

Atlantic Scaffolding Company and United Brotherhood of Carpenters and Joiners of America, Local 502. Case 16–CA–26108

March 18, 2011

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS PEARCE
AND HAYES

On October 5, 2009, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief to the General Counsel's exceptions.

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,¹ and conclusions only to the extent consistent with this Decision and Order.

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by discharging employees for engaging in a work stoppage over a pay raise. The judge dismissed the complaint, finding that the employees' work stoppage, while protected at its inception, lost its protection "at some point in time." We disagree. As explained below, the employees' work stoppage was a protected concerted action in support of their demand for higher wages, and it did not interfere with the Respondent's use of its property. Accordingly, the Respondent violated the Act by discharging the employees on March 19, 2008, for engaging in the work stoppage.

I

The relevant facts are fully set forth in the judge's decision. Briefly, the Respondent contracted with ExxonMobil to perform scaffolding work at its refinery during a maintenance "turnaround." During these turnarounds, individual refinery units are shut down to undergo inspections and various maintenance procedures. ExxonMobil imposed a strict deadline for the turnaround work in order to minimize its loss of revenue during this period. The Respondent employed 240–250 employees

for the turnaround, and there were approximately 1000 other employees on the project employed by other contractors. The turnaround started on March 17, 2008.²

A few days prior to the starting date, the Respondent's employees learned that it was converting a rumored raise for work performed on the refinery project to an incentive bonus, which they could lose for attendance and safety reasons or for failing to remain in the Respondent's employ for the duration of the project. On Sunday, March 16, employees prepared and signed a letter demanding, among other things, an increase in pay, and per diem rate. At around 6:55 a.m. on March 17, approximately 100 of the Respondent's employees gathered outside the lunch tent at ExxonMobil's refinery and presented the letter to the Respondent's turnaround supervisor, David Wall. They included both day-shift employees, whose shift had just started, and night-shift employees, who remained in the facility after their shift ended at 5 a.m. to demonstrate their support. The Respondent's managers discussed the demands with the employees, and asked them to return to work while the demands were under consideration. The employees refused. William Swango, ExxonMobil's turnaround department head, became aware of the situation and ordered the employees to be transported by bus from outside the lunch tent to the facility's parking lot, because their refusal to work while remaining inside the refinery area could present a safety issue.

The employees promptly complied with this directive, and began leaving the work area at about 8:16 a.m. aboard ExxonMobil buses to go to ExxonMobil's parking lot. As the employees exited the gate leading to the parking lot, their ID badges and H2S (hydrogen sulfide) monitors were collected, as required by ExxonMobil's safety procedures.

The employees continued to discuss their pay demands with the Respondent's supervisors in the parking lot. Victor Corral, the Respondent's general foreman,³ testified that Wall told him that the Respondent wanted the employees to come back to work. Dylan Fulton, the Respondent's site manager, testified that he went to the parking lot to try to negotiate with the employees. He testified that he urged the employees "to please come

¹ In the absence of exceptions, we adopt the judge's finding that the Respondent's foremen on the ExxonMobil turnaround project did not function as supervisors within the meaning of Sec. 2(11) of the Act.

The General Counsel has excepted to some of the judge's credibility findings. 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.

² Unless otherwise noted, all dates are in 2008.

³ The General Counsel excepts to the judge's failure to find that General Foreman Victor Corral was a statutory supervisor. We find merit to this exception because the parties stipulated at the hearing that the Respondent's general foremen are supervisors within the meaning of Sec. 2(11) of the Act. Thus, we find that Victor Corral was a statutory supervisor.

back to work.”⁴ After the employees had been in the parking lot for over an hour, ExxonMobil security told the employees that they had to leave ExxonMobil property. Some of the employees then left the scene, while the rest moved to a vacant lot across the street from the refinery.

At the vacant lot, the Respondent continued to speak with the remaining employees about their pay demands and tried to persuade them to return to work. These efforts were unsuccessful, however, and the Respondent’s officials left the vacant lot and returned through the refinery gate at 12:07 p.m.⁵ Thereafter, ExxonMobil security and the police asked the employees to leave the vacant lot because it too was ExxonMobil’s property. The employees promptly complied and went to a public park where they contacted a representative of the Union.

At the time of the work stoppage, the Respondent’s employees were not represented by a labor organization and the Respondent did not have a formal grievance procedure.

On March 17 and 18, a few of the day-shift employees returned to work.⁶ There is no indication in the record that any of the other strikers indicated to the Respondent that they had quit or otherwise abandoned their jobs during that time. On March 19, the Respondent sent separation notices to 77 employees who had engaged in the work stoppage and not returned to work, discharging them assertedly for job abandonment.

II.

In dismissing the complaint, the judge found that the General Counsel did not establish under *Wright Line*⁷ that the employees’ work stoppage was a motivating factor in their discharges. Instead, the judge found that the

⁴ While in the parking lot, night crew employees were returned their badges. The respondent also made arrangements for the return of employees’ own work tools to those employees who requested them.

⁵ At 3:42 p.m., Fulton sent Swango an email with a list of employees who participated in the work stoppage and who were being turned into ExxonMobil security for “nonentry” classifications for ExxonMobil facilities. In the email, Fulton stated that a large majority of the employees were in favor of coming back in if the entire group was allowed, but the Respondent “was firmly against allowing the organizers reentry under any circumstances.”

After ExxonMobil placed employees who engaged in the work stoppage on its “denied entry” list for its facilities, ExxonMobil agreed to a settlement with the Board in Case 16–CA–26241. Pursuant to the settlement, ExxonMobil posted a “Notice to Employees” stating that ExxonMobil “will not place any employees’ names on [its] denied entry list in retaliation for the employees’ protected concerted and/or union activities.” Additionally, ExxonMobil agreed to remove the names of specified employees from its denied entry list.

⁶ All of the night-shift workers returned for their next shift following the start of the work stoppage.

⁷ 251 NLRB 1083, enf’d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

facts were similar to those presented in *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005), where the Board found that an employer did not violate Section 8(a)(1) by dismissing 83 employees who engaged in a peaceful 12-hour work stoppage in its parking lot, and refused to leave the premises until the police were summoned. According to the judge, the employees here were engaged in protected concerted activity when they presented their letter to the Respondent on the morning of March 17, but their work stoppage lost the protection of the Act “at some point in time and prior to [their] termination on March 19.” The judge did not explain the loss of protection finding, but elsewhere in her opinion concluded that the Respondent issued the separation notices on March 19 “because there was no indication that the employees were going to return to work.”

The General Counsel excepts, arguing that the work stoppage remained protected activity, and that the Respondent terminated the employees for that protected activity. We find merit to the General Counsel’s exceptions, and reverse the judge’s dismissal of the complaint for the reasons set forth below.⁸

III.

A.

At the outset, we find that the judge erred in finding that “at some point in time” the employees’ work stoppage lost the protection of the Act. The judge gave no explanation for this finding, and the record reveals no evidence of any employee misconduct that would cause the work stoppage to lose the Act’s protection. Indeed, the work stoppage was peaceful at all times, there was no attempt to deny anyone access to the property, and the employees promptly complied with every request to move their protest elsewhere.

The Respondent nonetheless contends that this peaceful work stoppage should be deemed unprotected because the employees’ absence from their jobs interfered with the ability of nearly 1000 employees of other contractors to accomplish their work, citing *Waco, Inc.*, 273 NLRB 746 (1984), *Cambro Mfg. Co.*, 312 NLRB 634 (1993), and *Quietflex Mfg. Co.*, supra. Those cases do not support the Respondent’s position. They addressed situations where employees, in the course of protected activity, occupied their employer’s property in the face of

⁸ We agree with the judge, for the reasons she cites, that the Respondent did not terminate any employees on March 17. The judge found, however, and the Respondent does not dispute, that on March 19 the Respondent terminated employees who engaged in the work stoppage and had not returned to work. Because the complaint alleges that the Respondent discharged employees “on or about” March 17, a finding that the employees were discharged on March 19 is well within the scope of the complaint.

the employer's order to leave and deprived the employer of the use of its property for an unreasonable period of time. The Board recognized in *Quietflex*, relying on *Cambro*, supra at 635, that "at some point [in an on-site work stoppage], an employer is entitled to exert its private property rights and demand its premises back." 344 NLRB at 1056. In those 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. *Id.* at 1056–1058.⁹

Here, the facts are different. The employees complied with each request to move the location of their concerted protest. When they were directed to leave the work premises and go to the parking lot, they complied. An hour later, the employees were told they had to leave the parking lot, and they promptly moved to a vacant lot across the street. And about an hour after that, when the employees were asked to leave the vacant lot because it too was ExxonMobil's property, they left and went to a public park. Because there was no meaningful impairment of property rights, there is nothing to balance against the employees' rights under the Act.

What remains of the Respondent's argument is that the work stoppage was timed to maximize its effect on the refinery turnaround operations, and was therefore unprotected because it was "extremely disruptive" of the ability of other subcontractors' employees to begin work scheduled for that day. Of course, the timing of the work stoppage was at least partially the Respondent's own doing, because employees learned only a short time before March 17 that they would have to earn incentive bonuses in lieu of the expected pay raise. In any event, the same interference with work would have resulted if the Respondent's employees had immediately struck and

left the ExxonMobil property. Stripped to its bare essentials, the Respondent's argument is that the work stoppage lost its protection because of the economic harm inflicted on the Respondent. This argument is antithetical to the basic principles underlying the statutory scheme, i.e., the right of employees to withhold their labor in seeking to improve their terms of employment, and the use of economic weapons such as work stoppages as part of the "free play of economic forces" that should control collective bargaining. *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971). The protected nature of the work stoppage in this case was not vitiated by the effectiveness of its timing.

Even if a balancing of rights under the *Quietflex* standard were called for, application of the standard would support a finding of a violation.¹⁰ The factors to be considered under *Quietflex* are (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 access to its property; (4) whether employees had adequate opportunity to present grievances to management; (5) whether employees were given any warning that they must leave the premises or face discharge; (6) the duration of the work stoppage; (7) whether employees were represented or had an established grievance procedure; (8) whether 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. 344 NLRB at 1056–1057.

These factors, considered under the circumstances of this case, favor a determination that the work stoppage remained protected at all times relevant to the case. The reason for the work stoppage, a protest over wages, clearly is protected by Section 7. The work stoppage was peaceful at all times and there was no cognizable inter-

⁹ In *Waco*, the Board ruled that the employees "were occupying the facility in a manner which was unprotected" because they continued to occupy the employer's premises for several hours after they had been directed to leave if they were not returning to work and they failed at any time during the occupation to "communicate to the Respondent the particulars of their grievances so as to facilitate a discussion or possible resolution of their concerns." 273 NLRB at 746–747. In *Cambro*, the Board stated that while "the employees were entitled to persist in their in-plant protest for a reasonable period of time . . . [there came] a point at which the Respondent was entitled to reclaim the use of its entire premises." 312 NLRB at 636. In *Quietflex*, the Board explained that *Waco* and *Cambro* "seek to balance competing employer and employee rights, focusing on the degree of impairment of the employees' Section 7 rights if access is denied, compared to the degree of impairment of the employer's private property rights if access is granted." 344 NLRB at 1058 (citing *Hudgens v. NLRB*, 424 U.S. 507 (1976)). The Board went on to articulate a 10-factor analysis for balancing the competing rights in the context of an onsite work stoppage. Pursuant to that analysis, employees who remained on the employer's property for more than 8 hours after being asked to leave, dispersing only after the police were called and arrived on the scene, lost the protection of the Act.

¹⁰ Member Hayes believes that the presence of employees withholding their work anywhere on the property of their employer or the property where their employer has contracted to work involves an impairment of property rights and thus necessitates a balancing of those rights with the employees' Sec. 7 rights. For this reason, *Quietflex* sets out numerous factors to consider "in determining which party's rights should prevail in the context of an on-site work stoppage." 344 NLRB at 1056 (emphasis added). This case involves an onsite work stoppage and thus the *Quietflex* analysis applies here. Member Hayes disagrees with his colleagues that the *Quietflex* test is limited to situations when "employees, in the course of protected activity, occupied their employer's property in the face of the employer's order to leave and deprived the employer of the use of its property for an unreasonable period of time." The nature of the work stoppage (occupation "in the face of the employer's order to leave") and its duration ("an unreasonable period") are to be considered as factors in the *Quietflex* analysis, not as prerequisites to employing that analysis. Member Hayes thus disagrees with his colleagues' attempt to limit the *Quietflex* analysis to the circumstances they describe. He concurs in finding a violation under *Quietflex*.

ference with production. See *Quietflex*, supra at fn. 6. (“It is not considered an interference of production where the employees do no more than withhold their own services.”) Nor was there any attempt to deny anyone access to the property, or any challenge to the authority of the Respondent or ExxonMobil to control the property. As noted above, the employees were never warned that they must leave or face discharge, instead, they promptly complied with each directive they were given to move from one location to another. The employees were unrepresented, there was no established grievance procedure, and there was no attempt to seize the Respondent’s (or ExxonMobil’s) property. The reason advanced by the Respondent for the employees’ discharge likewise favors protection, as the Respondent did not raise a concern about property rights in notifying the employees of their termination.

