

Relco Locomotives, Inc. and International Brotherhood of Electrical Workers, Local Union No. 347. Case 18–CA–074960

June 12, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On September 25, 2012, Administrative Law Judge Eric M. Fine issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Acting General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions, to amend the remedy, and to adopt the recommended Order as modified and set forth in full below.

¹ The Respondent 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), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge’s findings.

We note that the judge credited the testimony of employees Mark Douglas and Jerry Sindt that the Respondent’s co-owner, Douglas Bachman, held mandatory employee meetings in late November or early December 2011, during which he solicited employee grievances. Because these meetings occurred during the Union’s organizing campaign, which Bachman was aware of, and because the Respondent had no past practice of holding such meetings, we agree with the judge’s finding that Bachman implicitly promised to remedy the employees’ grievances at these meetings, including the employees’ suggestions to implement a bonus program, provide better equipment, and improve communication with supervisors. See *Capitol EMI Music*, 311 NLRB 997, 1007 (1993) (holding that “the solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances”), enf. 23 F.3d 399 (4th Cir. 1994); accord: *ManorCare Health Services-Easton*, 356 NLRB 202, 220 (2010), enf. 661 F.3d 1139 (D.C. Cir. 2011).

In adopting the judge’s finding that the Respondent knew that Douglas and Sindt engaged in union activity, we rely not only on Respondent Supervisor Cliff Benboe’s separate unlawful interrogations of Douglas and Sindt, but also on the timing of the terminations, the Respondent’s general knowledge of its employees’ union activity, the Respondent’s otherwise demonstrated union animus, and the pretextual reasons offered by the Respondent for the terminations. See *Evenflow Transportation, Inc.*, 358 NLRB 694, 696 (2012) (finding that employer had knowledge of specific employees’ union activity based on same factors).

We also find that the Respondent’s union animus is clearly established by its multiple violations of the Act in *Relco I* and *Relco II*, referenced below, and by its independent 8(a)(1) violations in this case. In finding such animus, we find it unnecessary to rely on the picture of the IBEW headquarters posted at the employee clock-in computers and on the bulletin board near the employees’ locker room shortly after the Union’s handbilling at the Respondent’s facility.

AMENDED REMEDY

The judge recommended that the unfair labor practices in this case be remedied with a narrow order, requiring the Respondent to cease and desist from committing the particular violations found and from violating the Act “[i]n any like or related manner.” We find, however, that a broad cease-and-desist order, requiring the Respondent to cease and desist from violating the Act “in any other manner,” is warranted in this case.

Broad injunctive relief is appropriate when a respondent is shown to have “a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ fundamental statutory rights.” *Hickmott Foods*, 242 NLRB 1357, 1357 (1979). We find that the Respondent’s record of unfair labor practices reflects both a “proclivity to violate the Act” and a “general disregard” for employees’ rights; either finding would suffice here to justify a broad order.

This is the third case in 2 years in which the Board has found that the Respondent committed multiple and serious violations of the Act. In all three cases, the same officers of the Respondent committed those violations. In the first case, *Relco Locomotives, Inc.*, 358 NLRB 229 (2012), the Board found that the Respondent violated Section 8(a)(3) and (1) by terminating two employees for engaging in union activity, and violated Section 8(a)(1) by terminating two additional employees for engaging in protected concerted activities and by maintaining an overly broad nondisclosure agreement and coercing employees to sign it. In the second case, *Relco Locomotives, Inc.*, 358 NLRB 298 (2012), the Board found that the Respondent violated Section 8(a)(3), (4), and (1) by disciplining and ultimately terminating two employees for engaging in union activity and for testifying at the unfair labor practice hearing in the first case, and violated Section 8(a)(1) by terminating two additional employees for engaging in protected concerted activities. In the present case, we find that the Respondent violated Section 8(a)(3) and (1) yet again by discharging two employees for engaging in protected activity, and violated Section 8(a)(1) by coercively interrogating two employees and engaging in other coercive acts. In light of the Respondent’s recidivist conduct, including its termination of multiple employees for engaging in union activity in an effort to defeat an organizing campaign, we find that a broad cease-and-desist order is appropriate. Accord *Excel Case Ready*, 334 NLRB 4, 4 fn. 5 (2001) (broad cease-and-desist order warranted where employer committed numerous violations of Sec. 8(a)(3) and (1) to quash an organizing campaign).

The request for relief in the unfair labor practice complaint included a provision that the Respondent be required to read aloud the Board's remedial notice to its production and maintenance employees. The judge, however, did not order that remedy, and neither the Acting General Counsel nor the Union filed exceptions to the judge's decision. Nonetheless, we find the Respondent's violations of the Act are sufficiently serious and pervasive to warrant it. Requiring a responsible management official to read the notice aloud, or to be present when a Board agent reads it, will ensure that the employees "fully perceive that the Respondent and its managers are bound by the requirements of the Act." *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007), *enfd.* 273 Fed. Appx. 32 (2d Cir. 2008) (quoting *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003), *enfd.* 400 F.3d 920, 929-930 (D.C. Cir. 2005)); accord: *WestPac Electric, Inc.*, 321 NLRB 1322, 1322 (1996) ("[T]he Board has broad discretion in determining the appropriate remedies to dissipate the effects of unlawful conduct," even where the General Counsel and Charging Parties did not except to the judge's remedy.).

In addition, in accordance with our recent decision in *Latino Express, Inc.*, 359 NLRB No. 44, slip op. at 1 (2012), we shall order the Respondent to compensate Mark Douglas and Jerry Sindt for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters.

Last, the Respondent may comply with our Order requiring it to rescind its unlawful handbook rule regarding solicitation and distribution without management approval by supplying employees either with a handbook insert stating that the unlawful rule has been rescinded, or with a new and lawfully worded rule on adhesive backing which will cover the old and unlawfully broad rule, until it republishes the handbook without the unlawful provision. Thereafter, any copies of the handbook that are printed with the unlawful rule must include the new insert before being distributed to employees. See *Guardsmark, LLC*, 344 NLRB 809, 812 fn. 8 (2005), *enfd.* in pertinent part 475 F.3d 369 (D.C. Cir. 2007).

ORDER

The National Labor Relations Board orders that the Respondent, Relco Locomotives, Inc., Albia, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Coercively questioning its employees about their union activities on behalf of International Brotherhood of

Electrical Workers, Local Union #347, or any other labor organization.

(b) Instructing employees not to distribute union authorization cards on company time.

(c) Soliciting employee complaints and grievances and impliedly promising to remedy those complaints and grievances in order to discourage employees from selecting union representation.

(d) Maintaining a distribution and solicitation policy requiring employees to seek authorization from management before employees engage in any distribution or solicitation, including that during nonworktime and in nonwork areas.

(e) Discharging employees because they engage in union activities or other protected concerted activities to discourage employees from engaging in those activities.

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

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

(a) Within 14 days from the date of this Order, rescind the Respondent's handbook rule stating, "Employees are not permitted to . . . solicit or distribute literature without management approval," and notify employees in writing that this has been done.

(b) Within 14 days from the date of this Order, offer employees Mark Douglas and Jerry Sindt full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make Mark Douglas and Jerry Sindt whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(d) Reimburse Douglas and Sindt an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against them.

(e) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Douglas and Sindt, it will be allocated to the appropriate periods.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful terminations of Mark Douglas and Jerry Sindt and, within 3 days thereafter, notify them in writing that this has been done and that the terminations will not be used against them in any way.

(g) 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.

(h) Within 14 days after service by the Region, post at its facility in Albia, Iowa, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 18, 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 its operations at Albia, Iowa, 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 October 1, 2011.

(i) Within 14 days after service by the Region, hold a meeting or meetings during working time and at the Respondent's facility, and scheduled to ensure the widest possible attendance, at which the attached notice is to be read by a responsible management official of the Respondent or by a Board agent, in the presence of a responsible management official of the Respondent.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 18 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.

3. Substitute the attached notice for that of the administrative law judge.

² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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

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

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 coercively question our employees about their activities on behalf of the International Brotherhood of Electrical Workers, Local Union #347, or any other labor organization.

WE WILL NOT instruct employees not to distribute union authorization cards on company time.

WE WILL NOT solicit employee complaints and grievances and impliedly promise to remedy those complaints and grievances in order to discourage employees from selecting union representation.

WE WILL NOT maintain a solicitation and distribution policy requiring employees to obtain management approval for soliciting and distributing in nonwork areas during nonworktime.

WE WILL NOT discharge employees because they engage in activities on behalf of the International Brotherhood of Electrical Workers, Local Union #347, or any other labor organization, to discourage employees from engaging in union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, rescind our employee handbook rule stating, "Employees are not permitted to . . . solicit or distribute literature without management approval," and we will notify employees in writing that this has been done.

WE WILL, within 14 days from the date of the Board's Order, offer employees Mark Douglas and Jerry Sindt full reinstatement to their former positions or, if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Mark Douglas and Jerry Sindt whole for any loss of earnings and other benefits suffered as a result of their unlawful terminations in the manner set forth in Board's decision.

WE WILL reimburse employees Mark Douglas and Jerry Sindt an amount equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against them.

WE WILL submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Douglas and Sindt, it will be allocated to the appropriate periods.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful terminations of Mark Douglas and Jerry Sindt, and WE WILL, within 3 days thereafter, notify them in writing this has been done and their terminations will not be used against them in any way.

RELCO LOCOMOTIVES, INC.

Catherine L. Homolka, Esq. and *Nichole L. Burgess-Peel, Esq.*,
for the Acting General Counsel.

Paul E. Starkman, Esq. and *Svetlana Zavin, Esq.*, of Chicago,
Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Albia, Iowa, on June 6 and 7, 2012. The charge was filed on February 22, 2012; the first amended charge was filed on March 16, 2012; the second amended charge was filed on April 10, 2012; and the third amended charge was filed on June 1, 2012.¹ The charge and amended charges were filed by the International Brotherhood of Electrical Workers, Local Union #347 (the Union, the IBEW, or Local 347) against Relco Locomotives, Inc. (Respondent). The complaint, as amended at the hearing, alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: in October and December 2011 interrogating employees about their union activities; in December 2011 prohibiting an employee from engaging in union activities during nonworktime; in December or January 2012 soliciting employee complaints and grievances and promising employees increased benefits and improved terms and conditions of employment; and that Respondent maintained a rule improperly restricting employees discussions of their working conditions. The complaint alleged Respondent violated Section 8(a)(1) and (3) of the Act by discharging its employees Mark Douglas and Jerry Sindt on January 2, 2012.²

¹ All dates are in 2011, unless otherwise indicated.

² Respondent argues that it was denied due process by my refusing to enforce its subpoena duces tecum with regard to witness affidavits. Pursuant to Sec. 102.118(b)(1) of the Board's Rules and Regulations, the Respondent was provided with witnesses' affidavits upon its re-

quest prior to its cross-examination of those witnesses, and it had an opportunity to cross-examine those witnesses about their prior statements. See, e.g., *Success Village Apartments*, 347 NLRB 1065, 1065 (2006). Respondent was allowed to request the amount of time it needed to review those affidavits, and to request more time if necessary. Respondent has shown no prejudice by my following Boards procedures concerning the refusal to enforce its subpoena.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, with an office and place of business in Albia, Iowa (Respondent's facility), has been engaged in the business of repairing and rebuilding locomotives. During the past calendar year, Respondent has sold and shipped from its Albia, Iowa facility goods valued in excess of \$50,000 directly to points outside the State of Iowa. Respondent admits and I find it is an employer engaged in commerce under Section

3 In *Relco Locomotives, Inc. (Relco I)*, 358 NLRB 229 (2012), Respondent was found to have unlawfully discharged five employees, one in June 2009, one in September 2009, and three in March 2010 because of their activities on behalf of the Brotherhood of Railroad Signalmen Union. Respondent was also found to have unlawfully maintained a nondisclosure requirement that prohibits employees from engaging in union or other concerted activities. Respondent was ordered by the Board to rescind all nondisclosure agreements and any other rules that prohibit employees from engaging in protected union or concerted activities. In *Relco Locomotives, Inc. (Relco II)*, 358 NLRB 298 (2012), Respondent was found to have unlawfully discharged two employees in December 2010; and another two employees in March 2011. Respondent in that decision was also found to have engaged in other unlawful conduct including threatening an employee that he was being watched, issuing a verbal warning to an employee, and issuing unfavorable performance reviews to employees. I am aware of these decisions, but have not relied on them in making credibility determinations, or to make any of my findings here.

⁴ Following the close of the hearing counsel for the Acting General Counsel filed a motion to strike certain portions of Respondent's post-hearing brief asserting certain matters contained in the brief were based on matters outside the record. Respondent filed a response to said motion. While counsel for the Acting General Counsel may disagree with certain arguments raised in Respondent's brief based on Respondent's interpretation of the record, Respondent did provide citations to transcript pages for most of those arguments. I am fully capable of reading Respondent's brief and agreeing or disagreeing with its arguments. I find counsel for the Acting General Counsel's brief is a reply brief labeled as a motion to strike. Accordingly, the motion to strike is denied, and I have not considered the arguments raised in the motion or Respondent's response in deciding this case.

⁵ In making the findings, I have considered the witnesses' demeanor, the content of their testimony, and the inherent probabilities of the record as a whole. In certain instances, I have credited some but not all of what a witness said. See *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), reversed on other grounds 340 U.S. 474 (1951). All testimony and evidence has been considered. If certain testimony or evidence is not mentioned it is because it is cumulative of the credited evidence, not credited, or not essential to the findings herein. Further discussion of specific credibility determinations is set forth below.

2(2), (6), and (7) of the Act and the Union is a labor organization under Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The IBEW Local 347 Organizing Campaign*

Mark Bachman is the chief operating officer for Respondent.⁶ Respondent's corporate office is in Lisle, Illinois, and its production facility is in Albia, Iowa. Bachman is in charge of the Albia facility. Respondent has been in business since 1961, but the Albia facility has been open since 2005. Bachman is co-owner of Respondent with Cheri Bachman and D. Bachman. The Albia facility covers 100 acres and is capable of working on 27 locomotives. It has 3 miles of rail track. At the time of the unfair labor practice trial, there were about 140 individuals working at Albia, with over 100 of them being production workers. Bachman testified that from the fall of 2011 to February 2012 there were about six supervisors or foreman at the facility.

Sindt testified he learned of the IBEW's organizing campaign at Respondent around January 2011. Beginning in January or February, Sindt attended IBEW meetings around once a month up to around July for a total of five to seven meetings. Sindt started passing out union authorization cards at Respondent around April or May. Sindt passed out the cards in the parking lot and sometimes on the floor at Respondent when they were no supervisors around. He testified employees asked him for a card around once or twice a week.

Local 347 Organizer Courtland Pfaff was hired by the Union in September 2011, and he became involved in the campaign at Respondent at that time. Pfaff held organizing campaign meetings with Respondent's employees including one on September 26 in Albia attended by about 10 to 15 employees. Pfaff met Douglas at the September 26 meeting. Pfaff testified Douglas raised issues about safety concerns at Respondent at the meeting, as well as issues about the way the employees were treated. During the September 26 meeting, Pfaff selected Douglas to become a member of the Union's voluntary organizing committee. Pfaff and Douglas exchanged phone numbers, and following the meeting they texted each other and talked on the phone.

Douglas testified he became aware of the IBEW campaign in the spring of 2011. Douglas heard about the campaign through rumors at the shop. Douglas attended about four or five Local 347 meetings during the campaign starting in the spring of 2011 until his termination. Douglas testified he attended the IBEW meeting on September 26 in Albia. Douglas testified there was a discussion at the meeting that there was no longer a representative for coordination of the union activities since employees Newton and Baugher had been terminated. Douglas volunteered his services and informed Pfaff that Douglas had been a union steward in the past. Douglas testified the conversation was in front of other employees. After September 26, Douglas had meetings with Pfaff, and Douglas distributed un-

ion authorization cards to employees and returned signed cards to Pfaff. Douglas had not distributed cards prior to September 26. Douglas passed out cards in the locker room, the cafeteria, the main shop, and in Respondent's parking lot. Douglas stored the authorization cards in his toolbox, which he kept along the wall of the shop building or as close to him as possible. Douglas testified employees asked him for a union card at least once a week, and they asked him questions about the union campaign which he relayed to Pfaff for response.

Douglas testified that, shortly after the September 26, meeting, Douglas asked Sindt to become involved in the IBEW campaign since Sindt, due to his job, had access to the paint and blast booths at the plant. Thereafter, Sindt distributed blank authorization cards, and returned signed cards to Douglas who gave them to Pfaff. Sindt confirmed that Douglas requested Sindt's help in the campaign around September 2011 and Sindt agreed to help Douglas get the cards signed. Sindt, on his own, was also getting cards signed prior to September.

Pfaff testified around October he went to Albia to collect authorization cards from Douglas and they discussed strategy to organize Respondent. Pfaff testified Douglas was the key person on the Union's organizing committee and he was in contact with Douglas weekly or biweekly until Douglas was terminated on January 2, 2012. Pfaff testified Douglas called Pfaff on the day of Douglas' discharge stating he could no longer be on the Union's committee because he was discharged.

