanted to do and they advised her based on her explanation.

E. Ferrell's Complaint to the Occupational Safety and Health Administration

Ferrell testified that often the baskets containing parts and located on each side of the base pan machine were double-stacked. Although the baskets were double-stacked, forklifts operated in the areas around the base pan machine and removed the baskets of finished products. Ferrell recalled an incident in early 2012 when a forklift not only picked up the basket of finished parts, but also her chair as well. Although the forklift driver could not see her, she yelled out to the driver. Ferrell recalled reporting to Raines that in addition to having been lifted in the air by the forklift on that occasion she had also been pushed by baskets when forklift operators backed into the baskets at her workstation. Ferrell testified that she reported the incident to Supervisors Lee, Moore, and Raines as well as to group coordinator Archer and to Union Steward Donelson. Ferrell contended that she did not fill out an incident report or a near-miss report about the incident as she did not know that she should have done so and no one directed her to fill out any form. Lee testified that at no time did Ferrell ever report that she had been lifted into the air by a fork lift. He explained that if she had made such a report the Company would have immediately conducted an investigation and completed a near miss accident report.

Lee acknowledged, however, that Ferrell raised concerns with him about safety and had asked to meet with the safety committee; a committee composed of both company and union representatives. Lee referred her concerns to the safety committee for investigation. After conducting an investigation, the safety committee determined that the area was not congested. Lee recalled that Ferrell had also complained to him that the baskets near her work area were stacked too high. Lee also referred this concern to the safety committee for

investigation. Lee testified that to his knowledge the safety committee did not find that any changes were needed with respect to stacking baskets near the area of the base pan machine. Union Grievance Chairman Starr Graham testified that during a meeting on August 29, 2013, the Union's safety committee representative assured Ferrell that he had spoken with the management safety representative and Supervisor Moore and had received assurances that no baskets would be stacked too high. Following that same meeting, Donelson checked the area around the base pan machine and confirmed that there were no baskets that were double stacked and everything looked good to him.

Historically, when Occupational Safety and Health Administration (OSHA) complaints were filed against Respondent, the complaints were typically handled by Respondent's safety manager. In recent years, however, Respondent did not always have a safety manager available and the OSHA complaints were investigated by Employee Relations Manager Fesperman. In July 2012, Ferrell telephonically contacted OSHA concerning various issues inside the plant. She told the representative that she had spoken with the Union several times but she felt that she was not getting anywhere. The OSHA representative suggested that she again speak with the Union. After contacting the Union, Ferrell again contacted OSHA on July 18. After Ferrell's contact on July 18, OSHA notified Respondent that an employee complaint had been made and OSHA asked Respondent to address the specific concerns. The issues identified by OSHA involved the risks of employees being struck by forklifts, inadequate training for forklift drivers, and slippery floor surfaces caused by oil spills and rain water. The OSHA notice also identified departments 782 and 784 as the plant location for the alleged safety violations.

Fesperman investigated the concerns that were addressed in OSHA's letter to Respondent and responded to OSHA in a letter dated July 25, 2012. In his letter, Fesperman specifically addressed the safety conditions in departments 782, 784, and 007. In a letter dated July 30, 2012, the OSHA area director responded to Ferrell concerning her complaints. OSHA informed her that Respondent had given assurances that the complaints had been investigated and based on the information provided by the Respondent, OSHA believed that the complaint items no longer presented a hazard to employees. A copy of Fesperman's July 25, 2012 letter was attached for Ferrell.

Both Fesperman and Lee testified that prior to Ferrell's discharge they were unaware that she had filed a complaint with OSHA. Fesperman testified that although he had investigated the OSHA complaint, he could not recall specifically with whom he had spoken during the investigation.

Following her discharge, Ferrell filed a second complaint with OSHA alleging that she had been discharged in retaliation for her first OSHA complaint.

F. Ferrell's July 20, 2012 Discipline

On July 20, 2012, Lee went into the area of the jacket line to look into a problem with the assembly process. While he was speaking with operator Keith Moore, he had a view of

the base pan machine and Ferrell. Lee observed Ferrell sitting with her back to the machine. As he continued the conversation with Moore, he saw that Ferrell remained seated in the same position. He took out his phone and activated the stopwatch function. Lee testified that he allowed the timer to run for 15 minutes. During that time, Ferrell did nothing to produce any parts on the machine. After 15 minutes, she returned to work. Lee contacted Raines to determine if Ferrell had any other discipline and he told Raines that he intended to issue a warning to Ferrell. Because Ferrell had not previously been disciplined for a similar violation, he prepared a written confirmation of a verbal warning to issue to Ferrell. Ferrell was then given a verbal warning for a violation of plant rule 20, which involves carelessness, failure to meet standards of workmanship, production, or other neglect of duties.

Ferrell testified that when Supervisor Lee gave her the warning he told her that he had observed her sitting at the base pan machine and not working for a period of time. Ferrell does not dispute that she admitted to Lee that she had not been working. She testified that she told Lee that instead of working she had been watching out for the forklift drivers operating in her work area. Ferrell acknowledged that during this period when she had not been working there were times when she moved completely out of her work area. Ferrell testified that every time a forklift entered the area around the base pan machine she stopped working to watch the forklift. Donelson recalled that Lee told him that he had observed Ferrell away from her work area for as long as 15 to 20 minutes. In response to receiving the warning, Ferrell told Lee that he was unfair in giving her the discipline and she felt that he was retaliating against her. On July 24, 2012, Ferrell filed a grievance concerning this warning.

G. Ferrell's Suspension and Discharge

Respondent asserts that Ferrell's suspension and discharge was based on the events of August 29, 2012. Specifically, Respondent contends that Ferrell falsely reported on that day's base pan machine Department Production Sheet (DPS) that she had made 903 base angles when the basket of base angles sitting to the left of the base pan machine contained only 403 base angles or finished parts. Respondent submits that this was deliberate falsification of a work record in violation of Plant rule 9. The applicable rule provides that an employee who falsifies work records, punches another employee's timecard, or permits another employee to punch his or her timecard will be subject to disciplinary action, including discharge.

1. The events of August 29, 2012

During an unspecified period of time that occurred at least a year prior to Ferrell's termination, employees were required to keep daily production logs for the base pan machine. On August 17, 2012, Supervisor Lee and Union Representative Donelson informed Ferrell that employees working on the base pan machine were again required to keep a production log and Ferrell began doing so. The form required that the employee working on the base pan machine write down the base pan part number and the quantity of parts produced each hour. Although the form did not require that the employee list his or her clock number, the form contained a section for the employee to make comments explaining any issues or irregularities that affected the production information. The form known as the Department Production

Sheet or DPS was developed by Lee and approved by Donelson. At the end of each day, Donelson collected the DPS forms and then entered the data into the computer. A report of all the data was then compiled into a report that was given to Lee.

Lee testified that he reinstituted the log as a means to track production for that part of the operation. He explained that department 782 depended on department 783 for its raw parts. Because there had been some difficulties with department 783 having sufficient raw parts ready for department 782's production, he implemented the log to track the process. In addition to the base pan machine, Lee also required production reports from employees assigned to other machines including the three S2 bender machines, the L2 Benders, and the cutoff machines. The group coordinator in department 7 was also required to complete a production report.