The fact that some night-shift employees stayed over to join the onsite portion of the work stoppage, and the approximately 5–1/2-hour duration of the work stoppage might in some circumstances weigh against protection. Here, however, the employees were in the lunch tent within the refinery area for no more than 85 minutes before leaving for the parking lot, and never received, much less defied, a directive to leave the premises if they did not return to work. Instead, all employees involved in the protest complied with each request to move their protest elsewhere. Moreover, the onsite portion of the work stoppage ended promptly after the discussions with the Respondent over the employees’ demands had ended. In these circumstances, we find that these two factors do not favor loss of protection. At most, they are neutral.

We recognize that the employees here had an adequate opportunity to present their grievances to management. However, to the extent that this factor weighs against protection under *Quietflex*, it is substantially outweighed by the other factors discussed above. Therefore, application of the *Quietflex* standard would strongly favor a finding that the work stoppage remained protected at all relevant times.

B.

We also find no merit to the judge’s finding that the Respondent terminated the employees because there was no indication they would return to work. Typically, when an employer asserts that employees were discharged because they would not return to work after commencing a work stoppage, the assertion suggests that the discharge was for engaging in the work stoppage itself. See *CGLM, Inc.*, 350 NLRB 974, 979–980 (2007), enfd. 280 Fed. Appx. 366 (5th Cir. 2008) (discharge of striking employees—purportedly for not calling in or showing up for work—amounted to a discharge

for the act of going on strike, and accordingly was unlawful); *Anderson Cabinets*, 241 NLRB 513, 518–519 (1979), enfd. 611 F.2d 1225 (8th Cir. 1979) (“Calling a strike . . . an absence from work justifying discharge is to write Section 13 [the right to strike] out of the Act.”). In order to show that employees truly abandoned their jobs, an employer must present “unequivocal evidence of intent to permanently sever [the] employment relationship.” *L.B. & B. Associates, Inc.*, 346 NLRB 1025, 1029 (2006), enfd. 232 Fed. Appx. 270 (4th Cir. 2007) (citation and quotation omitted).

No evidence of job abandonment was presented here. The evidence does not demonstrate that the employees’ work stoppage had ended—or that *any* employees had voluntarily quit their jobs—before the termination notices were issued on March 19. Indeed, the Respondent did not even solicit any employees to return to work, much less receive notice of a refusal to return to work, on March 18 or 19.¹¹ Accordingly, as there is no evidence of employee job abandonment, the Respondent’s contention that it terminated the employees for this reason supports a finding that they were terminated for their participation in the work stoppage. *CGLM, Inc.*, supra.

We also find that the judge erred in analyzing the 8(a)(1) discharge allegations under *Wright Line*, supra. Where, as here, employees are terminated for engaging in a protected concerted work stoppage, *Wright Line* is not the appropriate analysis, as the existence of the 8(a)(1) violation does not turn on the employer’s motive. *CGLM, Inc.*, supra at fn. 2 (rejecting application of *Wright Line* to an allegation of discharging employees who engaged in concerted work stoppage, where “the very conduct for which employees are disciplined is itself protected concerted activity,” quoting *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981)). Rather, when the conduct for which the employees are discharged constitutes protected concerted activity, “the only issue is whether [that] conduct lost the protection of the Act because . . . [it] crossed over the line separating protected and unprotected activity.” *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. mem. 63 Fed.Appx. 524 (D.C. Cir. 2003).¹² As explained above, nothing in the employees’ conduct caused them to lose the protection of the Act.

¹¹ Moreover, the Respondent’s job abandonment contention is undermined by the fact that on March 17 it placed the employees’ names on a list for a “denied entry” classification for ExxonMobil facilities.

¹² See also *Tamara Foods, Inc.*, 258 NLRB 1307, 1308 (1981), enfd. 692 F.2d 1171 (8th Cir. 1982), cert. denied 461 U.S. 928 (1983) (in finding that discharge of employees for engaging in a concerted work stoppage violated Sec. 8(a)(1), the Board’s analysis focused exclusively on whether work stoppage was protected).

In sum, we find that the record clearly establishes that the Respondent discharged the employees for their participation in a protected concerted work stoppage, and that at no time did that work stoppage lose the protection of the Act. Accordingly, the discharges violated Section 8(a)(1) as alleged.

AMENDED CONCLUSIONS OF LAW

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

2. The Respondent violated Section 8(a)(1) of the Act by discharging employees for engaging in protected concerted activity.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) by discharging employees because they engaged in protected concerted activity, we shall order the Respondent to offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).¹³ The Respondent shall also be required to remove from its files any and all references to the unlawful discharges of these employees, and to notify them in writing that this has been done and that the discharges will not be used against them in any way.

It is undisputed that the Respondent sent separation notices on March 19 to employees it believed engaged in the work stoppage and had not returned to work. While those notices are not in the record, Fulton's March 19 email to Swango and other ExxonMobil representatives

¹³ In the complaint, the General Counsel sought compound interest for all monetary relief awarded. On May 14, 2010, the Board solicited amicus briefs in this case, and others, regarding whether the Board should routinely order compound interest on backpay and other monetary awards in unfair labor practice cases and, if so, what the standard period should be for compounding. The Respondent filed a brief on June 24, 2010, recommending continued application of simple interest to backpay awards. On October 22, 2010, we issued our decision in *Kentucky River Medical Center*, supra, announcing that interest on backpay is to be compounded on a daily basis.

contained a list of 77 employees the Respondent terminated because they engaged in the work stoppage and did not return to work on March 18 or 19. We find that the Respondent sent the March 19 notices to those 77 employees. Seventy three of those employees were included in the complaint, and are thus encompassed by our remedial order. There is no evidence that the Respondent discharged the 30 additional employees named in the complaint, and they accordingly are not entitled to reinstatement or backpay.¹⁴

ORDER¹⁵

The National Labor Relations Board orders that the Respondent, Atlantic Scaffolding Company, LaPorte, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging its employees for engaging in protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing its 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 this Order, offer the following employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Juan Abarca	Emmanuel Gomez	Jose Rangel
Hector Acosta	Uriel Gracia ¹⁶	Richard Reyna
Emilio Acosta	Tyrone Grant	David Reyna
Rodney Adams	Raymond Grant	Victor Rios
Juan Alanis	Noe Guajardo, Jr.	Americo Rios
Manuel Alanis	Ivan DeJesus Gutierrez	Pedro Rivera
Jesus Alanis	Marco Hermosillo	Jonathan Rivera

¹⁴ The complaint alleges that the Respondent discharged 105 employees for engaging in a work stoppage over a pay raise. During the hearing, the General Counsel amended the complaint to remove from the complaint Rogelio Chavez (who was inadvertently listed twice) and Ron Fontenot. Of the remaining 103 employees, only 73 employees were named on the Respondent's list of terminated employees. Four employees were listed as "terminated" on the Respondent's list but were not named in the complaint: Victor Corral (a supervisor), Rodolfo Espinoza Jr., Roberto Garcia, and Mack James.

¹⁵ We shall also provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

¹⁶ The spelling of the names of Uriel Gracia, Ivan DeJesus Gutierrez, Daniel Herrera, Edgar Pacheco, and Stephanie Limbrick Patillo reflect the General Counsel's amendments during the hearing.

Hugo Alvarez	Mario Hermosillo	Juan Rocha
Lizzette Cabrera	Daniel Herrera	Fernando Rubio
Jose Cadena	Billie Jack	Carlos Sahagun
Mario Cantu	Elvira Joshua	Enrique Salazar
Jose Cantu, Jr.	Jorge Martinez	Victor Salazar
Javier Cantu	Sergio Melendez	Christian Salazar
Michael Castellanos	Juan Montoya	Eduardo Salinas
Daniel Cazares	Ivan Morales	Jaime Salinas
Ramiro Chapa	Javier Morales	Jose Soto
Jacinto Chapa	Lizzie Odom	Annetia Spikes
Barry Craig	Antonio Ortiz	Daniel Torres
Luis de la Garza	Edgar Pacheco	Cruz Trenado
Ricardo Espinoza	Stephanie Limbrick Patillo	Juan Trevino
Arnoldo Garcia	Tyangela Porter	Eliud Trevino
Alfonso Garcia	Tommy Prosperie	Regina Williams
Guillermo Garcia	Jose Ramirez	Gilibaldo Zuniga
Guadalupe Garza	Alexi Ramos	Benansio Zuniga Emigdio Zuniga

(b) Make the employees named above in subparagraph (a) whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of the employees named above in subparagraph (a) and, within 3 days thereafter, notify those employees in writing that this has been done and that the discharges 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 La Porte, Texas facility, copies of the attached notice marked "Appendix."¹⁷ Copies of

¹⁷ 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."

the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the 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 March 19, 2008.

(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.

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 you for engaging in protected concerted activity.

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

WE WILL, within 14 days from the date of the Board's Order, offer the following employees full reinstatement to their former jobs or, if those jobs no longer exist, to

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

substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Juan Abarca	Emmanuel Gomez	Jose Rangel
Hector Acosta	Uriel Gracia	Richard Reyna
Emilio Acosta	Tyrone Grant	David Reyna
Rodney Adams	Raymond Grant	Victor Rios
Juan Alanis	Noe Guajardo, Jr.	Americo Rios
Manuel Alanis	Ivan DeJesus Gutierrez	Pedro Rivera
Jesus Alanis	Marco Hermosillo	Jonathan Rivera
Hugo Alvarez	Mario Hermosillo	Juan Rocha
Lizzette Cabrera	Daniel Herrera	Fernando Rubio
Jose Cadena	Billie Jack	Carlos Sahagun
Mario Cantu	Elvira Joshua	Enrique Salazar
Jose Cantu, Jr.	Jorge Martinez	Victor Salazar
Javier Cantu	Sergio Melendez	Christian Salazar
Michael Castellanos	Juan Montoya	Eduardo Salinas
Daniel Cazares	Ivan Morales	Jaime Salinas
Ramiro Chapa	Javier Morales	Jose Soto
Jacinto Chapa	Lizzie Odom	Annetta Spikes
Barry Craig	Antonio Ortiz	Daniel Torres
Luis de la Garza	Edgar Pacheco	Cruz Trenado
Ricardo Espinoza	Stephanie Limbrick Patillo	Juan Trevino
Arnoldo Garcia	Tyangela Porter	Eliud Trevino
Alfonso Garcia	Tommy Prosperie	Regina Williams
Guillermo Garcia	Jose Ramirez	Gilibaldo Zuniga
Guadalupe Garza	Alexi Ramos	Benansio Zuniga Emigdio Zuniga

WE WILL make the employees named above whole for any loss of earnings and other benefits resulting from their discharges, less any interim earnings, plus interest.

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

ATLANTIC SCAFFOLDING CO.

Jamal M. Allen, Esq., for the General Counsel.

G. Mark Jodon, Esq. and *Timothy A. Rybacki, Esq.*, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Beaumont, Texas, on May 26, 27, and 28, 2009. The charge in this case was filed on March 20, 2008, by the United Brotherhood of Carpenters and Joiners of America, Local 502 (the Union). On August 29, 2008,¹ the Regional Director for Region 16 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing based on the allegations contained in the underlying charge. The complaint alleges that Atlantic Scaffolding Company (Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging 105 employees because the employees engaged in concerted activities with other employees for the purposes of mutual aid and protection by engaging in a work stoppage over a pay raise.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation, with an office and place of business in La Porte, Texas, has been engaged in the business of a refinery maintenance subcontractor. During the past fiscal year, Respondent, in conducting its business operations, has provided services valued in excess of \$50,000 to ExxonMobil Oil Refining and Supply Corporation, an enterprise directly engaged in interstate commerce. 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 and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

ExxonMobil Refining and Supply Corporation (ExxonMobil) operates an oil refinery in Beaumont, Texas, composed of 38 separate processing units. At regular intervals, ExxonMobil schedules "turnarounds" in which individual refinery units are shut down to undergo inspections and various maintenance procedures. Respondent is a refinery maintenance contractor with offices in LaPorte, Texas. In the spring of 2008, ExxonMobil contracted with Respondent to perform scaffolding work for a scheduled maintenance "turnaround" at the Beaumont refinery. The turnaround required the shutdown of 13 processing units at the refinery. Respondent was responsible for performing the scaffolding work on all units on the north side of the refinery, including the FCC unit. The FCC unit is

¹ All dates are 2008 unless otherwise indicated.