Pfaff testified he and union official Bob Thomas came to Respondent's facility in October during a shift change at around 4 or 5 p.m. and handbilled on the roadside outside Respondent's gate. Pfaff identified the packet of materials they distributed to employees in a blank manila envelope. The envelope contained three pages of IBEW literature, a blank authorization card, Pfaff's business card, and a Local 347 sticker. Pfaff estimated they gave away around 60 envelopes that day. Pfaff gave Douglas six or seven of the envelopes for distribution. Douglas was carpooling that day and Pfaff estimated there were four people in Douglas' vehicle. Pfaff testified no one threw anything back at him or Thomas from their car. He testified it was a small area so he would have seen if something was thrown back. Pfaff and Thomas were wearing IBEW sweatshirts containing large insignia on the front and back. Pfaff testified he saw a vehicle that had a license plate including the letters RELCO. He testified it was a white SUV or pickup. Pfaff saw the person in the vehicle take one of the manila envelopes. Both Douglas and Sindt confirmed they saw the IBEW officials handbilling outside the gate in October and they each received the Union's distribution materials on that date.

Douglas clocked in for work using computers located main shop. He estimated there are about 8 to 12 of these computers. Douglas testified the day after the Local 347 handbilling there were pictures posted at each of the computers containing about three or four lines of writing, including the statement "You can see this is what your union dues go to." Douglas testified the postings contained a picture of a multimillion dollar building containing the word IBEW on it. Douglas testified all the postings were identical, and they remained posted above the computers for about a week. Douglas testified he could not see how members of management would not have seen the postings.

⁶ Both Mark and Douglas Bachman testified during this proceeding. Mark Bachman was the decision maker in the termination of Sindt and Douglas and as such he is a principal witness to this proceeding. Mark Bachman will be referred to as Bachman; and Douglas Bachman will be referred to as D. Bachman.

Similarly, Sindt testified he saw a sheet referencing the IBEW posted at all the login computers. He testified he saw the posting the day after or shortly after the union handbilling. Sindt estimated there were 8 to 11 postings and he stated one was also on the glass enclosed bulletin board near the entrance to the locker room. Sindt testified postings were there for around 3 to 4 days. Sindt testified the postings contained a picture of a building with verbiage along the lines of union dues will pay for big fancy buildings for their corporate headquarters.

Sindt testified that around a day or two after the handbilling at Respondent, Sindt was scrapping out a cab off a locomotive when Supervisor Cliff Benboe approached Sindt and asked him what he thought about the Union. Sindt replied he had worked at a union and nonunion place and it did not matter to him one way or the other. Benboe asked Sindt how he felt he was treated at Respondent. Sindt said he felt he was treated fairly. Sindt testified he responded the way he did because he felt his response could have impacted his job.

Sindt testified there are meetings every morning in the breakroom at Respondent before the start of the shift where the supervisors give employees their daily assignments. The supervisors conduct the meetings. Sindt testified Bachman attended on rare occasions. Sindt testified that, after the Local 347 handbilling, Benboe made a comment on more than one occasion at these meetings that unions are not all they are cracked up to be. Sindt testified that, after the handbilling, Bachman made a comment on more than one occasion at these meetings that he would rather keep everything in house and that he did not like unions. Similarly, Douglas testified that during the fall of 2011 Benboe and Bachman discussed the IBEW at the morning meetings. Douglas testified Benboe said sometimes a union is good and sometimes they are bad and they just help the lazy people. Douglas testified Bachman said in years past, even with the recent recession that Respondent never had to lay off anyone, and that if a union was brought in there was no promise this would not happen. Douglas testified Bachman said this after but within a month of the union handbilling. Douglas testified Bachman said if the employees had any questions to get a hold of him. Douglas testified everybody in the shop that was working that morning, including the supervisors, would have attended the meeting. Douglas testified Benboe and Bachman made their remarks about the Union in separate meetings.

Douglas testified that sometime after Thanksgiving but before they went on their Christmas break in 2011 which begins on December 23, they were doing a cleanup at the end of a shift. Douglas testified he had authorization cards sticking out of his back pocket. Douglas testified Benboe noticed the cards and asked Douglas if he was doing that on company time pointing at Douglas's pocket. Douglas replied no. He testified Benboe said, "You better not be." Douglas testified that was the end of the conversation. Douglas testified that at the time Benboe saw him with the union cards Douglas was in middle of the shop which is a work area and it was during worktime. Douglas testified the union cards were sticking out from his back pocket far enough to see the IBEW insignia on the cards. Douglas knew the cards were showing because when Benboe pointed to them, Douglas looked and saw them. Douglas testi-

fied he did not know the cards were visible until Benboe mentioned it.⁷

Sindt testified he attended a small group meeting conducted by D. Bachman in December 2011.⁸ Sindt testified D. Bachman set up group meetings in the cafeteria, also known as the breakroom, with about 8 to 15 employees per group. Sindt testified a notice was posted for the meetings in the hallway leading to the breakroom listing the time and employee's name for the meeting they were to attend. Sindt's name was listed. He testified all the employees were listed. The meeting Sindt attended took place from around 1:30 to 3 p.m. Sindt testified D. Bachman wanted to know any ideas to make the plant more efficient and ideas of how they could improve morale. Sindt testified there were quite a few suggestions from employees. Sindt proposed a bonus that if you worked 30 days you received a half day pay. D. Bachman said he liked the idea. Sindt testified there were about 10 to 15 different bonus program suggestions at the meeting. Sindt testified that at the end of the meeting someone asked D. Bachman if they had a problem how they could get in touch with him and he flipped back a few pages on a poster board where his personal cell phone number was listed and Sindt thought D. Bachman's email address was also there. Sindt testified D. Bachman had not given out his cell number or email address in the past.

Sindt testified the only other meetings he recalled with D. Bachman were two, one in the fall of 2010 relating to insurance and another in the fall of 2011 also concerning insurance. Sindt testified that, during the one in the fall of 2011, D. Bachman said he would be back to hold small group meetings with employees sometime later in the year in late November or early December.⁹ Sindt testified he was not aware of any other meetings that D. Bachman held at the plant. Sindt testified that he was aware in the fall of 2011 there was a big project coming up involving the CSX railroad and he thought this was mentioned in one of the morning meetings. Sindt testified he did not recall D. Bachman attending the meeting when they discussed CSX. Sindt testified the only three meetings he recalls D. Bachman attending were the two for insurance and one for small groups.

Douglas testified that, prior to his termination, he had seen D. Bachman at the Albia facility around once or twice a year. Douglas testified that between the time of the IBEW handbilling in October 2011 and his termination on January 2, 2012, Douglas saw D. Bachman at the Albia facility. Douglas testi-

⁷ Douglas gave an affidavit on January 12, 2012, and although the affidavit contained a section with the heading "Knowledge" in emboldened print and underlined, Douglas did not mention anything as to this encounter with Benboe. Douglas did mention the described conversation with Benboe in a subsequent affidavit.

⁸ Sindt testified, on cross-examination, he was pretty sure the meeting occurred in December. Sindt testified it could have been in November. Sindt testified it was not in October, and he thought it was after Thanksgiving.

⁹ Along these lines, Sindt gave an affidavit on February 29, 2012, which reads, "Back in October or November 2011, D. Bachman came to a morning meeting and said he would be meeting with a bunch of guys. That the groups would be 10 to 15 guys, there would be several meetings." The affidavit continues, "The meetings actually took place in December. It was mandatory for everyone to go to these meetings."

fied D. Bachman was talking to groups of six to eight employees at a time and these meetings took place around the end of November or the beginning of December.¹⁰ Douglas testified he attended one of these meetings in the cafeteria and D. Bachman was the only member of management present. Douglas testified he learned of the meeting because Respondent had postings in the hallway scheduling groups of employees for the meetings listing each employee's name and the time they were to attend. Douglas testified the postings took up half the hallway. Douglas testified the postings had the names of a lot of employees broken down by their supervisor and craft. Douglas assumed he was required to attend. Douglas testified at the meeting he attended, D. Bachman asked the employees if there were any improvements Respondent could make for the employees to help improve production and Respondent's relationship with its clients. Douglas testified that everyone had something to say. Douglas testified he mentioned the need for better equipment and for some verification for the supervisor who was testing employees pertaining to welding. Douglas testified Benboe coordinated the welding certification tests. Douglas had been welding for a long time, and he testified he did not believe Benboe was certified. Douglas testified there were a lot of other employees who agreed with him. Douglas testified one of the suggestions was better communication between the supervisors and all of management. Douglas testified that, during the meeting, D. Bachman wrote his cell phone number on an eraser board and said this was his personal cell number if the employees had any questions or concerns feel free to call. Douglas testified D. Bachman had never offered Douglas his personal phone number before. Douglas testified he had never previously attended a meeting conducted by D. Bachman at the Albia plant where discussions took place about how to improve working conditions. Douglas testified D. Bachman had held other meetings at the plant in the past that Douglas had attended but those were annual meetings in which D. Bachman reviewed Respondent's insurance offerings with employees. Douglas testified that everyone attended the insurance meeting at once. Douglas testified this took place 2010 and 2011. Douglas testified aside from the two insurance meetings he was not aware of any other meetings D. Bachman held with employees.

B. The testimony of Respondent's Witnesses Concerning Knowledge and Response to the IBEW Campaign

Bachman testified that in the past Respondent has had unions and they also negotiated a contract for a potential offsite facility, where the employees would be represented by a union. He testified there had been unions at Respondent's Provo, Utah, and Kansas City locations. Bachman testified in Provo there was a union from 1988 to 1989 for around 12 years before the facility shut down. Bachman testified Respondent provided maintenance services at the Provo steel mill until it shut down. Bachman testified in Kansas City there was a contract to be negotiated, but it never took effect because Respondent's cus-

tomers withdrew its offer during the downturn in the economy in 2009. He testified when Respondent considered opening the plant it was to be entirely organized by the IBEW. He testified the plant was intended to service one particular customer. I do not put much credence into deciding this case relating to Bachman's testimony concerning his prior experience with organized or possibly organized facilities. Here, Bachman's testimony was sketchy at best, and it is not of a choice of an employer whether a facility becomes organized rather it is the choice of the employees working there. The fact that Respondent may have had an organized facility in the past, does not display one way or the other its current attitude towards Unions.¹¹

Bachman testified as chief operating officer of the Albia plant one of his duties is to ensure that the plant complies with applicable laws. In terms of labor law, Bachman testified Respondent has had various training sessions with its supervisors to refresh them on what the various "do's and don'ts" as to what they could talk to employees about. Bachman testified the supervisors were trained multiple times as to what they could and could not ask an employee and they have been taught not to question an employee about their union affiliation.

Bachman testified he did not talk about the IBEW or unions in any of the morning meetings with employees in 2011. Bachman testified he would not have talked about unions at a morning meeting because he knew it was not something Respondent could do. I found Bachman's testimony here to be questionable. He testified Respondent's officials received training as to what they could or could not say about a union, and certain statements as to an employer's opinion about a union are protected under Section 8(c) of the Act. Therefore, his contention that he could not say anything undermines the validity of his contention that training was received as well as his contention that he did not say anything about it. There was a clear theme amongst the testimony of Respondent's officials to obfuscate or testify in absolutes such as Bachman's contention that he did not say anything about the Union. The tenor of their testimony suggests that they were intentionally not giving a correct account of what actually transpired. Moreover, it calls into question the reliability of their denials such as Bachman's claim that he did not state at a morning meeting that Respondent never had layoffs but if the Union came in there was no promise that would not happen.

Bachman testified he "surmised" that an IBEW organizing campaign took place at Respondent's facility in 2011. Bachman testified he knew the IBEW was trying to organize by a letter he found stating, "That's the extent of what I know about

¹⁰ Douglas later testified D. Bachman held the small group meetings with employees in late October or early November. He testified the meetings could have been in early December, but he thought they took place in November.

¹¹ Similarly, Respondent introduced evidence of Benboe's prior employment with certain labor organizations, as well as his history of holding union office prior to his employment with Respondent in support of a contention that he would not be involved in any unlawful conduct concerning union activities of Respondent's employees. However, despite any past activities, Benboe impressed me as someone who was very loyal to Respondent, his current employer, and that he would adopt his position towards unions to that established by Bachman. Moreover, for various reasons enunciated herein, I did not find Benboe's testimony concerning the IBEW campaign at Respondent to be credible.

it.” Bachman then testified that in October 2011 he either received a report, or saw a person at the end of the driveway at Respondent’s facility. Bachman identified his affidavit dated April 6, 2012, wherein he stated that, “[s]ometime during the last half of the year, I had a report that there was a person out at the end of the driveway. I looked out and saw a car at the end of the driveway.” Bachman testified at the hearing that he could not recall who he received the report from. Bachman testified he surmised that IBEW reps were handbilling outside of Respondent’s facility because Bachman found an IBEW handbill on his desk the next day, which was why Bachman concluded the car belonged to someone from the IBEW. Bachman testified he did not know who put the handbill on his desk. Bachman testified the IBEW handbill was in an envelope that he found on his desk. Bachman testified he guessed the handbill came from the car he saw outside the gate because the car sat there for a long time. Bachman testified the envelope on his desk contained miscellaneous propaganda including an authorization card and an IBEW booklet. Bachman testified he did not recall discussing the envelope with members of management, including Benboe or D. Bachman. Bachman testified he did not direct anybody to gather materials from the people at the gate. Bachman’s testimony here is that he mysteriously received an envelope on his desk concerning a union campaign, from an unknown source, an issue of concern or interest to most employers, but he discussed it with no one from management. An absolute that I do not find credible.¹²

Respondent’s other witnesses took a similar approach in their testimony in their efforts to deny knowledge of the IBEW campaign. Despite the IBEW’s handbilling at Respondent’s facility in October, and the subsequent posting at Respondent’s facility at the log in computers in Respondent’s shop of anti-

¹² Along these lines, Bachman testified he attended an unfair labor practice trial on August 9 and 10, 2011, during which he sat at counsel table for the entire hearing. Bachman denied hearing testimony by an employee that the employees were trying to bring in the IBEW to Respondent during that trial. However, the August 9 transcript reflects that an employee testified that he was aware an employee of Respondent contacted the IBEW in January 2011, and the employee who testified attended IBEW meetings in January and February 2011. The employee was questioned about his attendance at the IBEW meetings both on direct and cross-examination. I do not credit Bachman’s claim that he did not learn of an IBEW campaign during the August trial, particularly since his attorney questioned the witness about it and would likely have discussed this aspect of the witness’ testimony with Bachman. An organization campaign by another union at the time Respondent was going through an unfair labor practice trial certainly would have been a matter of interest to all concerned. I do not find Respondent’s arguments persuasive that I should not have allowed Bachman to be questioned about the prior proceeding because the employee who testified at that time was not called as a witness in the current case. The testimony at the prior proceeding was not admitted for the truth of employee’s testimony, but only that Bachman had knowledge of his claims as evidence that Bachman was aware of a union campaign. Moreover, I have credited Sindt’s testimony at the current proceeding that the IBEW campaign began in early 2011 at Respondent’s facility, which for purposes of this case establishes that the IBEW did begin to try and organize Respondent’s facility in early 2011.

IBEW literature for several days, Benboe incredibly claimed he did not learn of the IBEW campaign in 2011. Rather, he testified the first time he learned of it was when he gave an affidavit in response to the current unfair labor practice charge. As previously mentioned, Bachman’s testimony reveals that he “surmised” there was a campaign in October, and he also claims his supervisors were trained as to how to respond to union activity. It seems a little inconsistent for him to beware of union activity at the facility, but not bother to inform the supervisors such as Benboe of that activity so that they could respond to it in an appropriate manner. I do not credit Benboe’s claim that he did not become aware of the October handbilling at the facility at least by general word of mouth, nor do I credit any contention that it was not discussed amongst the supervisors and upper level management. This hear and see no evil approach was similarly taken by Respondent Supervisor Shipp who claims he received an envelope containing union materials from the IBEW officials the day they were handbilling, but to have thrown it back unopened out his car window. Shipp testified he knew it was an IBEW document when he looked at the front of it. I do not credit Shipp’s testimony that he threw the document out the window. First, IBEW Organizer Pfaff credibly testified he would have observed any one throwing the distribution out of the window, and this did not occur. Second, Pfaff credibly testified IBEW materials were handed out in unmarked manila envelopes. Thus, I have concluded that, contrary to his assertion at the hearing, Shipp received the envelope for the Union officials and kept it.¹³ Despite admittedly being offered an IBEW document during a handbilling session at Respondent’s front gate, Shipp took a similar approach to Respondent’s other officials by trying to minimize the spread of knowledge of union activity. He incredibly claimed that he did not discuss the handbilling incident with anyone from management, that he could not recall if he discussed it with employees, and that at the time he testified at the unfair labor practice trial was the first time he discussed it with anyone.

