Amglo Kemlite Laboratories, Inc. *and* Beata Ossak. Case 13–CA–065271

February 21, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

This case[1] involves a nonunion company's response to its employees' decision to cease work in order to protest the lack of a wage increase. We first provide a brief overview of the case before setting forth the facts and detailing the reasons for our conclusions and order.

I. OVERVIEW

The Respondent operates several facilities around the world, including one in Bensenville, Illinois, where it manufactures specialty lighting equipment. The Respondent's production employees at the Bensenville facility are not represented by a union and had not received a wage increase for many years. On September 20, 2011,[2] nearly all of the Respondent's production employees ceased work after their morning break and gathered in the lamp assembly area inside the facility to protest the Respondent's failure to grant them wage increases. The Respondent concedes that the work stoppage was protected at the outset, but claims that the employees lost the protection of the Act by remaining inside the facility for several hours after the Respondent repeatedly told them that it would not give them a wage increase and that they should leave if they were not going to work. The protest continued for several more days outside the Respondent's facility, although groups of employees gradually returned to work before the strike ended the following week.

Despite claiming that the employees lost the Act's protection, the Respondent denies that it ever fired any of the strikers. Instead, the Respondent claims that it repeatedly asked the strikers to return to work beginning the day of the strike and that it actually reinstated the vast majority of the strikers without any consequences. On September 27, the 50-plus strikers who had not returned to work made an unconditional offer to return under the preexisting terms and conditions of employment. By September 30, the Respondent had reinstated all but 22 of them. About a month later, the Respondent told those 22 individuals that it did not have jobs for them due to the economy and its movement of production work to its Mexico facility, and that it was therefore placing them on a preferential hiring list. By the end of the hearing before the judge, in early February 2012, none of those 22 employees had been reinstated.

The complaint alleges that the Respondent unlawfully discharged all the strikers on the first day of the work stoppage, made a single unlawful statement to strikers, and unlawfully transferred work from the struck facility to its Mexico facility. On the final day of the hearing, the General Counsel moved to amend the complaint to allege an additional unlawful threat that the owner would fire half of the employees. The judge denied the motion at the hearing. In his posthearing decision, the judge found that the Respondent did not in fact discharge any of the strikers, but he made no express findings regarding the merits of the remaining complaint allegations. However, he found that the Respondent violated the Act by accelerating the layoff of the 22 employees who were not reinstated.

The Respondent excepts, contending that, having properly found no merit to the complaint allegations, the judge should have dismissed the complaint instead of reaching out to find a violation that was not alleged in the complaint or fully litigated and that was contrary to the facts. The General Counsel likewise excepts to the judge's finding that the Respondent violated the Act by accelerating the layoff of the 22 strikers it did not reinstate, arguing that it was illogical for the judge to find that the Respondent accelerated a plan to lay off employees when the judge found that the Respondent never planned to lay anyone off prior to the strike.[3] However, the General Counsel also excepts to the judge's failure to find that the Respondent violated the Act as alleged in the complaint. The General Counsel further excepts to the judge's failure to find that the Respondent made numerous unlawful threats of reprisals.[4]

[1] On March 22, 2012, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel filed exceptions, and the Respondent filed cross-exceptions, to the judge's decision. The General Counsel and the Respondent also filed supporting briefs, answering briefs, and reply briefs. The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order. Member Miscimarra is recused, and took no part in the consideration of this case.

[2] All dates are in 2011 unless otherwise specified.

[3] We reverse the judge's finding that the Respondent violated the Act by accelerating a layoff of the 22 strikers it did not reinstate, given that both the Respondent and the General Counsel have excepted to the judge's finding of that unalleged violation.

[4] The General Counsel and the Respondent have also excepted to some of the judge's credibility findings. In particular, the General Counsel argues that the judge erred by discrediting employee Jesse Kopec, who testified that the Respondent told employees on two sepa-

As set forth in greater detail below, we find that the employees' work stoppage retained the protection of the Act at least until the Respondent's officials left the assembly area after discussing the employees' demand for a wage increase. We find it unnecessary to decide whether the employees thereafter lost the protection of the Act by remaining inside the Respondent's facility, because we conclude that the Respondent condoned the employees' conduct. We also conclude that the judge erred in denying the General Counsel's motion to amend the complaint to allege an unlawful threat to discharge half of the employees, and we find that threat of reprisal violated Section 8(a)(1). However, we find it unnecessary to determine whether certain of the Respondent's additional statements to employees constituted independent 8(a)(1) violations, as urged by the General Counsel, because the finding of additional 8(a)(1) violations would not materially affect the remedy.[5] We agree with the General Counsel that the judge applied the wrong legal test for determining whether the Respondent had discharged the strikers; nevertheless, we find, applying the correct test, that the Respondent did not in fact do so. Accordingly, we dismiss the complaint allegation that the Respondent discharged all the strikers on the first day of the work stoppage. Finally, we agree with the General Counsel that the Respondent unlawfully transferred work from its Bensenville facility to its Mexico facility in retaliation for the employees' work stoppage.

II. FACTS

On September 20, virtually the entire production work force of approximately 94 employees at the Bensenville facility ceased work after the morning break ended at about 8:40 a.m. They gathered in the assembly area of the facility to protest the Respondent's failure to grant them a wage increase for several years. Respondent President Izabella Christian and Plant Manager Anna Czajkowska arrived in the assembly area between 9 and 9:30 a.m. Czajkowska, who was upset, asked the employees what they were doing and told them to return to work. When employees said that they wanted to know about wage increases, Czajkowska or Christian said several times that the Respondent would not raise wages and that the employees should return to work or leave (or punch out and go home).

The employees then asked if they could talk to Jim Hyland, the Respondent's owner, about a wage increase. President Christian replied that Hyland was not as pro-Polish as he used to be.[6] She added that the owner already knew the employees wanted a wage increase but that the Respondent could not do anything about it. Plant Manager Czajkowska said, "I'll tell you what he's going to say. He will tell us to get rid of half of you. And you're not going to do anything. You're not going to scare him. You're not going to threaten him[.] You're going to lose."

Czajkowska admitted that, during her meeting with employees, she held resignation forms in her hand and told employees that if they did not like working for their current wages, they could resign. Nevertheless, the conversation continued. As the judge found, President Christian discussed globalization and the Respondent's foreign facilities. The testimony indicates that Christian asked the employees if they knew about globalization and what that means. Christian said that companies can move production to China and Mexico. She reminded the employees that the owner had other companies, and added, "[Y]ou're asking what would he [the owner] do? It would be so easy for him to make a decision. It's so strange that you don't know what he would do at that point with you."[7]

At some point, an employee indicated that she wanted to go back to work. Employee Zofia Bialon told the employee to be quiet. Plant Manager Czajkowska then put one of the resignation forms on the table in front of Bialon and encouraged her to sign it and leave. Bialon pushed it away and told Czajkowska to sign the form herself.

About 10:30 a.m., President Christian and Plant Manager Czajkowska left the assembly area. After a while, the employees realized that the Respondent's officials would not be returning, so the employees decided to formalize their demand for a wage increase in writing. As conditions for ending the strike, the employees de-

rate occasions on September 20 that they were fired. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[5] Member Hirozawa would find one of the additional statements unlawful, as explained below.

[6] Most of the Bensenville employees are Polish.

[7] The Respondent has facilities located in China and Mexico. The Respondent's vice president for sales and marketing testified that the Respondent's Mexico facility is a "sister facility" to the Bensenville facility, and that the Respondent sometimes transfers high volume runs from its Bensenville facility to its Mexico facility, which he stated has lower costs. He further testified that the business model relationship between the Bensenville and Mexico facilities has been in place since 2004 or 2005. The record shows that the Respondent had increased the size of the Bensenville production work force from 85 to 94 employees in the 9-month period before the events at issue (i.e., between December 2010 and August 2011).

manded guaranteed annual future wage increases tied to the rate of inflation, as well as backpay since the date of their last wage increase (based on the rate of inflation during those prior years). Later that morning, an office employee typed the petition in Polish, the language spoken by nearly all of the Respondent's employees, and presented it to the Respondent's management. Czajkowska telephoned Owner Hyland about the petition but never got back to employees about it. Virtually all the production employees remained in the assembly area until 2:45 p.m., even though many of the employees' shifts had ended at 1:15 p.m.[8] The late afternoon/early evening shift did not participate in the strike and worked that day. As early as the afternoon or evening of September 20, Christian or Czajkowska tried to contact employees through their supervisors to get them to return to work but did not have much success reaching employees.