Ferrell began the workday on August 29, 2012, working on the jacket line platform. She estimated that she worked on the platform for less than an hour and then she transferred to the base pan machine. She testified that she was working on part number 61624-14 that is classified as a "78" part. In completing the production log, Ferrell identified the identification number of the part and the number of total parts that were processed each hour. She also completed the section of the form identifying any additional information relevant to a specific hour. Ferrell indicated on the form that she worked only on part 61624-14 for each work hour on the base pan machine. Ferrell normally took her morning break at approximately 9a.m. and her afternoon break at 1 p.m. She took her lunch break from 11 to 11:30 a.m. Ferrell testified that after recording the number of parts that she had worked during each hour, she then reset the machine counter. She asserted, however, that she did not always reset the counter when she went to lunch at 11 a.m. The form allows for the 30-minute lunch break between 11 and 11:30 and then designates the next production hour as 11:30 to 12:30.

On the production log for August 29, 2012, Ferrell indicated that she completed 24 parts from 6 to 7 a.m. and she noted that she had worked on the platform machine for a part of that period. She recorded that she completed 72 parts from 7 to 8 a.m. and also noted that the jacket machine had been down. She documented that she took her break at 8 a.m. and that she had produced a total of 184 parts between 8 to 9 a.m. Ferrell recorded that she completed 203 parts from 9 to 10 a.m. and completed 250 parts from 10 to 11 a.m. Ferrell testified that she did not clear the machine counter before going to lunch at 11 a.m. When she returned from her lunch break, she noticed that the counter on the machine had been cleared. She asked Archer if he had cleared her counter and he told her that he had not. She also told Union Representative Donelson about the clearing of the counter. Ferrell also noted the clearing of her counter on the DPS form. Donelson testified that he also checked with Archer and asked him if he knew anything about the cleared counter or if he had seen anyone near Ferrell's machine. Archer denied any knowledge of the cleared counter.

For the period between 11:30 a.m. and 12:30 p.m., Ferrell recorded that she produced 47 parts. Ferrell had previously asked for a meeting with the Union to discuss her questions and issues involving the base pan machine and the production log. Ferrell went to this meeting in the front conference room at 12:35 p.m. Before going to the meeting, Ferrell

recorded that she produced 114 parts from 12:30 to 12:35 p.m. Those individuals scheduled to attend the union meeting were Ferrell, Donelson, Graham, and Bobby Waller, the Union's safety committee person for Ferrell's area of the plant. She took the production log form with her as well as a copy of an old production log. She testified that she wanted to show the differences between the new form and the previous form; which she preferred. When she arrived at the conference room, Union Representatives Donelson and Starr Graham were already there. Ferrell recalled that Donelson and Graham told her that she should not have brought the production log with her to the meeting. While she was speaking with the union representatives, Lee approached her and asked her for the production log. He took the log and left. Once the meeting began, Ferrell told the union representatives that she preferred the previous production logs. The union representatives, however, told her that in their opinion the new logs were actually better for her as an employee. Ferrell recalled that she also talked about her concerns about forklift safety and the matters that she had already raised with OSHA. Donelson recalled that Ferrell talked about her concerns with the way in which the baskets were stacked at her work area. Donelson also recalled that Waller told Ferrell that the manager over safety for the entire company agreed that the baskets should not be double-stacked and that he had advised the forklift drivers and the supervisors that baskets were not to be double-stacked in her area. The meeting lasted from 12:35 to approximately 1 p.m. When Ferrell left the meeting, she went to Archer to request a 10-minute break. After her break, she returned to her department. Rather than assigning her to continue on the base pan machine, Archer assigned her to work in a different department for the remainder of her workday.

2. Respondent's investigation of Ferrell

Keith Moore has worked for Respondent since October 2004. He is a member of the Union and in August 2012, Moore worked as one of the four setup operators that were classified as "A" operators in department 782. During the August 2012 time period, Moore occasionally ran the base pan machine if Ferrell was working on the platform or if the department was behind its production schedule.

On the morning of August 29, Moore delivered a basket containing 391 raw parts to the base pan machine sometime between 6:45 and 7:30 a.m. No one was running the machine at the time as Ferrell was working on the 90-plus machine on the platform. After delivering the basket, Moore ran approximately 20 to 25 parts. When he completed running the parts, he cleared the counter.

Moore and the other "A" operators rotate every 2 hours from one side of the jacket line to the other. Every other week, the operators also rotate from the front of the line to the back section of the line. Moore testified that on August 29 he moved to the west side of the jacket line at approximately 1:10 p.m. and after his break that was scheduled at 1 p.m. After going to the west side of the line, he checked the finished parts at the base pan machine to see how many were available for the next process. A part of Moore's job as an operator is to determine if there are sufficient finished parts available for the next functions on the processing schedule. When Moore looked at the production log that Ferrell had completed,

he saw that for two of the morning hours Ferrell had recorded production in excess of 200 parts. Specifically, the log reflected that Ferrell recorded a production of 203 parts completed from 9to 10a.m. and 259 parts completed from 10 to 11 a.m. Moore testified, "I'm not a super smart guy, but that's 400 and something, and it's just absolutely impossible to run 400-some-odd parts out of a basket containing 391." He explained that when he compared the number of parts that Ferrell recorded on the daily production sheet with the number of finished base angles in the basket he realized that she could not have produced the number of parts she claimed to have produced.

Respondent acknowledges that Moore's recollection of when he first saw the discrepancy on the DPS could not be accurate. Although he believed that it had been after his 1p.m. break, Ferrell took the log with her when she went to the meeting and the log was not returned to the base pan machine until Lee retrieved it from her. Moore testified that when he first looked at the log Ferrell had not been at the base pan machine and Respondent submits that Moore must have first observed the discrepancy sometime before Ferrell took the DPS with her to the 12:30 p.m. meeting.

Moore testified that prior to this date the operators were working really hard and he had repeatedly asked the supervisors and the coordinator to observe and to take some action about operator A's having to pick up for other people's slack. During the months before August 29, Moore had complained to both Archer and Lee that Ferrell was not producing a sufficient number of parts. On August 29, he decided to take his concerns directly to Raines. When he met with Raines, he explained that earlier that morning he placed a basket containing 391 raw parts at the base pan machine. He told Raines that the production log now reflected that Ferrell had completed 700 to 800 finished parts from that basket. Moore testified that when he reported this situation to Raines, he was 100 percent certain that Ferrell had not produced the parts that she had claimed on her production log. Moore also testified that he was unaware of any need for anyone to move any of the parts from the finished parts basket and he had been confident that the finished parts basket was the same basket that he had seen at the machine earlier that morning. Raines testified that when Moore came to see him, he began his comments apologetically. He told Raines that normally he would not do what he was doing but he wanted to let Raines know that Ferrell had recorded on her production log more parts than she had in her basket to produce.

After talking with Moore in his office, Raines went out to the line and asked Moore to identify the machine and the basket to which he was referring. When Raines looked at the finished parts basket next to the machine, he asked Moore if those were the finished parts that had been run by Ferrell that day. When Raines initially arrived at the machine, the production log had not been at the machine. When Lee approached him at the machine, Raines told Lee that he needed the production log. Lee opined that Ferrell must have it and he left to retrieve the production log from Ferrell. Raines recalled that when he had left his office he had seen Ferrell near the human resources conference room. Raines recalled that there had been a tag on the basket and he had not removed the tag. Raines testified that when he compared the part number on Ferrell's log to the part number on the basket tag the part numbers were not the same. Lee also testified that the tag on the basket was labeled with a different part number

than what was listed on Ferrell's DPS. Raines asked Moore about the discrepancy in the numbers and Moore confirmed that the parts in the basket were the same parts that Ferrell had been running on the machine. Lee also testified that he had needed Moore to identify the parts in the basket because he was not able to distinguish the parts by sight. Moore confirmed for Lee that the parts in the basket were the same parts listed on Ferrell's DPS. The tag on the basket, however, identified the part as part number 61858-11.