Despite the contention of Bachman and Shipp that they did not discuss the union campaign with anyone, and the claim of Benboe that he did not know about it; D. Bachman, a part owner of Respondent, who does not work at the Albia facility, and who testified he only occasionally visits that facility testified he came to the facility on October 19, and that as of that date, he knew that some time before then someone from the IBEW was handing out union material at the front gate. D. Bachman’s knowledge was unexplained particularly since Bachman, his brother, claimed not to have discussed it with him. Thus, I have concluded for the reasons stated that, contrary to the testimony of Bachman, Benboe, and Shipp, the IBEW’s October handbilling was a widely discussed topic amongst Respondent’s management, and that they all knew and talked about it

¹³ Pfaff testified he and the other handbiller were wearing prominent IBEW insignia at the time of the distribution, but this was not how Shipp claimed he knew it was an IBEW distribution. Rather, he claimed it was by reading a label on the distribution. Shipp also testified in front of Bachman, which given Respondent’s antiunion posture, is a likely reason Shipp refused to admit he kept the distribution at the time of his testimony.

more than they were willing to admit.

Bachman testified that following the IBEW handbilling, around a month later, he saw a picture on one of Respondent's computer terminals where employees are required to clock in. He testified he was "pretty sure" the picture was not posted the day following the handbilling. Bachman testified the picture referenced the IBEW. Bachman testified it was a picture of an office building of the IBEW. Bachman did not recall what the writing said on the picture. Bachman did not know who posted the picture. Bachman testified they have 8 to 10 computers where employees sign in. He testified the picture was on only one computer and it was taped to the back. When asked if it was for or against the Union, Bachman testified it did not say anything. It just had a picture of their facility. Bachman then testified he did not recall what it said on it when asked if it said IBEW. However, he testified he knew it was an IBEW facility. Bachman testified the document had two or three pictures of an office building that was quite nice. Bachman testified he did not recall the words, but he admitted the picture had a heading. Bachman testified management did not post the picture, and he threw it away immediately upon seeing it. Bachman testified no one asked permission to post it. Bachman testified they do not allow employees to post things.

Bachman's testimony confirms that of Douglas and Sindt that an anti-IBEW picture was posted at Respondent's facility. Both Douglas and Sindt credibly testified the picture was posted a day following, or shortly after the Union's handbilling, a fact that Bachman did not affirmatively deny. I have credited the testimony of Douglas and Sindt over Bachman that copies of the picture were posted at multiple log in computers rather than just one as Bachman claimed. I have also credited their testimony that the pictures were posted for multiple days with Douglas estimating about a week and Sindt 3 or 4 days, over Bachman's claim that he took it down after 1 day. I do not find Respondent's argument that the discrepancy in the precise number of days the picture was posted between Sindt and Douglas undermines their assertion that it was posted for multiple days. For, at the time, neither had a reason to make a record or a note of each day they saw the posting. Having found the picture was posted in plain view of the shop for multiple days on the Respondent's property, I can only conclude that it was posted by Respondent. For, as Bachman testified, Respondent does not allow employees to post things, and as Douglas testified given the number of copies of the picture and the location it was posted, Respondent's officials could not have helped but see it. Thus, the reasonable inference is that Respondent posted the pictures, or at a minimum condoned the antiunion postings.

Bachman testified D. Bachman periodically holds meetings for employees at the Albia facility. Bachman testified that in December they held their health insurance benefits meeting for the following year. Bachman testified everyone was in the breakroom, and the health insurance people were there. However, when asked if D. Bachman was at the facility in December 2011, Bachman testified he was not sure. He testified he thought it was at the beginning of December but that it could have been the end of November. Bachman testified it was the same period every year.

When asked if D. Bachman held small group meetings with

employees in December 2011, Bachman testified, "I don't know when it was," and "I wouldn't call them small group meetings." Bachman testified, "It was the entire facility." Bachman then explained "it was who could fit in our conference room." When later asked if D. Bachman held meetings in November or December with groups of employees, Bachman testified, "I don't recall the exact date. It was towards the end of the year. It was continuation of the meetings that I held for two years prior to that."¹⁴ Bachman testified D. Bachman met with groups of employees in Respondent's conference room. Bachman testified 10 to 18 people fit in the conference room. While Bachman testified the meetings were voluntary, he testified employees knew what time to attend based on a posted schedule. Bachman thought D. Bachman had a series of meetings with employees but Bachman did not attend the meetings. Bachman testified he and D. Bachman talked about the meetings. Bachman testified they discussed a lot of different versions of what the meetings were because in that timeframe they were winding down Bachman's safety and process improvement teams. When asked a leading question whether D. Bachman told Bachman he was going to have a meeting in October 2011 to get ready for the CSX Railroad project, Bachman testified he remembered discussing that issue. He testified he did not remember the timeframe it was but stated they had correspondence with employees to update them. When asked if he knew if the CSX project was the primary subject of D. Bachman's meetings in October, Bachman testified he thought they were talking about two different meetings. Bachman testified he was with D. Bachman when they discussed a CSX meeting and that was with the whole group of individuals in the conference room.

Bachman later testified he was aware D. Bachman came to the facility and held meetings with groups of 8 to 15 employees and multiple meetings in 1 day. Bachman testified he did not know the timeframe of these meetings. Bachman testified they discussed various ideas concerning these meetings but he did not recall the exact outline of what D. Bachman was doing. He testified they discussed the concept of the continuation of the process of improvements and safety issues. Bachman testified he did not recall what D. Bachman actually did at these meetings. When asked if there was a written schedule posted for employees to attend the meetings, Bachman testified they broke people up into groups because there were too many people as a whole to have a town hall meeting. He testified D. Bachman would meet with 10 employees at a time. Bachman testified he did not know if D. Bachman's meetings with groups of employees were before or after the IBEW people came to the facility. Bachman testified in response to leading questions that there were prior meetings where D. Bachman came to Albia to meet with small groups of employees and get their input on various processes and ways to improve things. Bachman testified the meetings are continual and when asked if they were in 2010 and 2011, he testified, "All the time." As disclosed by the

¹⁴ Bachman later testified D. Bachman may have come to Albia for a meeting in November or December. Bachman testified that he and his brother were out of the country for during mid-December and returned on Christmas Day.

above recap of Bachman's testimony concerning his brother's meetings with groups of employees, I found Bachman's testimony to be inconsistent, marked by poor recall, and somewhat evasive.

D. Bachman testified he is the chief administrative officer with Respondent. He testified he did not have any direct responsibilities with respect to the Albia plant. However, D. Bachman testified that he does periodically go to the plant to meet with the production employees and he started doing so in 2005. D. Bachman testified he did not go to the Albia plant during November or December 2011. D. Bachman testified he did have a series of voluntary meetings with production employees in the mid-October 2011. He testified the purpose of those meetings was to discuss a large contract bringing work to Respondent from the CSX Railroad and the need to do that work well. He testified the meetings with employees were productivity enhancement meetings relating to how they could improve the infrastructure to get work out. D. Bachman testified Respondent planned for the October meetings in August when CSX officials came to town. He testified they had a meeting at that time with employees to let them know the CSX officials were coming and they were going to have to figure out how to get the work done.¹⁵ D. Bachman testified they discussed a wide variety of things including specific work processes, training, tooling, and the availability of detail on the project plans during the October meetings. D. Bachman testified when he conducts a meeting he usually has a flip chart, lays out the problem, and in that particular case the challenge was all the work coming in with CSX. D. Bachman testified he would ask employees to help them better understand how they can address the problem, the employees start talking, D. Bachman will put their comments on the board and then they discuss it at the meeting. D. Bachman testified he asked employees for input about the production processes. He denied that he discussed working conditions such as wages, benefits, and hours. D. Bachman testified that in October there were several meetings with groups of employees over a 2-day period of time. D. Bachman testified they received lots of input because it was such a critical customer coming online.

D. Bachman identified a list with the heading "DAB Round-Table Discussions" which he testified he had compiled showing dates of meetings with topics that he held at Albia from 2006 to 2011. The list showed one meeting held on October 19, 2011, with the topic listed as "Productivity General." He testified the purpose of the meeting was to improve productivity. D. Bachman testified the October 19 meeting was a series of meetings

¹⁵ D. Bachman testified he had many meetings with small groups of employees over the years. D. Bachman testified that in 2011 he met with small groups of employees three or four times prior to October. D. Bachman testified he had about three to five meetings with small groups of employees in 2010. D. Bachman testified Albia produces a product that Respondent administers back in Lisle. D. Bachman testified his purpose was to go out there and find out how things were going, how they could make improvements in productivity and efficiency, and to meet customer needs. D. Bachman testified in response to leading questions that during the meetings he had with employees in 2010 and 2011 he always asked for employee input for ways to improve productivity.

with various groups of employees. D. Bachman testified many of the other meetings listed on his list involved a series of meetings with groups of employees. D. Bachman testified in 2009 they were launching a new payroll system that required the time entry on various computers around the shop so they met with groups of employees about how to design the interface effectively. He testified in 2010, his focus was the economy was rebounding and Respondent's productivity was flat so they needed to sort that out. D. Bachman testified that in 2011 the safety meeting in July was with groups of employees and then again in October they were talking about productivity. D. Bachman testified he solicited employee input during each of the meetings. D. Bachman identified what he labeled as a compendium of all the flip chart notes he made during meetings. He testified it was organized into subject areas so he could keep track of what people said and determine if there was something to improve their methods and procedures. D. Bachman's list related to all the meetings from 2006 to 2011. He testified his notes from the October 19, 2011 meeting, which was the most recent, would be interspersed on the list amongst notes from all of the meetings. D. Bachman recalled, during the October 19 meeting, suggestions concerning the way they write the project plans. He testified during meetings the employees made some suggestions about how to better maintain and disburse inventory. D. Bachman testified the purpose of the meetings was not to discuss union activity at the Albia plant. D. Bachman testified there was no discussion about union activity but people could blurt out what they want. However, D. Bachman testified no one blurted anything about the union activity in the 2011 meetings. D. Bachman testified he did know that, sometime before the October 19 meeting, the IBEW was handing out material outside Respondent's gate.

D. Bachman testified the CSX project would have been a component of the October 19 meeting.¹⁶ D. Bachman testified he thought they started getting locomotives for the CSX project in November and December 2011, and that continued at the time of the hearing. He testified the CSX project involved mechanical work and fabricators. D. Bachman testified there was no time frame for the project to be completed which was why it was so important. D. Bachman testified if they could do the work well they would continue to do it for years. D. Bachman did not know how many small group meetings of employees he held on October 19. He testified they were running almost all day long and took almost 2 days to complete. D. Bachman testified they broke the employees into groups and posted those groups along the wall in the hallway. D. Bachman testified about a dozen employees attended each meeting. D. Bachman testified all the posting said was the employee name and time of the meeting. D. Bachman testified that most of the meetings were in the lunchroom/breakroom. D. Bachman testified the round table discussions were always voluntary meet-

¹⁶ D. Bachman testified concerning the October 19 meeting that in August high-level officials from CSX came to Albia. D. Bachman testified the day after they left, he had a meeting with the entire plant and he announced there would be a meeting in the third quarter to get themselves ready for the CSX work. D. Bachman testified they started planning the October 19 meetings in August.

ings. D. Bachman testified the October 19, 2011 “Productivity General” meeting was a roundtable discussion.

I did not find D. Bachman’s testimony as to the nature and scope of his listed meetings to be very convincing. He often spoke in generalities, did not provide original notes or outlines of any of the meetings, and his description of the group meetings which he claimed he held on October 19, 2011, were not confirmed by Bachman who testified he thought the meetings were held in November or December, and did not place them as relating as to the CSX account, but rather as a continuation of meetings Bachman claimed to be holding for the past 2 years. Moreover, D. Bachman listed seven meetings in 2010 and 2011 in his “Round-Table” list to which he claimed employees were invited and to which according to their hire dates, Douglas and Sindt would have been eligible to attend. Yet, they both credibly testified they only attended three meetings with D. Bachman, two in which he annually discussed the next years insurance benefits with the whole staff, and the other the meeting at issue herein where D. Bachman met with groups of about 10 employees in the breakroom, and these meetings were scheduled for the entire staff of employees. Thus, regardless of whether he had conducted meetings in the past where some employees were invited to attend, I find that none were of the breadth and nature as the group meetings he conducted toward the end of 2011 where a schedule for the whole staff was posted.

Moreover, while D. Bachman testified his prior meetings were voluntary, I find by the way the employees were notified of the meetings in dispute here they were mandatory. First, D. Bachman testified only the employee’s name and time of appearance was listed on Respondent’s posted schedule. The meetings appeared to be during the workday, and by Respondent’s own admission there was nothing on the posting informing employees they did not have to attend. A reasonable employee, given the circumstances and the nature of the posting, could only conclude their attendance was required. I have also credited Sindt and Douglas as to their testimony as to what was discussed at the meetings they attended. In this regard, D. Bachman testified the purpose of these meetings was to improve productivity. In fact, Sindt testified productivity related bonuses were brought up with D. Bachman’s approval at the meeting he attended. In fact, D. Bachman’s summary of what was discussed at his “Round-Table” meetings included in the list five different types of bonuses, a night differential, a reference to increased overtime, references to personal days, the addition of a department, profit sharing, career path with employee evaluation with reference to money, etc. D. Bachman did not testify when these matters were discussed, however, I have concluded it was likely that some if not most of them were discussed during the meetings which he testified took place on October 19 in view of the open-ended nature of the meetings. In fact, the only thing he claimed was not on topic for these meetings was the Union. In a transparent effort, as did Respondent’s other officials through their testimony, to keep union activity out of the picture. D. Bachman testified he was aware the IBEW handbilling took place prior to the time he held these meetings, and I have concluded the meetings were in a direct response to that handbilling as opposed to D. Bach-

man’s claims that they were previously planned as a result of the CSX account, an assertion that was not confirmed by Bachman.

My conclusion as to the nature and purpose of D. Bachman’s group meetings was also confirmed by the testimony of Supervisor Benboe. Benboe testified D. Bachman occasionally comes to the Albia plant. As did Douglas and Sindt, Benboe testified D. Bachman comes to the plant once a year at the end of the year to speak with employees regarding insurance. Benboe testified that in addition to the insurance meetings, Benboe thought D. Bachman came to the plant in December 2011 and held small group sessions with employees. Benboe testified he thought the meetings were about shop improvements and employee improvements. Similarly, Benboe testified in his prehearing affidavit that “I seem to recall that Doug Bachman came down and talked to employees in small group sessions about shop improvements and employee improvements. I was not involved in these meetings, but I was aware of them. It was my understanding that these meetings were going to be about plant and employee improvements.” Thus, Benboe, like Sindt and Douglas did not mention in his testimony that he was aware of any other meetings conducted by D. Bachman that employees attended other than the annual insurance meetings, and the one time group meetings at the end of 2011. While Benboe claimed he did not attend the meetings, it was likely that, as a member of management, he was informed of the topics of the meetings as he testified since the whole employee staff attended and their scheduled attendance was posted in plain view. Accordingly, for all the reasons mentioned, I have credited Sindt and Douglas description of the employee group meetings.

C. The 8(a)(1) Allegations

1. The interrogations and related conduct

In determining whether a supervisor’s questions to an employee constitutes an unlawful interrogation, the Board examines whether, under all the circumstances, the questioning tends to interfere with, restrain, or coerce employees in the exercise of Section 7 rights. *Rossmore House*, 269 NLRB 1176 (1984), *affd.* 760 F.2d 1006 (9th Cir. 1985). In making this assessment, the Board reviews various factors, including whether the employee is an open union supporter, the employer’s background (whether there is a history of employer hostility and discrimination), the nature of the information sought (whether the interrogator appeared to be seeking information on which to base action against individual employees), the identity of the questioner in terms of how high they are in the company hierarchy, the place and method of the interrogation, and the truthfulness of the reply. *Medcare Associates, Inc.*, 330 NLRB 935, 939 (2000). The Board will determine whether under all the circumstances the questioning would reasonably tend to coerce the employee at whom it is directed so they would feel restrained from exercising their Section 7 rights. *Carroll & Carroll, Inc.*, 340 NLRB 1328, 1332 (2003).

The complaint alleges that in October 2011, Respondent through Benboe interrogated an employee about the employee's union activities.¹⁷ Sindt's hire date with Respondent was April 5, 2010. He credibly testified that within a month of his hire date he became aware of the organizing efforts of the Brotherhood of Railroad Signalman and he was informed of it by former employee Charles Newton. Newton was discharged by Respondent on March 11, 2011.¹⁸ Sindt's testimony reveals he was aware of Newton's union activity and of his termination by Respondent. During the IBEW campaign, Sindt was an active but not open union adherent. Sindt began his union activities around January 2011 and his activities continued thereafter during which time he attended union meetings and distributed union cards in and around Respondent's facility. In October 2011, IBEW officials openly hand billed at the gate at Respondent's parking lot. I have concluded that Respondent's officials including Benboe, despite his denial of such knowledge, quickly became aware of the handbilling.¹⁹ In this regard, Sindt credibly testified that around a day or two after the IBEW handbilling at Respondent, Sindt was scrapping out a cab off a locomotive when Benboe approached him and asked him what he thought about the Union. Sindt responded he had worked at a union and nonunion place and it did not matter to him one way or the other. Benboe asked Sindt how he felt he was treated at Respondent and Sindt said he felt he was treated fairly. Sindt testified he responded this way, despite his pro-IBEW activities, because he felt affirmatively announcing his support for the Union could have impacted his job.²⁰

¹⁷ Respondent admits that Supervisors Benboe and Shipp, as well as other named individuals in the complaint are statutory supervisors within the meaning of Sec. 2(11) of the Act, but denied they are agents within the meaning of Sec. 2(13) of the Act. However, the Board has held under Sec. 2(13) of the Act an employer is bound by acts and statements of its supervisors whether specifically authorized or not. See *Sysco Food Services of Cleveland*, 347 NLRB 1024, 1034 fn. 23 (2006); *Ideal Elevator Corp.*, 295 NLRB 347 fn. 2 (1989); and *Dorothy Shamrock Coal Co.*, 279 NLRB 1298, 1299 (1986), enf'd. 833 F.2d 1263 (7th Cir. 1987). Here, Benboe played a particularly important role at the plant as his visual inspection was required before an employee could become certified as a welder. Moreover, Benboe and Shipp were also given authority to speak on behalf of Respondent in that they represented Respondent during employee evaluation and termination meetings.