The next morning employees arrived at the facility around 5 a.m., but they could not enter the plant because the Respondent had changed the locks. About 7 a.m., Christian, Czajkowska, and the Respondent's chief financial officer, accompanied by a police officer, came to the employee entrance and asked the employees to return to work. When the employees said they would not return to work without a raise, the Respondent said there would be no raise, and that employees must get off the Respondent's property if they were not going to return to work. The chief financial officer told employees that they were striking and would not qualify for unemployment compensation and that the Respondent would contest any application they made. The police officer shook his handcuffs to reinforce the message that employees had to leave the property, and the employees moved their cars off the Respondent's property and reassembled on public property across from the Respondent's facility. The judge found that at some point that morning, Czajkowska asked employees what they were doing at the plant and may have said that they were fired. When employee Elizabeta Rosa said, "[S]o you did fire us," Czajkowska replied that the employees were firing themselves or resigning by not returning to work.[9] In any event, 10 employees returned to work that day.

On Thursday, September 22, Christian and Czajkowska motioned for the striking employees to come in and return to work, and 17 additional employees returned to work.

On Friday, September 23, another employee returned to work. That same day, another small group of employees went to the facility and asked for permission to return to work. According to Czajkowska, she told the group that they had to fill out job applications to show their functions and positions before the Respondent would consider bringing them back. The group then went back outside and reported to striking coworkers assembled there that new applications were required. The employees then decided that if the Respondent needed them to fill out new applications they would do so. Three of the employees who requested reinstatement then returned to the facility to fill out applications, but returned to the group without any applications. The judge specifically found that there was no evidence that any striking employee filled out a job application.

On Monday, September 26, two more employees returned to work. On Tuesday, September 27, four permanent replacements began working for the Respondent, though two of the replacements quit the same day. Also on Tuesday, September 27, the 50-plus strikers who had not yet returned to work unconditionally offered to return under the preexisting wages and working conditions. The testimony indicates that when employee Beata Ossak asked how long it would take for the Respondent to call those employees back to work, President Christian said she could not give employees a timeline or say how many employees the Respondent would recall, adding that the Respondent was reorganizing the production and moving the production to Mexico because of the situation. Two days later, the Respondent asked Ossak to return to work.

Between September 27 and 30, the Respondent reinstated another 30-plus employees.

On October 21, the Respondent sent a letter to the 22 employees it had not reinstated, for the stated purpose of updating their employment status. The letter referenced the strike and stated, "based on our assessment of the economy and our continued movement of production to our plant in Mexico (which we continue to assess), we have determined we do not currently have jobs for all of our employees who offered to return to work on September 27th. Therefore, those employees who have not re-

[8] The day-shift employees, who constitute most of the facility's work force, begin work at 5 or 6:30 a.m. and end at 1:15 or 2:45 p.m.

[9] In his decision, the judge quotes Czajkowska as answering Rosa, "No, you fired yourselves when you walked off the job." No such quote appears on the page of the transcript cited by the judge. Instead, before being cut off by the General Counsel, Czajkowska acknowledged that, after the employees had said that they were not returning to work, she said that the employees were firing themselves. In response to the General Counsel's subsequent questions, Czajkowska testified that her Board affidavit correctly set forth the exchange between her and Rosa as follows: when employee Rosa heard that the Respondent would not be granting the wage increases that the employees wanted, Rosa said, "[So] fire us." Czajkowska then responded to Rosa, "[N]o, you are trying to fire yourselves. You're resigning because you don't want to return to work."

turned to work have been placed on a preferential hiring list." The letter added that the employees on the list had not been terminated and had the right to be recalled if and when the Respondent had job openings in the future. The Respondent promised to recall employees from the preferential hiring list before hiring new employees in accordance with Federal and State labor laws. The letter added that the Respondent would be mailing vacation checks to employees who had not returned to work and would also send out COBRA notices. The letter asked the recipients to arrange a time to pick up their personal items, but closed by repeating that the Respondent would recall employees from the preferential hiring list in the event of future openings. The Respondent had yet to offer reinstatement to any of the 22 employees on the list by the close of the hearing.

III. ANALYSIS

A. The Protected Nature of the Work Stoppage

The Section 7 right to engage in concerted activity for the purpose of mutual aid or protection is "afforded equally to nonunion employees and union employees." *NLRB v. McEver Engineering, Inc.*, 784 F.2d 634, 639 (5th Cir. 1986) (enfg. 275 NLRB 921 (1985)). Accordingly, unrepresented employees are ordinarily engaged in protected concerted activity when they cease work to pressure their employer to improve their wages and working conditions. See, e.g., *Atlantic Scaffolding Co.*, 356 NLRB No. 113, slip op. at 4 (2011); *Ridgeway Trucking Co.*, 243 NLRB 1048, 1048 (1979), enfd. 622 F.2d 1222, 1223–1225 (5th Cir. 1980). Although an onsite work stoppage can be a form of economic pressure protected by the Act, "[a]t some point, an employer is entitled to exert its private property rights and demand its premises back." *Quietflex Mfg. Co.,* 344 NLRB 1055, 1056 (2005) (citation omitted). Under these circumstances, "the employees' Section 7 right to engage in activity on the employer's property must be balanced against the employer's asserted private property rights." *Atlantic Scaffolding*, supra, slip op. at 3 (citing *Quietflex*, supra at 1056–1058).

The Board considers a variety of factors in determining which party's rights should prevail in the context of an onsite work stoppage, including: (1) the reason the employees have stopped working; (2) whether the work stoppage was peaceful; (3) whether the work stoppage interfered with production or deprived the employer of access to its property; (4) whether the employees had an adequate opportunity to present grievances to management; (5) whether the employees were given any warning that they must leave the premises or face discharge; (6) the duration of the work stoppage; (7) whether the employees were represented or had an established grievance procedure; (8) whether the employees remained on the premises beyond their shift; (9) whether the employees attempted to seize the employer's property; and (10) the reason for which the employees were ultimately discharged. *Quietflex*, supra at 1056–1057 (surveying cases).

Applying the *Quietflex* factors, we find that the employees' work stoppage retained the protection of the Act until at least the time (about 10:30 a.m.) that the Respondent's officials left the assembly area after discussing the employees' demand for a wage increase.[10] The employees stopped work for a reason entitled to the Act's protection: to pressure their employer to grant them wage increases, after their previous requests for wage increases had gone unanswered for several years. The judge found that the in-plant work stoppage was peaceful and did not interfere with the Respondent's production to any greater extent than if the employees had simply left the facility and picketed outside. See *Atlantic Scaffolding*, supra, slip op. at 4 ("It is not considered an interference [with] production where the employees do no more than withhold their own services") (citation omitted). The Respondent admits that the employees were nonviolent and did not damage any machinery or product, and there is no evidence that employees denied anyone access to the property. Further, the employees had remained on the property without working for a limited period of time (approximately 2 hours) when the officials left the assembly area, and it appears that employees were continuing to discuss their request for a wage increase with management until the officials left. The Respondent states that it never told the employees that they would be fired if they did not leave the facility and never fired, or otherwise disciplined, any of the employees for remaining in the facility. The employees were unrepresented, and the Respondent concedes that the employees had no established formal grievance procedure. Finally, none of the employees' shifts had ended as of the time the Respondent's officials left the assembly area, and the employees made no attempt to seize the Respondent's property. In sum, all of the relevant factors, considered under the circumstances of this case, support a finding that the employees' work stoppage retained the protection of the Act at least until the time that the Respondent's officials left the assembly area. See *City Dodge Center*, 289 NLRB 194 (1988), enfd. sub nom. *Roseville Dodge v. NLRB*, 882 F.2d 1355, 1359 (8th Cir. 1989) (peaceful in-plant work stoppage lasting

[10] As explained below, we find it unnecessary to decide whether the employees thereafter lost the protection of the Act.

"a limited period of time" (2 to 3 hours) to pressure president to meet with employees regarding their grievances was protected); *Pepsi-Cola Bottling Co.*, 186 NLRB 477, 478 (1970) (sit-down strike lasting "only a few hours" protected), enfd. 449 F.2d 824, 825, 829–830 (5th Cir. 1971), cert. denied, 407 U.S. 910 (1972).

The Respondent admits that the employees' in-plant work stoppage was protected at the outset but essentially claims that the employees lost the protection of the Act by remaining inside the facility for about 4 hours after being repeatedly told by high-ranking officials that the Respondent would not raise their wages and that the employees should either return to work or leave. Although the Respondent agrees with the judge that *Quietflex* "directly applies" to this case, it challenges the judge's application of the test and his conclusion that the employees' work stoppage retained the Act's protection for the entire duration that employees remained in the facility.