Raines directed Lee to have the basket in question weighed to determine the number of parts. Lee contacted employee Shaun Earl James by radio and asked him to come to the jacket line to pick up the parts' basket. When James arrived at the area, Lee pointed out the particular basket and asked him to take the basket to the Racks Department area to be weighed. After James did so, the individual weighing the basket gave James a simple piece of paper containing a written number for the parts. James returned the basket to the area where he had found it and where Lee was waiting for him. James gave Lee the piece of paper containing the number of parts. When Raines received the piece of paper from Lee, he saw that the total parts recorded were 403. Because the count was not on an official document or tag, Raines told Lee that he needed to have the basket recounted and the number of parts needed to be documented on the basket tag. Raines told Lee that although the part number on the basket was different from the part number on the production log he wanted the count recorded on the tag that was attached to that basket. He explained to Lee that he wanted to have the basket weighed again and to have the number of parts recorded on the basket tag because he did not want to be accused of changing anything.

In order to have the second count done, Lee contacted Supervisor Danny Lee Emerson and asked him to meet him between the gas line machine and the front of the assembly area. As Emerson supervises the material department of the plant, he is also responsible for the part of the plant where product is weighed and counted. Lee pointed out the basket of parts and asked Emerson to have someone take the basket to be weighed and counted. Emerson contacted his group coordinator, James McKinney, and asked him to bring a forklift to transfer the basket to the scales to be weighed. Emerson accompanied McKinney to the scales and remained with him while McKinney weighed the basket. In order to determine the number of parts in a basket, one of the parts is weighed on the scale. Based on the total weight of the basket and the individual weight of one part, the number of parts is determined by the scales. This is the method that the Racks Department uses each day to determine part counts and to determine the information that is recorded in inventory records and audited by Quality Control.

Emerson testified that because his work involves the inventory function of the facility he can identify and pull parts based on their appearance. Emerson also confirmed that there is a tenth of a pound's difference in weight between part 61624-14 and 61858-11. Emerson testified that when he and McKinney weighed the parts in the basket on August 29, 2012, he did not check to determine whether or not the parts were 61858-11. McKinney testified that in his job in the Racks Department he was not familiar with the part that was in the basket. Both Emerson and McKinney both testified that they simply weighed the parts in the basket and the total number of parts was determined to be 403 parts. Emerson opined, however, that

if the basket had contained part 61858-11 rather than part 61624-14, the weighing process might have recorded more parts rather than less parts because part 61858-11 weighed one-tenth of a pound less than 61624-14. McKinney recorded the part count as 403 and wrote it on the basket tag. McKinney also included his name, his clock number, his shift, and the location of the specific scale that was used to weigh the basket. McKinney also recorded on the tag the date and the time that the basket was weighed. Emerson could not recall if McKinney wrote this information on a tag that was already hanging on the basket. He only recalled that this same tag was the tag on the basket when he and McKinney returned to basket to Lee. McKinney could not recall if the basket that he took to the scales already had a tag on it when he picked it up. He recalled only that he attached the tag to the basket once he recorded the number of parts and the other identifying information.

After the basket was weighed, Emerson followed McKinney back to the area where they had originally found the basket and where Lee was waiting for them. Emerson gave Lee the tag with the count of 403 parts recorded and Lee showed the tag to Raines. Raines testified that he never took possession of the piece of paper containing the information about the 403 parts that was recorded from the original weighing of the basket. He did, however, compare the basket tag showing the 403 parts to the production log completed by Ferrell. He determined that Ferrell had recorded a production of approximately 500 more parts on her production log than what was recorded as the total number of finished parts.

3. The September 4, 2012 meeting

On September 4, 2012, Ferrell was called to a meeting in Raines' office. Donelson was also present. Raines told Ferrell and Donelson that the number of parts in her finished basket did not match the number of finished parts that she had recorded on her daily production log for August 29. Raines told her that contrary to her production log she had only run a total of 403 parts for that day. When Donelson and Ferrell questioned how this had been determined, Raines told them that the finished parts had been weighed. Raines showed Ferrell a basket tag for her department. The tag shown to Ferrell referenced the part number as 6185811. Ferrell told Raines that the part on the tag was not the part on which she had worked on August 29, 2012. She also mentioned to Raines that someone had cleared her machine counter while she had been at lunch on that same day. Ferrell acknowledged, however, that she had made all of the handwritten entries on the DPS and that she had obtained hourly production numbers from the counter. Raines testified that he asked Ferrell if the counter was functioning properly and she indicated that it was.

Raines testified that after he initially spoke with Ferrell, he consulted with Jim Fesperman; employee relations manager. Raines reported to Fesperman all the information that he had learned thus far and he told Fesperman that he believed that Ferrell had falsified production records. Raines recommended that Ferrell be suspended pending additional investigation and Fesperman agreed. Raines returned to his meeting with Ferrell and issued her a 3-day suspension pending an investigation of whether she had falsified work records.

Raines testified that after meeting with Ferrell and prior to her termination he asked Keith Moore to verify whether the counter was working accurately. Raines watched as Moore turned the dial on the counter in an attempt to manually increase the number of parts recorded. Raines explained that when Moore did so, the counter turned all six digits returning the count to zero. In watching Moore, Raines determined that the counter reset dial could not be manually advanced to increase the counter number. Lee testified that he also checked the counter on the machine by operating the machine and producing approximately 10 or 11 parts. When he attempted to rotate the dial to alter the production count, all of the digits on the counter moved forward preventing him from entering a false number. He also determined that the only way that the counter could be increased without the machine in operation was to manually activate the machine, causing the count to increase in increments of single parts.

Raines recalled that he also asked Lee on September 4 to verify whether anyone in the department had moved any baskets from the machine on August 29. In response to Raines' request, Lee spoke with Archer and Moore. Moore confirmed for Lee that the basket that had been weighed was the same basket present when Moore began the production process on the base pan machine on August 29. Lee testified that he also spoke with Archer because Archer controls the production process and he is responsible for moving the baskets in and out of the machine area. Archer had no knowledge that the basket in issue had been moved during the day. During the same day, Lee sent Raines an email confirming that he had spoken with Moore and Archer and they had both confirmed that the basket containing the finished parts had been at the base pan machine all day. Furthermore, they had both told Lee that no one moved the baskets. Lee further confirmed to Raines that Moore stated that the basket was the same basket that he had started on August 29.

4. The events of September 7, 2012

Although Raines recommended Ferrell's discharge to both Fesperman and Sharon Reeder, the final decision was authorized by Sharon Reeder. When Ferrell returned to the facility on September 7, 2012, she was informed by Jim Fesperman that she was terminated. Raines testified that Ferrell met with Fesperman because it is Respondent's policy that the manager who conducts an investigation does not make the decision concerning the employee's termination. On September 12, 2012, Ferrell filed a grievance concerning her termination.