ExxonMobil's third largest gasoline production unit in the United States. The primary purpose of the turnaround was to replace the FCC unit's old reactor with a new one and repair and modernize the regenerator. The turnaround also involved various capital projects, including maintenance tasks on the refinery's other process units.

B. Issues

The General Counsel alleges that Respondent terminated approximately 105 employees in retaliation for the employees' engaging in a peaceful work stoppage and presenting a concerted complaint letter regarding pay and benefits to management on March 17, 2008. Respondent, however, submits that it did not discharge the employees in issue. Further, Respondent asserts that even if the employees had been discharged their work stoppage was not protected activity.

While there is no dispute that Respondent's general foremen are supervisors and excluded from the protection of the Act, the parties do not agree as to the supervisory status of the foremen; who are subordinate to the general foremen. The General Counsel takes the position that the foremen who engaged in the work stoppage were not statutory supervisors and were protected by the Act. Respondent maintains that its foremen meet the requirements for supervisory status under Section 2(11) of the Act. Over the course of the hearing, the parties were also unable to reach an agreement as to whether Alfonso Garcia held the status of general foreman or a foreman during the 2008, turnaround in issue.²

C. Supervisors and Management Officials for ExxonMobil and Respondent

Respondent's primary supervisory and management officials involved in this case were Site Manager Dylan Fulton, Site Superintendent Jeremy Chatagnier, Turnaround Supervisor David Scotty Wall, Safety Manager Derek Harvey, and Regional Manager Chad King. As site manager, Dylan Fulton (Fulton) was the highest-ranking official for Respondent at the Beaumont, Texas facility. Jeremy Chatagnier (Chatagnier) reported to Fulton and oversaw all field operations. David Scotty Wall (Wall) supervised the general foremen on the job and Derek Harvey (Harvey) was responsible for the Respondent's safety functions at the facility. Although Chad King was present at the facility on March 17, 2008, he did not testify and the record does not reflect his specific duties in relation to the Beaumont facility.

William Alan Swango (Swango) is ExxonMobil's turnaround department head for the Beaumont refinery. In that position, he is responsible for all the planning and execution of ExxonMobil's scheduled turnarounds. Dorothy Patterson was ExxonMobil's turnaround manager. Rick Goldin was head of security for ExxonMobil and Mike Lorenzen was ExxonMobil's director for security. There is no evidence that ExxonMobil and the Respondent are joint employers and the General

Counsel does not assert that these employers functioned as joint employers during the turnaround period in issue.

D. The March 17, 2008 Work Stoppage

1. The turnaround operation

March 17, 2008, was the first day of the scheduled turnaround. Fulton testified that when the units were operational, they generated millions of dollars in production. Because of ExxonMobil's revenue loss resulting from the shutdown, Respondent had only a small window of time to perform its contractual function. Additionally, because the FCC unit was ExxonMobil's third largest gasoline-producing unit, ExxonMobil imposed a very strict deadline for the turnaround. The turnaround actually lasted only 8 weeks and ended on May 10, 2008.

The turnaround operated around the clock, with employees working either day or night shifts. Respondent employed approximately 240 to 250 employees for the turnaround. This complement of employees included general foremen, foremen, lead carpenters, carpenters, and helpers, in addition to a maintenance division of approximately 50 employees. In addition to Respondent's employees, there were approximately 1000 additional workers who were employed by the other contractors on the turnaround project.

During a turnaround procedure, ExxonMobil transports the contractors' employees into the facility from the parking lot by transportation buses. Under OSHA regulations, ExxonMobil must account for everyone who is inside the refinery. To comply with the regulations, ExxonMobil requires all contractor employees to have an identification badge for entrance into the facility. All employees must swipe their badges upon entering and leaving the facility. Contract employees are also required to carry with them a hydrogen sulfide (H₂S) monitor while working inside the refinery. If an employee comes into an area where there is a certain level of hydrogen sulfide, the monitor will automatically emit an audible, visual, and vibrational warning. The employees normally kept their identification badges and H₂S monitors until they complete their work on the job. Swango explained, however, that if a contract employee leaves the employment of a contract company or if there is a safety incident in the refinery, ExxonMobil collects the badges and monitors until the completion of the investigation and a determination has been made as to whether an employee is allowed to return to the property. Chatagnier also confirmed that badges and monitors are retrieved from employees if ExxonMobil asks the employee to leave the facility for any safety reason.

During the turnaround procedure, each day began with a "turnover meeting," in which ExxonMobil met with the contractors' supervisors at approximately 6 a.m. each day. The meetings were held at the beginning of the shift to allow the transfer of work from the night shift to the day shift. During the turnover meeting, ExxonMobil representatives discussed occurrences during the night shift and updated the contractors as to the general status of the turnaround. Respondent's general foremen and supervisor, wall, attended the turnover meeting and received the daily work assignments from ExxonMobil. Each contractor had an ExxonMobil representative who distributed a written schedule of the work to be performed by the

² Inasmuch as Alfonso Garcia was included in the group of employees who did not begin work on the turnaround on the morning of March 17, 2008, neither the General Counsel nor Respondent could rely on work performed to establish his status during the turnaround.

contractor. At approximately 6:30 a.m. and following the meeting with supervisors, ExxonMobil conducted a larger safety meeting involving all the contractors on the turnaround. Because the safety meeting required the attendance of all employees working for the various contractors, there were often as many as 600 employees attending the safety meeting. The safety meetings lasted for approximately 15 to 30 minutes. Following the larger safety meeting, Respondent's employees attended "toolbox" safety meetings with their foremen, general foremen, and various safety officials before they went to their respective work areas. During the toolbox meetings, general foremen discussed safety issues and the employees received their assignments for the day. These meetings normally lasted between 15 and 30 minutes. Wall testified that after attending the morning meetings and collecting their tools, the employees were normally at their work assignments and working by 7:15 to 7:20 a.m. Each foreman worked with three-person crews consisting of a lead carpenter, carpenter, and carpenter's helper. There were usually no more than three crews assigned to work with each foreman.

2. Employee compensation concerns

Victor Corral worked for Respondent for 4 years prior to March 17, 2008. He had been a general foreman for only 3 to 4 months on March 17. Prior to the turnaround beginning on March 17, rumors spread among all the employees working on the Beaumont site that ExxonMobil planned to give raises to all of the turnaround contractors. Corral spoke with Site Superintendent Chatagnier and Turnaround Supervisor Wall about whether Respondent's employees would receive raises. Chatagnier told him that Respondent intended to give its employees incentive pay rather than a raise. Under the incentive program that was to be in effect from March 13, 2008, until May 8, 2008, employees would receive incremental raises if they complied with attendance and safety guidelines. Under the terms of the program, employees could be disqualified for having more than one unexcused absence for the week, leaving early, or arriving late more than once a week, or for having an OSHA recordable injury. The eligibility for the \$1.25 per hour incentive pay was payable weekly. The remaining half of the incentive payment was paid as a completion bonus and provided \$1.25 for every hour worked from March 13, 2008, until May 8, 2008. When Chatagnier told Corral about the proposed incentive pay, Corral responded that the employees were not going to like the incentive pay in lieu of a raise.

Corral shared his dissatisfaction concerning the proposed incentive pay with other employees. After his discussions with a number of his fellow employees, leadman Victor Salazar prepared a letter to Respondent on his home computer on March 16, 2008. The 1-page letter was addressed "To whom it may concern," and it is shown to be from "ASC employees, at ExxonMobil Beaumont, TX." The first paragraph of the letter contains:

In behalf of all Atlantic Scaffolding Company employees currently employed at ExxonMobil Beaumont, TX, we demand a pay rate increase; per diem pay increase, and a better br[e]ake down system for craftsman classification. We ASC employees feel deserve the above because first of all our hard work,

followed by the professionalism we provide to this company and last, the high level of risk involved at work.

The letter continues with an explanation of why the work is "hard work" and how the employees demonstrate professionalism. Additionally, the letter describes the kind of work that poses risks for employees. The letter ends by asking whether Respondent supported the employees in this matter and expressing a desire to avoid an "escalade" of the matter beyond Beaumont facilities. Attached to the letter is a list of employee concerns. The first of the six listed concerns proposes that other contractors at the same site provide their employees with the "right pay rate" and a "reasonable" amount of per diem.

When Foreman Jose Rangel first saw the letter on Sunday, March 16, 2008, a signature page was attached. At the time that he signed the letter, the attached page contained approximately 30 to 40 signatures. When Victor Corral and Foreman³ David Reyna first saw the letter on March 16, 2008, there were approximately 100 signatures on the attached pages. Although Reyna did not identify who had given him the letter and the list of signatures, he recalled that "they" told him that "they" were going to speak with Respondent's supervisors about a pay increase on the following morning. Corral acknowledged that the letter was a means by which to justify the employees' receiving more money.

3. The employees present the letter to Wall

As noted above, Monday, March 17, 2008, was the first day of the scheduled turnaround. Respondent's employees attended the safety meeting that was held inside the lunch tent for the FCC unit. At approximately 6:55 a.m., Supervisor Wall was standing outside the lunch tent; in the area where the toolbox meetings are held. Foreman Eduardo Salinas handed him a copy of Salazar's letter. Victor Corral estimated that approximately 100 employees were gathered together at the time the letter was presented to Wall. Although the night-shift employees were typically released from work at 5 a.m., a number of the night-shift employees remained in the facility to demonstrate their support for the letter. In recalling what Salinas said to him as he presented the letter, Wall testified: "He just told me this is what they wanted before they would go back to work." Wall went on to add that Salinas told him that the employees wanted an increase of \$5 an hour and \$90 a day per diem before they would return to work. Corral also confirmed that in speaking with Wall, the employees demanded an increase of \$5 an hour and an increase in per diem pay. Wall told Salinas that he could not negotiate that kind of request and he would have to turn it over to uppermanagement. Wall testified that Salinas and Corral were the two employees who spoke with him about the letter. Wall asked them if they would go to work until Respondent could get the matter resolved. Wall testified that not only did he ask the foremen to begin working; he specifically asked them to update the scaffold tags that required the foremen's authorization before the other contractors

³ Reyna was a foreman during the 2008 turnaround period. At the time of his testimony, he was employed by Respondent as a leadman.

could use the scaffolds.⁴ Wall asserted that Salinas and Corral refused. Salinas did not testify and Corral did not rebut Wall's testimony. Wall also recalled that only General Foreman Jared LeJeune and a "couple" of the other foremen helped him to update the scaffold tags.

4. Chatagnier's initial involvement with the employees

After receiving and reading the letter, Wall contacted Site Superintendent Chatagnier and asked him to come to the lunch tent area. After Chatagnier arrived and read the letter, he spoke with the employees outside the tent. Chatagnier recalled that approximately 20 to 30 employees attempted to speak with him at one time. When he asked for one person to speak with him from the group, Salinas came forward. Salinas told him that the employees wanted a \$5-an-hour across-the-board raise and an increase in their per diem pay. Chatagnier told Salinas that he was not in a position to make that call and those were decisions that would have to be made by individuals above him. Chatagnier recalled that Salinas told him that Respondent had until noon to come up with a decision. Chatagnier testified that at that point he assumed that the employees were going back to work while they waited for the decision. Chatagnier then contacted Fulton and told him that the employees had given Respondent until noon to reach a resolution. When Chatagnier returned to the assembled employees, he told them that Fulton was on his way and that Fulton would address with ExxonMobil what needed to be addressed. Chatagnier told the employees that he needed them to return to work and Fulton would come down at noon and let them know what could be resolved. Chatagnier testified "Eduardo Salinas told me that I misunderstood what he said. When he meant noon, that they were going to sit there and wait till noon, but that they were not going to go back to work until a decision was made." Chatagnier further recalled that Salinas told him that whether they would stay or leave would depend on what the employees heard about their pay rates and the per diem. Chatagnier also recalled that Salinas told him that if their demands were not met by noon they were going to request their pink slips and their tool passes to remove their tools.