¹⁸ Newton's discharge was found to be violative of Sec. 8(a)(1), (3), and (4) of the Act by the Board. See *Relco II*.

¹⁹ For the same reasons I have concluded Benboe did not credibly testify when he denied knowledge of the handbilling or of the IBEW campaign, I do not credit his claim that he did not question employees about their union activities. Benboe impressed me as someone who was very loyal to Respondent. He also did not appear to be someone who was likely to keep silent about such a hot topic as union activity at Respondent as he claimed. Moreover, considering his demeanor, the content of his testimony and recall, I found Sindt to be a credible witness.

²⁰ Sindt credibly testified that following the Union's handbilling at Respondent's facility both Benboe and Bachman made negative remarks to the employees about unions during Respondent's morning meetings. He testified Benboe commented on more than one occasion that unions are not all they are cracked up to be; and Bachman made a

In sum, I find Benboe's questioning of Sindt was a coercive interrogation. Benboe was one of only six supervisors at Respondent's facility and he directly supervised Sindt during periods of his employment. Moreover, he was the only supervisor whose visual inspections directly impacted on whether Sindt passed his welding test at Respondent. Benboe was also involved in Respondent's evaluation process, and he was the supervisor selected to subsequently inform Sindt and Douglas of their terminations marking his status at Respondent. Sindt was not an open union adherent at Respondent. Additionally, at the time of his questioning by Benboe, Sindt was aware that Newton, a prior union adherent, had been discharged. Benboe and Bachman's statements against the union during the morning meetings reveals that Respondent's antiunion stance continued at the time of Benboe's questioning of Sindt. Moreover, Sindt credibly testified he did not give Benboe a truthful response as to Sindt's pronoun stance because he feared for his job. Accordingly, I find Benboe's questioning of Sindt to be violative of Section 8(a)(1) of the Act. See *Medcare Associates, Inc.*, supra, and *Carroll & Carroll, Inc.*, supra.²¹

Douglas credibly testified as follows: Between Thanksgiving and before the Christmas shutdown in 2011 they were doing a cleanup at the end of the shift. Douglas unknowingly had authorization cards sticking out of his back pocket. Benboe noticed the cards and asked Douglas if he was doing that on company time pointing at Douglas's back pocket. Douglas replied no. Benboe said, "You better not be." Douglas testified he only knew the cards were showing because when Benboe pointed to them, Douglas looked and then saw them.²² I find

comment on more than one occasion that he would rather keep everything in house and he did not like unions.

²¹ I do not find cases cited by Respondent to require a different result. In *NLRB v. Armour & Co.*, 213 F.2d 625 (5th Cir. 1954), the employees questioned were not discharged. Similarly, in *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 549 (6th Cir. 1984), in finding the questioning of two employees not to be unlawful, the court noted neither of the questioned employees were discharged or disciplined, and in both instances the interrogated employee demonstrated a lack of fear or coercion. These elements are not present here. In fact, Sindt and Douglas, two leading union adherents, were both interrogated by Benboe, and were discharged by Benboe shortly after the union openly came on the scene for reasons I have found to be pretextual. I have also found that Respondent, following the Union's October handbilling, solicited and impliedly promised to remedy grievances during multiple meetings with its employees, and that Respondent's officials condoned or posted antiunion literature at employee clock in computers. Accordingly, I find cases cited by Respondent are distinguishable and that Benboe's questioning of Sindt and Douglas within close proximity to when he notified them of their discharges constituted a coercive interrogation.

²² Respondent argues I should not credit Douglas' testimony because his initial affidavit did not reference the described encounter with Benboe. While the omission from the affidavit is troublesome, I do not find it sufficient to discredit this aspect of Douglas' testimony. See *Gold Circle Department Stores*, 207 NLRB 1005, 1010 fn. 5 (1973). In this regard, Douglas' assertion that he was distributing union cards at Respondent's facility since September was corroborated by Pfaff and Sindt. Second, Douglas credibly testified he kept those cards in his pocket when he did not have the opportunity to deposit them in his toolbox. Third, for reasons stated, I did not find Benboe's claim that he

Benboe's questioning of Douglas concerning his union activities constituted a coercive interrogation in violation of Section 8(a)(1) of the Act. The questioning came with the back drop of Benboe and Bachman's negative comments towards unions during the morning meetings, as well as the antiunion posting at Respondent's facility where employees signed in at work, which again I have concluded Respondent posted, or condoned. While Douglas distributed the cards at Respondent's facility, there is no contention that he openly discussed the matter with any of Respondent's officials. In fact, Douglas was not aware the union cards were showing until Benboe pointed it out to him. I have concluded Douglas, having the cards in his back pocket, did not display them in such a manner as to purposely draw attention about his union activity or to otherwise invite comment. I also find Benboe's instruction to Douglas not to distribute the cards on "company time" constituted an unlawful instruction. The Board has held a statement prohibiting an employee from soliciting signatures for a union on "company time" and during "working hours" is violative of Section 8(a)(1), because it can be interpreted by the employee that he is not permitted to engage in such activity on his own time at the Respondent's premises such as breaks or other nonworking periods. See *Manor Mechanical Contractors, Inc.*, 357 NLRB No. 128 (2011); *Loparex LLC*, 353 NLRB 1224, 1233-1234 (2009); and *St. George Warehouse, Inc.*, 331 NLRB 454, 462 (2000), *enfd. mem.* 261 F.3d 493 (3d Cir. 2001).

2. The solicitation of an implied remedy of grievances

In *Latino Express, Inc.*, 358 NLRB No. 94, slip op. at 11 (2012), it was stated:

An employer interferes with Section 7 rights where he solicits employee grievances during an organizational campaign and promises, either expressly or implied, that those grievances will be remedied. *Briarwood Hilton*, 222 NLRB 986, 989 (1976); see *Capital EMI Music*, 311 NLRB 997, 1007 (1993) (holding that soliciting grievances during union organizing inherently constitutes an implied promise to remedy them). Implicit in that promise is that unionizing is unnecessary because the employees' grievances will be righted absent a union. *House of Mosaics, Inc.*, 215 NLRB 704, 704 (1974). Where an employer solicits grievances in accordance with past practices, prior to any union activity, however, he may not have violated the Act. *Yale New Haven Hospital*, *supra* at 365.

Sindt testified he attended a small group meeting conducted

was unaware of the union campaign at Respondent's facility to withstand scrutiny. I also have credited Sindt that Benboe questioned him about the Union, and that Benboe spoke out against it during some of the morning meetings, further undercutting Benboe's testimony that he was unaware of the union campaign until he gave his affidavit in response to the unfair labor practice charge. Finally, considering his demeanor, I find that Douglas gave a credible account of the described encounter with Benboe on both direct and cross-examination. I have found, despite the omission from his affidavit, the record as a whole supports Douglas' testimony concerning the encounter.

by D. Bachman in December 2011.²³ Sindt testified D. Bachman set up group meetings in the cafeteria, also known as the break room, with about 8 to 15 employees per group. Sindt testified a notice was posted for the meetings in the hallway leading to the breakroom listing the time and employee's name for the meeting they were to attend. He testified all the employees were listed. Sindt testified that, during the meeting, D. Bachman wanted to know ideas to make the plant more efficient and to improve morale. Sindt testified there were quite a few suggestions as to how this could be accomplished. Sindt testified he proposed a bonus of a half day's pay if someone worked 30 days. D. Bachman said he liked the idea. Sindt testified there were 10 to 15 different employee suggestions including a bonus program for getting jobs done on time. Sindt testified at the end of the meeting someone asked D. Bachman if they had a problem how they could get in touch with him and he flipped back pages on a poster board where his personal cell phone number was listed. Sindt thought D. Bachman's email address was also there. Sindt testified that D. Bachman had not given out his cell number or email address in the past.

Similarly, Douglas testified that, around the end of November or the beginning of December, D. Bachman spoke to groups of six to eight employees at a time.²⁴ Like Sindt Douglas learned of the meetings through a posted schedule at Respondent listing each employee's name and the time they were to attend. Douglas testified the postings took up half the hallway. Douglas testified he assumed he was required to attend. Douglas testified at the meeting, D. Bachman asked employees if there were any improvements Respondent could make for the employees to help improve production and Respondent's relationship with its clients. Douglas testified everyone had something to say. Douglas mentioned the need for better equipment and for some verification for Benboe's qualifications to issue welding certifications. Douglas testified he had seen Benboe's welds, and he did not believe Benboe was certified. Douglas testified there were a lot of other employees who agreed with him. Douglas testified one of the suggestions was better communication between the supervisors and management. Douglas testified D. Bachman wrote his cell phone number on an eraser board and said this was his personal number if the employees had any questions or concerns feel free to call. Prior to this, D. Bachman had not offered Douglas his phone number.

Sindt testified the only other meetings he recalled with D. Bachman were two, one in the fall of 2010 and one in the fall of 2011 concerning the Respondent's annual insurance offerings to employees. He testified that in 2011, D. Bachman said he would be back to hold small group meetings with employees

²³ Sindt testified, on cross-examination, he was pretty sure the meeting occurred in December, but it could have been in November. Sindt testified it was not in October. Sindt testified he thought the meeting was after Thanksgiving.

²⁴ Douglas later testified D. Bachman held these meetings with employees in late October or early November. He testified the meetings could have been in early December, but he thought they took place in November.

sometime later in the year late November or early December.²⁵ Sindt credibly testified he was not aware of any other meetings that D. Bachman held at the plant. Sindt did not recall D. Bachman attending the meeting where the CSX work was discussed. Sindt testified the only three meetings he recalls D. Bachman attending were the two for insurance and the one for small groups. Similarly, Douglas testified he had never previously attended a meeting with small groups of employees conducted by D. Bachman. Like Sindt, Douglas testified the only other meetings D. Bachman held in the past were two plantwide annual insurance meetings.

While D. Bachman testified he conducted the small group meetings with employees on October 19, he admitted he was aware the Union conducted a distribution at the facility at the time he held these meetings. I have credited the testimony of Sindt and Douglas as to how they were informed of these meetings, which was confirmed by D. Bachman. Moreover, I find it was reasonable for the employees to assume the meetings were mandatory since there was a posted schedule listing every employee's name and time of attendance, and the employees were not told the meetings were not mandatory. I find, as admitted by D. Bachman, that Respondent was aware of a union campaign at the time he conducted these meetings, and that the credited testimony of Sindt and Douglas, with Sindt in particular establishes that D. Bachman solicited grievances during the meetings, including telling Sindt his suggestion of a bonus program sounded like a good idea. Moreover, D. Bachman gave out his personal cell number to employees for the first time asking them to get in touch with him if they had a problem indicating that his solicitation of employee complaints was on going. Since D. Bachman admitted he was aware of the union distribution at the plant gate at the time he conducted these meetings, I do not find the date of the meetings is critical to the establishment of a violation. However, I find Sindt's recollection to be the best among all the witnesses, and based on that have credited him that D. Bachman's group meetings with all the employees took place sometime between Thanksgiving and early December. I do not find that Respondent has established the D. Bachman has conducted such meetings in the past with groups of employees where he solicited grievances and provided his personal number. In this regard, I found D. Bachman's testimony concerning prior meetings, their purpose, and who attended to be hazy at best. Rather, I have credited the testimony of Sindt and Douglas, which was supported in part by Benboe, that D. Bachman theretofore only regularly conducted annual insurance meetings with all of Respondent's staff at Respondent and that the purpose of those meetings was not to solicit grievances but to inform Respondent's staff of their annual options under Respondent's insurance plans. Accordingly, I find that D. Bachman violated Section 8(a)(1) of the Act by around December 2011, holding small group meetings with

employees wherein he solicited complaints and grievances, and implied promises of increased benefits and improved terms and conditions of employment as alleged in paragraph 5(d) of the complaint.

3. The handbook requirement that employees seek management approval before they solicit or distribute literature

Respondent's employee handbook, which was revised on October 1, 2011, contains the following solicitation and distribution policy:

Solicitation for any cause during working time and in working areas is not permitted. You are not permitted to distribute non-company literature in work areas at any time during working time. Working time is defined as the time assigned for the performance of your job and does not apply to break periods and meal times. Employees are not permitted to sell chances, merchandise or otherwise solicit or distribute literature without management approval.

The complaint as amended at the hearing alleges the last sentence of the above policy to be violative of Section 8(a)(1) of the Act. Counsel for the Acting General Counsel contends the last sentence of the rule is unlawful on its face because while the preceding sentences of the rule are limited to what can be done during working time, the last sentence of the rule has no such limitation. It is argued that the last sentence of the rule is likely to have a chilling effect on employees Section 7 rights during nonworking time.

In *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374–376 (D.C. Cir. 2007), the court considered whether the respondent employer's mere maintenance of three work rules violated Section 8(a)(1). The court enforced the Board's finding that two of the three rules violated the Act, and reversed the Board by finding the third rule was also unlawfully maintained. In doing so, the court set forth the following principles:

To determine whether a work rule violates NLRA section 8(a)(1), the Board considers “whether the rule[] would reasonably tend to chill employees in the exercise of their statutory rights.” *Adtranz ABB Daimler-Benz Transp. v. NLRB*, 253 F.3d 19, 25 (D.C. Cir. 2001) (quoting *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998)). In making this assessment, the Board engages in a two-step inquiry described in *Martin Luther Memorial Home*, 343 NLRB No. 75, at 1-2 (May 19, 2004). First, the Board examines whether the rule “explicitly restricts” section 7 activity, *id.* at 1; if it does, the rule violates the Act, *id.* But if nothing in the rule explicitly restricts section 7 activity, then the Board moves to the inquiry's second step, under which the rule violates the Act if it satisfies any one of the following three conditions: “(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Id.* at 2. In the first step—which looks to see whether the rule explicitly restricts section 7 activity—as well as in the first of the second step's three alternative conditions—which looks to see whether employees would reasonably construe the rule to restrict section 7 activity—the

²⁵ Along these lines, Sindt gave an affidavit on February 29, 2012, which reads, “Back in October or November 2011, D. Bachman came to a morning meeting and said he would be meeting with a bunch of guys. That the groups would be 10 to 15 guys, there would be several meetings.” The affidavit continues, “The meetings actually took place in December. It was mandatory for everyone to go to these meetings.”

Board focuses on the text of the challenged rule. See *id.* at *2-3. Thus, “mere maintenance” of a rule likely to chill section 7 activity, whether explicitly or through reasonable interpretation, can amount to an unfair labor practice “even absent evidence of enforcement.” *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998), enforced mem., No. 98-1625, 1999 WL 1215578, at 1 (D.C. Cir. 1999); see also *Cnty. Hosps. of Cent. Cal. v. NLRB*, 335 F.3d 1079, 1088 (D.C. Cir. 2003) (citing the Board’s “mere maintenance” rule).

Chain-of-Command Rule

While on duty you must follow the chain of command and report only to your immediate supervisor. If you are not satisfied with your supervisor’s response, you may request a meeting with your supervisor and his or her supervisor. If you become dissatisfied with any other aspect of your employment, you may write the Manager in Charge or any member of management. Written complaints will be acknowledged by letter. All complaints will receive prompt attention. *Do not register complaints with any representative of the client.*

Guardsmark, 344 NLRB No. 97, at *1, [809, 809 fn. 1 (2005)] 2005 WL 1378568 (emphasis added). The Board found that the rule’s last sentence “explicitly trenches upon the right of employees under Section 7 to enlist the support**366 *375 of an employer’s clients or customers regarding complaints about terms and conditions of employment.” *Id.* at *2. See also *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 343 (D. C. Cir.2003) (noting that employees’ statutorily protected rights to solicitation extend to solicitation of nonemployees). The Board rejected *Guardsmark*’s contention that the last sentence is limited by the “[w]hile on duty” phrase appearing in the rule’s first sentence, explaining that even though the phrase “arguably limits [the rule]’s prohibition on lodging complaints with employees outside the chain of command to working time only[,] . . . its prohibition on discussing terms of employment with customers is not similarly time-limited. It is absolute” *Guardsmark*, 344 NLRB No. 97 at *2 [at 810].