We find it unnecessary to determine whether the employees lost the protection of the Act by remaining inside the facility after the Respondent's officials left the assembly area because, even assuming, arguendo, that the employees lost the Act's protection, the Respondent clearly condoned their conduct. *Emarco, Inc.*, 284 NLRB 832, 833 (1987) (finding it unnecessary to determine whether employees' conduct was unprotected in light of employer's condonation, which "rendered the strike, in effect, protected activity, regardless of whether it was initially protected or unprotected"). Here, the Respondent, by its own admission, frequently invited the strikers to return to work (including the day after the in-plant work stoppage) and reinstated all but 22 of the strikers without any consequences. And the Respondent claims that the only reason it did not reinstate those 22 strikers—but instead placed them on a preferential hiring list—was because it did not have jobs for them. See *Beverly Health & Rehabilitation Services,* 346 NLRB 1319, 1321–1322 fn. 17 (2006) (by placing employee on preferential rehire list, employer "forfeited its right to rely on her participation in the unprotected strike to justify her subsequent discharge"); *Virginia Mfg. Co.,* 310 NLRB 1261, 1261 fn. 2, 1272, 1277–1278 (1993) (employer condoned alleged misconduct by offering reinstatement to the strikers after their alleged misconduct), enfd. mem. 27 F.3d 565 (4th Cir. 1994); *Circuit-Wise, Inc.*, 308 NLRB 1091, 1091 fn. 2, 1101–1102 (1992) (employer condoned strike misconduct by testifying at unemployment hearing that he would reinstate strikers if they applied for it), enfd. mem. 992 F.2d 319 (2d Cir. 1993); *Richardson Paint Co.*, 226 NLRB 673, 673 (1976) (although walkout in violation of no-strike clause was unprotected, employer condoned it by offering reinstatement to the employees who participated in the walkout), enfd. in relevant part 574 F.2d 1195, 1202–1203 (5th Cir. 1978); *Jones & McKnight, Inc.*, 183 NLRB 82, 82 fn. 3, 89–91 (1970) (employer condoned strike in breach of collective-bargaining agreement by saying strikers could return to work), enfd. 445 F.2d 97, 102–104 (7th Cir. 1971).[11]

B. The Respondent's Threat to Discharge Half of the Strikers

The judge found that when employees asked if they could speak to the Respondent's owner about their demand for a wage increase (after the Respondent's other officials had rejected the demand), Czajkowska said that the owner would tell her and Christian "to get rid of half of you." As the Respondent acknowledges in its answering brief, the General Counsel moved to amend the complaint during the hearing to allege that the Respondent threatened that the owner would fire half of the employees. However, the judge denied the motion, stating that it was unnecessary. The General Counsel excepts to the judge's failure to find that the Respondent's statement constituted a threat of reprisal for striking in violation of Section 8(a)(1) of the Act.

We find merit in this exception. The judge should have granted the motion to amend and found the violation thereby alleged. Section 10(b) of the Act expressly provides that a complaint "may be amended . . . at any time prior to the issuance of an order based thereon." Section 102.17 of the Board's Rules and Regulations makes the granting of motions to amend filed during the hearing discretionary with the administrative law judge; however, where the matter has been fully litigated at the hearing and the amendment essentially conforms the complaint to the evidence adduced, the administrative law judge's denial of such motion is in error. *The Lion Knitting Mills Co.*, 160 NLRB 801, 802 (1966). [12]

Initially, we find that the matter was fully litigated. The record shows that although the Respondent objected to the General Counsel's motion to amend the complaint on the third (and final) day of the hearing, the Respondent did not object when the evidence about the threat was adduced on the second day of the hearing, and the Respondent failed to question the witness about the relevant statement on cross-examination. In addition, the Respondent failed to question the official who made the

[11] Had the Respondent not condoned the employees' conduct in remaining in the assembly area, Member Johnson would have found that the striking employees lost the Act's protection.

[12] The General Counsel inadvertently stated that Christian, rather than Czajkowska, voiced the threat at the September 20 assembly room meeting, but that error is not material here.

remark, despite that official testifying after the evidence about the statement was admitted. See *Park 'N Fly, Inc.*, 349 NLRB 132, 133–134 (2007) (matter was fully litigated where respondent did not object to evidence in question, had the opportunity to cross-examine witness who supplied evidence of unalleged violation, and could have questioned its supervisor—who later testified—about an unalleged violation); *Casino Ready Mix, Inc.*, 335 NLRB 463, 464 (2001) (employer had the opportunity to fully litigate an unalleged violation where employer did not object to the evidence establishing the violation and had the opportunity to cross-examine witnesses about the statements), enfd. 321 F.3d 1190, 1199–1200 (D.C. Cir. 2003).

Further, we find that the General Counsel's motion amends an existing complaint allegation to conform to the evidence adduced. The complaint alleged that Plant Manager Czajkowska violated the Act on September 20 by threatening employees that things would not end well for them if they continued to strike. That complaint allegation was a threat of reprisal. Just as certainly, the statement by the same person to the same audience on the same day as alleged in the complaint was a threat of reprisal. Accordingly, we find that the judge erred in failing to grant the General Counsel's motion to amend the complaint to conform to the evidence adduced, and, based on this evidence, we find that the Respondent violated Section 8(a)(1) as alleged by Czajkowska's statement that the owner would direct her and the president to get rid of half of the strikers. See *Dayton Newspapers,* 339 NLRB 650, 652 (2003), enfd. in relevant part 402 F.3d 651, 660 (6th Cir. 2005) (employer threatened employees with discharge by warning employees that if they struck, they would not be working there anymore).[13]

C. The Discharge Allegation

Ordinarily in cases involving alleged unlawful discharges, there is no dispute that the employer has in fact discharged the employees in question. Instead, the parties typically dispute the employer's motivation for the discharges. In this case, however, the Respondent denies that it ever fired employees. The General Counsel argues that the Respondent fired all the employees within the first hour of the in-plant work stoppage by telling them they were fired and giving them resignation forms to sign; however, the judge discredited the testimony that the Respondent told employees on the first day of the strike that they were fired.[14] The judge further credited the testimony of the Respondent's witnesses that the Respondent did not fire any employees. On the basis of those credibility findings, the judge found that the Respondent had not in fact fired the employees on September 20.

We find, in agreement with the General Counsel, that the judge applied the wrong legal test in evaluating the unlawful discharge allegation. Put simply, an employer may be deemed to have discharged employees even if the employer does not explicitly tell its employees that they have been fired. The test of whether an employer has discharged employees is whether the employer's words and conduct would reasonably lead employees to believe that the employer has terminated them. *Pride Care Ambulance*, 356 NLRB No. 128, slip op. at 2 (2011); *Ridgeway Trucking Co.*, 243 NLRB at 1048–1049 (1979), enfd. in relevant part 622 F.2d 1222, 1224 (5th

[13] The General Counsel also excepts to the judge's failure to find that the Respondent committed seven additional independent 8(a)(1) violations by making the following threats of reprisals: (1) telling employees during the first hour of the in-plant work stoppage that they were fired; (2) telling a small group of employees later that afternoon that they were fired and should go away; (3) telling employees on the first day of the strike that they were going to lose; (4) telling employees on the strike's first day that there are companies that are moving production to China and Mexico, the owner has four different companies on different continents, and it would be so easy to make a decision; (5) telling employees on the strike's first day that the owner was no longer as pro-Polish as he once was; (6) telling employees on the strike's first day that they should resign; and (7) telling employees on the strike's second day that they had fired themselves when they walked off the job. We find no merit to the General Counsel's exceptions regarding the first two statements in light of the judge's decision to discredit the testimony on which they rely. As to the remaining statements, the General Counsel did not allege such violations in the complaint or move to amend the complaint to allege them. Chairman Pearce finds it unnecessary to determine whether these remaining unalleged statements constitute independent 8(a)(1) violations because the finding of additional violations would not materially affect the remedy.

Member Hirozawa agrees with the Chairman as to statements 3, 5, 6, and 7, but he would find that the Respondent violated Sec. 8(a)(1) by implicitly threatening that the Respondent would transfer work to a foreign facility if the employees continued striking (statement 4). The Board finds, below, that the statements comprising this threat were made and that they demonstrate the Respondent's animus toward the employees' strike. In Member Hirozawa's view, the threat to transfer work is closely connected to the complaint allegations (specifically, the threat of reprisals and the unlawful transfer of work), and it was fully litigated for the same reasons as the threat to fire half the employees, explained above. Thus, under *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990), he would find that the statements constituted an unlawful threat.