H. Issues and Prevailing Legal Authority

The General Counsel asserts that Respondent unlawfully suspended and terminated Ferrell in retaliation for her union and protected activities. Respondent, however, contends that Ferrell was discharged solely because she falsified the production log and Respondent asserts that there is no evidence to suggest that Raines or any other decisionmaker harbored any retaliatory or other unlawful intent, or that they were influenced by Ferrell's safety complaints or her prior grievances.

Because the Respondent's motive is an integral factor in determining the lawfulness of Ferrell's discharge, it is necessary to use what has come to be known as a *Wright Line*[4] analysis. The *Wright Line* analysis is based on the legal principle that an employer's motivation must be established as a precondition to finding a violation of Section 8(a)(3) of the Act. *American Gardens Management Co*., 338 NLRB 644, 645 (2002). In its decision in *Wright Line*, the Board stated that it would first require the General Counsel to make an initial "showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line,* above at 1089. Essentially, the General Counsel must establish not only that the employee engaged in protected conduct, but also that the employer was aware of such protected activity, and that the employer bore animus toward the employee's protected activity. *Praxair Distribution, Inc*., 357 NLRB No. 91, slip op. at 1 fn. 2 (2011). Once the General Counsel makes a showing of discriminatory motivation by proving the employee's protected activity, employer knowledge of the activity, and animus against the employee's protected activity, the burden of persuasion shifts to the employer to demonstrate that the same action would have taken place, even in the absence of the protected conduct. *Manno Electric*, 321 NLRB 278, 281 (1996).

1. Whether Ferrell engaged in union and protected activity

Counsel for the General Counsel asserts that the record evidence establishes that Ferrell was engaged in protected activity in the months prior to her discharge. The General Counsel acknowledges that while Ferrell's complaints in June 2012 about Lee's monitoring her work and the issues with her vacation slip were solely related to personal issues, she nevertheless requested that the Union file and process a grievance for her allegations of harassment. Ferrell's initial grievance was filed on June 22, 2012. Ferrell's second grievance was filed on July 20, 2012, after she received the verbal warning.

Ferrell's complaints about the safety of her work area triggered an investigation by the joint safety committee at the plant. When Ferrell met with the union representatives on August 29, 2012, the Union's safety committee representative told Ferrell that the Union had been given assurances that the parts' baskets would not be doubled stacked in her area. In addition to filing complaints with the plant safety committee, Ferrell also filed a complaint with OSHA concerning safety issues in her department and surrounding departments. In her complaint to OSHA, Ferrell alleged five areas of potential work hazards relating primarily to departments 782 and 784. Three of the complaints involved potential danger to employees from forklifts. One specific complaint alleged that forklift drivers were having accidents and employees were being struck by forklifts.

Respondent concedes that some-but not all-of the various complaints made by Ferrell in 2011 and 2012 may be characterized as concerted activity by Section 7 of the Act. Respondent submits that Ferrell's various complaints of personal harassment by Archer, Lee, and others did not constitute protected concerted activity. Respondent also contends that although Ferrell apparently felt that she was the victim of "sabotage," she never claimed that

[4] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393, 399-403 (1983).

any other employees were affected by the alleged misconduct that she attributed to Lee, Archer, or others. Counsel for the Respondent points out that with respect to the allegations of personal harassment there is no evidence that Ferrell did anything to protect anyone but herself or to advance any cause other than her own.

Respondent acknowledges, however, that inasmuch as the Board has generally held that safety-related complaints are protected by Section 7, it does not dispute that Ferrell's safety-related complaints about the operation of the forklifts and the stacking of baskets in her work area constituted protected concerted activity. Furthermore, Respondent does not dispute that her two grievances filed prior to her discharge also constituted protected concerted activity as they arose under the auspices of the collective-bargaining agreement.

2. Respondent's knowledge of Ferrell's protected activity

Respondent concedes that it was aware of Ferrell's two predischarge grievances and her internal safety complaints. Respondent denies, however, that it was aware that she made the July 2012 complaint to OSHA because Respondent's notice from OSHA of the July 2012 complaint did not identify Ferrell as the complainant. Furthermore, Respondent relies on the fact that Lee, Raines, and Fesperman all testified that they were not aware that Ferrell had filed the complaint until after she was discharged.

The record evidence does not support Respondent's denial of knowledge with respect to Ferrell's OSHA complaint. It is simply not plausible that Respondent's supervisors could have been aware of Ferrell's internal safety complaints without also linking these complaints to the OSHA complaint. Lee testified that Ferrell brought safety issues to him and he referred those issues to the safety committee. He specifically recalled that one of those issues involved Ferrell's contention that the area around the base pan machine was too congested and that there was not enough space for the forklift drivers to safely move through the area. Lee testified that even though he had not believed that the area was congested he referred this issue to the safety committee for their investigation. Lee also recalled that Ferrell had complained to him that the drivers' visibility was impaired because the parts' baskets were stacked too high in the area. Lee referred this same complaint to the safety committee. On June 20, 2012, Lee issued Ferrell a verbal warning for her failure to perform her job during a monitored period of time. Lee testified that for a period of 15 minutes he observed that Ferrell did not produce any parts and that she sat with her back to the base pan machine. Lee recalled that when he confronted Ferrell concerning this behavior she asserted that she had been nervous because of the forklifts.

On July 18, 2012, Respondent received notice that a complaint had been filed with OSHA concerning specific alleged safety violations at the Fort Smith facility. Because there was not a designated safety manager to respond to the OSHA complaint, Employee Relations Manager Fesperman investigated the allegations and prepared the final report to OSHA. On July 25, 2012, Fesperman sent OSHA a full report addressing each of the alleged safety problems that were the subject of the OSHA complaint. Three of the complaints specifically dealt with forklift safety. Not only did Fesperman address training and accidents for forklift

drivers, but he also addressed the allegation that employees were at risk to be struck by forklifts because their work area was cluttered with parts and he did so with respect departments 782 and 784.

Fesperman testified that in conducting his investigation he would have spoken with the supervisors in the involved areas. He acknowledged that he probably spoke with both Supervisors Lee and Bryan Moore and that he would have told them the specific allegations that had been made in the OSHA complaint. Fesperman testified, however, that he could not specifically recall with whom he had spoken when he conducted his investigation and he could not recall what the witnesses told him during the investigation. He nevertheless contended that no one told him during his investigation that there had been any previous safety complaints concerning department 782. Although he denied that he had been unaware of any previous safety complaints concerning department 782, he also admitted that as he was acting safety manager in July 2012, he would have received reports from the safety committee. Fesperman testified that Respondent only received a total of two OSHA complaints in 2012 and as of the June 2013 hearing Respondent had not had any OSHA complaints for the year.

There is no dispute that Fesperman conducted his OSHA investigation during the period of time between July 18 and 24. Although he asserts that he cannot recall with whom he spoke or what those individuals told him, he acknowledges that he probably spoke with both Lee and Moore. Inasmuch as the July OSHA complaint was one of only two complaints received during the entire year of 2012, it is reasonable that Fesperman and other managers would have had more than a passing interest in knowing who was responsible for such a complaint. It is inconceivable that Lee would not have shared with Fesperman that Ferrell had made safety complaints about the forklifts in department 782 and had even raised her fears about the forklifts as a defense to her July 20, 2012 discipline. Furthermore, as acting safety manager during July 2012, it is not plausible that he was totally unaware of Ferrell's previous complaints to the safety committee about the forklifts in her area. The total record evidence demonstrates that it is reasonable that Respondent linked the OSHA complaints to Ferrell and Respondent's knowledge may be inferred.