Guardsmark argues that instead of reading the rule as a whole, as *Martin Luther* requires, 343 NLRB No. 75, at *1 [646, 646 (2004)] (holding that the Board “must refrain from reading particular phrases in isolation . . .”), the Board “treated the phrase ‘while on duty’ in complete isolation from the phrases that immediately followed it in the same paragraph.” *Guardsmark*’s Opening Br. 9–10. In our view, however, the rule’s structure supports the Board’s reading. Following the first sentence, which tells employees: “While on duty you must follow the chain of command and report only to your immediate supervisor,” the next four sentences describe the chain of command, and the last sentence flatly tells employees: “Do not register complaints with any representative of the client.” Given the change in focus from supervisors to clients, the number of intervening sentences, and the last sentence’s direct command forbidding complaints to clients, the Board rea-

sonably read “while on duty” to apply exclusively to the prohibition against discussing complaints with non-supervisory employees and interpreted the ban on client communications to be a separate non-time-limited instruction. Because “[e]mployees have a statutorily protected right to solicit sympathy, if not support, from the general public . . . [and] customers” regarding their terms and conditions of employment, see *Stanford Hosp.*, 325 F.3d at 343 (quoting *NCR Corp.*, 313 NLRB 574, 576 (1993)), the Board’s conclusion that the chain-of-command rule explicitly prohibits section 7 activity is “reasonably defensible,” *Adtranz*, 253 F.3d at 25. Cf. *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 542–43, 92 S.Ct. 2238, 33 L.Ed.2d 122 (1972) (“Early in the history of the . . . Act the Board recognized the importance of freedom of communication to the free exercise of organization rights.”).

The court in *Guardsmark* went on to state since the Board concluded that the rule in question explicitly restricts Section 7 activity, the Board had no obligation to consider whether *Guardsmark* actually enforced the rule against such activity. The court distinguished its findings in *Adtranz ABB Daimler-Benz Transportation v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001), stating that in “*Adtranz*, which involved a rule expressly prohibiting “soliciting and distribution without authorization,” 253 F.3d at 28, although we did consider the challenged rule’s context, including the absence of enforcement, the rule’s legitimate business purpose, and the lack of antiunion animus, we did so only after first concluding that the rule, which applied only to conduct during working time, did not prohibit Section 7 activity. *Id.* at 28–29

The Board has held that rules requiring employees to check with an employer to secure permission before they engage in protected Section 7 activities are unlawful. See *TeleTech Holdings, Inc.*, 333 NLRB 402, 403 (2001); *Brunswick Corp.*, 282 NLRB 794, 795 (1987); and *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171–1172 (1990). When a rule is presumptively unlawful, the employer has the burden to show that it communicated or applied the rule in a way that conveyed a clear intent to permit the protected conduct the rule proscribes. See *Ichikoh Mfg. Co.*, 312 NLRB 1022 (1993), *enfd.* 41 F.3d 1507 (6th Cir. 1994); *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465 (1987); and *J. C. Penny*, 266 NLRB 1223, 1224–1225 (1983). In this regard, where there are ambiguities in employee work rules promulgated by an employer, the ambiguity must be resolved against the promulgator of the rule rather than the employees, who are required to obey it. *Norris/O’Bannon*, 307 NLRB 1236, 1245 (1992).

I find the last sentence of the current rule reading that “Employees are not permitted to sell chances, merchandise or otherwise solicit or distribute literature without management approval” constitutes an unlawful solicitation and distribution rule because it requires management approval for engaging in protected conduct, which includes solicitation and distribution during nonworktime and in work areas. As the court found pertaining to the “Chain of Command” rule in *Guardsmark, LLC*, I find that the last sentence of the rule in the present case is not connected to, saved by, or defined by the prior pro-

nouncements of the rule which specifically relate to solicitations and distributions during working time and in working areas. In fact, those portions of the rule explicitly prohibit all such solicitations during working time, which the company is permitted to do. Since all such solicitations are prohibited, the import of the last sentence, which I have found to be unlawfully maintained is that any other solicitations during nonworking time, and/or distributions in nonwork areas require company approval. This Respondent cannot do. Accordingly, the maintenance of the last sentence of Respondent's solicitation and distribution rule is violative of Section 8(a)(1) of the Act. To the extent Respondent may claim this allegation is time-barred, unlawful work rules which may be longstanding which are maintained within the statutory limitations period established in Section 10(b) of the Act constitute continuing violations of the Act. See *Turtle Bay Resorts*, 353 NLRB 1242, 1272 (2009); *Pipe Corp.*, 347 NLRB 836, 846 fn. 10 (2006); *Alamo Cement Co.*, 277 NLRB 1031, 1037 (1985); and *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), where the Board held the maintenance of an unlawful rule is violative of the Act.

I find the solicitation/distribution rule here to be distinguishable from the rule the court found to be lawfully maintained in *Adtranz ABB Daimler-Benz Transp., N.A., Inc. v. NLRB*, 253 F.3d 19, 23 (D.C. Cir. 2001). The rule in *Adtranz* entitled "Solicitation and/or Distribution" provided that:

The unauthorized sale of tickets, solicitation of contributions, or distribution of handbills can disrupt work. Therefore, such activities are not permitted on Company premises during working time except for specific Company-sponsored solicitations or distributions. Unauthorized activities include, but are not limited to, distribution of any literature or any material in work areas and solicitation in either work or non-work areas where either the employee soliciting or the employee being solicited is scheduled to be working. All solicitation requests must be approved in advance by Human Resources.

The court stated the above rule only applied to conduct during working time and in the workplace. In fact, the rule *Adtranz* allowed for certain company sponsored solicitations or distributions during worktime. So, the subsequent sentence that all solicitation requests must be approved in advance by human resources could be read to relate to the aforementioned working time solicitations and distributions. However, the rule in the instant case prohibited all working time distributions and solicitations except for company literature, so the additional sentence requiring management approval for solicitations and distributions was superfluous and could only be read by a reasonable employee to refer to all solicitations including those during breaks, lunch periods, and before and after work. For the reasons set forth above, I find the sentence listed in Respondent's rule is unlawfully maintained. I also note I have found other 8(a)(1) and (3) violations in this case showing Respondent has a documented history of animus towards union activity, which as the court noted should be considered in placing the published rule in context as considered by a reasonable employee.²⁶

²⁶ Since I have found the mere maintenance of the rule to be violative of the Act, I reject Respondent's arguments that they were some-

D. The January 2, 2012 Discharges of Douglas and Sindt

1. Douglas

Douglas began working for Respondent on April 5, 2010, and he was terminated on January 2, 2012. Douglas's job title was fabricator. Douglas worked in the main shop performing upgrades, structural, and cosmetic repairs to locomotives.²⁷ Douglas testified he averaged 50 hours a week at work. Douglas attended meetings every morning before the start of his shift in the cafeteria which was also the breakroom. Douglas testified the meetings were mandatory because the employees receive attendance points if they were late. He testified all employees from the shop attended. Douglas testified meetings were usually conducted by Supervisors Dave Crall or Benboe. Douglas testified that when he first started working at Respondent Shawn Shaffer was his supervisor, and at the time of his termination Benboe was his supervisor. Douglas testified the only other person to supervise him was on occasion Jim Cronin when Douglas was working in the rust unit. Douglas testified that Benboe supervised him from August 2010 until his termination, except when Douglas was working on the rust unit, which was 5 to 10 percent of Douglas' time.

On August 5, 2010, Douglas signed for and received a written copy of Respondent's blue flag policy, which required employees to place their blue flag on any unit or structure on which they were working and to remove the flag when they finished their work. Douglas received a written verbal warning dated August 26, 2010, for a violation of the blue flag policy. Douglas testified in August or September 2010 Benboe told Douglas that Bachman had placed Douglas on probation because he was taking too long on a snowplow project. Douglas testified when Benboe informed Douglas of his probationary status, Benboe asked Douglas if he wanted to meet with Bachman, and the three met in the conference room. Douglas testified the snowplow was the first snowplow Respondent had worked on. He testified he had to take the front end off and no one knew how to do it. He testified he spent about a week and a half trying to take it off which was the issue leading to his probationary status. Douglas asked Bachman how they could state he was taking too long when no one had previously done the work, and they did not have the prints for the machine. Douglas testified neither Benboe nor Bachman told him how long his 2010 probation would last.

Douglas received an evaluation for the period of April 5 to December 9, 2010. The evaluation was not signed by Douglas or the reviewer. The evaluation contains a performance graph

how prejudiced by my granting at the outset of the trial the Acting General Counsel's motion to amend the complaint to allege the rule as unlawful. Similarly, *Gooch Packing, Inc.*, 187 NLRB 351 (1970), cited by Respondent does not require a different result as the rule there required company approval of solicitation during working time. Here, the rule in question was not limited to working time solicitations and distributions but required all solicitations and distributions to be approved by management.

²⁷ Douglas testified Respondent has three buildings in Albia including: the shop, which houses the main shop and the offices; the second building contains the blast booth and paint booth; and the third building is the warehouse/maintenance shop.

with ratings of 1 to 5, with 5 being unacceptable and 1 being outstanding. There were 26 items on the grid. Douglas received 1 mark for exceeding expectations; 14 for satisfactory, and 11 for below expectations. Douglas received a raise from \$15 to \$15.50 an hour at the time of the evaluation. The evaluation contained handwritten notations under weaknesses showing Douglas received a notice for job performance with a 30-day review and he had four attendance points. It stated he needed to stay on task, needed to work on his fabrication skills, and he needed to become a certified welder. The evaluation stated Respondent needed to see further improvement in quantity and quality. Douglas testified he was not offered a chance to see the review. Douglas testified Dave Crall gave him the review.²⁸ Douglas testified that, during the review, Crall mentioned that Douglas's attendance was where it should be, that Douglas was not there very long, and Crall did not expect him to have a high level of knowledge of the shop at the time. Crall told Douglas that he had a good safety record. Douglas did not know what ratings Crall gave him. Douglas knew Crall gave Douglas a 50-cent-an-hour raise.

Douglas next received a review covering the period of December 1, 2010, to June 1, 2011, which Douglas signed for on August 24. Douglas testified he was never shown a copy of the evaluation. He testified Benboe went over the review with him. On the review, Douglas received 3 marks for below satisfactory, 22 marks for satisfactory, and 4 marks for between satisfactory and below satisfactory. Written remarks on page one of the evaluation showed Douglas had eight attendance points. Under summary of weaknesses the following were listed on page one: attendance, attitude, needs to become certified in welding processes, has become certified since evaluation was written. The second page of the evaluation includes statements that Douglas needs to work on communication with supervisor and to stay at assigned job. It states under goals or improvement programs: attendance issue; need to work on attitude and the way he interacts with supervisors. It states in section E of the evaluation "probation for above." Douglas testified he did see the second page of the evaluation. While it is reflected in the evaluation that Douglas was on probation in the section right above Douglas' signature, Douglas testified he did not pay any attention to it and he could not say if it was there or not at the time he signed for the evaluation. Douglas testified he was not told he was on probation during the review. He then testified that he did not recall whether he was told he was on probation. Douglas testified that, during the evaluation meeting, Benboe mentioned to Douglas that he needs to improve his attitude and communication with his supervisor and he needed to stay at his assigned job. Douglas testified he argued the point with Benboe. Douglas testified Benboe did not say anything about an attendance issue. Douglas testified he signed the document without bothering to look at it because he was frustrated with what Benboe was telling him as Benboe was telling him things that Douglas did not agree with. Douglas testified he became certified as a welder at the end of June 2011. Douglas testified that during the evaluation meeting when Benboe

mentioned he needed to become certified Douglas told him that he had and Benboe penciled it in. Douglas was issued a 3-day suspension on July 22, 2011, for a second violation of Respondent's blue flag policy. Douglas testified he received a \$1-an-hour raise after he became a certified welder several months after the fact.

Douglas testified that between the August 24 meeting and his January 2, 2012 termination, Benboe mentioned "attaboys" to Douglas concerning his work performance and had come up to Douglas telling him good job on projects that Douglas had completed. Douglas testified that Benboe had praised his performance on more than one occasion in November or December 2011. Douglas testified on one occasion in front of all the shop employees at the morning meeting, Benboe commended Douglas for a job well done on some doors on a snowblower. Benboe said Douglas had done a really good job and saved Respondent money. Douglas testified Benboe also indicated he informed Bachman that Douglas had done a good job and saved Respondent money because they thought the job was going to have to be outsourced or reordered from the company they were doing the work for. Douglas testified Benboe did not usually praise employees during morning safety meetings. Sindt confirmed that, during the morning staff meetings around a week before the Christmas shutdown, Benboe complimented Douglas' work in front of all the employees for a job Douglas had done on an entryway door to a cab. Sindt testified Benboe said Douglas did an excellent job and he probably saved around \$1000 to \$2000 in replacing the door and the door sash. Sindt testified he only heard Benboe complement an employee for their work one time at these meetings and that was Douglas.

Douglas testified he was terminated by Benboe on January 2, 2012, the day the employees returned to work following the holiday shutdown. Douglas testified he was working on a high voltage cabinet, a project he had started working on prior to the Christmas shutdown. Douglas was welding when Benboe came up to Douglas with an envelope and told Douglas to put his tools down. Douglas followed Benboe to the breakroom. He testified no one was there when they first walked in but Cronin later joined them. Douglas testified when they entered the breakroom, Benboe handed Douglas a piece of paper. Douglas read the paper which he testified stated Douglas was being terminated for lack of performance. Douglas testified that Cronin was not in the room at the time. Douglas testified he looked at Benboe and said, "Are you fucking kidding me?" Benboe responded, "No, I'm not." Douglas testified he stated if this is the case, "What about the attaboys" and "the job well done that I had in the past?" Benboe said in response that was not always the case. Douglas testified Benboe gave no further explanation as to why Douglas was terminated. Douglas testified he asked Benboe why, and Douglas even asked Benboe for an example. In this regard, he testified he asked Benboe "What are you talking about?" Douglas testified Benboe did not say anything in response. Douglas testified Benboe just shut down the conversation and did not want to say anything further. Douglas' January 2, 2012 termination letter read, "This letter is to inform you that your employment at RELCO Locomotives, Inc. has ended today January 2, 2012, due to poor job performance. The required improvements on your last employee

²⁸ Douglas testified that Crall has never supervised Douglas.

performance review have not been met.” Douglas testified that Benboe did not mention Douglas’ blue flag violations during Douglas’ January 2 termination meeting. Douglas testified that during the meeting Benboe did not get into the specifics of Douglas’ performance problems, but Benboe did state that Douglas’ issues were not an everyday thing.

2. Sindt

Sindt’s employment dates at Respondent were April 5, 2010, to January 2, 2012. Sindt was hired as a general laborer. However, Sindt was promoted to the position of mechanic at Respondent around June 2010, at which time he received a \$4-an-hour raise in lieu of his accepting a job offer from a former employer. As a mechanic, he worked in the truck shop tearing down trucks, de-trucking locomotives, and on the general rebuild of the trucks. Sindt testified Benboe was his supervisor at the time of his termination. When Sindt was first hired Jeff Dalman was his supervisor. Sindt testified he was also supervised by Shipp and Cronin. Sindt worked under Cronin for about a week or two when Sindt worked on hinges on the battery box in the fabrication department. This took place around August or September 2011. Sindt thought Shipp supervised him around July to August 2011. Sindt was also supervised by Ryan Bjornson around December 2011 when Sindt worked on bilevel trucks. Sindt testified Bjornson supervised him for about 2 to 3 weeks.

Sindt testified, performing as a mechanic, he worked on around 10 bilevel trucks during his employment. Sindt learned about bilevel trucks from a schematic given to him by Dalman when the first contract came for bi-level trucks at the facility. The bilevel truck project was called the DART project. Sindt testified Respondent had two different contracts for bi-level trucks and he worked on them in the fall of 2010, the beginning of 2011 and in December 2011. He testified he considered the bilevel truck work he performed to be mechanical rather than fabrication. Sindt testified that there were no other people working on the last set of bilevel trucks. He testified that most of the work done on the DART bilevel trucks was either by Sindt or an assistant he trained late in the process. Sindt testified that in addition to the work on the trucks in the last part of his employment he performed work that Benboe assigned to him. Sindt testified that Benboe did not comment about Sindt’s performance either positively or negatively. Benboe never said he had a problem with Sindt’s work.

Sindt testified that he also performed work in the fabrication department at Respondent in that in the summer of 2011 they were cross-training everyone. Sindt testified he received very little cross-training in fabrication and he only performed a little bit of fabrication work as there were a couple of small fabrication jobs he worked on. Sindt replaced some hinges on one unit, and he rebuilt a battery box on that unit. Sindt testified in the latter part of 2011 his work area was all over the shop. Sindt testified as a mechanic he did not require a welding certification. He testified he did very little welding as a mechanic but did do some on occasion. Sindt testified no member of management told him he needed to obtain a welding certification by a certain date or there would be consequences. Sindt testified he has cleaned the shop quite a bit, and he cleaned

during the time period of October 2011 and January 2, 2012, about 40 to 50 percent of his time. Sindt testified Benboe gave him the assignment to clean. Sindt testified Dalman asked Sindt why he was cleaning and Sindt said it was his assignment. Dalman told Sindt if Benboe was not going to utilize Sindt to potential Dalman was going to try and get Sindt back into the truck shop. Sindt said that would be fine.