Chatagnier testified that although he does not speak Spanish he could tell by the tone of their voices that the employees were frustrated. He recalled that one employee yelled out to him: "F—k you, white boy. Please hit me so I can sue you." He also recalled that a "couple of times" Salinas urged the employees to calm down.

5. ExxonMobil's involvement with the employees

Swango recalled that following the morning safety meeting on March 17 he headed back toward the turnaround trailer. Before reaching the trailer, however, he was notified that Respondent's scaffold builders had refused to go to work. When he returned to the FCC tent area, he observed approximately 100 scaffold builders outside the east side of the tent. Dorothy Patterson, ExxonMobil's turnaround manager, as well as two other ExxonMobil representatives, accompanied Swango.

⁴ Wall explained that "updating" the scaffold tags refers to checking the scaffolds to make sure that they are still sound and ready to be used by the contractors on the turnaround.

When Swango and the other ExxonMobil representatives arrived at the tent, Chatagnier was speaking with the employees. Although Swango did not overhear Chatagnier's discussion with the employees, Chatagnier subsequently reported the employees' demands to him and the other ExxonMobil representatives. When Patterson heard the demands, she opined that ExxonMobil "was not real willing to meet those demands."

Fulton arrived at the tent area just shortly after the ExxonMobil representatives. Fulton also addressed the employees and asked them to return to work in order that the situation could be resolved. Fulton also told the employees that under the current circumstances, ExxonMobil was not willing to negotiate in that manner. Fulton recalled that when he asked the employees to give him a day to negotiate with ExxonMobil they emphatically refused. When he asked them to return to work until he could give them an answer by noon, the employees again refused. Employee Regina Williams testified that employees refused to return to work after Fulton asked the employees to give him a day to work out a resolution and then again when he asked if they would give him until noon. Fulton testified that he pleaded with the employees, telling them that Respondent needed them, as did ExxonMobil. Chatagnier recalled that the employees responded to Fulton as they had responded to him by stating that they weren't going to return to work until they knew whether they were receiving a raise.

During the time that Chatagnier and Fulton spoke with the assembled employees, Swango and the other ExxonMobil representatives remained inside the tent. Swango did not personally overhear what the employees were saying. Swango testified, however, that based on his conversation with Chatagnier and Fulton, it was his understanding that if the employees did not receive a bonus; they were not going to work.

Swango testified that as he waited inside the tent it seemed to him that Chatagnier and Fulton's discussions with the employees lasted for a couple of hours, with "back-and-forth" discussions. While the employees were assembled outside, Swango remained inside the tent, pacing back and forth along the front of the tent. Swango testified that even though he did not hear what the employees were saying he observed that things were not going well and that some of the individuals were becoming agitated. Swango testified that it was his understanding that the employees were not going to work without getting an increase in pay. Finally, Swango told Chatagnier and Fulton that they had to remove the employees from the property and to deal with them outside the refinery. Chatagnier recalled that the ExxonMobil representatives asked Chatagnier and Fulton to make one last request for the employees to return to work. Fulton made the additional request. Fulton told the employees that if they did not return to work ExxonMobil was going to have them removed from the facility. Fulton explained that the matter was out of Respondent's hands and that the employees either needed to return to work in order for the negotiations to occur or the buses were going to pick them up to leave the facility.

Although Chatagnier noticed a small change in the employees' attitudes once they realized that ExxonMobil was going to call for the buses, the employees did not return to work. Victor Corral also acknowledged that from the time that the employees

presented the letter to Wall until the time that the employees were bused from the facility the employees performed no work.

Swango confirmed that it was he who instructed ExxonMobil personnel to call for the transportation buses and to have ExxonMobil security to remove the employees from the premises. Swango testified that ExxonMobil wanted the employees bused to the parking lot because they were refusing to work inside the refinery and such action presented a safety issue for ExxonMobil. Swango testified that while he did not speak Spanish he concluded that the employees refusing to work were becoming more agitated and that the situation was deteriorating.

Chatagnier testified that the decision to remove the employees was made solely by ExxonMobil and not by any representatives of Respondent. Chatagnier confirmed that Swango ordered the buses and that ExxonMobil's security director Mike Lorenzen, initiated the request that the employees be removed from the refinery. Lorenzen also orchestrated the process for employees to board the buses. When ExxonMobil's security personnel arrived at the tent, they took command of the situation and ordered the employees to form a single line and make their way from the east side of the tent to the west side of the tent where the buses were waiting.

Employee Regina Williams recalled that approximately 2 minutes after she saw Swango exit the tent, ExxonMobil security arrived. She recalled that ExxonMobil's security personnel told the employees that they needed to leave the yard because the number of people posed a safety hazard. When employees asked where they were going, the security personnel told them that they were going elsewhere to talk with their contractor because there were too many people in the tent area. Swango recalled that after he called for the buses, some of Respondent's employees approached him and told him that they weren't refusing to work. He told them to get with their foremen and go to work.

In response to Swango's direction, approximately five or six buses arrived to transport the employees away from the tent area. ExxonMobil representatives asked Respondent to provide two supervisors for each employee bus. Williams explained that she assumed that they were going to be bused back to the trailer to have a meeting about the letter. The buses, however, transported the employees to one of the refinery gates, which led to an ExxonMobil parking lot. The first bus left the area outside the FCC tent at approximately 8:16 a.m. ExxonMobil's gate log reflects that the employees began exiting the refinery at approximately 8:19 a.m. When the employees exited the buses, they passed through the gate in a single-file line. As the employees exited the facility through the security gate, both Respondent officials and ExxonMobil officials were present. Fulton testified that ExxonMobil's security and turnaround management directed that the employees turn in their badges, H2S monitors, and company radios when they exited the gate. Fulton testified that he believed that Swango gave the direction for the ExxonMobil items to be collected from the employees. Chatagnier testified that he specifically heard Swango give the direction for the badges, monitors, and radios to be collected from the employees. Chatagnier also testified that neither he nor Fulton protested the directive because it is ExxonMobil's

facility and they were going to do what ExxonMobil asked them to do. There is no dispute that some of Respondent's managers assisted in collecting the badges, monitors, and radios. Although Swango did not deny that the items were collected from the employees, he denied that he personally told Respondent to collect the employees' badges and monitors. Swango testified that the employees were refusing to go to work and that is why ExxonMobil removed the employees from the facility. Although Swango testified that he did not know who actually requested that the employees turn in their badges and monitors, he acknowledged that the direction could have come from ExxonMobil's security subcontractor. Swango confirmed that a refusal to work by subcontractors' employees constitutes a reason for ExxonMobil to take the employees' badges and limit their access to the premises.

6. The employees in the parking lot

After exiting the buses, the employees proceeded through the gates to the ExxonMobil parking area. The employees did not immediately leave, but, instead, remained in the parking lot. Victor Salazar testified that the employees remained in the parking lot because they were waiting for Respondent's representatives to come and to speak with them and to see what Respondent was going to do for them. During the time that the employees remained in the parking lot, some of the employees told Exxon security personnel that they wanted their work tools from the facility. The employees normally stored their tools outside the FCC lunch tent in the area where the toolbox meetings were conducted. Swango recalled that after the employees were bused from the facility, he was notified that some of the employees requested their tools. Normally, a contract employee must have a gate pass or authorization from ExxonMobil to remove tools from the refinery. Swango made the necessary arrangements for the return of the tools and authorized Respondent to pick up the employee tools and take them to the employees.

7. The employees' contact with Respondent's managers and supervisors

While the employees were gathered in the parking lot, the employees continued to communicate with Respondent's supervisors personally and telephonically. The record reflects a wide disparity in the testimony concerning these conversations. The General Counsel's witnesses testified concerning conversations in which they either personally participated or conversations which they overheard involving Wall, Safety Manager Derek Harvey, Dylan Fulton, or Regional Manager Chad King while they were gathered in the parking lot.

While he was in the parking lot, Corral had three or four cell phone conversations with Wall. Corral asserted that in one of the conversations he asked Wall why their badges had been taken and "what was going on." Corral asserted that Wall initially responded that he didn't know and he would have to get with Chatagnier and Fulton; who were meeting with ExxonMobil. Corral acknowledged that during one of the conversations Wall asked him what the employees wanted. Corral asserted that he told Wall that the employees wanted a straight raise of \$2.50. Corral asserted that in a later conversation Wall told him that Chatagnier agreed and that buses were going to be

sent to the parking lot to bring the employees back into the facility. Corral testified that when the buses did not return Wall told him that Fulton would take back only 75 percent of the employees. Wall had allegedly asserted that 25 percent of the employees had to stay out because ExxonMobil wanted “somebody punished for what happened.” Corral admitted, however, that during the cell phone conversation, Wall told him that Respondent wanted the employees to come back to work.

Employee David Reyna testified that Derek Harvey, Respondent’s safety manager, came to the parking lot while the employees were gathered there. Reyna testified that he overheard Harvey talk with some employees about the incentive raise that Respondent had planned to give employees. Reyna asserted that at some point Harvey stated that employees were going to get a straight raise rather than the incentive pay and that buses were going to be sent to take employees back into the facility. ExxonMobil’s ins-and-outs report for March 17, 2008, reflects, however, that Harvey entered the facility at 6:41 a.m. and did not exit the refinery until 10:41 p.m. on March 17, 2008.

Victor Corral, Jose Rangel, and David Reyna all recalled that Regional Manager Chad King came out to the parking lot while the employees were gathered there. Corral asserted that King told Eduardo Salinas and him that the employees ought to take the offer of 75 percent of the employees returning because he had 80 employees coming in to replace them. Salinas did not testify. When Corral gave an affidavit during the investigation of the initial charge, he mentioned that King came to the parking lot to talk with employees. He admitted in his testimony at trial that he never mentioned anything in the affidavit about King’s telling employees that only 75 percent of employees could return. Rangel and Reyna did not overhear King’s conversation with any of the employees. Corral also testified that when Fulton came to the parking lot to talk with employees he mentioned that only 75 percent of the employees could return because 25 percent had to be punished. Regina Williams is the only other employee who testified that she heard Fulton state that only 75 percent of the employees could return. She acknowledged, however, that she only heard bits and pieces of Fulton’s comments to employees while he was in the parking lot. She further admitted that when she gave a prior affidavit to the Board she failed to mention anything about Respondent saying that only 75 percent of the employees could return to work. Victor Salazar testified that he did not hear any of Respondent’s supervisors or managers mention anything about a 75/25 percent split for employees returning to work. He testified that he only heard from fellow employees that only 75 percent of the employees could return to work.

In addition to the day-shift employees who had been bused out of the facility, there were also a number of night-shift employees in the parking lot. Because these employees were grouped with the day-shift employees on the buses, their badges were collected as well. Swango confirmed that if any of the night-shift employees who had not participated in the work stoppage had turned in their badges, the badges were returned to them for them to return to work. When David Reyna saw the badges returned to the night-shift employees, he asked Esther Sepulveda, an office employee with Respondent, if he could

have his badge as well. She told him that she could not give it to him until “they” told her to do so. Reyna recalled that at that point, ExxonMobil security was telling employees that they had to leave the parking lot because they were terminated. Reyna recalled that Respondent’s safety manager, Derek Harvey, spoke up and told ExxonMobil security that the employees were going back to work. ExxonMobil’s security personnel then told Harvey that it was their understanding that the employees had been fired and they could not return to the facility.

Fulton testified that it was his understanding that the employees were required to board the buses because ExxonMobil demanded that they leave the facility. He explained that his plan had been to go to the parking lot to try to negotiate with the employees. He recalled that when he went to the parking lot, he urged the employees to “please come back to work.” He told employees that ExxonMobil had indicated that they would sit down and talk with Respondent, however, they (ExxonMobil) would not simply allow the employees “not to go to work.” Fulton believed that employees Eduardo Salinas and Juan Trevino were acting as spokespersons for the employees in the parking lot. When he stated this request to Salinas and Trevino, they continued with their original demand of the \$5 an hour across-the-board raise and doubling their per diem. Fulton recalled that the back-and-forth discussions with the employees in the parking lot and with ExxonMobil continued for perhaps 2 to 3 hours. Fulton testified that he never told any employees in the parking lot that they were fired or that only 75 percent of the employees could return. He also denied hearing King make any statement to the employees that only 75 percent of the employees could return.