3. Whether Ferrell's protected activity was a motivating factor in her discharge

Although Respondent does not dispute that Ferrell engaged in some actions that may constitute protected activity and that it had knowledge of some, but not all, of those activities, Respondent vehemently denies that there is any evidence of animus or evidence that would establish a causal link between Ferrell's discharge and her protected activity. Respondent submits that the General Counsel has not produced any evidence from which a finding may be made that Ferrell's protected activity was a motivating factor in Respondent's decision to suspend and discharge her.

Respondent asserts that there is no direct evidence that Lee, Raines, Fesperman, or anyone else harbored a retaliatory intent to discipline Ferrell. Counsel for Respondent submits that there was no testimony at the hearing that anyone said anything even remotely

suggesting that any manager connected Ferrell's discharge back to her safety complaints or grievances. Respondent further argues that with respect to the question of unlawful management animus against Ferrell's protected activity, "there is no manager to pin it on." Respondent relies on the fact that it was a bargaining unit employee who reported Ferrell's falsification of the log and that Raines simply investigated the allegation without saying or doing anything that would suggest that he was acting in response to Ferrell's protected activity. Respondent asserts, therefore, that because there is no direct evidence of causation or animus the General Counsel's prima facie case cannot even be made through circumstantial evidence.

Counsel for the General Counsel maintains, however, that Respondent's stated reason for Ferrell's discharge was pretextual and that, absent her union and protected activities, including her safety complaints and her July 18, 2012 OSHA complaint, Respondent would not have discharged Ferrell. I find that the overall records support the General Counsel's argument. As the Board noted in *La Gloria Oil & Gas Co.,*[5] the timing of a discharge in relation to a respondent's learning of an employee's protected activity supports a finding that the respondent knew of the activity and knew who had been involved. The Board referenced its prior decisions in *Montgomery Ward & Co*., 316 NLRB 1248, 1253 (1995),and *Metro Networks, Inc*., 336 NLRB 63 (2001), in which the Board noted that knowledge of an employee's protected activity can be inferred from the timing of the actions taken toward the employee. For the reasons discussed above, I find that Respondent had reason to believe that Ferrell was responsible for the OSHA complaint in addition to her undisputed internal safety complaints.

In addition to inferring knowledge of Ferrell's OSHA complaint, I also find that the total record evidence is sufficient for an inference of animus as well. In its decision in *Signature Flight Support*, 333 NLRB 1250 (2001), the Board adopted Judge Keltner W. Locke in finding that the General Counsel made a showing sufficient to support an inference that the respondent believed that three employees engaged in protected activity and that such activity was a motivating factor in the respondent's decision to terminate the employees. Judge Locke found animus based solely on inference, relying in part on the timing of the discharges and a finding that the respondent's explanation for the discharges was pretextual. In his analysis, Judge Locke explained that basing his finding of unlawful discharge on inference made his case very close. He also noted that while Board precedent allows a finding of animus to rest on indirect evidence to be appropriate in some cases,[6] there are also cases in which the Board has found that drawing such an inference is inappropriate.[7] Based on the total record evidence before me, I find that animus may be appropriately inferred in this case.

In determining that the General Counsel has met his initial burden under *Wright Line*, I note that the Board has recognized that proof of discriminatory motive can be inferred from circumstantial evidence based on the record as a whole as well as from direct evidence. To

---

5 337 NLRB 1120, 1123 (2002).

6 *Montgomery Ward & Co*., above at 1253.

7 *J. O. Mory, Inc*., 326 NLRB 604 (1998); *Frierson Building Supply Co*., 328 NLRB 1023 (1999).

support an inference of unlawful motivation, the Board looks to such factors as inconsistencies between the proffered reason for the discipline and other actions of the employer, disparate treatment of certain employees with similar work records or offenses, deviation from past practice, and the proximity in time of the discipline to the protected activity. *Embassy Vacation Resorts*, 340 NLRB 846, 847 (2003); *W. F. Bolin Co. v. NLRB*, 70 F.3d 863, 871 (6th Cir. 1995).

In making an inference of the Respondent's discriminatory motive, I find timing to be a significant factor. As counsel for the General Counsel points out, Ferrell had worked for Respondent for 12 years without any instances of discipline for poor work performance or failure to meet production standards. Certainly, Ferrell received no prior discipline for falsification of records or for engaging in misrepresentation of any kind. With the exception of a verbal warning in January 2008 for leaving the facility early, Ferrell had only been disciplined for attendance violations during her 12-year work history. Prior to her July 20, 2012 warning for performance, her last warning for attendance had been in January 2011. Counsel for the General Counsel submits that within only 2 days after Respondent received notice of the OSHA complaint which specified not only Ferrell's assigned work area, but in part mirrored some of the same allegations that she had raised with supervision, she was given a verbal warning for neglecting her work and then she was terminated a little over a month later. The General Counsel concedes that because the July 20, 2012 warning was not alleged as a violation in the complaint, the Board cannot find the warning to be unlawful. Citing the Board's decision in *Monongahela Power Co.*, 324 NLRB 214 (1997), and the Court's decision in *Machinists Local Lodge 1424 v. NLRB*, 362 U.S. 411, 416 (1960), the General Counsel argues that the July 2012 warning can nevertheless shed light on the Respondent's motivation even though the Board cannot find it to be an independent violation of the Act. The General Counsel suggests that the fact that Respondent issued a verbal warning to Ferrell only 2 days after receiving the OSHA complaint and during the 6 days that Respondent was investigating the OSHA complaint demonstrates Respondent's hostility to Ferrell's protected concerted activity. The General Counsel asserts that Ferrell's discharge on September 7, 2012, is a demonstrable extension of its animus toward Ferrell's protected concerted activity; especially in light of Ferrell's previous work history.

A second factor that I find significant in inferring Respondent's discriminatory motive is Respondent's failure to conduct a fair or meaningful investigation of Ferrell's alleged falsification. Respondent presented extensive evidence to show how it came to determine that the finished parts basket contained fewer parts than the numbers contained on Ferrell's production log. Respondent's witnesses verified that the basket in question was weighed not once, but twice, on August 29 in order to verify the number of parts in the basket. Raines testified that he watched Keith Moore as he checked the counter on the base pan machine to verify that it was functioning properly and Lee testified that he also checked the accuracy of the machine counter. As the General Counsel points out, however, Respondent did not attempt to meet with Ferrell on August 29 to ascertain why she completed the log as she had, even though she was present in the department for the remainder of her shift on August 29. In fact, Respondent waited almost a week to talk with Ferrell and to get her response to the investigation.

After Raines spoke with Ferrell on September 4, the only evidence of any additional investigation was an email that Lee sent to Raines on September 4, 2012, just shortly after Raines met with Ferrell. Lee merely confirmed that when he had spoken with Keith Moore and Gary Archer, both confirmed that the basket of parts had remained at the base pan machine all day and that no one had moved any baskets out of the area. Lee admitted, however, that there had been three other setup operator A's, as well as, three setup operator C's working in that same department. Raines acknowledged that he did not ask Lee if he had checked with the other setup operators or anyone other than Moore and Archer to determine if they knew whether the baskets had been moved.