Sindt testified that structural welding is like the frame of the truck and has to be rigid, versus a door hinge on the car body. Sindt testified structural welding requires a welding certificate. He did not do structural welding. Sindt was aware Respondent wanted him to obtain his welding certificate. Sindt testified that as far as he was aware they wanted everyone to be certified to do any welding there. Without the welding certificate there was some work he could not be assigned to do. He testified welding is an important part of a fabricator’s job. However welding is not the only thing a fabricator does. They build things without welding and tear things down. He testified tear down can be performed by a fabricator or a mechanic. He testified there was also some work in the truck shop as a mechanic he could not do because he did not have his welding certificate.

Sindt testified he tried to get his welding certificate a couple of times. Sindt testified the welding certification test involves a two part test. He testified he passed vertical welding visual test in July 2011 but did not pass overhead welding which he took twice and failed both visuals for Benboe, who administers the test. Sindt testified he took the test for overhead welding in August and September 2011 but failed each.²⁹ Sindt testified the second time he failed the overhead test Benboe was upset. Sindt testified he had planned to take the overhead portion of the test again after the first of the year in 2012. Sindt testified that around a couple of weeks before the Christmas shutdown he told Benboe he would like to take the overhead test after the first of the year. He testified Benboe said that would be fine.

Sindt’s initial evaluation at Respondent covered the period of June 7 to November 10, 2010. The evaluation does not contain Sindt’s signature. Sindt testified he never saw the written evaluation but he met with Dalman for the review. The evaluation contains handwritten notations under strengths “welding really needs to be tested very good welds” and “do whatever it takes.” Under weaknesses it states “need to learn more also he needs to clean up area after working.” In the summary section it states in handwritten notes, “hard work very good welder, good at trucks, need to work fast, need to clean up area.” Sindt testified he was told he needed to get his welding tested and he needed to learn more. He testified he was told he needed to clean up

²⁹ Sindt stated in his February 29, 2012 affidavit that in early 2011, while working as a mechanic, Dalman and Bachman asked him if he could become certified as a welder. Sindt testified in his affidavit he passed the visual vertical welding test in May or June, and he took the overhead test twice once in July and once in August. It is stated in the affidavit that the second time Sindt failed Benboe said he only allows three tests a year and Sindt stated he would take the overhead again after the first of the year and Benboe said that would be okay. Sindt testified at the hearing that he concluded he had taken three tests in 2011 that is one vertical test and two overheads, and it was his understanding from Benboe’s statement Sindt had to wait until the next year to take the test again.

his area after working. There is a handwritten notation on the evaluation that Sindt was given a 75-cent-an hour raise on December 21, 2010. On the evaluation grid, Sindt was given 1 outstanding for attendance; 3 exceeds expectations; 17 satisfactory; and 5 below expectations.

Sindt received an evaluation covering the period of December 1, 2010, to June 1, 2011, which Sindt signed for on September 15, 2011. Sindt testified he received and reviewed both pages of the evaluation at the time of his review. Sindt met with Shipp and another person who attended as a witness for Respondent. Sindt testified at the time his job was a fabricator which involves welding. He testified he was told he needed to become certified as a welder in order to do his job as a fabricator. Sindt testified he never did become certified as a welder. He testified he was never made aware of the time period where he had to become certified. The evaluation under strengths contains the handwritten remark "willingness to accept direction" and under weakness it lists "drive and initiative is lacking." The evaluation contains other hand written remarks such as "has learned and worked in general locomotive areas." It states, "Jerry needs to become more proactive and have greater initiative." The evaluation states Sindt needs to become certified as a welder, needs to cross-train as a fabricator. It states Sindt has started cross training as a fabricator since July. Concerning the evaluation grid marks, Sindt received 6 below expectations; 22 satisfactory; and 2 exceeds expectations.

Sindt testified he visited Bachman after Sindt's midyear review in September 2011. Sindt told Bachman that Sindt liked doing mechanical work, but that he did not like working for Benboe. Sindt also told Bachman that he did not want to do fabrication work that he preferred turning a wrench as a mechanic. Sindt testified Bachman told Sindt he needed to do fabrication work and it was possible Bachman stated Respondent had more fabrication work than mechanical. Sindt testified he did not have another conversation with Bachman in his office in December 2011. Sindt testified that during his final few months at Respondent he was primarily working under Benboe.

Sindt testified Respondent's has an annual plant shutdown during Christmas week and Respondent reopened on January 2, 2012, following its 2011 shutdown. Sindt testified he went to work on January 2, 2012, and reported at 6 a.m. and was scheduled to work until 4:30 p.m. Sindt testified that around 2:30 p.m., Benboe came up to him with a manila envelope, and they walked to the west end of the building. Sindt testified Shipp came walking by and Benboe asked Shipp to come over. Sindt testified Benboe handed him a sheet and Sindt started to read it and then said, "You got to be fucking kidding me." Shipp asked Sindt what happened and he had Shipp read the sheet. Sindt testified Shipp then also said, "You got to be fucking kidding me" to Benboe. Shipp said you are firing the only guy who knows anything about the bilevel cars. Sindt testified Benboe just shrugged his shoulders and shook his head yes. Benboe asked Shipp to walk with Sindt to pick up his tools and then Shipp and Sindt proceeded to Sindt's toolbox. Sindt testified that while they were at the toolbox Shipp was in total shock that this was going on. Shipp said he did not know what Sindt had done wrong. Shipp said from what he had seen that Sindt was a really good worker. Sindt cleaned out his toolbox,

Shipp took Respondent's tools, Sindt's Id. badge and left. Sindt testified that the last time he had worked on bi-level trucks was during 2 weeks in December. Sindt testified the work he was doing on the bilevel trucks was complete at the time of his termination. Sindt testified that Benboe did not verbally inform him the reasons for his termination. Sindt testified the letter stated he was being terminated due to poor performance. Sindt did not ask for a further explanation. Sindt testified he never received any written warnings during his time at Respondent.

E. Respondent's Witnesses Concerning the Termination of Douglas and Sindt

Bachman testified Respondent has a formal evaluation process in which they try to give each production employee two reviews per year. There is a mid-year review and an end of year review. The reviews include an evaluation form and a meeting with a foreman and the employee. Bachman testified foremen fill out the evaluation forms, but no particular foremen fills out the form. He explained the same supervisor does not supervise the same employee every day. Rather, employees are supervised by a particular foreman based on the project or work they are assigned. The foreman fills out most of the evaluation form, and Bachman may insert some comments on the form. Bachman testified he makes the ultimate decision on all terminations except for terminations for attendance for which there is a point system. Attendance based terminations are based on the number of days off from work, and the policy it is not a matter of interpretation. Bachman is informed of an attendance based termination, but he is not asked to approve it. Points can accrue for various reasons such as calling off from work or coming in late. If an employee accrues 12 or more points in a calendar year then they are terminated for attendance. The points drop off from the one year anniversary date from when they first accrue. Bachman testified when people are terminated whether it is for attendance or some other reason they are provided with a termination letter. Bachman testified Sindt and Douglas were the only employees terminated on January 2, 2012.

1. Douglas

Bachman initially testified the decision to terminate Douglas was made in a group and all the supervisors participated. The meeting took place in December when they were reviewing evaluations around the last 2 weeks before the holiday shutdown. Bachman testified Douglas was terminated for poor performance. Bachman stated in his prehearing affidavit dated April 6, 2012, "The reason for Mark Douglas's termination was poor performance. I don't recall specifics in terms of what the problems were. In general terms it was all performance based." "Douglas and Sindt do not stay on task, quality was poor, they wandered, they talked to everyone, attendance was poor, and their attitude was poor."³⁰ Bachman estimated that Douglas had around 10 or 11 attendance points at the time of his termination.

³⁰ However, Bachman denied at the hearing that both employees had attendance problems stating in reference to his affidavit, "I'm merging two employees together with a statement that's generalizing both of them put together." Bachman testified that attendance was only a factor in Douglas' termination, not Sindt's.

nation. Bachman testified at the hearing that, at the time of their terminations, Douglas and Sindt were not doing a satisfactory job of meeting deadlines for work assignments. Yet, Bachman testified at the hearing he would not say Sindt or Douglas overall quality of work was not satisfactory at the time of their termination.³¹

Bachman testified Douglas was a fabricator in 2011. Bachman testified Douglas had basic abilities but was very confrontational and did not take direction well. He had a tendency to want to do things his own way even though the customer required something different. Bachman testified Douglas performance was at the bottom of the fabricators who had worked as long as Douglas had. He testified other than Sindt no one was lower than Douglas. Bachman testified he had a fairly vocal discussion in the conference room with Douglas when Douglas was put on probation the first time. Bachman estimated this was in 2010. Benboe stated to Bachman that Douglas wanted to talk to them. Bachman testified Douglas came up to the conference room and did not feel he was being fairly treated in the description of the work he was doing and that his work was fine. Bachman explained the customer wanted something different than what Douglas wanted to do. Bachman testified Douglas became very vocal and boisterous and was yelling in the conference room when they had customers there. Benboe said they could not handle the conversation that way and it ended. Present were Benboe, Douglas, and Crall, who was no longer with Respondent. Bachman testified he explained to Douglas he could not pick how we would do a job, it was up to the customer.

Bachman testified in response to a leading question he was aware Douglas was placed on probation a second time at the midyear review in September 2011. Bachman testified he thought Douglas was placed on probation because of a performance issue but he would have to review the particulars. Bachman testified, after looking at Douglas evaluations, that Douglas was placed on probation for performance issues, including attendance, attitude, interaction with supervision, and staying on job assignments. Bachman testified he did not recall the specifics concerning Douglas. Rather, Bachman was taking a lot of his direction on Douglas from input from Benboe.

³¹ Bachman testified that when he decided to terminate Douglas he did not know for sure how many attendance points Douglas had. He testified it did not make a difference whether it was 8, 9, 10, or 11 points, as Douglas was very high in the point structure for attendance. Bachman testified he would consider 10 points to be evidence of poor attendance. Bachman testified he looked at an attendance chart in Douglas' file at the time he decided to terminate him, which showed consistent absences. Bachman testified he considers a person with a large amount of attendance points to be part of what he deems to be poor performance. Bachman testified most of Respondent's projects have committed delivery dates. Bachman testified if one of the scheduled employees does not show up for work, Respondent is unable to recover the calendar day. This causes Respondent to incur overtime which reduces profitability. Bachman testified performance or competency of an employee is related to a lot of different things. It is the quality and quantity of the work, reliability, and knowledge.

Bachman initially testified he had an opportunity to observe Douglas' performance in the latter quarter of 2011. Bachman testified after an employee receives a poor review Bachman spends more time watching the employee to confirm or form his own opinion about the review. Bachman testified he watched Douglas and agreed with Benboe. However, when asked for specifics about what he saw, Bachman spoke in generalities. Bachman then testified he watched how Douglas dealt with a supervisor to see if he was confrontational or willing to take direction; how Douglas was interacting with employees; and if Douglas wanted to help. Bachman testified he reviewed Douglas attendance file to see if his attendance was as bad as reported. Bachman testified he basically confirmed what was reported. Bachman recalled a specific instance where Douglas was confrontational with his supervisor. Bachman testified he remembered Douglas working on a snowplow and Benboe was giving him direction on what to do and from a distance Bachman could see Douglas was very disgusted and angry. Bachman testified this took place in the mid to early part of 2011. Douglas review shows he was put on probation on June 1, 2011, but Bachman could not recall if the incident with the snow plow was before or after Douglas was placed on probation. When asked if there was anything he could say he observed concerning Douglas after June 1, 2011, when Douglas was placed on probation Bachman testified he needed to take a look at Douglas review for the second half of the year. Bachman testified, upon looking at the review, that this period of time was basically a continuation of his inability to work and interact. Bachman testified he did not have any specific recollection of any observation concerning Douglas other than Bachman's being aware of his attendance, which Bachman testified got progressively worse. Bachman testified from his personal observation during the latter half of 2011 he could not say whether Douglas was performing his work in a timely manner. Bachman could not say what types of work or what projects Douglas was working on during the last quarter of 2011.

While he had earlier testified the decision to terminate Douglas was made in a group and that all the supervisors participated, Bachman later testified he made the decision to terminate Douglas based on reports Bachman received from Benboe; and upon Bachman's review of Douglas' reviews. Bachman testified it was the review of the file, Douglas' inability to improve, and what Bachman had received from Benboe that led him to decide to terminate Douglas. When asked if Benboe made a recommendation to Bachman that Douglas be terminated or if Bachman reached that conclusion on his own, Bachman testified, "I believe with Mr. Douglas I had made the decision because of his continued inability to improve." Bachman testified that Benboe gave Bachman the year end review for Douglas and explained it. Bachman pulled up Douglas' file on how long the probationary period had been going on for and the issues they had with Douglas. Then Bachman went back to Benboe and explained to him that he did not know if this was a person that they were going to keep. Bachman testified Benboe agreed Douglas was not progressing and was progressively getting worse, that they could not rely on him and Bachman told Benboe that he thought they should terminate him. Bach-

man testified he did not recall Benboe said anything vocally to Bachman in support of the decision to terminate Douglas, but Benboe did not argue against it. Bachman testified he remembered telling all the foremen that that Sindt and Douglas should be terminated. Bachman testified if they did not agree all the foremen will say what their feelings are. Bachman then testified, upon being asked by his Respondent's counsel, that he could not recall whether Benboe made a recommendation to terminate Douglas.

While Bachman testified Benboe made no affirmative recommendation that Douglas be terminated, Benboe told a different story. Benboe testified he completes a performance evaluation form for an employee, and then he gives it to Bachman for review. Benboe testified in December 2011 he completed performance reviews for Sindt and Douglas, and gave them to Bachman the first week of December. Benboe testified he made a recommendation at the time he handed in the evaluations to Bachman that Sindt and Douglas be terminated for poor performance. He testified that with respect to these two employees he said it was his recommendation that they were below average performers and Respondent was not getting any benefit from them being there other than just letting them stay. Benboe testified Bachman did not say anything other than he wanted to look at their evaluations.

Benboe testified he filled out most of Sindt and Douglas' last evaluation forms, but Bachman wrote comments in section E of the evaluation. Benboe testified that unlike the evaluations he gave to Bachman for other employees, Bachman did not return the evaluations for Sindt and Douglas to Benboe. Benboe testified about 5 to 7 days after Benboe had handed Bachman the evaluations, all the other employees evaluations had been returned to Benboe. Benboe testified he assumed at that time Bachman was going to terminate the two employees. Benboe testified Bachman did not actually tell him they were going to be terminated until after they returned from vacation during the Christmas shutdown. However, Benboe also testified, upon reviewing his prehearing affidavit that he had a conversation with Bachman before the employees were terminated where he asked Bachman why he did not get the evaluations back and Bachman said the employees were going to be disciplined. He testified Bachman told Benboe the two employees were going to be allowed to go through the holiday shutdown, receive their holiday pay, and that Bachman elected to hold off until after they returned from shutdown after the first of the year. Benboe testified he recommended to Bachman that Douglas be terminated for poor performance. Benboe testified that part of his decision to make his recommendation for Douglas' termination was blue flag violations Douglas had in the past.

When asked about any specific instances in the latter part of 2011 that led him to conclude Douglas should be terminated, Benboe testified there is a document concerning Douglas attendance and that in December there were 3 days in a row that he took off. Douglas records show it was December 6, 7, and 8. Benboe testified Douglas just arbitrarily left saying he had to go home. Benboe testified employees do not ask his permission and he does not grant permission to leave. Benboe testified if they want to leave that is up to them. Benboe testified he was not aware of whether Douglas was on probation at the time

he took the early departures. Benboe testified in response to leading question that he considered Douglas attendance to be a part of his overall pattern of poor performance.

Benboe's claim that Douglas was terminated for attendance is belied by content of Douglas' termination letter. In this regard, Benboe testified he terminated Sindt for poor workmanship, and Sindt's termination letter only sites "poor performance" with no mention of attendance being an issue. Benboe testified he would have given the secretary the reasons for the termination and they would have typed what he told them to type in the termination letter. After some waffling and upon reviewing Sindt's attendance information, Benboe testified attendance was not an issue as a reason for Sindt's discharge. Benboe then testified if someone was being terminated for attendance, Benboe would have directed that to be included in the termination letter. Yet, Benboe testified that he also gave a secretary the information to type for Douglas' termination letter. Douglas' termination letter, like Sindt's, made no mention of attendance, but listed as the sole cause of termination poor performance.