Member Johnson agrees with the Chairman that it is unnecessary to pass on the legality of statements 4, 6, and 7 inasmuch as finding violations based on these statements would be cumulative and would not materially affect the remedy. However, Member Johnson would find that statements 3 and 5 were lawful expressions of the Respondent's free speech rights under Sec. 8(c) of the Act, and therefore may not be found to constitute independent 8(a)(1) violations.

[14] As noted, we find no basis for reversing the judge's decision to discredit employee Kopec's testimony that the Respondent told employees on September 20 that they were fired.

Cir. 1980). And, in determining whether strikers have been discharged, "the events must be viewed through the striker's eyes and not as the employer would have viewed them." *Swardson Painting Co.*, 340 NLRB 179, 180 (2003) (quoting *Brunswick Hospital Center*, 265 NLRB 803, 810 (1982)). Nevertheless, applying the correct test, we find that the General Counsel has failed to carry his burden of showing that the Respondent discharged all the strikers on September 20. The Respondent's words and conduct on September 20, including its requests that employees return to work, could not reasonably have led employees to conclude that they had been fired that day. See, e.g., *California Gas Transport*, 347 NLRB 1314, 1319 and fn. 17 (2006) (employer did not discharge employees by demanding to know who was willing to work and who was not and handing employees resignation forms to sign, where employees did not sign the forms and the employer took no other action consistent with firing employees on that date), enfd. 507 F.3d 847 (5th Cir. 2007). We further find that the Respondent's post-September 20 statements and conduct, when considered in the context of the totality of the Respondent's conduct, could not reasonably have led employees to believe that they had been fired on September 20.

D. The Transfer-of-Work Allegation

Although the judge found that the Respondent bore animus toward the employees' strike activity and transferred work from Bensenville to Mexico after the strike, the judge made no express finding regarding the complaint allegation that the Respondent had unlawfully transferred work from its Bensenville facility to its Mexico facility in retaliation for the employees' strike. The General Counsel argues that the Board should correct the judge's failure to make that unfair labor practice finding. We find merit in this exception.

An employer violates Section 8(a)(1) of the Act by taking adverse action against employees because of their protected concerted activities. The critical question in such cases is whether the employer's challenged action was motivated by the employees' protected activity, which we assess by applying *Wright Line*.[15] Under *Wright Line*, the General Counsel has the initial burden to show that the employee's protected activity was a motivating factor for the adverse action by demonstrating (1) the employee's protected activity, (2) the respondent's knowledge of that activity, and (3) the respondent's animus. See *Austal USA, LLC*, 356 NLRB No. 65, slip op. at 1 (2010). The burden then shifts to the respondent to show that it would have taken the same action even in the absence of the employee's protected activity. Id.

Compelling record evidence persuades us that the Respondent did indeed transfer work in retaliation for the employees' work stoppage, a stoppage that the Respondent's condonation effectively rendered protected, even assuming it otherwise might have lost the Act's protection.

Further, the Respondent was plainly aware of its employees' work stoppage. It also manifested animus toward that activity. Among other things, the Respondent implicitly warned employees that if they continued striking, the Respondent would transfer work to a foreign facility.[16] The same day, the Respondent also explicitly threatened that the owner would fire half of the strikers, in violation of Section 8(a)(1). See *Taylor Machine Products*, 317 NLRB 1187, 1187, 1212–1214 (1995), enfd. in relevant part 136 F.3d 507, 515 (6th Cir. 1998) (statements that unionization would result in job loss and that employer would "take care of" employees in prounion department supported finding that subsequent relocation of department's operations, ostensibly for business reasons, was unlawful); *Jays Foods, Inc*, 228 NLRB 423, 423, 429–430, 433 (1977) (finding that employer unlawfully subcontracted out part of its operation, in view of supervisor's previous threat that employer would contract out work if employees kept "fooling around" with the union), enfd. as modified 573 F.2d 438, 442–443, 445–446 (7th Cir. 1978), cert. denied 439 U.S. 859 (1978); see also *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 297 (6th Cir. 1985) (enfg. 271 NLRB 1320 (1984)) (where an employer's representative announces an intent to retaliate against an employee for engaging in protected activity, the Board has before it "especially persuasive evidence" that a subsequent adverse action was unlawfully motivated), cert. denied, 476 U.S. 1159 (1986).

[15] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). By its terms, *Wright Line* applies to 8(a)(1) allegations that adverse action was motivated by protected concerted activity, just as it does to 8(a)(3) allegations of actions motivated by union activity. Id. at 1089.

[16] See fn. 13. Chairman Pearce and Member Hirozawa note that under well-settled law, the implicit threat to transfer work if the employees continued striking may be used to establish unlawful motivation even though the complaint did not allege that threat as unlawful. See *Cla-Val Co.*, 312 NLRB 1050, 1050 fn. 3 (1993); see also *SCA Tissue North America LLC v. NLRB*, 371 F.3d 983, 989 (7th Cir. 2004) (Board may properly consider unalleged acts occurring outside the Sec. 10(b) period in its attempt to discern the true motive behind employee's termination). Although Member Hirozawa, unlike the Chairman, would reach the unalleged threat and find it unlawful, he agrees that the Board need not find the threat unlawful to consider it as evidence of the Respondent's motive.

This is also one of those rare cases with direct evidence of unlawful motivation. Thus, when employee Ossak asked on September 27 how long it would take for the Respondent to reinstate the strikers who had unconditionally offered to return to work, Christian replied she could not say, adding that the Respondent was "moving the production to Mexico because of the situation." Similarly, as the judge found, Czajkowska told the Board agent during the investigation of the unfair labor practice charge that "the company accelerated its decision to transfer the work to Mexico because of the strike."[17] The suspicious timing of the work transfer—so soon after the onset of the strike—likewise supports a finding of unlawful motivation for the transfer.

We also find that, with the exception of the work transferred to meet the customer deadline, the Respondent failed to show that it would have transferred the work when it did for nondiscriminatory reasons. Although the Respondent claims that Christian's main reason for visiting the plant on September 18 (prior to the strike) was to try to accelerate the process of transferring work from Bensenville to Mexico, the judge did not credit the Respondent's claim that it had decided before the strike to transfer so much work from Bensenville to Mexico that a reduction in force would be necessary in Bensenville. Thus, the judge expressly found that the Respondent failed to show that it had plans to lay off any employees prior to the strike. And the Respondent's contrary claim is belied by Czajkowska's admission at the hearing that the Respondent decided to accelerate the transfer of work *after* the employees went out on strike.

Alternatively, the Respondent argues that the Board should not find a violation because it transferred only "a miniscule amount of work" after the strike. However, the judge found, and we agree, that the Respondent has not established that it transferred an insignificant amount of production work to its Mexico facility. Indeed, the Respondent's contemporaneous statements are inconsistent with its claim of having transferred only a miniscule amount of work after the strike. The Respondent's October 21 letter explains that the Respondent does not have jobs for 22 of the former strikers—approximately 25 percent of its pre-strike work force—in part because of the "continued movement of production to our plant in Mexico." Similarly, Christian told an employee on September 27 that she could not say how many employees the Respondent was going to recall (and when employees would be recalled) because the Respondent was in the process of moving the production to Mexico.

Finally, we find no merit to Respondent's claim that *Textile Workers Union of America v. Darlington Mfg. Co.*, 380 U.S. 263 (1965), precludes the Board from finding an unlawful transfer of work (and issuing a restoration order) absent an 8(a)(3) finding. *Darlington* does not purport to address the issue of whether the Board may find an 8(a)(1) violation when an employer transfers some of its work from one facility to another in retaliation for its employees' protected concerted (but not union) activity. Instead, it merely holds that an employer has the absolute right to terminate his entire business for any reason. Id. at 268. Here, the Respondent has not shut down its entire business; instead, it has transferred work from its Bensenville facility to its Mexico facility, and it continues to operate the Bensenville facility. Moreover, we are not finding an 8(a)(1) violation in the absence of a finding of unlawful motivation. Rather, we have found that the transfer of work from Bensenville to Mexico was unlawful because it was unlawfully motivated by the employees' strike activity, a violation that is legally analogous to the 8(a)(3) violation that the Respondent contends is necessary. Under the Respondent's view, although an employer could not transfer work to punish *unionized* employees for striking, it could, with impunity, transfer work to punish *nonunion* employees for striking. Nothing in *Darlington* supports such a result. Not surprisingly, therefore, the Board has ordered work restoration remedies in the absence of 8(a)(3) findings. See, e.g., *Glenwood Management Corp.*, 287 NLRB 1151, 1151 fn. 2 (1988) (employer ordered to reestablish its maintenance department as a remedy for Section 8(a)(1) discharges); cf. *Fibreboard Paper Products Corp v. NLRB*, 379 U.S. 203, 208, 215 (1964) (employer ordered to restore its maintenance operation to remedy 8(a)(5) violation).[18]

[17] We recognize that an employer has the right to continue operating during a strike, and therefore may temporarily transfer work to satisfy customer orders. But the Respondent merely claimed at the hearing that it temporarily transferred a single project during the strike because of a customer deadline, and it returned that work to Bensenville after the strike ended. The record, however, reflects that additional work was transferred after the strike began on September 20, and the Respondent did not show that it transferred the other work in order to continue operations during the strike.