8. The employees leave the vacant lot

After the employees had been in the parking lot for over an hour, ExxonMobil security told the employees that they had to leave ExxonMobil property. The group of employees then moved to a vacant lot across the street from the refinery. In the process of the employees moving to the vacant lot, approximately 20 to 30 employees left the group. Chatagnier denied that Respondent had any involvement in having the employees removed from the parking lot. At approximately 11:15 a.m., Wall received a call from Corral, asking him to come outside the refinery to speak with the employees. Chatagnier was present when Wall received the call and suggested that he accompany Wall to the vacant lot. ExxonMobil’s in-and-outs report for March 17 reflects that Wall and Chatagnier exited the facility at 11:38 a.m.

Chatagnier estimated that approximately 60 to 70 employees were gathered in the vacant lot. When Chatagnier spoke to the employees in the group, he spoke with Eduardo Salinas as their representative. He did so because Salinas was bilingual and he offered to speak for the group. Chatagnier presumed that he was acting as spokesman for the group because he translated Chatagnier’s comments to the other employees. The employees asked Chatagnier about the status of their employment. He reminded them that they had given Respondent a deadline of noon to “come up with a decision” on their raise and ExxonMobil had bused them out of the property.

Corral testified that Chatagnier told the employees that he wanted 75 percent of them to return to work. When asked if Chatagnier identified the employees who would be included in the 25 percent who would not return, Corral identified Victor Salazar and Jacinto Chapa. He contended that Chatagnier identified only these two employees as employees who could not return to work. Corral acknowledged that during the meeting with Chatagnier and Wall he understood that he was welcome to return to work. David Reyna recalled that Chatagnier and Wall told the employees that they could select the 75 percent who would return and it didn't matter who was selected. Reyna added that only 25 percent had to remain out in order for ExxonMobil to see that someone had paid for what happened.

Chatagnier recalled that employees asked him whether ExxonMobil would globally blackball them and whether ExxonMobil was only going to allow 75 percent of the employees to return. Chatagnier testified that this was the first that he had heard anything about a 75/25 plan or about their being blackballed by ExxonMobil. Chatagnier testified that he did not tell the employees that only 75 percent could return. He also added that during the time that they were in the vacant lot Wall tried to get the workers to return to work as a whole group. When asked about ExxonMobil's blackballing them, he told the employees that would be an issue that they would have to discuss with ExxonMobil. He also testified that while they were in the vacant lot with the employees some of the employees asked if they were fired. Chatagnier told them that as far as Respondent was concerned they were not. Chatagnier also recalled that employees told him that if they were not going to get the pay raise they would find other jobs. He specifically recalled that Victor Corral and Eduardo Salinas told him that they had other jobs lined up.

Although Fulton and Chatagnier denied that they told any employees that only 75 percent of the employees could return, Wall acknowledged that he did so. Wall testified that he told Corral and Salinas that only 75 percent of the employees could return to work because of an earlier conversation that he had with Chatagnier. Wall did not indicate that he made this statement to any other employees. He also testified that he did not tell any employees that they were terminated. Victor Salazar testified that while Chatagnier and Wall came to the vacant lot and spoke with the employees, he did not speak with them and was not "directly" present when they spoke. He acknowledged that any information about the alleged 75/25 return-to-work offer came only from his fellow employees. He did not hear either Chatagnier or Wall talk about the offer. He testified that the employees did not go back because the employees believed that 100 percent of the employees should be given the opportunity to go back to work and not just 75 percent.

Wall and Chatagnier left the vacant lot and returned through the refinery gate at 12:07 p.m. After they left the vacant lot, Wall again telephoned Corral. He asked Corral if any of the employees wanted to return to work and Corral told him that they did not. Corral did not testify concerning this last conversation with Wall on March 17 and he did not rebut Wall's testimony concerning this conversation. He acknowledged, however, that even after March 17, 2008, he talked with Wall and Chatagnier about returning to work. He testified that he had

declined to return to work because the alleged 75/25 offer was still in place.

9. The employees are removed from the vacant lot

Corral estimated that after the employees remained in the vacant lot for 40 minutes to an hour ExxonMobil security and the Beaumont police asked the employees to leave the vacant lot because the lot was ExxonMobil property. Chatagnier testified that Respondent did not request the removal of the employees from either the parking lot or from the vacant lot. After leaving the vacant lot, a number of the employees went to a public park that was near the refinery. While the employees were in the park, they contacted Michael Doggett, a representative of the Carpenters union. Doggett came to the park and met with the employees. Corral recalled that Doggett collected their names and addresses and suggested that he would help the employees to talk with Respondent and ExxonMobil. Corral's narrative description of the employees' discussion with Doggett is somewhat ambiguous. It is unclear as to whether the employees told Doggett they were fired or whether Doggett opined that they were fired.

10. Respondent's actions following the work stoppage

At 3:42 p.m., Fulton sent an email to Swango with a list of the employees, identifying them as the employees who walked out during the morning. Fulton explained in the email that the badges were being turned into ExxonMobil security for "Non Entry" classifications for the ExxonMobil facilities. Fulton further explained in the email that he had approximately 100 employees who were located at various sites along the Gulf Coast and who had experience with Respondent. Fulton confirmed that he was in contact with ExxonMobil security to coordinate expedited site specific training for replacement employees and he had 40 employees on schedule for ISTC training on the following Wednesday. ISTC training is the training that is required to allow access to the refinery. Fulton assured Swango that Respondent would over-hire to ensure that adequate manpower requirements were met. Fulton also explained in the email that Respondent had not been given the opportunity to resolve the issues with the employees and that it appeared that a number of individuals orchestrated the entire group. He also explained that a large majority of the employees had been in favor of coming back in if the entire group was allowed. Fulton confirmed that Respondent was firmly against allowing the organizers re-entry under any circumstances.

11. Employees return to work

Chatagnier recalled that a foreman whose name was Rodriguez did not participate in the work stoppage and remained at the facility on March 17, 2008. At approximately 9:30 a.m. or 10 a.m., he contacted his crew that had been bused out of the facility. He told them to stay behind in the parking lot. When everything cleared, the employees in his crew went to the contractor's entry gate to obtain re-entry to the facility. Chatagnier recalled that he spoke with Fulton and then Fulton contacted Swango to get permission for their re-entry. After Respondent obtained permission from ExxonMobil, the employees were given their badges and allowed re-entry into the facility.

Fulton confirmed that all of the night-shift employees returned for their next shift following the work stoppage. On March 18, 2008, Chatagnier received a telephone call from Respondent's Nederland office concerning Foreman Antonio Montelongo. Chatagnier was informed that Montelongo and his crew appeared at the Nederland office, reporting that they had not wanted to participate in the walkout. They reported that they had done so because they felt intimidated and they wanted to return to work. ExxonMobil's gate entry and exit report (ins and outs report for March 18, 2008) reflects that Montelongo and his crew were given access to the refinery during the afternoon of March 18, 2008.

Fulton testified that when the employees left the refinery on March 17, 2008, there was no decision made as to their employment status. When the employees had not returned to work by March 19, Respondent determined that they had abandoned their jobs. On March 19, 2008, Respondent sent separation notices to the employees who they believed to have engaged in the work stoppage and had not returned to work. On March 19, 2008, Fulton also sent an email to Swango and other ExxonMobil representatives with a final list of the employees and their employment status in connection with the March 17, 2008, work stoppage. The March 19, 2008, list was an update to the original list sent by Fulton to ExxonMobil on the afternoon of March 17 and referenced above. Chatagnier testified that the list was prepared and given to ExxonMobil at the request of ExxonMobil. He explained that ExxonMobil wanted a list of the employees that were not going to return in order that the employees' names could be put into their global database for restricted access to any ExxonMobil facility. Swango also confirmed that he and other ExxonMobil representatives made the decision that the employees would be placed on a denied-access list and that the ExxonMobil security subcontractor placed these individuals' names on the denied access list for any ExxonMobil property.

Following March 17, 2008, Respondent telephoned many of the employees who had participated in the work stoppage in an attempt to rehire the employees for the turnaround. Corral acknowledged that on April 9, 2009, Chatagnier talked with him about coming back to the job and also offered him an hourly raise. Chatagnier even told him that he would be protected from layoff and he could work through the end of the turnaround. Corral also admitted that Chatagnier additionally told him about other employees who had participated in the work stoppage who was brought back to work during the turnaround.

E. Conclusions Concerning the Work Stoppage

Counsel for the General Counsel submits that the overall record proves that Respondent discharged the workers in retaliation for their protected concerted activity, thereby violating Section 8(a)(1) of the Act. Respondent asserts that the General Counsel's allegations should be dismissed in their entirety for two reasons. Respondent submits that first of all, the General Counsel has not shown that Respondent terminated the employees in retaliation for the March 17, 2008 work stoppage. Secondly, Respondent argues that the work stoppage "was not protected activity because the timing and manner in which the employees conducted it was abusive, indefensible, excessively

disruptive of other workers, and therefore, unprotected" by Section 7 of the Act.

1. Whether the work stoppage was protected by the Act

The law is well settled that employees may engage in protected work stoppages to protest their terms and conditions of employment. In its landmark decision in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), the Court upheld the Board's decision in finding that an employer unlawfully discharged unrepresented employees for leaving their work to protest their working conditions. It has become well established that employees who concertedly refuse to work in protest over wages, hours, or other working conditions are engaged in "concerted activities" for "mutual aid or protection" within the meaning of Section 7 of the Act. *Odyssey Capital Group, L.P.*, 337 NLRB 1110, 1111 (2002); *Jasper Seating Co.*, 285 NLRB 550, 551 (1987).

In their posthearing briefs, both the General Counsel and Respondent refer to the Board's ruling in *Cambro Mfg. Co.*, 312 NLRB 634, 636 (1993). In *Cambro*, the Board noted that when an in-plant work stoppage is peaceful, is focused on a specific job-related complaint, and causes little disruption of production by those employees who continue to work, employees are entitled to persist in their in-plant protest for a reasonable period of time. Citing *TPA, Inc.*,⁵ a 2001 Board decision that follows *Cambro*, General Counsel asserts that the employees are protected by Section 7 of the Act because they briefly engaged in a peaceful work stoppage when they presented their concerted complaint letter to Respondent. The General Counsel maintains that the work stoppage caused minimal disruption to the other employees who desired to work and occurred for a reasonable period of time.

Respondent, however, submits that there was extreme disruption caused by the work stoppage at the refinery. Respondent asserts that the work stoppage impacted nearly 1000 workers' ability to accomplish their work that day, and idled hundreds of contractor employees aside from those employed by Respondent. Fulton testified that because March 17, 2008, was the first day of the turnaround, it was critical for employees to get their tools and begin work the first thing that morning. Fulton also explained that because millions of dollars of production was affected by the multiple shutdown of the FCC unit, Respondent and other contractors had only a "small window" of time to accomplish the turnaround. Respondent provided all the scaffolding for the turnaround. Without Respondent to update the scaffolding according to OSHA regulations and ExxonMobil's policies, no other craft employees or contractors could access any of the temporary work platforms used in the turnaround. Swango verified that with 13 units out of operation, ExxonMobil lost millions of dollars a day during the turnaround period. While Swango could not say with certainty that ExxonMobil lost millions of dollars because of a delay of several hours, he estimated that the loss was in "that range." Victor Corral also admitted that the work stoppage was intended to take place on the first day of the turnaround in order that it would have the maximum impact. Corral further admitted that

⁵ 337 NLRB 282, 282 (2001).

the employees knew that by staging the walkout at that time would put Respondent in a “very uncomfortable position” with ExxonMobil and thereby would result in some sort of wage or compensation increase.