Benboe testified he met with Douglas and notified him of his termination. He testified then Supervisor Cronin was present. Benboe testified Douglas said this is a bunch of "fucking bullshit." Benboe testified Douglas got up and started stomping towards the door of the breakroom. Benboe testified he went with Douglas to pick up his tools and check the toolbox to make sure none of Respondent's inventory was in it. Benboe testified Douglas then left the premises. Benboe testified he was not aware Cronin had anything to do with the discharge other than attend the meeting. Benboe testified Cronin did not say anything during the meeting. Benboe testified Douglas did not say anything else aside from what Benboe previously testified to. Benboe testified Douglas did not ask for an explanation for the termination. Benboe testified the letter said performance and Douglas did not ask what it meant by performance. Benboe testified it was a very short conversation. Considering the demeanor of the witnesses, and the record as a whole, I have credited Douglas' version of his termination meeting over Benboe's. Part of Douglas history of his relationship with Benboe was that Douglas would dispute work-related decisions with Benboe. It would be particularly uncharacteristic as Benboe claimed for Douglas not to raise questions about his termination. Particularly, since I have found based on Sindt and Douglas' credited testimony that Benboe had recently complimented Douglas in front of the whole staff concerning Douglas' performance.

2. Sindt

Benboe testified he was Sindt's supervisor sporadically based on Sindt's assignments. Benboe thought he supervised Sindt at times in the latter half of 2011, during which time Sindt was being cross-trained as a fabricator. Benboe did not recall the dates of the conversations but he testified he had conversations with the entire fabrication crew approximately around 3 or 4 weeks before their midyear evaluations which issued in June where he told them as a group they needed to become certified welders. Benboe testified he said, "[A]ny of you guys that are not certified need to make a concerted effort to do this. Benboe

testified that at the time they were about 35 members of the fabrication crew and about 10 or 12 were not certified welders. He testified Sindt was there for this discussion.³² Benboe estimated that by the end of the year 2011 only 4 or 5 of the 10 or 12 became certified. He estimated about 8 or 9, including Sindt, did not become certified welders.

Benboe testified that Sindt tried to pass the welding test twice in the first part of 2011. Benboe testified he thought Sindt tried to pass the test again in the second half of 2011. Benboe testified it is a two-part test including a vertical up multiple pass and an overhead multiple pass. Benboe testified if you pass one half of the test it does not get sent out for certification. Both halves of the test go out together in that the one that is passed waits for the other half to be completed. Benboe testified they do the vertical test first and once they have a visual confirmation that looks like a pass, then they do the overhead test. Benboe testified Sindt passed a visual on the vertical up test. He did not pass a visual on the overhead. Benboe testified he thought Sindt only took the overhead once in 2011. Benboe testified he thought Sindt took the vertical up twice and passed it the second time. Benboe testified passing the visual test is a prerequisite to send the welds to be testified by an independent facility. Benboe testified he did not tell Sindt he could not take any more tests in 2011 or that he could take another test that year. Benboe explained, "I'm not going to stand there and carry these guys around like little kids." Benboe testified he never had a conversation with Sindt about taking the welding test in 2012.

Benboe testified he is a level two welding inspector for the American Welding Society. Benboe can do visual welding inspections at Respondent's facility, and he is the only supervisor or manager at Respondent who can perform the inspection. When asked if Respondent has timelines that employees must obtain the welding certifications by, Benboe testified that timelines would be their evaluations. He testified when they are given their evaluation they are asked that before their next evaluation that this certification will be completed. However, when Benboe testified about welding during a prior NLRB proceeding held on August 9 and 10, 2011, he stated that when an employee is hired at Respondent, they are asked to take their welding test within about 30 days; that if they do not pass they must wait 30 days before they can take the test a second time; and if they do not pass the second time they must wait 90 days before passing the test. Benboe admitted during that testimony there were no specific deadlines in which an employee must pass the test.

Benboe testified that at some point in the latter part of 2011 he came to the decision that Sindt should be discharged. Benboe testified he could give specific instances but not a specific date when he made up his mind. Benboe testified when Sindt wanted to be on a job he would stay there and do the job. However, if it was not what he thought he wanted to do, Benboe would find him anywhere in the shop at any point in the day. Benboe testified there were times he would turn around and Sindt would be coming at him from the other end of

the shop saying he had to talk to Benboe. Benboe testified it would be something Benboe thought was insignificant such as a question about how to tighten a bolt. He testified it was just an excuse not to be at the jobsite. As to a specific instance, Benboe testified he had Sindt working on a unit at the west end of track three and Benboe made Sindt aware this had to be done on a timeline that day. Benboe testified at the end of the day it was not finished. When Benboe asked Sindt why it was not done he did not know. Benboe testified this was in the last couple of months of 2011. As to other projects, Benboe testified projects normally go on for multiple days so it was more difficult to have a timeline for them. Benboe testified this was the only instance he could recall Sindt did not meet his deadline.

As discussed earlier, Benboe testified when he prepared yearend 2011 evaluations for Sindt and Douglas he gave them to Bachman. Benboe testified he made a recommendation at the time he handed in the evaluations to Bachman. He testified he handed in everyone's evaluation the same time and with respect to these two employees he said it was his recommendation that they were below average performers and Respondent was not getting any benefit from them being there other than just letting them stay. Benboe testified Bachman did not say anything other than he wanted to look at their evaluations. Benboe could not recall whether he had more than one conversation with Bachman about Sindt's discharge.³³ Benboe testified about 5 to 7 days after Benboe had handed Bachman the evaluations, everyone else's evaluations except Sindt and Douglas were returned to Benboe. Benboe testified he had a conversation with Bachman about Douglas and Sindt's evaluations. Benboe testified Bachman said he was going to hold onto them until after the first of the year after he came back off the Christmas shutdown. Bachman said he did not want to have any terminations until after then, that he wanted them to get the holiday pay and he did not want to disrupt their Christmas holidays. Benboe testified he just said okay. Benboe testified he assumed at that time Bachman was going to terminate the two employees. Yet, Benboe testified Bachman did not actually tell him they were going to be terminated them until after they returned from vacation.

Benboe testified he met with Sindt and Shipp when he gave Sindt his termination letter. Benboe testified that during the meeting Sindt did not say very much and he was very calm about it. Benboe testified that Sindt did not use profanity during the meeting. Benboe testified that Shipp did not say anything during the meeting. Benboe testified that Shipp escorted Sindt off the premises.

Shipp testified he was present for Sindt's termination meeting. Shipp testified he did not make a recommendation for Sindt's termination, and no one asked his opinion. Shipp testi-

³² However, Sindt's evaluation states he only began cross-training in fabrication in July.

³³ While Benboe testified he recommended to Bachman that Sindt be discharged when he tendered Sindt's evaluation to Bachman, Benboe wrote in the evaluation, "If Jerry stays in fabrication, he will need to become certified in welding." Implicit in this statement was Benboe was not planning on Sindt's termination, and that it was his understanding that Sindt was to be given another opportunity to pass the welding exam.

fied he found out Sindt was being terminated on January 2, 2012, when Benboe asked Shipp to be a witness for the meeting. Benboe said he needed Shipp to be a witness as Sindt was going to be terminated today. Benboe did not tell Shipp the reason for Sindt's termination. Present at the meeting were Benboe, Shipp, and Sindt. Shipp at first testified he did not know if Benboe told Sindt the reason for the termination during the meeting stating Shipp stood in the background and did not hear the whole conversation. When reminded he was asked to attend as a witness, Shipp then testified he recalled Benboe telling Sindt he was terminated for performance. However, Shipp testified he was not 100 percent sure. Shipp at first testified he has trouble hearing. When reminded again that he was asked to attend as a witness, Shipp then testified he did not have trouble hearing at the meeting, that he heard the conversation, but he did not recall if Benboe said anything about the reasons why Sindt was terminated. Shipp testified that Sindt "might've objected a little bit" to his being terminated. He testified "I believe he said this is fucking bullshit." Shipp testified he thought Benboe told Sindt the termination was about performance issues. Shipp testified he did not recall if Benboe said anything else.

When Shipp was later called as a witness by Respondent, he testified to a certainty that during the termination meeting, he heard Sindt state, "[A]re you fucking kidding me?" Shipp testified he did not recall saying anything when Sindt made that comment. Shipp testified, "I don't believe I said anything at all." Shipp then clarified stating to a certainty that he did not say anything. Shipp testified that at no time during the meeting did Shipp say anything like "are you fucking kidding me?" Shipp denied saying during the meeting that Benboe was terminating one of the only people that knew anything about b-level trucks. Shipp testified he did say now he had to go find someone else to do the bilevel trucks so Shipp was going to have to pull someone from another job. Shipp testified he recalled telling Sindt that it might work out for the best for him. Shipp testified Sindt was working under Benboe at the time, but Shipp had borrowed Sindt for the trucks which is why Shipp had to find a replacement. Shipp testified no one informed him in advance that Sindt was going to be terminated or asked if it would be a problem to replace Sindt. Shipp testified beginning the next day he borrowed Jeff Maddy and Michael May to replace Sindt to finish the trucks.

Shipp later testified he did not know if Benboe was there when he said he was going to have to find someone to replace Sindt to do the bilevel trucks. Shipp testified Sindt was there for the remarks. Shipp then testified he did not recall saying anything during the termination meeting when Benboe was present. Shipp at first testified he thought he made the remark to Sindt before the termination meeting as Benboe told Shipp before the meeting that he was going to terminate Sindt. Shipp then testified he told Sindt after the meeting that he was going to have to get a replacement for Sindt, while Sindt loaded his toolbox. Shipp testified that while he was escorting Sindt off the premises he said it might have been a blessing if he had a job somewhere else. Shipp denied telling Sindt he was a good worker. Shipp testified Sindt was not a bad person but he was not a good worker. Shipp testified Maddy used to work in the

truck shop. Shipp testified that after Sindt was terminated Shipp moved Maddy back to the truck shop for the bilevel trucks. Shipp testified it was not difficult to replace Sindt on bi-level trucks because they are some of the easiest trucks to build.

I found that, considering his demeanor, Sindt testified in a credible manner about the events on his termination day including what transpired at his termination meeting. On the other hand, Benboe's testimony was undercut by that of Shipp. In this regard, Benboe, contrary to Sindt, denied that Sindt used profanity in reaction to his being terminated, while Shipp admitted Sindt did. I do not consider Sindt's remarks were of the nature that Benboe would have forgotten he made them. Shipp, although requested to serve as a witness by Benboe at the meeting, at first stated he stood in the background and did not hear the whole conversation. He then claimed he had trouble hearing, but soon admitted he heard the conversation. I find Shipp testified in such a manner because he intentionally did not want to accurately report what transpired at the meeting. Shipp later testified he protested the termination at the meeting because of the short notice he had in finding a replacement for Sindt, only to then state he made these remarks only in Sindt's presence prior to the meeting with Benboe not being there. When Shipp realized this aspect of his testimony did not ring true, because Sindt had not been told he had been let go prior to his meeting with Benboe, then Shipp testified he made the remarks about finding a replacement only to Sindt and it was after the termination meeting. I found neither explanation by Shipp very convincing, and have concluded that Shipp made the remarks during the termination meeting, in Benboe's presence, when as Sindt testified Shipp strenuously objected to the discharge.

Bachman testified it was his decision to terminate Sindt. Yet, in Bachman's affidavit, dated April 6, 2012, Bachman stated, "I don't recall the exact reasons for Jerry Sindt's termination. I made the final decision to terminate him. I believe the majority of the reasons were based on his performance over the period of time. I don't recall the specifics of his poor performance or how many times it happened, without going through documentation." However, Bachman testified at the hearing he was aware of Sindt's performance in 2010 and 2011 in that he had an opportunity to personally observe Sindt. He testified Sindt started out pretty well in an entry-level job as a general laborer. Then Sindt moved into basic mechanical work which is truck rebuild. Bachman testified Sindt liked working on truck assemblies, but Respondent did not necessarily have truck assemblies to work on. Bachman testified Sindt demonstrated an ability to weld while performing the truck rebuild work because there is quite a bit of welding going on truck assemblies.

Bachman testified Respondent ran out of the truck work and placed Sindt into fabrication where the majority of his work was welding during the spring or summer of 2011. Bachman testified he was aware Sindt had not received his welding certification because when Sindt was in the truck rebuild area he could perform basic welding functions, but Respondent always had to move a certified welder there to do critical welds so they needed two people to do one person's job. Bachman testified

he felt it was a problem that Sindt did not get a welding certificate because the job he was doing as a truck mechanic and the job he was placed in fabrication severely limited what Respondent could use him for. Bachman testified that is why it was discussed with Sindt multiple times about the importance of a welding certification. Bachman testified Respondent could not have people without their progressing to the certification level. However, Bachman testified there are employees Respondent retains who do not have a welding certification, if they show fluent skills in other areas.

Bachman testified in the latter part of 2011 Sindt was assigned in part to do some basic cleanup work and scraping. Bachman testified Sindt was given these assignments because they were limited in what they could use him for. Bachman testified that after 2 years it got to the point where he became a burden on the company because there were limited areas Respondent could place him. Bachman testified Sindt put forth no effort to further himself to where Respondent could place him in other areas.

Bachman testified he talked to Sindt on two different occasions about the need for him to obtain his welding certification. Bachman testified his first conversation with Sindt was a little bit after his Sindt's midyear review in 2011 which was August or September. Bachman testified he believed Benboe stated Sindt wanted to talk to Bachman and Bachman agreed to meet with him. Bachman testified he stated to Sindt the importance of his obtaining a welding certificate because that was the type of work Respondent had. Sindt responded he liked doing truck work better and Bachman explained they did not have truck work to put him in. Bachman told Sindt he has the ability if he uses it and trains to become certified but if he does not he is severely limiting his usefulness to the Company. Bachman testified Sindt said he did not like doing welding work, he did not like working with Benboe, and he did not like the work he was doing. Sindt said he wanted to go back to truck work. Bachman told him the truck work was sporadic, that they would be able to use him when they could, but the majority of the work load at that time was welding and fabrication and that was where they needed him. Bachman testified Sindt walked away saying he would go through the process again to become certified.

Bachman testified that the next time he had a one-on-one conversation with Sindt it was the beginning of December and Benboe again said Sindt wanted to talk to Bachman. He testified Sindt said the same thing that he did not like doing fabrication work. Bachman told Sindt this was the work that they had, and he could not pick and choose the type of work he wanted to do, that Sindt needed to become certified and he needed to do it quickly because they were doing reviews now. Sindt said he would get it done before the end of the year which was a couple of weeks away. Bachman testified he was not aware of anything that would have stopped Sindt from taking the test again. Bachman testified he told Sindt they had discussed this before and there had to be something else bothering Sindt because they were talking about the same thing again. Sindt said his sister had been sick. Bachman said he understood this was affecting Sindt's work and it was going to affect both situations if Sindt did not do something quickly about it. Bachman did

not know if he had received Sindt's yearend evaluation at the time of this conversation. Bachman testified that at the time he met with Sindt in December he was aware they were getting down to the wire as to whether they could invest in Sindt as an employee, and there was a high probability that Sindt would not continue employment unless he got the certification in the remaining couple of weeks of the year. When asked if he told Sindt this, Bachman testified he did not give employees ultimatums. He testified he strongly encouraged employees but did not threaten employees with termination if they do not put forth the effort to do the job. Bachman testified he strongly told Sindt he needed to get the certification within the remaining weeks of the year. Bachman testified he was never aware of any union activity by Sindt.

Sindt denied the aforementioned conversation took place with Bachman in December, and I have credited his denial. First, Benboe did not corroborate Bachman's assertion that he referred Sindt to talk to Bachman. Second, Benboe never claimed he was told by Bachman that as of December Sindt had to receive his welding certification by the end of the year. Since Benboe was the one who administered the test it is likely he would have been consulted or at least informed by Bachman that there was such a deadline in place for Sindt. Third, it is extremely unlikely that Sindt would have committed to Bachman that he would have completed the test before the end of the year since Sindt did not control Benboe's availability for the administration of the test. Moreover, the test results after Benboe's review had to be sent out for independent certification, and Sindt could not have known when the certification would have come back. Fourth, Sindt had already taken separate welding tests with Benboe three times, two vertical, and one horizontal. Thus, he had made an effort to pass the test. I do not credit Bachman's claim that at Bachman's suggestion Sindt agreed to take the test within a 2-week period but never even consulted Benboe as to the availability of his taking the test during that time period.

Bachman testified he made the final decision to terminate Sindt's employment. He testified the termination was recommended to him by Benboe during the end of year reviewing process. Bachman testified this was during December because their yearend reviews encompass the 2 to 3 weeks in December that they would be working. Bachman testified he recalled talking to Benboe about his frustration with Sindt. Benboe said Sindt was giving up not wanting to weld, constantly complaining about the job he was in and that he wants to get back to truck rebuild. Bachman testified he thought he discussed with Benboe that when Bachman was in the shop he observed Sindt was kind of lackadaisical, not staying on task, and wandering around. Bachman testified that Benboe pretty much agreed and Bachman told him to write up what he needed to write up in the review and they would review it. Bachman testified he had the secretaries pull up Sindt's prior reviews to see what they had established and he made his decision based off of that. I do not credit Benboe or Bachman's testimony that Benboe recommended that Sindt be terminated to Bachman. In this regard, in Benboe's final review of Sindt, he just stated, "If Jerry stays in fabrication he will need to become certified in welding." Implicit in that statement was that Sindt would be given another

opportunity to be complete the welding exam, and that if he failed it would be transferred.