The General Counsel also argues that while the Respondent weighed the finished parts' basket twice on August 29, 2012, Respondent apparently did nothing to determine the number of parts in the unfinished basket placed to the right of the base pan machine. Moore testified that when he placed the unfinished parts' basket at the base pan machine at the beginning of the August 29 shift there were 391 parts in the basket. It was this number that Moore used as a basis for asserting that Ferrell had falsified her production log. When Raines was asked if there were any unfinished parts in the basket on the right of the machine, Raines acknowledged that it was possible, however, his interest had been in the finished parts' basket on the left. Thus, it is suspect that while Respondent relied on Moore's assertions that there were only 391 unfinished parts available to Ferrell, there is no evidence that anyone compared the unfinished parts basket to the finished parts basket in order to complete the investigation.

While I don't find Respondent's failure to examine the unfinished parts' basket on August 29, 2012, to be a substantial factor in determining Respondent's motivation, the oversight nevertheless supports the conclusion that Respondent did little more than weigh the one basket in comparison to the production log. The General Counsel argues that these kinds of flaws in the investigation, in conjunction with Respondent's failure to give Ferrell an opportunity to timely respond to the investigation, reflects clear indicia of discriminatory intent as Respondent appeared determined to secure the result it wanted rather than conduct a fair and meaningful investigation. The Board has long held that an employer's failure to permit an employee to defend himself or herself before imposing discipline supports an inference that the employer's motive was unlawful. *Johnson Freightlines*, 323 NLRB 1213, 1222 (1997); *K&M Electronics*, 283 NLRB 279, 291 fn. 45 (1987). In the instant case, Respondent's delay of almost a week before confronting Ferrell and its abbreviated investigation during the interim lends credence to the General Counsel's argument.

4. Respondent's history of discipline

Respondent maintains a progressive discipline policy for administering its plant rules. There are 27 rules listing actions for which an employee may be disciplined. The progressive discipline schedule provides that Respondent will issue a verbal warning, a written warning, or a 3-day or more suspension before an employee is disciplined. Raines testified that there is also conduct for which an employee may be discharged upon a first offense and the Respondent does not adhere to the progressive discipline schedule. Raines identified seven

such plant rules for which a violation could result in discharge without benefit of the progressive discipline schedule. The seven areas of conduct include: (1) Plant rule 1: fighting or disorderly conduct; (2) Plant rule 4: insubordination; (3) Plant rule 6: sabotage, slowdowns, or interference of any kind with production; (4) Plant rule 9: Falsifying work records, punching another's timeclock, or permitting another to punch his timeclock; (5) Plant rule 10: Theft from fellow workers or the company; (6) Plant rule 11: Leaving the department or plant without permission during working hours or making preparations to quit before quitting time or failure to be in your department immediately after breaks and lunch; and (7) Plant rule 13: Falsifying reason for absence. Specifically with respect to violations of Plant rule 9, Raines acknowledged that Respondent has discretion as to whether it will terminate an employee for a first offense or issue a lesser discipline to the employee. Raines admitted that under its policy, an employee could receive a lesser form of discipline for a violation of Plant rule 9.

Counsel for the General Counsel argues that Respondent's treatment of Ferrell is disparate as compared to its treatment of other employees. In the posthearing brief, Respondent addresses various disciplinary records for other employees who have been disciplined, but not discharged at the Fort Smith facility for reasons other than the falsification of records. Respondent argues that the General Counsel cannot appropriately argue that these offenses were equally or more serious than the conduct for which Ferrell was terminated. Respondent further argues that an attack on its judgment as to the relative seriousness of employee offenses is not permissible and that it may rank offenses as it pleases as long as it does so out of an unlawful motive. Respondent contends that the specific level of disciplinary action taken against Ferrell may not be second-guessed in the absence of discriminatory disparity.

The General Counsel argues, however, that Respondent has tolerated extreme and gross misconduct by other employees and has given them multiple opportunities to correct their behavior, exercising varying discretion as to how it applies the disciplinary process. In support of this argument, the General Counsel submitted personnel records for employee Glen D. This employee received a 3-day suspension on June 21, 2006, for a violation of Plant rule 2; the rule that provides for discipline for an employee's use of abusive, insulting, or disrespectful language toward a supervisor or fellow employee. Only 3 days later, the employee received a 3-day suspension for insubordination or Plant rule 4. In May 2008, Glen D. was terminated for fighting or disorderly conduct and for using abusive, insulting, or disrespectful language toward a supervisor or fellow employee; violations of both Plant rules 1 and 2. This employee was reinstated by Respondent and he received a written warning in June 2010 for again violating Plant rule 2. On August 31, 2010, Glen D. was given a 1-day suspension for a violation of Plant rule 2. On September 2, 2010, Glen D. received a 2-day suspension for a violation of Plant rule 2. On January 29, 2011, this same employee received a verbal warning for smoking in a prohibited area. A month later, Glen D. received a 3-day suspension and was ultimately terminated for a violation of Plant rule. 2.

On January 23, 2009, employee Scott A. received a verbal warning for a willful failure to follow instructions. On April 12, 2010, this employee receiver a verbal warning for leaving

his work area without permission and on November 11, 2010, he received a written warning for the same conduct. On January 26, 2011, Scott A. received a verbal warning for failing to follow instructions. On April 13, 2011, he also received a verbal warning for his failure to meet production standards. On October 18, 2012, employee Scott A. received a 3-day suspension for violation of Plant rule 2.

While the above-listed discipline was given for conduct other than that covered by Plant rule 9, the employees' conduct involved repeated offenses and violations of plant rules. Part of the nondischarge discipline was given for conduct involving insubordination and leaving the work area without permission; two offenses that Raines identified as conduct that could constitute first offense termination. With respect to employee Glen D., Respondent tolerated repeated violations of its plant rules before terminating the employee. After the employee was rehired, the employee again engaged in repeated violations of Respondent's plant rules before the employee was terminated a second time for misconduct. Although the Respondent maintains that it had absolute discretion to rank offenses differently, these records underscore the fact that Respondent has a history of exercising discretion in tolerating repeated misconduct or in tolerating conduct which would otherwise constitute a basis for termination on the first offense.

Based on the total record evidence, I find that the General Counsel has met the requisite burden under *Wright Line*. As discussed above, there is no dispute that Ferrell engaged in protected activity during the 6 to 8 months prior to her discharge. Her protected activity included not only filing grievances with the Union, but it also included her complaints to management and the safety committee concerning safety issues in the plant. Throughout this same time period, Ferrell repeatedly complained to the Union and to management concerning a myriad of complaints. The litany of complaints ranged from complaints that she was being harassed by Lee and Archer to her complaints that she was being sabotaged and that someone was deliberately keeping her from having the requisite parts to do her job. She additionally complained that she was the target of racial discrimination. From the record testimony, it is apparent that Ferrell repeatedly complained to management and to the Union about a broad range of issues and concerns. She continually voiced complaints to the Union, requiring the union representatives to investigate her concerns and intervene on her behalf. The record reflects that she isolated herself from her fellow workers and she apparently saw herself as the victim of abuse from management and from other employees. Why she came to adopt these attitudes after 12 years of a relatively unblemished work history is not apparent from the record evidence. While her continuing complaints to the Union and to management may have been an annoyance to management, Respondent appeared to tolerate the complaints and address them when raised. Respondent's tolerance ended, however, once she went beyond internal complaints and she took her complaints to OSHA.