In its argument that the employees only engaged in a brief work stoppage, The General Counsel cites two Board cases in which the work stoppage was found to have lasted a reasonable time. In *TPA, Inc.*, supra, a 20-minute work stoppage was found to be protected and in *HMY Roomstore, Inc.*, 344 NLRB 963 (2005), the protected work stoppage lasted for less than an hour. I am also mindful that in a very recent decision,⁶ the Board found a concerted work stoppage to be protected when the employer began suspending employees for their failure to return to work or go home after only an hour. Relying on the recall of employee witnesses,⁷ counsel for the General Counsel submits that the extent of the work stoppage in this instance was reasonable, asserting that the work stoppage lasted for approximately only 30 minutes. Had the employees presented their concerted complaint letter to the Respondent and only delayed going to work for only a 30-minute period, such argument could be given greater weight. This case is somewhat unique, however, in that there was a significant and independent intervening occurrence. Prior to Respondent reaching a resolution of the matter with the employees, ExxonMobil independently determined that the employees’ refusal to begin work posed a safety threat to its operation and removed the employees from ExxonMobil property. On their own initiative or in response to the requests of Wall, Chatagnier, or Fulton, the employees had to specifically request to return to the worksite after their removal by ExxonMobil. As evidenced by what occurred with Foremen Rodriguez and Montelongo, employees requesting to return to the refinery were allowed to do so after Respondent received the necessary authorization from ExxonMobil. The majority of the employees, however, did not request to come back into the facility. Wall and Chatagnier left their final meeting with the employees and returned to the refinery at 12:07 p.m. Wall testified without dispute that following his departure from the vacant lot he telephoned Corral one last time that day to ask if any of the employees wanted to return to work. Corral rejected his request. Thus, the record evidence reflects that the work stoppage on March 17, 2008, continued as long as 5 hours after the employees presented their letter to Wall.

The facts of the *Cambro* case discussed above reflect that the alleged 11 discriminatees in that case ceased working between 2:30 and 3 a.m. on the day in question. The employees declined to return to work until they spoke with the plant manager or the owner. The employees were aware that neither official normally appeared at the plant during that particular shift. The supervisor urged them to return to work, explaining that either the plant manager or the owner would arrive early in the morn-

ing for a meeting with them. The employees declined to do so. Although the employees were again encouraged to either return to work or to clock out and return at 7:30 a.m. for a meeting with the plant manager the employees continued their work stoppage. The plant manager arrived at the plant at 6 a.m. and conferred with the supervisor and then with the employees. At the conclusion of his meeting with the employees, he suspended them for failing to follow instructions. In deciding the case, the Board noted that the work stoppage was peaceful, focused on several specific job-related complaints, and caused little disruption of productive for those employees who continued to work. The Board further noted that in such circumstances, the employees were entitled to persist in their in-plant protest for a reasonable period of time. The Board found, however, that the work stoppage exceeded a reasonable period. Even though the employees were given assurances that the plant manager would meet with them and they would be able to present their grievances they nevertheless continued their work stoppage. The Board found that the employees’ failure to return to work or to leave the plant after the supervisor’s second directive resulted in the forfeiture of the Act’s protection. *Cambro* at 636. In a more recent case⁸ in which the majority relied on *Cambro*, the Board found that an employer lawfully discharged 83 employees who refused to vacate its parking lot and who engaged in a peaceful work stoppage to protest their terms and conditions of employment. The Board noted that there were a number of factors that weighed in favor of the employees’ rights. These factors included the fact that the employees engaged in a peaceful work stoppage at all times and there was no evidence that they ever tried to block ingress or egress to the employer’s facility. They did not disrupt the employer’s operation or prevent other employees from performing their duties. The employees did not seek to deprive the employer of the use of its property and they were at all times on the outside of the employer’s facility, rather than the inside. The employees congregated together to present their work-related complaints to the employer in a concerted fashion and the employees were unrepresented without access to any formalized grievance procedure. Notwithstanding the factors that weighed in the employee’s favor, the Board nevertheless gave greater weight to the employer’s property interests based on the circumstances of the case.

In *Waco, Inc.*, 273 NLRB 746, 746 (1984), the Board affirmed the judge in finding that an employer lawfully discharged nine unrepresented employees who refused to begin their work after arriving at the employer’s facility. The employer offered to meet with the employees individually to address their grievances; however, he declined to participate in a mass meeting. The employees did not begin their work and were terminated 3-½ hours after the employer offered to meet with them individually. In dismissing the allegation that the discharge of these employees violated the Act, the Board noted:

“[A]lthough employees who are unrepresented and are working without an established grievance procedure have a right to engage in spontaneous concerted protests concerning their

⁶ *Fortuna Enterprises*, 354 NLRB 202 (2009).

⁷ Employee witnesses gave various estimates of the length of time between the presenting of the letter and their removal by ExxonMobil. ExxonMobil’s electronic exit log reflects that employees began passing through the entry gate at 8:19 a.m., approximately an hour after they would normally have begun their work.

⁸ *Quietflex Mfg. Co.*, 344 NLRB 1055 (2005).

working conditions, the precise contours within which such activity is protected cannot be defined by hard-and-fast rules. Instead, each case requires that many relevant factors be weighed. [Id. at 746.]

The Board's reasoning follows the Supreme Court in its earlier decision in *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976), in which the Court noted that the "locus of the accommodation" between Section 7 rights and private property rights "may fall at differing points along the spectrum depending upon the nature and strength" of the respective rights in any given context. Id. at 522.

2. Whether the employee's were terminated on March 17, 2008

Counsel for the General Counsel asserts in his brief that the present circumstances are distinguishable from those in *Cambro* above. Counsel for the General Counsel argues that in the instant case, the employees did not refuse to leave the facility and did not refuse to return to work. In asserting that employees did not refuse to go to work, the General Counsel relies on the testimony of David Reyna and Victor Corral. Reyna testified that he did not hear either Fulton or Chatagnier tell the employees to return to work while Respondent tried to work out a solution with ExxonMobil. In explaining why he did not hear such a statement, he added that there were a "whole bunch of crew people" assembled in the group. Corral admitted that when Fulton spoke with the employees, he told them that he needed to talk with ExxonMobil about the letter. Corral asserted, however, that Fulton never told the employees to go to work while he spoke with ExxonMobil. During cross-examination, Corral was asked why the employees were milling about outside the lunch tent instead of going to their assigned workstations if they had not refused to go to work. In response, Corral contended that the employees could not go to their assigned work area because they had not had their toolbox meeting. In contrast to Corral's testimony, however, David Reyna, Victor Salazar, and Regina Williams testified that the toolbox meeting did, in fact, occur on the morning of March 17, 2008. Later in his testimony, however, Corral admitted that Fulton asked the employees to return to work prior to ExxonMobil's busing the employees from the facility. Regina Williams also admitted that Fulton asked employees to go to work and he told them that he would see what he could do in response to their letter. In her sworn affidavit to the Board, Williams acknowledged that Respondent asked the employees to give Respondent a day to work out a solution and the employees said, "No." She added that Respondent then asked to have until noon to work out a solution and the employees also replied, "No." Based on the entire record, I find the testimony of Reyna, Salazar, and Williams in this regard to be more credible than that of Corral with respect to whether employees had participated in the toolbox meeting. As discussed more fully below, Corral's testimony was not only inconsistent, but the testimony appeared in parts to be somewhat contrived.

Aside from the fact that both Corral and Williams admitted that Fulton asked employees to return to work prior to ExxonMobil's removing them from the property, it is incredible that Fulton would not have done so. This entire scenario occurred on the first day of a very large and costly turnaround for

ExxonMobil. Respondent was given only a limited time to construct and certify the readiness of scaffolding that was to be used for the inspection and repair of 13 refinery units, including its third largest fuel-producing refinery unit in the United States. In addition to Respondent's employees, there were 1000 additional employees who were scheduled to work on the maintenance turnaround for the other maintenance contractors. When faced with the fact that almost all of its day shift employees were not reporting to their scheduled work assignments, it would have been inconceivable that Respondent would not have asked the employees to go to work until Respondent could work out a solution to the problem. With ExxonMobil representatives standing just inside the tent waiting for their turnaround project to begin, it is unimaginable that Fulton or Chatagnier would have spoken with the employees about anything else other than their returning to work. Although Victor Salazar testified that he did not recall hearing Fulton ask the employees to go back to work, he admitted that he heard from other employees that Fulton had asked the employees to do so.

Additionally, there is no dispute that after the employees were bused to the parking lot, Fulton went out to the parking lot and spoke with the employees. When ExxonMobil removed the employees from the parking lot, Wall and Chatagnier went to the vacant lot to talk with the employees. And finally, even after Wall and Chatagnier left the vacant lot, Wall telephoned Corral again to talk about the employees' returning to the facility. The undisputed evidence of Respondent's supervisors reaching out to the employees even after they left the facility totally contradicts the employees' assertions that they were never asked to return to work. Additionally, I note that the credible record evidence reflects facts not that dissimilar from those in *Quietflex Mfg. Co.*, involving the lawful discharge of work stoppage employees even though they were outside the employer's facility.

3. Whether the record establishes a prima facie case of discriminatory discharge

Under its landmark decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board adopted a framework to evaluate alleged 8(a)(3) violations when the case turns on the employer's motive. In the instant case, General Counsel alleges that the alleged discriminatees were discharged in violation of Section 8(a)(1) of the Act and because of their having engaged in protected concerted activity. In its decision in *Phoenix Transit System*, 337 NLRB 510, 510 (2002), the Board explained that a *Wright Line* analysis is not required in cases where it is undisputed that the employer took an adverse action against an employee for his or her engaging in protected concerted activity and the action is alleged as a violation of Section 8(a)(1) of the Act. As discussed above, Respondent not only disputes that the employees engaged in protected concerted activity, but also disputes that they were terminated for their actions. Thus, inasmuch as the present discharge issue turns on motive, the *Wright Line* analysis may nevertheless be used. *Alton H. Piester*, 353 NLRB 369, 373 (2008).

To establish a violation under *Wright Line*, the General Counsel bears the burden of showing by a preponderance of the evidence that the employees' protected concerted activity was a motivating or substantial factor in an adverse employment action. The usual elements that are required to make such a showing are protected activity by the employee, employer knowledge of that activity, animus on the part of the employer, as well as actual adverse action toward the employee. *Willamette Industries*, 341 NLRB 560, 562 (2004). Once the General Counsel has demonstrated such factors, the burden then shifts to the employer to show that it would have taken the same action even in the absence of the employee's protected activity. *Manno Electric*, 321 NLRB 278 fn. 12 (1996). In the instant case, there is an issue with respect to all of the elements that are necessary to establish a prima facie case. Respondent not only asserts that it did not terminate the employees in response to their work stoppage, but Respondent also asserts that the employees were not engaging in protected activity.

In light of the total record evidence, Respondent's argument has merit. Arguably, when the employees presented their letter to the Respondent on the morning of March 17, 2008, the employees were engaged in protected concerted activity that would otherwise be protected by the Act. While the employees were described as frustrated and agitated, there is no evidence that they engaged in any physical violence or overtly disruptive behavior that would have initially forfeited the protection of the Act. *Timekeeping Systems, Inc.*, 323 NLRB 244, 248 (1997).

Credible record evidence reflects, however, that Respondent took no adverse action toward the employees in response to their engaging in the protected concerted activity. There is no dispute that both Fulton and Chatagnier spoke with the assembled employees and assured the employees that Respondent would speak with ExxonMobil in response to the employees' demands. There is also no dispute that, as the ExxonMobil official with responsibility for the turnaround procedure, Swango made the decision that the employees could no longer remain on ExxonMobil property as they posed a safety risk to the facility. Furthermore, there is no evidence that Swango did so at Respondent's urging or suggestion. Respondent's desire for the employees to return to their jobs is clearly demonstrated by the fact that Fulton, Chatagnier, Wall, and King went out to talk with the employees after ExxonMobil ejected the employees from the facility.

Although Respondent's supervisors and managers assisted ExxonMobil security in the orderly evacuation of the employees and the retrieval of badges and monitors, they did so in compliance with ExxonMobil's exit procedure for the employees. The fact that Respondent's supervisors assisted ExxonMobil with the employees' exit does not support a finding that in doing so Respondent terminated the employees. Had the employees been sent out of the refinery because they were terminated, there would have been no reason for Fulton, Chatagnier, Wall, or King to go outside the refinery to meet with the employees. Additionally, employee Reyna's testimony contradicts the assertion that Respondent fired the employees. Although ExxonMobil's entry and exit log does not reflect that Safety Manager Harvey ever left the facility during the morning of March 17, 2008, Reyna nevertheless recalled that

Harvey came to the parking lot. Reyna testified that when ExxonMobil security told the employees that they were fired, Harvey contradicted security, asserting that they were not fired. Although it appears that Reyna was mistaken as to who made this statement, Reyna obviously associated the comment with Respondent's management and may have erroneously credited Harvey with the statement, rather than one of the other managers who came to the parking lot.

Although there is no dispute that Respondent issued termination notices to employees on March 19, 2008, Respondent did so because there was no indication that the employees were going to return to work. The General Counsel attributes much significance to Fulton's email to Swango on March 17, 2008, after the work stoppage. Although Fulton identified for Swango the employees who participated in the work stoppage, there is nothing to indicate that Respondent had already terminated the employees or that they were terminated for having participated in the work stoppage. Additionally, there is nothing to indicate that Respondent was terminating 25 percent of the employees as asserted by some of the employee witnesses.