[18] In agreeing that the Respondent unlawfully transferred work in retaliation for its employees' work stoppage, Member Johnson does not rely on the Respondent's putative implicit threat to transfer work, which was not alleged in the complaint. Rather, he relies exclusively on Christian's admission that the Respondent transferred the work from Bensenville to Mexico in response to the strike. In addition, Member Johnson observes that the transfer of work was unlawful because the Respondent had fully condoned a strike that Member Johnson would otherwise find unprotected—converting the strike into protected activity—and then took adverse action against that protected activity. He further observes that employers in similar circumstances have the op-

CONCLUSIONS OF LAW

1. The Respondent, Amglo Kemlite Laboratories, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act:

(a) Threatening its employees with discharge because they engaged in a concerted work stoppage.

(b) Transferring work from its Bensenville, Illinois facility to its Mexico facility because its employees engaged in a concerted work stoppage.

AMENDED REMEDY

Having found that the Respondent unlawfully threatened its employees with discharge, we shall order it to cease and desist from that activity.

Further, having found that the Respondent unlawfully transferred work from its Bensenville, Illinois facility to its Mexico facility in retaliation for its employees' work stoppage, we shall order the Respondent to restore the production work to its Bensenville facility that it unlawfully transferred.[19] We shall also order the Respondent to offer full reinstatement to any employee who lost his or her job as a result of the unlawful transfer of work or, if that job no longer exists, to a substantially equivalent position, without prejudice to his or her seniority or any other rights or privileges previously enjoyed, and to make whole each employee for any loss of wages and other benefits they may have suffered by reason of the Respondent's unlawful transfer of work, 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). However, the Respondent will have the opportunity to demonstrate in compliance that it would have subsequently laid off for legitimate reasons any employees who were adversely affected by the unlawful transfer of work, and thereby limit its remedial obligations to such employees. In addition, the Respondent shall compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. The Respondent shall also be ordered to expunge from its files any reference to employees' loss of employment due to the unlawful work transfer and to notify the affected employees in writing that this has been done and that the loss of employment will not be used against them in any way.

Given that a significant number of the Respondent's employees speak Polish and that the Respondent and its employees largely communicated with each other in Polish during the strike, we agree with the judge's recommendation that the notice be posted in both English and Polish. See *St. Francis Medical Center*, 347 NLRB 368, 368 fn. 4 (2006). We reject the General Counsel's request that President Christian be required to read aloud the Board's remedial notice, because the General Counsel has not demonstrated that this measure is needed to remedy the effects of the Respondent's unfair labor practices. See *Mardi Gras Casino & Hollywood Concessions, Inc.*, 359 NLRB No. 100, slip op. at 1 fn. 3 (2013). The Respondent shall also post the notice in accordance with *J. Picini Flooring*, 356 NLRB No. 9 (2010).

ORDER

The National Labor Relations Board orders that the Respondent, Amglo Kemlite Laboratories Inc., Bensenville, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge because they engage in a concerted work stoppage.

(b) Transferring work from its Bensenville, Illinois facility to its Mexico facility because its employees engage in a concerted work stoppage.

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

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

(a) Restore production work that was transferred from the Respondent's Bensenville, Illinois facility to the Respondent's Mexico facility in retaliation for the employees' work stoppage at the Bensenville facility.

(b) Within 14 days from the date of this Order, offer full reinstatement to those employees who lost their jobs as a result of the unlawful transfer of work in the manner set forth in the amended remedy section of this decision.

(c) Make employees whole for any loss of earnings and other benefits suffered as a result of the unlawful

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tion of avoiding condonation by warning employees that their strike is unprotected and that it may result in discipline or discharge, consistent with *Quietflex* factor 5. See *Quietflex*, 344 NLRB at 1056–1057.

[19] We leave for compliance the determination of the precise amount of work that the Respondent transferred from Bensenville to Mexico in retaliation for the strike.

Member Johnson would limit the remedy to the particular work unlawfully transferred from Bensenville to Mexico, and would bar any attempt to compel the transfer of any work back to Bensenville that was lawfully slated for transfer to Mexico before the strike. Thus, to the extent any start-up, or "incubator," manufacturing of a new part was unlawfully transferred to Mexico, he would not require the Respondent to move full-scale production of that part to Bensenville provided that such production was originally slated for Mexico before the strike.

transfer of work in the manner set forth in the amended remedy section of this decision.

(d) Compensate employees who lost work because of the unlawful work transfer for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(e) Within 14 days from the date of this Order, remove from its files any reference to employees' loss of employment due to the unlawful work transfer, and, within 3 days thereafter, notify the affected employees in writing that this has been done and that the loss of employment will not be used against them 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 Bensenville, Illinois facility copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 13, in English and Polish, 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 an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 20, 2011.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 13 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. February 21, 2014

[20] 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."

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

(SEAL) 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.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discharge because you engage in a concerted work stoppage.

WE WILL NOT transfer work from our Bensenville, Illinois facility to our Mexico facility because you engage in a concerted work stoppage.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL restore production work that we transferred from our Bensenville, Illinois facility to our Mexico facility in retaliation for the employees' September 2011 work stoppage at our Bensenville facility.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to those employees who lost their jobs as a result of our unlawful transfer of work, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make our employees whole for any loss of earnings and other benefits resulting from our unlawful

transfer of work from our Bensenville facility to our Mexico facility, less any net interim earnings, plus interest.

WE WILL compensate employees who lost work because of the unlawful work transfer for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to employees' loss of employment due to the unlawful work transfer, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the loss of employment will not be used against them in any way.

AMGLO KEMLITE LABORATORIES, INC.

Cristina Ortega and *Richard Kelliher-Paz, Esqs.,* for the General Counsel.

Philip Miscimarra and *Ross Friedman, Esqs. (Morgan, Lewis & Bockius LLP),* of Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Chicago, Illinois, on January 30–February 1, 2012. Beata Ossak filed the charge on September 23, 2011, and the General Counsel issued the complaint on December 30, 2011.

Virtually the entire production workforce of approximately 94 employees at Respondent's nonunionized Bensenville, Illinois facility went on strike at mid-morning on Tuesday, September 20, 2011.[1] On September 27, 2011, all or almost all of the employees had either returned to work or agreed to return to work with no change in their working conditions as compared to before the strike. By September 30, 72 or 73 of these employees had returned to work. Twenty-two were not recalled and were placed on a preferential hiring list.

The General Counsel alleges that Respondent violated Section 8(a)(1) by threatening employees, terminating them in retaliation for the strike, and transferring work from the Bensenville facility to Respondent's Juarez, Mexico facility in retaliation for the strike.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

[1] Respondent also has production facilities in Florida, Juarez, Mexico, and China. I conclude that the best evidence as to the number of production employees at Bensenville as of September 20, 2011, is 94 (Co. Exh. 6).

[2] Tr. 253, line 8 & Tr. 255 line 22: 2428A should be 3428A.

FINDINGS OF FACT[3]

I. JURISDICTION

Respondent, a corporation, manufactures specialty lamps, such as those on airplane wings at its facility in Bensenville, Illinois. It annually sells and ships goods valued at excess of $50,000 from this facility directly to points outside of Illinois. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Izabella Christian, Respondent's president and chief operating officer travelled from Florida to Chicago on September 18. On Monday, a supervisor told Christian that employees wanted a wage increase. Several employees had complained to Christian and/or plant manager Anna Czajkowska before this visit to Chicago about the lack of any wage increases. Christian told the supervisor that employees' wages were frozen and that Respondent could not raise wage rates.

Tuesday, September 20, 2011

The next day, Tuesday, September 20, 2011, at about 8:40 a.m., virtually the entire workforce at Respondent's Bensenville, Illinois plant, including all 94 production employees, did not return to work after their morning break. Instead they gathered in the area in which Respondent's lamps are assembled.