As noted above, it is inconceivable that Respondent did not know that Ferrell was the source of the OSHA complaint. The majority of the allegations in the complaint dealt with safety in the plant related to forklifts and department 782 was one of the areas identified as having the alleged safety risk related to the forklifts. Some of the allegations in the complaint mirrored those made by Ferrell to management. Even a minimal investigation by Fesperman

in dealing with the OSHA complaint would have uncovered the fact that Ferrell was the employee in department 782 making similar complaints. Ferrell's defense to her July 20, 2012 warning would have certainly confirmed management's suspensions as Ferrell defended herself by asserting that she had been afraid of the forklifts operating around her work area.

Respondent maintains that it terminated Ferrell because she falsified her production log on August 29, 2012. The record reflects that Setup Operator Moore believed that he had been doing more work to make up for other employees' slack. From his testimony, it is apparent that he had not been impressed with Ferrell's work prior to her discharge and he was resentful of what he considered as slow production by Ferrell. It is reasonable that when he looked at her production log on August 29, 2012, he decided to bypass the group coordinator and the supervisor and go straight to Raines with what he saw. There is no dispute that Ferrell's production numbers on the DPS were simply incredible. Her documentation that she completed 47 parts between 11:30 a.m. and 12:30 p.m. and then completed 114 parts from 12:30 p.m. to 12:35 p.m. is absurd. There was no testimony by any witness that 114 parts could be produced in only 5 minutes. Thus, based on the documentation alone, it appears that Ferrell's alleged production was not feasible. Ferrell's unexplained action by inserting an unbelievable number of parts for only 5 minutes of work gave Respondent just what it needed to get rid of a complaining employee whose complaints had exposed Respondent to the scrutiny of OSHA. As Fesperman confirmed in his testimony, there were only two OSHA complaints during the entirety of 2012 and as of the June 2013 hearing, no OSHA complaints had been filed in 2013. OSHA complaints were not common place and Fesperman admitted that his investigation of this complaint was a special occasion. Just because Ferrell's creative documentation provided a reason to discharge Ferrell does not preclude a finding that Respondent wanted to get rid of her because of her protected activity in addition to her continuing complaints of harassment and sabotage.

Although there may not be any direct evidence of animus, the General Counsel may meet its *Wright Line* burden with indirect evidence of motivation. Motivation of animus may be inferred from the record as a whole where an employer's proffered explanation is implausible or a combination of factors support circumstantially such an inference. *Union Tribune Publishing Co. v. NLRB*, 1 F.3d 486, 490-492 (7th Cir. 1993). Accordingly, I find that General Counsel has met his burden of establishing that Ferrell's protected activity was a motivating or substantial factor in Respondent's decision to terminate her.

5. Whether Respondent has demonstrated that it would have terminated Ferrell in the absence of her protected activity

Respondent asserts that even if the General Counsel is able to make a prima facie case under the *Wright Line* analysis, the evidence will show that Respondent would have discharged Ferrell even in the absence of her protected activity because it reasonably concluded that she falsified a production record on August 29, 2013, and this is an offense for which immediate discharge is the customary penalty in the Fort Smith facility. For the reasons discussed below, I do not find that Respondent has met its burden under *Wright Line* as it asserts.

If the General Counsel makes the required initial showing of a prima facie case, the burden shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's protected activity. *Consolidated Bus Transit*, *Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). The General Counsel may also offer proof that the employer's reasons for an employee's discipline were false or pretextual. *Pro-Spec Painting*, *Inc.,* 339 NLRB 946 (2003). The Board has found that if the evidence shows that the respondent's proffered lawful reason for the discharge did not exist, or was not, in fact relied on, the respondent's reason is pretextual. If no legitimate business justification for the discharge exists, there is no dual motive, only pretext. *La Gloria Oil & Gas Co*., 337 NLRB 1120, 1124 (2002). A finding of pretext defeats any attempt by the respondent to show that it would have taken an adverse action against an employee absent that employee's protected activity. *Rood Trucking Co*, 342 NLRB 895, 897 (2004). The Board has long held that when the evidence establishes that the reasons given for an employer's action are pretextual-that is-either false or not in fact relied upon - the respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp*., 340 NLRB 382, 385 (2003); *Limestone Apparel Corp*., 255 NLRB 722 (1981). For the reasons discussed below, I find that Respondent's reason for discharge is pretextual.

Respondent presented evidence that since April 2002 it has terminated a total of 14 employees for violations of Plant rules 9 and 13. Plant rule 13 provides for discipline for employees who have falsified their reason for an absence. Six employees were terminated for falsifying doctor's notes and four were terminated for insurance fraud. One employee was terminated for falsifying a vacation request and two others were terminated for punching another person's timecard and for allowing someone to punch their timecard. Raines admitted that Ferrell is the only employee within the past 11 years who has been discharged for falsifying a work record. Fesperman further testified that he was not aware of any employee who was known by the Respondent to have falsified documents and who was not discharged. He concedes, however, that there have been individuals who have been terminated and then reinstated during the grievance procedure and pursuant to the plant manager's decision.

In March 2007, Dennis W. and Khankhab W. were discharged after Khankhab W. was observed clocking in both herself and her husband. Both employees were later reinstated by Plant Manager Doyle Thresher when it was determined that Dennis W. was standing near his wife when she clocked him in at the facility. Raines testified that based on the circumstances and the fact that no additional pay could be claimed; the plant manager reversed his decision to terminate the two employees. In March 2008, Respondent terminated Dennis W. again for a violation of Plant rule 9. He was terminated for signing his supervisor's name to a vacation form.

In July 2009, employee Frank W. was discharged for falsifying an insurance document and listing his girlfriend on his insurance as his spouse. His discharge was recommended by

Raines to HR Manager Fesperman. Frank W. had listed his girlfriend, who was not eligible for coverage under Respondent's health insurance plan, when he registered for the plan on April 12, 2006. His violation was discovered after he attempted to have his insurance canceled and he informed Respondent's benefits specialist that he was never married to the woman listed as a spouse on his registration form. During the period when the employee's girlfriend was listed as his spouse, the insurance carrier paid on 29 claims filed for the girlfriend. The decision to terminate the employee was ultimately made by Plant Manager Thresher. After the Union filed a grievance, the matter progressed to the third step of the grievance process. After the employee offered to make restitution to Respondent for insurance claims, the plant manager reinstated the employee. Raines admitted that while the employee continues to work for Respondent he has never made any payments for the improperly paid claims, even though he agreed to do so as a condition of his reinstatement.

On July 22, 2005, Respondent terminated employee Jerry T. for also falsifying his insurance forms. The discharge was not grieved by the Union and no adjustment was ever made to this discipline. In April 2007, Respondent also terminated Valerie F.; a non-bargaining unit employee, for falsifying her insurance records. Raines also testified that while he could not locate the employee's file, he recalled that employee Jerrod S. was terminated in April 2008 for representing someone other than his spouse as his spouse for insurance purposes. Raines recalled that the discharge was grieved and that pursuant to a later settlement, the employee was allowed to return to work. Raines recalled that Respondent determined that the employee had been in a valid common-law marriage in an adjoining State.