The record also reflects that Victor Corral was one of the principal participants in the work stoppage. The fact that an undisputed supervisor engaged in a work stoppage of this magnitude might be sufficient, in itself, to provoke an employer's animosity. Clearly, this did not appear to be the situation in the instant case. Corral admitted that he understood that he could return to work on March 17. He did not rebut Wall's assertion that Wall called him after 12:07 p.m. to ask one last time if any of the employees wanted to return to work. Corral also acknowledged that Respondent continued to maintain contact with him after he left the facility on March 17, and even offered him a raise if he would return to work. Although I note that the date of the job offer occurred after the filing of the charge, Respondent's overall interaction with Corral was not consistent with the kind of animus necessary to demonstrate a discriminatory termination.

Thus, I do not find that the General Counsel has established by a preponderance of the evidence that the employees' work stoppage was a motivating factor in the employees' discharge. The evidence reflects that ExxonMobil independently removed the employees from the refinery with no direction from Respondent. There is no evidence that ExxonMobil was a joint employer with Respondent or even acted as an agent of Respondent.

Despite the urging of Fulton, Chatagnier, and Wall, the employees did not attempt to return to the facility. One of the more conflicting areas of testimony among all the witnesses is the portion of testimony involving Respondent's alleged statement that only 75 percent of the employees could return to work. Only Corral and Regina Williams testified that Fulton told employees in the parking lot that only 75 percent of the employees would be allowed to return to work. Employee David Reyna denied however, that Fulton ever came out to the parking lot to talk with employees. Victor Salazar didn't recall that any management officials came out to talk with employees after their removal from the facility. He also recalled that employees were gathered in various separate areas outside the facility.

Both Chatagnier and Fulton denied that they ever told employees that only 75 percent of the employees could return to work. Swango also denied telling Fulton or Chatagnier that ExxonMobil would only allow 75 percent of the employees to return to the facility. Wall is Respondent's only supervisor who admits talking with employees about the 75/25 ratio. Although Wall asserts that he told Corral and Salinas that only 75 percent of the employees would be allowed to return to their jobs, there is no evidence that Wall repeated this to any other employees. Corral testified that Wall told him about the 75/25 ratio during a cell phone conversation. Wall, however, denied that he told Corral about the ratio during the cell phone conversation and asserts that the conversation occurred when he spoke with Corral in the vacant lot.

Corral testified that when Chad King came out to the parking lot, he mentioned that the employees should take the offer of 75 percent of the employees going back to work. David Reyna, however, denied that Chad King made this statement to employees. Jose Rangel did not hear King mention that only 75 percent of the employees could return. Although David Reyna testified that Respondent's safety manager, Derek Harvey said that only 75 percent of the employees could go back to work, ExxonMobil's gate entry records reflect that Harvey never left the facility during the entire day on March 17, 2008.

Based on the entire record testimony, it is apparent that there were discussions among employees concerning the alleged return of only 75 percent of the employees. The fact remains, however, that this rumor originated with the lowest-ranking supervisor who spoke with the employees on March 17, 2008. There is no credible evidence that either Fulton or Chatagnier ever presented this option to the employees. Of the five employees who testified, only Corral and Williams attribute this statement to Fulton. Additionally, I note that while Corral asserted that Chatagnier said that not everyone could return, he allegedly only identified Victor Salazar and Jacinto Chapa as the two employees who would not be allowed to return. Although David Reyna asserts that Fulton and Chatagnier said that only 75 percent could return, he contends that they told employees that they could select the 75 percent who would come back and the 25 percent who would not. The allegation that Respondent would allow employees to choose who would be terminated is simply not credible. Overall, the record reflects that while such a rumor may have initiated with a low level supervisor, the credible record evidence does not support a finding that Respondent terminated the employees on March 17, 2008, as alleged. I found both Fulton and Chatagnier's testimony to be consistent, plausible, and overall credible. Wall's testimony was contradictory in part. Although he alleges that he told two employees that he had heard that only 75 percent of employees could return to work, he also testified repeatedly that he urged Corral and others to return to work. The idea that Chatagnier and Fulton would simply leave it up to the employees to determine who retained their jobs and who did not is not plausible. While there was clearly some confusion among the employees with regard to their employment status, the confusion appeared to have resulted from rumors and misinformation circulating among the disorganized group of employees. The confusion was further exacerbated by the fact that

employees were gathered in separate groups and conversing in more than one language. A number of the employees obviously depended on their fellow employees to not only communicate with, but also to speak on their behalf, with Respondent's non-Spanish speaking officials.

In contrast to the variation in testimony concerning the limitation of 75 percent of the employees returning, the overall testimony confirms that employees were not told that they were fired. Regina Williams testified that Fulton and Chatagnier never told employees that they were fired. David Reyna also denied that Chatagnier told employees that they were fired. Although employees may have acted on misinformation and rumor, there is insufficient evidence to show that Fulton and Chatagnier told employees that they were fired when they spoke with them on March 17, 2008. Based on the total record evidence, I credit the testimony of Fulton and Chatagnier. Additionally, Corral admitted that when Fulton, Chatagnier, and Wall spoke with employees inside the facility, they never told employees that they would be fired if they did not go to work. Corral also acknowledged that even when Wall came to the vacant lot to speak with the employees, he did not tell them that they were fired. Corral further admitted that when he talked with Wall by telephone from the parking lot, Wall indicated that Respondent wanted the employees to return to work. Thus, the total record evidence does not support a finding that Respondent terminated the employees on March 17, 2008, as alleged.

Moreover, the record evidence also supports a finding that at some point in time and prior to the employees' termination on March 19, 2008, the work stoppage, which began as protected concerted activity, lost the protection of the Act. Accordingly, the evidence is not sufficient to show that the employees' participation in the work stoppage was a motivating factor in the employees' discharge and I find no merit to the allegation that these employees were discriminatorily discharged under Section 8(a)(1) of the Act.

F. Supervisory Status of Respondent's Foremen

1. The parties' positions

The parties do not dispute that as general foremen Victor Corral, and Jared LaJeune are excluded from the protection of the Act as supervisors. Respondent asserts, however, that the foremen on the turnaround are also supervisors under Section 2(11) of the Act. The General Counsel, however, submits that Alfonso Garcia is a foreman and not a general foreman and that he along with all the other foremen are not supervisors and are fully protected by the Act.

2. The prevailing case law

Under Section 2(11) of the Act, a supervisor "means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, 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." The enumerated powers in Section 2(11) are to be read in the dis-

junctive. Possession of one or more of the stated powers, however, does not convert an employee into a 2(11) supervisor unless the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. *Adco Electric Inc.*, 307 NLRB 1113, 1120 (1992). The Board does not construe supervisory authority too broadly because the employee who is deemed a supervisor loses his protected right to organize. The Board has long held that the burden of proving that an individual is a supervisor is placed on the party alleging that supervisory status exists. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003); *Masterform Tool Co.*, 327 NLRB 1071, 1071 (1999). In *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), and in accord with the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), the Board reiterated that the burden of proving supervisory status rests on the party asserting it. Additionally, the party seeking supervisory status must establish it by a preponderance of the evidence. *Dean & Deluca*, supra at 1047; *Bethany Medical Center*, 328 NLRB 1094, 1103 (1999).

3. Respondent's rationale and the record evidence

(a) Job description and organizational status

Respondent submits that as immediate supervisors for all members of the crews, the foremen "shoulder the overall responsibility for erection of scaffolding at the job site." In asserting that the foremen's responsibility equates to supervisory authority, Respondent points to the foremen's job description and to the fact that foremen are included as supervisors on the Respondent's organizational chart. Respondent's job description for its foremen specifies that the foremen are responsible for directing and supervising "lead carpenters, carpenters, and carpenter helpers in the proper, timely, and safe installation of scaffolding on the jobsite." The job description also provides that the foremen will train and instruct the crew members and know and enforce all company policies and procedures as well as all safety regulations on the job.

Although the portions of the job description upon which Respondent relies may describe duties that could support a finding of supervisory status, such description alone is not dispositive of the exercise of such duties. A finding of supervisory status cannot be based solely on a job description. Like a job title, the job description is not determinative of supervisory status. The issue is whether the individual actually possesses any of the powers enumerated in Section 2(11) of the Act. *Western Union Telegraph Co.*, 242 NLRB 825, 826 (1979). Through the testimony of Fulton, Respondent offered into evidence a copy of its organizational chart. Fulton testified that the document was prepared prior to Respondent's hiring its full complement of workers for the turnaround. The chart lists nine individuals in the organizational "box" beneath Wall's name and identifies those individuals as foremen. Neither Victor Corral nor any other designated foreman on the chart is designated as a "general foremen." Additionally, there is a listing of five individuals identified only as "yard crew" under the authority of the manager for QA/QC Inventory. Although Fulton confirmed that the chart reflects the supervisory or management team for Respondent at the Beaumont facility, the arrangement of the chart appears to place the foremen on the same level as the

"yard crew." Additionally, I note that tables of organization and job descriptions have not been found to be sufficient to vest supervisory powers. *NLRB v. Security Guard Service*, 384 F.2d 143, 149 (5th Cir. 1967). As the Fourth Circuit Court of Appeals pointed out in a very early decision, "It is equally clear that the employer cannot make a supervisor out of a rank and file employee simply by giving him the title and theoretical power to perform one or more of the enumerated supervisory functions. The important thing is the possession and exercise of actual supervisory duties and authority and not the formal title." *NLRB v. Southern Bleachery & Print Works, Inc.*, 257 F.2d 235 (4th Cir. 1958), cert. denied 359 U.S. 911 (1959). Accordingly, I do not find the job description for foremen or the organizational chart to be dispositive of supervisory status.

(b) Authority to hire, fire, and discipline employees

While authority to hire and fire employees is not a requisite element of supervisory status,⁹ the exercise of such authority is certainly determinative in establishing supervisory status. The instant record contains no evidence that foremen either hire or fire other employees and Foremen David Reyna and Jose Rangel both testified that they did not have the authority to hire employees or to discipline employees. Although Wall testified that foremen have the authority to discipline employees for engaging in misconduct, he gave no specific examples of their having done so. Foreman Reyna testified that if he saw a crew member failing to "tie off" before getting on scaffolding, he could correct the worker to work safely and he would tell the worker to tie off before getting on the scaffolding. Respondent asserts that such authority supports a finding that foremen have the authority to discipline crew members. I note, however, that while Reyna acknowledged that he could tell a crew member that he needed to tie off without first getting the permission of the general foreman; he also testified that his doing so would involve only a minor safety violation that required a reminder to the crew member to do the right thing before mounting the scaffold.

Foreman Rangel also testified that if he observed a crew member engaging in a very serious safety violation, he had the right to go to the general foreman and report the violation. Although Rangel asserted that he could recommend that the person be removed from the job if the employee were "violating safety rules left and right," there is no evidence that he has done so or evidence to show whether a general foreman has acted on the recommendation without independent investigation. Fulton also asserted that if a foreman observed a crew member working in an unsafe manner, he had the authority to pull the crew member aside and talk to him about his work. Fulton testified that a foreman could counsel a crew member about their work habits or safety issues without getting advance permission from the general foreman. Fulton further asserted that a foreman could give the employee a verbal warning or a written reprimand. Respondent presented no documentary evidence, however, to demonstrate that foremen have issued verbal or written warnings to other employees.

⁹ *Angeli's Super Valu*, 197 NLRB 85 (1972).

(c) The daily toolbox meetings

Respondent asserts that foremen generally led the daily toolbox safety meetings, with input from all crew members. Respondent presented a number of documents that were identified as daily safety meeting sign-in sheets. The individual sheets identify the date, the date of the week, and the shift. The sheets contain 30 separate lines for employees to list their printed name, classification, signature, badge number, and the time at which they signed the sheet. The name of the foreman is also completed at the top of the sheet. On the individual sheets, the foreman identified at the top of the sheet is also included in the listing of employees, along with signature, time of signing in, and other requisite information. Fulton testified because the foremen identified on the sheet had the highest level classification, they would have been the person who would have conducted the safety meetings. Fulton asserted that if a general foreman conducted the meeting, he would have been required to sign the sheet as well. Foreman Reyna, however, testified that he had never conducted a safety meeting. He asserted that the forms were merely a means by which the general foremen determined who was present that day and the forms were not used to document the safety meeting. Reyna explained that each contractor held their own toolbox meetings and that the meetings were conducted by the general foremen and never by the foremen. Foreman Rangel additionally testified that the general foreman conducted the toolbox meetings.