Margaret Chlipala, Respondent's production transfer coordinator, called Christian and plant manager Anna Czajkowska and told them that the employees had not returned to work and were gathered in the assembly area. Christian and Czajkowska went directly to the assembly area upon arriving at the plant. They addressed the assembled employees in Polish. All or virtually all the employees speak and understand Polish; some do not speak and understand English.

Czajkowska, who was upset, asked the employees what they were doing and told them to return to work. An employee or several employees said they wanted to know about wage increases. Either Christian or Czajkowska told the employees that Respondent could not raise their wages. The meeting between the employees and Christian and Czajkowska lasted between 45 and 90 minutes.[4] Christian and/or Czajkowska stated several times during this meeting that raises were not possible and that employees should return to work.

One or more employees asked if they could speak to Jim Hyland, Respondent's owner and chief executive officer. Chris-

[3] I do not think there are any material differences between the testimony of current employees Katarzyna Dziekan and Beata Ossak and the testimony of management's witnesses. To the extent that there may be any differences, I find the testimony of Dziekan and Ossak to be completely credible. As current employees their testimony is particularly reliable in that it is adverse to their pecuniary interest, a risk not lightly undertaken, *Gold Standard Enterprises, Inc.,* 234 NLRB 618, 619 (1978); *Flexsteel Industries,* 316 NLRB 745 (1995).

[4] The most credible evidence as to the duration of the meeting is the testimony of Beata Ossak (45 minutes to 1 hour, Tr. 131) and that of Izabella Christian, which indicates that she and Czajkowska arrived somewhere between 9 and 9:30 and left the meeting at about 10:30 a.m., Tr. 306–308.

tian responded negatively and said that Hyland was not as "pro-Polish" as he used to be. Czajkowska stated that Hyland would tell her and Christian to "get rid of half of you," Tr. 128.

Czajkowska had about ten copies of a resignation form (GC Exh. 5), in her hand. She told the employees something to the effect that if they did not like working for their current wage rate, they could resign (Tr. 175). Czajkowska may have told employees at some point during the meeting to leave the plant if they were not going to go back to work.[5] However, the discussion between Christian, Czajkowska and the striking employees continued. There was, for example, a discussion between Christian and employee Hanna Dulian about the impact of globalization and Respondent's foreign facilities on the Bensenville plant.

At one point employee Stanislawa Pietras, who worked in the Pyrex Department, indicated she wanted to go back to work. Employee Zofia Bialon told Pietras to be quiet. Czajkowska proffered Zofia Bialon a resignation form and encouraged her to sign the form and leave. Bialon told Czajkowska she should sign the form herself (Tr. 205–207, 36–37).

At about 10:30 a.m., Czajkowska and Christian left the assembly area. At that time they did not order employees to leave the facility if they were not going to return to work. Between 11 a.m. and 1 p.m., the employees prepared a petition in Polish, which human resource employee Marta Cooley took to Czajkowska and Christian, who were in the plant quality control room (GC Exh. 3). The petition, as translated in English, stated:

> Strike
>
> With regards of the conditions of ending the strike:
>
> 1) We request actual pay and pay back for every year since the last wage increase in a rate of the inflation rate according to the attachment.[6]
>
> 2) We request written guarantee to receive annual wage increase according to the federal annual inflation.

Czajkowska and Christian were aware that most of the employees were still waiting in the plant assembly area for a response to the petition at 1:15 pm. and even later. Neither responded to the petition nor ordered the employees to leave the plant. Upon receiving the petition Czajkowska and Christian went first to talk to Respondent's CFO Larry Kerchenfaut and then called Respondent's owner Jim Hyland in Florida to discuss the petition.

Also, at about 1 p.m., Czajkowska and Christian approached Krystyna Skomorowska, a working foreman, who either never joined the strikers or returned to work during or shortly after the employees met management. They asked Skomorowska to approach the other working foremen and have them come to meet Czajkowska and Christian in the quality control room. I infer this was an effort to enlist these foremen to assist in ending the strike. Skomorowska was unsuccessful and reported to Czajkowska and Christian that employees were planning to return the next morning.

All or virtually the employees remained in the assembly area until 2:45 p.m. Many thus stayed in the plant beyond the end of their shift at 1:15. A small group of employees who were on a late afternoon or evening shift worked on September 20. Their work was unaffected by the strike.[7]

That evening Respondent changed the locks on the gates to the facility and contacted the Bensenville police department. The next morning, Wednesday, September 21, many employees arrived around 5 a.m. and were unable to enter the plant.[8] This was the starting time for many of these employees. At about 7 a.m. Christian, Czajkowska, Larry Kerchenfaut, Respondent's chief financial officer and a company director, came to the employee entrance to the plant with a Bensenville policeman. First they asked the employees to return to work. An employee or employees responded that they would not do so without a raise. Kerchenfaut, Czajkowska, and the policeman then told the employees that they must get off Respondent's property. The employees complied with this order. They moved their cars from Respondent's parking lot to a public street and reassembled on public property across from the plant. Sometime prior to this, Czajkowska and employee Elizabeta Rosa[9] had a verbal exchange in Polish. Czajkowska asked the employees what they were doing at the plant. She may have told them that they were fired. Rosa replied, "so you did fire us."

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[5] The record is somewhat unclear on this point. Katarzyna Dziekan testified that Czajkowska threw some resignation papers on a table and told employees to sign them or "pack up and go" (Tr. 85). On cross-examination, Dziekan testified that at the beginning of the meeting Czajkowska told the employees that there would be no raises and "if anyone does not like it, they should punch out and go home" (Tr. 105, Co. Exh. 3). Ossak also testified that Czajkowska said "go back to work or punch out" (Tr. 158). However, it is clear that the discussion between employees and Czajkowska and Christian continued for some time afterwards.

Czajkowska and Christian deny that either of them ever ordered employees to get out of the plant (Tr. 199–201). Krystyna Skomorowska, a witness called by Respondent, did not hear Czajkowska or Christian say that the striking employees were fired or that they should "get out" or "punch out" (GC Exh. 9, p. 2). Eva Kulikowski, another supervisor, did not hear either tell the employees to "get out." She was not sure whether or not they said anything about "punching out" (Co. Exh. 15, p. 2). I do not credit the testimony of "Jesse" Kopec that Czajkowska and/or Christian told any employees that they were fired on September 20. There is no other testimony to this effect.

[6] A chart with inflation rates between 2000 and 2011 was attached. This translation herein is a synthesis of an on the record exchange between witness Beata Ossak and Respondent's COO Izabella Christian, at Tr. 136–139.

[7] I do not credit the testimony of Respondent's witnesses Christian and Skomorowska at Tr. 309 and 370–371 that Skomorowska advised Christian on September 20, that the employees planned to continue their in plant work stoppage on Wednesday, September 21. This is completely inconsistent with Christian's account of her conversation with "Jesse" Kopec several hours later in which she testified she told Kopec to come back the next morning, Tr. 310–311. The testimony of Dziekan and Ossak indicates, however, that the employees expected a response to their written petition.

[8] Some employees began their shifts at 5; others at 6:30.

[9] The transcript records this employee's name as Tarosa (Tr. 218). There is no such person who worked for Respondent in September 2011. In infer that whoever transcribed this hearing mistook the "ta" at the end of the employee's first name, for the first two letters of her second name, see GC Exh. 4, p. 2.

Czajkowska replied, "No, you fired yourselves when you walked off the job," Tr. 183.

Christian and Czajkowska tried to contact some employees through their supervisors as early as the afternoon or evening of September 20. These supervisors had difficulty contacting employees because maintenance foreman "Jesse" Kopec had advised employees not to answer the telephone, so that they would not be pressured into returning to work without a raise, Tr. 382, 386–387.

Ten employees returned to work on September 21 and 17 employees returned to work on Thursday, September 22. Only one, a hearing impaired employee whose mother was contacted, went back to work on September 23. Two more returned to work on Monday, September 26. However, the majority of Respondent's employees gathered in front of the plant on Thursday, September 22, Friday, September 23, and Monday, September 26, and did not return to work.

On Friday, September 23, 7–8 employees asked for permission to return to work. Czajkowska told them that they would have to fill out employment applications. However, there is no evidence that any employee did so. On Monday, September 26, four replacement employees began working at Respondent's facility. Two quit after the first day and two were still working at the plant at the end of January 2012.