Respondent also offered evidence of various employees who had been terminated for violating Plant rule 13; falsifying the reason for an absence. On June 7, 2002, Respondent terminated employee Jason S. for violation of Plant rule 13. The matter was not grieved by the Union and the employee was never reinstated. On February 15, 2007, Respondent terminated an employee who was identified in the record as K.S. for altering a doctor's statement in violation of Plant rule 13. Additionally, Respondent terminated employees Frank M., Wilbert J., Chad G., and Stephen G. on April 4, 2002, February 13, 2004, November 17, 2005, and February 15, 2007, respectively, for falsifying doctor's notes in violation of Plant rule 13. Employee Chad G.'s discharge was also determined to be a violation of Plant rule 9 as Respondent determined that he fraudulently represented himself as being on Family Medical Leave to excuse an absence and to qualify him for overtime.

Respondent argues that while the General Counsel may assert that Respondent reversed its actions and reinstated four employees who had been terminated for a violation of Plant rule 9, their discharges and subsequent reinstatements are distinguishable. Respondent contends that these individuals were discharged and reinstated by Plant Manager Doyle Thresher, who left his employment with Respondent prior to 2012 and thus he did not participate in the Ferrell's discharge. I don't find merit to this argument. Although Thresher may have no longer been a part of Respondent's management in September 2012, both Raines and Fesperman continued in Respondent's employ as high level managers. Raines has been employed with Respondent since 2003, serving first as labor relations administrator and then as labor relations manager. Fesperman has served in Respondent's human resources

department since 1996. Thus, both Raines and Fesperman would have been fully aware in September 2012 that Respondent has used discretion in giving employees an opportunity to return to work, even after the employees were discharged for falsifying records. In fact, with respect to employee Frank W. whose discharge involved his fraudulently misrepresenting his marital status to the Company and the insurance carrier, both Raines and Fesperman were involved in the investigation and discharge deliberation. Both would have been aware that Respondent reversed the discharge and allowed the employee to return to work with his assurances that he would reimburse the Company for the 29 fraudulent claims. Raines admitted that the employee had never made any payments to reimburse the Company as he was scheduled to do. Accordingly, Respondent's management in September 2012 was fully aware that Respondent has used discretion in dealing with employees who have been charged with misrepresentation or falsification of records.

As noted by counsel for the General Counsel, Ferrell was accused of misrepresenting the parts that she made during only a portion of the workday as compared to other employees who were terminated and then reinstated after committing fraud. Counsel or the General Counsel submits that Ferrell's alleged misconduct did not cause Respondent to make increased health insurance benefits contributions or to the payment of improper health insurance claims. Furthermore, there was no evidence presented that Ferrell's pay for August 29, 2012, or any other day was based on the number of parts that she produced per hour.

Counsel for the Respondent assets in his posthearing brief that Respondent introduced the discharge records described above to show that Respondent has historically treated intentional falsification of work records as an immediately dischargeable offense. The record evidence, however, does not support Respondent's claim.

The target production rate for the base pan machine is 250 parts per hour. As discussed above, the employee operating the base pan machine is required to maintain a production log showing the number of parts produced each hour. At the end of the shift, the operator leaves the log or DPS in a three-ring binder at the machine. The following day, employee Kenneth Donelson retrieves the form from the binder and enters the information into the computer. As a part of his job, Donelson sends an email report to Supervisors Lee and Bryan Moore, identifying the specific information taken from the employee's DPS for the base pan machine. He includes the part number, hour, and count in the email report. Lee testified that while he reviews the production reports only once or twice a week, he goes back and reviews any days that he may have missed. Lee also saves all the reports that he has reviewed. He also acknowledged that if he saw something odd or potentially wrong in the production report he would investigate the matter. He admitted that if he found that the number listed was incorrect he would turn the matter over to Raines.

Counsel for the General Counsel submitted into evidence a daily production sheet dated October 8, 2012; a log created approximately a month after Ferrell's discharge. Lee confirmed that the document was prepared by an employee working in department 783 under his supervision. The log reflects that between 6 and 7 a.m. the employee produced 800 parts. The log also reflects that between 7 and 8 a.m., the employee produced 370 parts and between

8 and 9 a.m., the employee produced 190 parts. No production is documented for the period of time between 9 a.m. and 12:30 p.m. The employee documented production of 348 parts between 12:30 and 1:30 p.m. Lee admitted that it would not be possible for an employee to complete 800 parts in an hour. Both machine operator Darrell Stephens and group coordinator Archer also testified that it would not be possible for an employee to produce 800 parts an hour.

There is no dispute that Lee reviews the daily production reports and he admits that he will notify Raines if he finds an irregularity in an employee's production log. Although Lee acknowledges that it would be impossible for an employee to produce 800 parts per hour, there is no evidence that Lee or any other manager ever investigated the employee's report of October 8, 2012, much less disciplined the employee for the incredible numbers reported for that day.

Thus, based on the entire record evidence, I do not find that Respondent has demonstrated that it would have suspended and terminated Ferrell for what she documented in the DPS on August 29, 2012, in the absence of her protected activity.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily suspended and discharged Elizabeth Ferrell, must offer her reinstatement and make her whole for any loss of earnings and other benefits. 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.

The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Ferrell for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

The Respondent shall also remove from its files any reference to the unlawful suspension and discharge of Elizabeth Ferrell, and notify her in writing that it has done so, and that the suspension and discharge will not be used against her in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[8]

[8] 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, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Rheem Manufacturing Company, Fort Smith, Arkansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Suspending, discharging, or otherwise discriminating against any employee for filing grievances, making safety complaints, filing complaints with the Occupational Safety Health Administration, or otherwise engaging in protected activity.

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

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

(a) Within 14 days from the date of the Board's Order, offer Elizabeth Ferrell reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Elizabeth Ferrell whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.

(c) File a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

(d) Compensate Elizabeth Ferrell for the adverse tax consequences, if any, of receiving on or more lump-sum backpay awards covering periods longer than 1 year.

(e) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful suspension and discharge and, within 3 days thereafter, notify Elizabeth Ferrell that this has been done and that the discipline will not be used against her in any way.

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

(g) Within 14 days after service by the Region, post at its Fort Smith, Arkansas facility, copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 15, 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, the notices shall be distributed electronically, such as by email, posting on an intranet or 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 facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent since September 4, 2012.

(h) 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.

Dated, Washington, D.C. September 9, 2013

Margaret G. Brakebusch
Administrative Law Judge

[9] 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."

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDEAL LAW GIVES YOU THE RIGHT TO

For, 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 suspend, discharge, or otherwise discriminate against you for filing grievances, making safety complaints, or for filing complaints with the Occupational Safety and Health Administration or otherwise engaging in other union or protected concerted activities.

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

WE WILL offer Elizabeth Ferrell full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Elizabeth Ferrell whole for any loss of earnings and other benefits resulting from her suspension and discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Elizabeth Ferrell for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL remove from our files any reference to the unlawful suspension and discharge of Elizabeth Ferrell, and **WE WILL** notify her in writing that this has been done and that the discipline will not be used against her in any way.

RHEEM MANUFACTURING COMPANY
(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.nlrb.gov.

80 Monroe Avenue, Suite 350, Memphis, TN 38103
(901) 544-0018, Hours: 8 a.m. to 4:30 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 COVERD 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 (901) 544-0011.