Despite Respondent's assertions that the foreman led these meetings, Respondent presented no evidence to show that the foremen independently selected the topics or information to be discussed. There is, in fact, nothing to show that foremen conveyed any information to employees that had not already been covered in the larger contractorwide meeting with ExxonMobil or that had not been received by the foreman from the general foremen. A foreman's simply passing along or communicating assignments or information that has been directed by the general foreman or higher management does not reflect the type of discretion indicative of supervisory status. *Somerset Welding & Steel, Inc.*, 291 NLRB 913, 914 (1988). Thus, even if the foremen held the highest level classification during these meetings, there is insufficient evidence to show that they exercised any independent judgment in presenting assignments or safety information to the other employees.

(d) Recommendations and evaluations

In asserting that its foremen have the authority to recommend the advancement or promotion of their crew members, Respondent relies on Fulton's testimony concerning evaluations. Fulton testified that foremen have the authority to complete employee evaluations and are required to do so every 90 days. Although Turnaround Supervisor Wall testified that foremen have the authority to conduct employee evaluations, he could not give any specific examples of their having done so. During direct examination, General Foreman Victor Corral testified that Respondent's foremen did not conduct employee evaluations. During cross-examination, however, Corral confirmed that foremen prepare evaluations on their crew members and the evaluations are used to move an employee into a higher pay classification. During redirect examination, Corral testified

that he was unaware of any of the alleged foremen having prepared an evaluation of other employees. Both Reyna and Rangel testified that they did not have the authority to conduct employee evaluations. Despite all of the contrasting information with respect to foremen evaluations, Respondent submitted no documentary evidence to support its assertion that foremen conduct employee evaluations.

Wall asserted that foremen have the authority to approve an employee leaving the worksite as an "early out." Corral, however, testified that an employee's request for an early out must be reported to the general foreman; who in turn reports the request to Wall for a final decision. On cross-examination, Corral explained that he would take into account the foreman's recommendation or information about whether the employee is dispensable to the job and then he would formulate a recommendation to Wall based on his general knowledge of all of the work being performed on the job. On redirect examination, however, Corral denied that he made any recommendation to Wall when he reported an employee's request for an early out.

Corral acknowledged that if a project is winding down and some of the employees must be laid off, he would get feedback from the foremen about the employees' skills in order to recommend employees for layoff. Corral was not asked to provide any specific examples of when he has done so and Respondent did not provide documentation to support such recommendations. Fulton testified that if an employee has more skills than necessary for the job for which he was hired, the foreman could go to the general foreman and superintendent and recommend the employee for a higher classification. Although Fulton asserted that this happens often during a turnaround, he provided no specific examples of when this has occurred.

(e) Assignment and direction of work

Respondent asserts that the "foremen were responsible for assigning each crew member to the particular duties they needed to perform to build, modify, or demolish a particular scaffold." Turnaround Supervisor Wall testified that the general foremen spend their day rotating from foreman to foreman to review the progress of each crew. He further asserted that the foremen are responsible for directing and assigning work to the individual crews. General Foreman Victor Corral testified that once a general foreman approved any modifications for particular scaffolding, the general foreman assigned the lead carpenter, the carpenter, and the carpenter's helper to their respective duties to accomplish those modifications. Corral acknowledged that it was the foreman's responsibility to oversee that the modification was performed correctly. Regina Williams was hired as carpenter's helper for the 2008 turnaround. She testified that the foreman not only gave the work assignments to the crew members, but also checked on the progress of the work.

Wall testified after receiving the work schedule from the general foremen, the foremen then explain the daily work schedule to the three-man crews. Wall also asserted that in carrying out the work schedule, the foreman could transfer employees from one crew under his direction to another crew under his direction without getting permission from the general foreman. The foreman is responsible for deciding the order of

the work performed by each crew. Wall also testified that if an ExxonMobil contractor or a representative of ExxonMobil requested a modification in a scaffold directly from the foreman, the foreman could make the modification without getting the approval of the general foreman. The foreman would then instruct the crew as to how to effect the modification.

Respondent submits that the foreman's supervisory responsibilities involve completing daily activity reports (DAR's.) The DAR's record the hours worked by employees on the crew and also all activities that the crew performs each day. Respondent asserts that the DAR's are "some of the most important documents that Atlantic maintains on a job site, and, therefore, are entrusted only to supervisors at the foreman level and above to complete." The DAR's submitted into evidence are captioned "Beaumont Refinery Daily Activities Report." The form contains the name of the contractor for ExxonMobil along with the date of the activity. The form contains the names and signatures of employees, along with the total number of hours worked by each employee for the specific date. There is also a section of the form for a narrative description of the daily work completed, scope changes, delays, and revisions. At the bottom of each form, there is a line for the signature of the contract foreman and the ExxonMobil contract representative. General Foreman Victor Corral, along with Foremen Reyna and Rangel, all testified that all of the entries listed under "daily work completed" on the forms were based on work assignments give by the general foremen to the foremen. Fulton also acknowledged that if the foremen needed approval of the general foreman or if the work was completed at the general foreman's direction, the general foreman would not sign the DAR and there would be no indication on the form itself that the general foreman approved or assigned the work. Wall also testified that a general foreman, a foreman, or "anyone" could fill out the forms. He explained that he also completes the forms on occasion. Accordingly, while a foreman's name and signature may appear on the form, the record is insufficient to show that the work described or the hours worked by the listed employees was solely authorized or directed by the foremen whose names appear on the form.

4. Conclusions concerning the supervisory status of foremen

There is no dispute that the individual crew members received their work assignments from the foreman assigned to their crew. The evidence reflects that the foreman is the conduit for instructions to employees from the general foreman as well as from ExxonMobil and their other contractors. There is no evidence that employees receive assignments, notice of necessary modifications, or even correction from individuals other than the foremen. The issue, however, is the extent to which the foremen exercise the requisite independent judgment in making assignments and directing the work of the individual crew members.

On September 29, 2006, the Board decided three cases which dealt specifically with the issue of whether a purported supervisor either "assigns" or "responsibly directs" other employees.¹⁰

¹⁰ *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006); and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006).

Using the Board's interpretation in *Oakwood Healthcare, Inc.*, the authority "responsibly to direct" exists when an individual decides "what job shall be undertaken next or who shall do it . . . provided the direction is both 'responsible' . . . and carried out with independent judgment." *Oakwood Healthcare* at 691. In its interpretation of "responsible" direction, the Board explained "the person performing the oversight must be accountable for the performance of the task . . . such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly." *Id.* at 692. Accordingly, "to establish accountability for responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Id.* at 692.

While the record may reflect that the foremen are responsible for organizing and executing the work, Respondent has presented no evidence of "actual accountability" to prove that the foremen "responsibly direct" the work of the crews. There is no documentary evidence to show that any foremen has been disciplined, demoted, or in any way adversely affected by his performance in directing the individual crew members. *Id.* at 731.

In its decision in *Oakwood Healthcare, Inc.*, the Board also clarified that "independent judgment" means that "an individual must at a minimum act, or effectively recommend action free of the control of others and form an opinion or evaluation by discerning and comparing data" provided that the act is "not of a merely routine or clerical nature." 348 NLRB at 9. In the instant case, the foremen direct the work of their crews based upon the pre-established work schedule provided to them by the general foremen. There is no dispute that foremen receive the daily work schedule directly from the general foremen. Wall testified that after the morning safety meeting and toolbox meeting, it is the responsibility of the general foreman to go into the field and to make sure that the foremen have placed their crews in the right places. The general foremen then communicate with the contractors and supervisors to determine if anything has changed in work scope for the day. If there are any changes that cause a shift in work priority, the general foreman directs his foremen to move crew members to address the priority. Thereafter, the general foremen rotate from foreman to foreman to review the work progress.

Respondent asserts that determining the type of a scaffold to build, as well as the proper job setup requires the foremen to use their independent discretion and judgment. In its decision in *Oakwood Healthcare Inc.*, the Board noted that for an individual to responsibly direct with independent judgment, the individual needs to exercise "significant discretion and judgment in directing others," *Oakwood Healthcare Inc.*, supra at fn. 38. As the Board has also noted in its decision in *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002), the burden is on the party alleging supervisory status to establish that the putative supervisor exercises independent judgment by submitting "concrete evidence showing how the decisions are made. *Ibid.*

Respondent also submits that the foremen were responsible for assigning each crew member to the particular duties they needed to perform to build, modify, or demolish a particular scaffold. Although the Respondent acknowledges that the foremen receive the daily work schedule from the general foremen, Respondent contends that the foremen are permitted to deviate from that schedule and to identify and execute modifications that are needed. In asserting this kind of independence in identifying and executing modifications, Respondent relies on the testimony of Swango, who did not supervise the work of Respondent's foremen. When asked if the foremen can modify the scaffolds without getting authorization from the other contractors or from ExxonMobil, Swango simply confirmed that the scaffolds belong to Respondent and Respondent can make those modifications without approval of ExxonMobil. Swango also clarified that he did not know whether foremen required the approval of the site superintendent or the general foremen before making those modifications. General Foreman Corral acknowledged, however, that the foremen assigned the crew members the duties needed to accomplish a modification after receiving the authorization from the general foreman.

In its decision in *Oakwood Healthcare, Inc.*, 348 supra at 689, the Board also clarified how it would analyze the authority to "assign" with respect to determining supervisory status for an individual. The Board explained that it would construe the term "assign" to refer to the "act of designating an employee to a place (such as location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee." The Board went on to note, however, that simply determining the order in which an employee will perform discrete tasks within those assignments would not be indicative of exercising the authority to "assign." Id. at 689.

With respect to the assignment of work in general, Regina Williams testified that the foreman gives the work orders to the lead carpenter, the carpenter, and the helper. The foreman also gives instructions and guidance as to whether to build the scaffold or whether to dismantle the scaffold. She also explained that if the foreman was not on the jobsite with the crew, the crew leader had the authority to send crew members to pick up materials and supplies in the same way that a foreman would send employees for these items. Although Wall and Chatagnier testified that the foremen have the authority to assign work to the crew members, Respondent provided no testimony or documentary evidence to show how foremen made the decisions to assign the respective crew members to the scaffold-building duties. The Board has long recognized that purely conclusory evidence, without specific explanation that the purported supervisor in fact exercised independent judgment does not establish supervisory authority. *Voltaire Contractors, Inc.*, 341 NLRB 673, (2004); *Dynamic Science, Inc.*, 334 NLRB 391, 393 (2001); *Sears, Roebuck & Co.*, 304 NLRB 193, 194 (1991).

Thus, the overall record demonstrates that the foremen communicate the work assignments to the crews and are responsible for carrying out the assignments. There is not, however, evidence to show that the foremen are disciplined for the work performed by the crew members or documentation to show that foremen evaluate, discipline, or reward crew members for the work performed. Overall, the record evidence does not establish that any direction or assignment by foremen is based upon anything other than experience and knowledge of the craft skills necessary to erect the scaffolding. *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995). The foremen's assignments of different jobs to their respective crews demonstrates nothing more than the knowledge expected of experienced persons regarding which employees can best perform particular tasks. *Quadrex Environmental Co.*, 308 NLRB 101 (1992).

Accordingly, the record does not support a finding that the foremen employed by Respondent during the ExxonMobil turnaround project functioned as supervisors within the meaning of Section 2(11) of the Act.

G. Alfonso Garcia's Status

Respondent asserts that Alfonso Garcia is precluded from the protection of the Act because he was a general foreman during the 2008 turnaround. Victor Corral testified, however, that only he and Jared LeJuene were general foremen on the day shift. Foreman David Reyna also confirmed that only Corral and LeJuene were general foremen. Corral, Reyna, and Salazar all identified Garcia as a foreman on the turnaround. Salazar, in fact, testified that Garcia was his foreman on the job. Corral testified that Garcia was a foreman who reported directly to him on the job and was assigned two to three crews. Respondent submitted no evidence to support its contention that Garcia was a general foreman rather than a foreman. Accordingly, based upon the total record evidence, I do not find that Alfonso Garcia functioned as a general foreman during the 2008 turnaround in issue.

CONCLUSIONS OF LAW

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

2. Respondent did not engage in conduct violative of the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The complaint is dismissed.

¹¹ 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.