On Tuesday, September 27, 57 employees signed a document attesting to the fact that they were willing to return to work under the same wages and working conditions that existed when they went on strike (GC Exh. 2). The document also stated that the employees understood that there would be no raises and that Respondent had no plans to increase wages in the near future.

As of September 30, 72 or 73 employees had returned to work; the other 22 were placed on a preferential hiring list. As of February 1, 2012, none of the employees on the preferential hiring list had been recalled.

Analysis

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. Section 7 provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, *and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection* . . . (Emphasis added)"

In *Myers Industries (Myers 1)*, 268 NLRB 493 (1984), and in *Myers Industries (Myers 11),* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

In order to establish that an employee or employees were discharged in violation of Section 8(a)(3) and/or Section 8(a)(1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatees protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (lst. Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983); *American Gardens Management Co.*, 338 NLRB 644 (2002).

The General Counsel's initial showing usually requires him to prove that (1) the employee was engaged in protected activity; (2) the employer was aware of the activity; and (3) that animus towards the protected activity was a substantial or motivating reason for the employer's action. The National Labor Relations Board may infer discriminatory motive from the record as a whole and under certain circumstances, indeed not uncommonly, infers discrimination in the absence of direct evidence.

Respondent's employees engaged in protected concerted activity by refusing to work to protest Respondent's unwillingness to raise their salaries.

In *Quietflex Mfg. Co.,* 344 NLRB 1055 (2005), the Board cited 10 factors to weigh in determining whether an in-plant work stoppage is protected. No one factor is controlling. These factors as applied to this case are as follows:

(1) The reason the employees have stopped working: In this case the work stoppage was due to the fact that Respondent had not raised employees' wages for what appears to have been a period of 6 years. Unlike the employees in *Waco, Inc.,* 273 NLRB 746 (1984), Respondent's employees communicated the particulars of their grievance and how they wished it to be resolved. They remained in the assembly waiting for a definitive response to this grievance.

(2) The work stoppage was completely peaceful. One employee told one other employee to be quiet when she expressed a desire to go back to work. Krystyna Skomorowska, a working "supervisor," testified that she wanted to return to work but was afraid to do so. Other testimony cited by Respondent as evidence that some employees were afraid to return to work is hearsay and not credible. It is not clear that any employee was afraid of anything other than social ostracization in their closely knit community.

(3) The work stoppage did not interfere with Respondent's production to any greater extent than a strike outside of the plant. First of all, the entire workforce took part in the strike, thus the fact that employees stopped work inside the plant affected production no more than if they had walked out and assembled off of Respondent's property. The strikers did not prevent other employees from working by gathering in the assembly area, as opposed to gathering outside the plant. Respondent made no attempt to obtain replacement workers until Thursday or Friday, when the strikers were locked out.

Secondly, the work stoppage did not deprive Respondent of access to its property other than the assembly area. Since there is no indication that any employees who worked in the assembly area attempted or desired to return to work on September 20, the fact that employees remained in the assembly area until 2:45 had no greater impact on Respondent's business than if the employees had walked out of the plant. On September 21, 10

employees returned to work, none of whom worked in the assembly department (Co. Exh. 5).

(4) The employees had an opportunity to present their grievances. However, it was not until they presented their petition to management that they were able to specify their demands. They never received any response to this petition until they were locked out of the facility the next morning. I credit the testimony of Dziekan and Ossak that at least some employees expected a response to their written petition.

(5) Employees were never given any warning that they must leave the premises or face discharge. In this regard, I credit Anna Czajkowska that at no time on September 20 did she tell employees that they were fired or to "get out." Christian and Czajkowska did tell employees to return to work several times and may have suggested that some or all resign, but they proceeded to engage in a lengthy discussion with employees afterwards, possibly leaving some or all the employees with the hope that their grievance regarding wage increases might be addressed more satisfactorily.

(6) The duration of the work stoppage is the only factor set forth in *Quietflex* that supports a conclusion that the employees' work stoppage was unprotected. I conclude that it is outweighed by the other nine factors. However, the fact that employees remained in the plant so long was due in part to the ambiguity of Respondent's responses to the employee demands. On September 21, Respondent clarified this ambiguity by letting employees know that they could continue working for Respondent only if they agreed to work under unchanged conditions.

(7) Respondent's employees were unrepresented and as far as this record shows Respondent did not have a grievance procedure. Thus, the in-plant work stoppage was one of the few, if only, ways of communicating their grievance to Respondent. Individual employees had complained to Respondent about the lack of wage increases prior to September 20, to no avail. As Justice Black noted in *NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 14 (1962), employees without a representative of any kind, may under certain circumstances have to speak for themselves as best they can. In this case, the employees in unison decided that the only way to present their grievances regarding their wages was to withhold their labor inside the plant and force management to address this issue.

(8) At least some employees remained in the assembly area for as much as 90 minutes after their work shift ended. However, they did not interfere with production to any extent beyond withholding their labor. There is no indication that the work stoppage interfered with the work of the few employees who worked at the plant on September 20, after 2:45 p.m.

(9) Respondent's employees made no attempt to seize Respondent's property other than by gathering in the assembly area. This case is thus distinguishable from *Peck, Inc.,* 226 NLRB 1174 (1976), which is cited in the *Quickflex* decision. The employees in *Peck* prevented the employer from closing the plant and remained there after a supervisor told them they would be terminated if they did not leave.

(10) Respondent contends that it did not discharge any of the employees. It argues that it laid-off 22 of the production employees for nondiscriminatory economic reasons. The fact that Respondent did not discharge any employees for remaining in the assembly area until 2:45 weighs in favor of finding their conduct protected, *Molon Motor & Coil Corp.,* 301 NLRB 138 (1991), enfd. 965 F. 2d 523, 528 (7th Cir. 1992). This also distinguishes this case from *Cambro Mfg. Co.,* 312 NLRB 634 (1993), in which the employees were terminated for their refusal to leave company property.[10]

Respondent's knowledge of and animus towards employees' protected activity

Respondent knew of the strike since Izabella Christian and Anna Czajkowska met with the employees on September 20 and 21. Respondent's animus is established, among other things, by its decision to lock out its employees on September 21 and the statements made by Czajkowska to striking employees.

Discriminatory Motive

The General Counsel's initial showing of discriminatory motivation is established by the fact that Respondent did not have any plans to lay-off or terminate employees from the Bensenville plant prior to the September strike.[11] Izabella Christian stated in an affidavit given to the Board Agent investigating this case that, "at the time of the work stoppage, management reviewed our production needs to see how many employees we really needed," Tr. 320.[12] This admission, that the timing of the lay-off was a result of the strike, meets the General Counsel's initial burden of proof. Indeed, regardless of whether Respondent had plans to lay-off employees at a later date, the acceleration of the lay-off establishes a violation of the Act, *Eddyleon Chocolate Co.,* 301 NLRB 887, 889–891 (1991).

While no charge was filed alleging an unlawfully accelerated lay-off and the General Counsel did not argue this case on such a theory, the Board may find and remedy a violation even in the absence of a specified allegation in the complaint if the issue is closely connected to the subject matter of the complaint and the violation has been fully litigated, *Pergament United Sales,* 296 NLRB 333, 334 (1989), enfd. 920 F. 2d 130 (2d Cir. 1990). Here a close connection exists between the complaint allegation that the employees were terminated in retaliation for their concerted strike and the question of whether the Respondent laid them off or accelerated a lay-off in retaliation for the strike. Moreover, as in *Pergament,* Respondent's management herein admitted that it accelerated the layoff because of the strike. Respondent also fully litigated its reasons for having a lay-off. Thus, *Pergament* compels a finding that Respondent unlawfully

[10] *Cambro* is also distinguishable in that prior to the employees' refusal to leave the employer's facility, the employer had agreed to meet with the employees the following day to discuss their grievances.

[11] Respondent last had a layoff in April or May 2009, apparently a result of a big drop in revenue as the result of the 2008–2009 recession.

[12] I do not credit Isabella Christian's testimony at Tr. 302 that just before her trip to Chicago, she and Jim Hyland discussed the need to layoff employees at Bensenville at some unspecified time in the future. There is no documentary corroboration for such a plan and Christian did not share this plan with anyone at Bensenville, including Czajkowska, see e.g., Tr. 305–306.

accelerated the lay-offs of 22 employees no later than September 30, 2011, *Service Employees International Union, Local 32BJ v. NLRB,* 647 F.3d 435 (2d Cir. 2011).

Respondent's affirmative defense

Thus the burden of proof has shifted to Respondent to prove that the lay-off of the employees who were not recalled was not discriminatorily motivated. I credit the testimony of Respondent's witnesses that it did not fire any employees.

Respondent has failed to meet its burden of proof. First of all, Respondent has admitted that the timing of the lay-off is related to the strike. Moreover, the evidence on which it relies for its contention that it was planning a lay-off for nondiscriminatory economic reasons is unconvincing. I do not credit the testimony of Respondent's management that there were discussions about lay-offs or an intention to lay-off employees at Bensenville prior to the strike. Respondent presented no evidence to support this contention other than self serving testimony.

Respondent also relies on the testimony of Grant Hyland, its vice president for sales and marketing, as well as (R. Exhs. 6 and 7), which indicate the number of lamps produced, the number of production employees, the number of production overtime hours, and revenues.

Hyland attempted to paint a very bleak picture regarding the future of the Bensenville plant. However, in many respects Respondent's exhibits do not support that testimony. Respondent's revenues were relatively low in September 2011 ($660,192). However, most of its production employees were on strike for a week or more during this month. For that reason, the revenue figures for September are not indicative of anything relevant to this case. The revenues for December 2011 and estimated revenue for January 2012 are also relatively low, below $700,000.

Nevertheless, there are statistics that belie Respondent's claim that it laid off 22 employees for nondiscriminatory reasons. The revenue figure for October 2011, $758,445 is greater than that for November and December 2010 and the number of production overtime hours is almost three times that for October 2010, when Respondent had 85 production employees as opposed to 72 in October 2011. The revenue figure for November 2011, $835,186 is greater than that for October, November, and December 2010 and June and July of 2011. In June and July 2011 Respondent had 93 production employees who worked slightly less overtime than did the 72 in November 2011.

One is also struck by the fact that revenue for August 2011, the month before the strike was $920,064, the most since September 2010 and the number of overtime hours worked, 1594, is the greatest number during the same period. As the General Counsel points out, Respondent increased the production workforce from 85 to 94 between December 2010 and August 2011, a fact which is also inconsistent with the bleak picture painted by Hyland (C. Exh. 6). There is no credible nondiscriminatory explanation as to why the future of the Bensenville plant suddenly became so dim after the strike.[13]

Respondent concedes that its exhibits regarding the number of employees and the number of overtime hours for production employees at its Juarez, Mexico facility may not be accurate, Tr. 237–238. Thus, I find that Respondent has not established that it did not transfer a significant amount of production work to Juarez and/or other facilities in retaliation for the strike at Bensenville. This is particularly true in light of Anna Czajkowska's statement to the Board Agent during Region 13's investigation that, "the company accelerated its decision to transfer the work to Mexico because of the strike" (Tr. 285).

Izabella Christian, in her affidavit to the Board stated, "the reason for this transfer of work was because the employees had walked out in September and they said they were not coming back, and also because Mexico has the capacity to build these same products," Tr. 316-17. At hearing Respondent attempted to show that there was very little work permanently transferred to the Juarez plant. I am not persuaded that this is true in the absence of accurate statistics regarding the Juarez, Chinese, and Florida facilities.

Hyland cited concerns about economic conditions in Europe and technological advances in LED lighting as reasons for his bleak projections for the future. There is no credible evidence linking these concerns to the timing of the lay-off of the 22 employees.

The General Counsel has not alleged that Respondent discriminated in selecting employees for lay-off. However, Respondent's decision not to recall certain employees also strongly suggests discriminatory motive. Respondent has offered no explanation as to how it chose the employees it recalled and those it did not. The record herein strongly suggests discriminatory motive with respect to some of these decisions. Of the two maintenance men, Respondent recalled the most junior, Stanislaw Wilusz, who had called Christian and Czajkowska on Wednesday to tell them that he had worked all day on Tuesday, September 20.

Moreover, I infer that Respondent knew that the senior maintenance man, "Jesse" Kopec had been encouraging employees to continue the strike.[14]

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[13] Respondent has failed to draw a convincing relationship between the number of lamps shipped and its need for production employees. First of all, it would have to show that all its lamps require the same number of production employees. It may well be that some products are more labor intensive than others. I would also note that the number of lamps shipped from Bensenville during 2010 and 2011 was highest in May 2011, which is inconsistent with Grant Hyland's testimony as to an increasingly deteriorating economic climate for Respondent's plant. The number of lamps shipped in August 2011 was greater than the number shipped in August 2010. The number of overtime hours needed to produce Respondent's lamps was significantly higher from March 2011 through August 2011, compared with 2010, despite the fact that Respondent had more production employees.

[14] Respondent has not met its burden of proving that Kopec or any of the other alleged discriminatees was a "supervisor" within the meaning of Sec. 2(11) of the Act.

Sec. 2(11) of the Act, defines "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or

Respondent also did not recall Elizabeta Rosa, the employee who had the verbal confrontation with Czajkowska on September 20. Rosa was not the most junior employee in the Pyrex department (GC Exh. 4, p. 2). There is no explanation in this record as to why she was not recalled when more junior employees were recalled. Similarly Zofia Bialon, the employee who told Stanislawa Pietras to be quiet in front of management on September 20 was not recalled. She was also not the most junior employee in her department (GC Exh. 4, p. 3). Dorota Cholewiak, a much junior employee with the same job description was recalled to work.

Several other employees who were not recalled also stood out as to their involvement in the work stoppage. Sebastian Kepa was among the employees who approached Czajkowska on September 23. Alicja Probola and Bernadetta Cukier were among the four who went to the NLRB Regional Office the same day. Hanna Dulian, who spoke up at the meeting with management on September 20, was also not recalled. Dziekan and Pavlo Dovhaychuk, who approached Czajkowska with Kepa, were among the last six employees who were recalled on September 30, as was Ossak (Co. Exh. 6).

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 laid-off 22 employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of layoff to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest compounded daily, *Kentucky River Medical Center,* 356 NLRB No. 8 (2010, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

However, backpay shall be tolled for any period after September 20, 2011, for which the Respondent proves at compliance that it would have laid off these individuals for legitimate nondiscriminatory economic reasons.

Respondent shall reimburse each of these employees in amounts equal to the difference in taxes owed upon receipt of a lump-sum backpay award and taxes that would have been owed had there been no discrimination. Respondent shall also take whatever steps are necessary to insure that the Social Security Administration credits their backpay to the proper quarters on their Social Security earnings record.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Amglo Kemlite Laboratories, Inc., Bensenville, Illinois its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, laying off, or otherwise discriminating against any employee for engaging in concerted activity for the mutual aid and protection of employees;

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

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

(a) Within 14 days from the date of the Board's Order, offer each employee who went on strike on September 20, 2011, and was not recalled to work by September 30, 2011, full reinstatement to their former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make each employee who went on strike on September 20, 2011, and was not recalled to work by September 30, 2011, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them as specified in the remedy portion of this decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful lay off of these employees and within 3 days thereafter notify them in writing that this has been done and that their layoff will not be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its Bensenville, Illinois facility copies of the attached notice marked "Appendix,"[16] in both English and Polish. Copies of

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effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." An individual who is a "supervisor" pursuant to Sec. 2(11) is excluded from the definition of "employee" in Sec. 2(3) of the Act and therefore does not have the rights accorded to employees by Sec. 7 of the Act.

A party seeking to exclude an individual from the category of an "employee" has the burden of establishing supervisory authority. The exercise of independent judgment with respect to any one of the factors set forth in Sec. 2(11) establishes that an individual is a supervisor. However, not all decision making constitutes the independent judgment necessary to establish that an individual is a statutory supervisor.

Respondent has not established that Kopec was required to use independent judgment for matters other than those which were routine in directing Respondent's other maintenance employee, Stanislaw Wilusz. Kopec did not assign Wilusz his place of work or his hours. As to his "responsibility to direct" Wilusz, Respondent did not establish that Kopec was held accountable for Wilusz's job performance, *Oakwood Healthcare, Inc.,* 348 NLRB 686 (2006).

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] 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 Judg-

the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 30, 2011. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

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

Dated, Washington, D.C., March 22, 2012.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT discharge, lay off, or otherwise discriminate against any of you for engaging in concerted activity for your mutual aid and protection, such as a strike for higher wages.

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, within 14 days from the date of this Order, offer full reinstatement to those employees who went on strike on September 20, 2011, and have not been recalled to work, to their job or, if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make those employees who went on strike on September 20, 2011, and were not recalled to work by September 30, 2011, whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful lay off of those employees who went on strike on September 20, 2011, and were not recalled to work by September 30, 2011, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the lay off will not be used against her in any way.

AMGLO KEMLITE LABORATORIES, INC.

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ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."