Bachman testified he had another meeting with Benboe after he provided Bachman with his year end review for Sindt for 2011. Bachman testified it was informal meeting. He testified he talked to Benboe and the other foreman stating they would be terminating Douglas and Sindt and Bachman did not want to do it at the end of the year when they gave them their review. Bachman testified he told the foremen to hold their reviews until the first of the year. Bachman testified he decided to terminate Sindt because he was unwilling to progress and get a certification, because of his abilities, and his performance. Bachman testified instances of poor performance Bachman observed was Sindt's unwillingness, almost to the level of insubordination to do a particular job, and he had a lackadaisical attitude. Bachman cited Sindt's constant complaints to the foremen about what job they placed him on. Bachman testified he witnessed this. Here again, I do not credit Bachman's testimony. Benboe testified he was not officially informed that Sindt would be terminated until January 2, 2012, when the employees returned from their Christmas break. Benboe did testify he asked Bachman for the return of Douglas and Sindt's appraisals prior to the Christmas break, but he was told Bachman wanted to return them after the break because he did not want to administer discipline prior to Christmas. Benboe also did not name anyone else as being present for this conversation. Similarly, contrary to Bachman, Foreman Shipp, who testified he was inconvenienced by Sindt's termination in that he was given no notice to find a replacement, also testified he was not notified of Sindt's termination until January 2, when he was called in to be a witness for the termination meeting.

Bachman testified that in the latter half of 2011 Dalman never expressed a desire to have Sindt come back to the truckshop or the mechanical area. Bachman testified Dalman was not involved with any mechanical supervision at the time as he was on another assignment. Bachman testified he did not think they had any supervisors in the mechanical area or truckshop at the end of the year. He testified Shipp worked there as a supervisor but they did not have consistent activity in the truckshop at that time. It was just on a daily basis when they were building trucks. Bachman testified Shipp was of the same opinion that Bachman was that Sindt was extremely lacking in his true mechanical abilities which would be consisting of rebuilding engines and the type of work Sindt was doing was more of an entry-level mechanic. Bachman testified they did not have a need for an entry-level mechanic so there was no place for Sindt.

Bachman testified that the bilevel truck rebuild project is an ongoing project that Respondent has done for a couple of years. Bachman testified he thought Sindt was involved as one of the people rebuilding truck assemblies, which is a minor portion of the entire job consisting of about 100 man hours per truck. Bachman testified there was not much truck work on b-level cars during the last quarter of 2011. He testified there were only two trucks to build for a car and once that is completed the work goes to another craft which is usually a skilled craft. Bachman testified Sindt would not be able to perform the skilled work on the bilevel car. He testified Sindt could help do

trivial tasks. Bachman testified the fact that there was not a lot of mechanical work on bilevel truck work is part of the reason Sindt was moved to do more fabrication in the latter part of 2011. Bachman testified they needed fabricators at that time. Bachman testified Sindt was not a fabricator. He testified he had good welding skills that he needed to work on and put forth the effort to gain experience. He testified Sindt would be at the bottom of Respondents welders. Bachman testified the only other person who worked in the mechanical and fabrication area who was as limited as Sindt was Douglas. Bachman testified they were the two most limited employees in those areas and Respondent basically gave up hope on their willingness or ability to improve.

Bachman testified Respondent had about 20 mechanics at the time of Sindt's termination, and not all of the mechanics had welding certifications. Bachman testified Sindt was not a mechanic. Bachman testified the people Respondent uses as fabricators need to have a welding certification, and anyone being cross trained to be a fabricator must have a welding certification as part of their process. Bachman testified one of the reasons for Sindt's termination was he did not have a welding certification. Bachman testified he felt Sindt had a reasonable time to get certified and Respondent requested it multiple times.

F. Analysis Concerning the Discharge of Douglas and Sindt

1. Case law pertaining to discriminatory conduct

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board established an analytical framework for deciding cases turning on employer motivation. To prove that an employee was discharged in violation of Section 8(a)(3), the General Counsel must first persuade, by a preponderance of the evidence, that an employee's protected conduct was a motivating factor in the employer's decision. If the General Counsel is able to make such a showing, the burden of persuasion shifts "to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, supra at 1089. See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The elements commonly required to support a finding of discriminatory motivation are union activity, employer knowledge, and employer animus. *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991), enfd. mem. 988 F.2d 120 (9th Cir. 1993).

The law is clear that knowledge of an employee's union activity may be established by reasonable inference. *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 983 fn. 36 (2007), enfd. in relevant part 570 F.3d 354 (D.C. Cir. 2009). See also as discussed in *Windsor Convalescent* the following: *Active Transportation*, 296 NLRB 431, 431-432 (1989), enfd. 924 F.2d 1057 (6th Cir. 1991) (knowledge inferred where, inter alia, three of four discharged employees engaged in union activities in the presence of employee who was an informer for the employer); *Clark & Wilkins Industries*, 290 NLRB 106, 106 (1988), enfd. 887 F.2d 308 (D.C. Cir. 1989), cert. denied 495 U.S. 934 (1990) (imputing supervisor's knowledge to employer where supervisor observed organizing campaign in small shop). It has also been long established that

circumstantial evidence including the timing of the alleged discriminatory event and the submission of pretextual reasons in support of it will support a finding of employer knowledge even in the absence of direct evidence of such. See *La Gloria Oil & Gas Co.*, 337 NLRB 1120, 1123 (2002), affd. 71 Fed. Appx. 441 (5th Cir. 2003); *Medtech Security, Inc.*, 329 NLRB 926, 929–930 (1999) (circumstantial evidence, including timing, general knowledge of union activity and pretext, supported finding of employer knowledge); *Darbar Indian Restaurant*, 288 NLRB 545 (1988) (finding of knowledge based on employer’s general knowledge of union activity, the timing of the discharge, the 8(a)(1) violations found, and pretext given). See also *West Motor Freight of Pennsylvania*, 331 NLRB 831, 836 (2000); *North Atlantic Medical Services*, 329 NLRB 85 (1999); *Hospital San Pablo, Inc.*, 327 NLRB 300 (1998), enf. 207 F.3d 67 (1st Cir. 2000); and *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), enf. mem. 97 F.3d 1448 (4th Cir. 1996). The Board has held that a supervisor’s knowledge of union activities is imputed to an employer absent a credible denial of such knowledge. See *State Plaza, Inc.*, 347 NLRB 755, 756–757 (2006); and *Dobbs International Services*, 335 NLRB 972, 973 (2001). Along these lines it has been long held as set forth in *Shattuck Denn Mining Corp. v. NLRB*, 366 F.2d 466, 470 (9th Cir. 1966), “it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to lawful motive could be brought to book.”

2. The prima facie case

Douglas and Sindt were each hired on April 5, 2010. The credited testimony reveals that Sindt learned of the IBEW’s organizing campaign at Respondent around January 2011, whereupon he attended IBEW meetings around once a month up to around July. Sindt started passing out union authorization cards around April or May 2011. He passed out the cards in the parking lot and sometimes on the floor at Respondent when they were no supervisors around, when employees asked Sindt for a card around once or twice a week. Sindt stored the cards in his lunch bucket which he kept his toolbox in the truckshop. Douglas became aware of the IBEW campaign at Respondent in the spring of 2011. Douglas attended about four or five Local 347 meetings during the campaign starting in the spring of 2011 until his January 2, 2012 termination. Bachman attended a prior unfair labor practice trial on August 9 and 10, 2011, during which he sat at counsel table for the entire hearing. The August 9, transcript reflects that an employee testified that he was aware an employee of Respondent contacted the IBEW in January 2011, and the employee who testified attended IBEW meetings in January and February 2011.³⁴

IBEW Local 347 Organizer Pfaff became involved in the union campaign at Respondent on September 1, 2011. Pfaff held organizing meetings with Respondent’s employees, including one on September 26 in Albia at park attended by Pfaff, union

official Luck, and about 10 to 15 of Respondent’s employees. Douglas attended the September 26 meeting, during which Douglas raised issues about safety concerns at Respondent, as well as issues about employee treatment there. During the meeting, Pfaff selected Douglas to become a member of the Union’s voluntary organizing committee. Pfaff and Douglas exchanged phone numbers, and following the meeting they texted each other and talked on the phone. Following the September 26 meeting, Douglas distributed union authorization cards to employees and returned signed cards to Pfaff. Douglas passed out cards in the locker room, the cafeteria, the main shop, and in Respondent’s parking lot. Douglas stored the authorization cards in his toolbox, which he kept along the wall of the shop building or as close to him as possible. Shortly after the September 26 meeting, Douglas asked Sindt to become involved in the IBEW campaign since Sindt, due to his job, had access to the paint booth and blast booth at the plant. After this conversation, Sindt helped Douglas distribute cards, and returned signed cards to Douglas who gave them to Pfaff. Pfaff was in contact with Douglas weekly or biweekly until Douglas was terminated on January 2, 2012. Pfaff testified Douglas was the key person on the Union’s organizing committee. Douglas called Pfaff on the day of his discharge stating he could no longer be on the Union’s committee.

Pfaff and then union official Thomas came to Respondent’s facility in October during a shift change at around 4 or 5 p.m. and hand billed on the roadside outside Respondent’s gate. They handed out a packet of materials to employees in a blank manila envelope. The envelope contained three pages of IBEW campaign literature, a blank authorization card, Pfaff’s business card, and a Local 347 sticker. Pfaff testified there was nothing written on the outside of the envelope. The union officials distributed about 60 envelopes on that date, including six or seven to Douglas who drove by with about four people in his vehicle. Pfaff and Thomas were wearing IBEW sweatshirts containing large insignia on the front and back during the distribution. One of the Union’s envelopes was handed to Foreman Shipp as he passed through the gate. One of the envelopes containing the Union’s distributions found its way to Bachman’s desk.³⁵

Douglas credited testimony reveals the day following the Union’s handbilling there were pictures posted at the 8 to 12 computers the employees use to clock in at work. The pictures contained about three or four lines of writing, including the statement, “You can see this is what your union dues go to.” Douglas testified the postings contained a picture of a multimillion dollar building containing the word IBEW on it. Douglas testified the postings were identical and remained above the computers for about a week. Sindt confirmed the postings were at the log in computers the day after or shortly after the union

³⁴ For reasons previously stated, I do not credit Bachman’s claim that he did not learn of the IBEW campaign during the August trial.

³⁵ I did not credit Shipp’s testimony that he threw the envelope back at the union officials. I did not credit Bachman and Shipp’s testimony that they did not discuss the handbilling with other officials of the company. I did not credit Benboe’s testimony that he did not become aware of the handbilling and that he was not aware of the IBEW campaign until he was asked to give a statement in response to the current unfair labor practice charge.

handbilling. Sindt testified credibly testified one of the postings was also in Respondent's glass enclosed bulletin board near the entrance to the locker room. Sindt testified postings were there for around 3 to 4 days. Sindt testified the posting contained a picture of a fenced building with verbiage along the lines of union dues will pay for big fancy buildings for their corporate headquarters. I have concluded the postings were there for a period of 3 to 7 days.³⁶

Sindt credibly testified that around a day or two after the union handbilling, while Sindt was working, Benboe came up to Sindt and asked him what he thought about the Union. Sindt replied he had worked at a union and nonunion place and it did not matter to him one way or the other. Benboe asked Sindt how he felt he was treated at Respondent and Sindt said he felt he was treated fairly. Sindt testified he responded that way because he felt it could have impacted his job if he disclosed his pro-IBEW stance. I have found for the reasons stated that Benboe interrogated Sindt in violation of Section 8(a)(1) of the Act.

Sindt testified there are meetings every morning at Respondent before the start of the shift in the breakroom. Sindt testified Bachman will attend these meetings on rare occasions. Sindt testified that, after the Local 347 handbilling, Benboe made a comment on more than one occasion at these meetings that unions are not all they are cracked up to be. Sindt testified that, during the morning meetings after the handbilling, Bachman stated on more than one occasion that he would rather keep everything in house and that he did not like unions. Similarly, Douglas testified that during the morning meetings, Benboe said sometimes a union is good and sometimes they are bad and they just help the lazy people. Douglas testified that, during the morning meetings, Bachman said in years past, even with the recent recession, that Respondent never had to lay off anyone, and that if a union was brought in there was no promise this would not happen. Douglas testified Bachman said if the employees had any questions to get a hold of him. Douglas testified everybody in the shop who was working that morning would have attended the meeting, including supervisors. Douglas testified Benboe and Bachman made their remarks about the Union in separate meetings.³⁷

Douglas credibly testified that, between Thanksgiving but before they went on their Christmas vacation in 2011 which begins on December 23, he was doing a clean up at the end of the shift. Douglas had union authorization cards sticking out of his back pocket. Benboe noticed the cards and asked Douglas if he was doing that on company time pointing at Douglas' back pocket. Douglas replied no. He testified Benboe said, "You better not be." Douglas testified the union cards were sticking out of his pocket far enough to see the IBEW insignia on the cards. Douglas did not know the cards were visible until Benboe mentioned it. I have found that by making these re-

marks Benboe interrogated Douglas pertaining to his union activity; and instructed Douglas not to distribute the union cards during company time; and that both actions were violative of Section 8(a)(1) of the Act.

Sindt credibly testified he attended a small group meeting conducted by D. Bachman in late November or December 2011. Sindt's testimony revealed D. Bachman set up group meetings in the cafeteria, also known as the breakroom with about 8 to 15 employees per group. Respondent posted notices naming all of its employees for the meetings listing the time and employee's name for the meeting they were to attend. During the meeting Sindt attended, D. Bachman wanted to know any ideas to make the plant more efficient and ideas of how they could improve morale. There were quite a few suggestions from employees as to how this could be accomplished. Sindt proposed a bonus of a half day's pay if someone worked 30 days. D. Bachman said he liked the idea. Sindt estimated there were around 10 to 15 suggestions including a bonus program for getting jobs done on time. At the end of the meeting, someone asked D. Bachman if they had a problem how they could get in touch with him and he flipped back pages on a poster board where his personal cell phone number was listed. Sindt thought D. Bachman's email address was also there. Sindt testified D. Bachman had not given out his cell number or email address in the past.

Similarly, Douglas also attended a meeting conducted by D. Bachman during this time period for a small group of employees. Douglas learned of the meeting through the posted schedule described in Sindt's testimony. At the meeting Douglas attended, D. Bachman asked the employees if there were any improvements Respondent could make for the employees to improve production and Respondent's relationship with its clients. Douglas testified that everyone had something to say. Douglas mentioned the need for better equipment and for some verification for Benboe's qualifications to issue welding certifications. Douglas testified one of the suggestions was better communication between the supervisors and all of management. Douglas testified D. Bachman wrote his cell phone number on an eraser board and said this was his personal number if the employees had any questions or concerns feel free to call. Douglas testified prior to the meeting D. Bachman had never offered Douglas his personal phone number.

Sindt and Douglas testified the only other meetings they recalled with D. Bachman were two, one in the fall of 2010 and one in the fall of 2011 concerning the Respondent's annual insurance offerings to employees. Neither had previously attended small group meetings conducted by D. Bachman. Douglas testified aside from the two insurance meetings he was not aware of any other meetings D. Bachman held with employees. D. Bachman admitted he conducted the small group meetings with employees at a time he was aware the Union had conducted a distribution at the facility. For reasons previously stated, I have credited Sindt as to when D. Bachman's small group meeting occurred, and I have found that by conducting these meetings and his conduct therein, D. Bachman solicited complaints and grievances, and implied promises of increased benefits and improved terms and conditions of employment in violation of Section 8(a)(1) of the Act.

³⁶ Bachman admitted to seeing the posting, but I do not credit his testimony that there was only one copy or that he removed it the day he saw it.

³⁷ I have credited Sindt and Douglas' testimony concerning Benboe and Bachman's remarks over the claims of Benboe and Bachman that they never discussed the Union during the morning meetings.

In sum, I find counsel for the Acting General Counsel has made a strong prima facie case of a unlawful discharge for Douglas and Sindt. Both Douglas and Sindt were active union adherents in the IBEW campaign. As IBEW Official Pfaff credibly testified, as of September 26, Douglas was his main employee contact at Respondent's facility. Shortly following the September 26, union meeting, Douglas sought and gained Sindt's assistance in the distribution and collection of union cards, an activity they engaged in and around Respondent's facility. In October, the Union established a visual presence at Respondent's facility by handbilling at Respondent's gate where 60 envelopes containing union literature were distributed to individuals entering and leaving the facility, including Shipp, and one of the packets was placed on Bachman's desk. I have concluded that all of Respondent's officials quickly became aware of the IBEW campaign. Between that time, and the time of Sindt and Douglas' January 2, 2012 discharge, Benboe and Bachman spoke out against the union at staff meetings, anti-union literature was posted at the employees' check in computers, Respondent solicited grievances, and Douglas and Sindt were interrogated about their union activities by Benboe, the supervisor who wrote their last evaluation, and who claims he recommended their termination. Concerning Douglas, Benboe saw him carrying union authorization cards and therefore there is direct evidence of knowledge of his union activities. While Sindt denied he was involved with the Union during Benboe's questioning, Benboe's questioning Sindt reveals Benboe was at least suspicious of his involvement. Moreover, the two leading union adherents who had worked for Respondent for close to 2 years were terminated midday on the same day, when their being escorted off the facility in plain view of other employees would clearly send a message not to engage in the same conduct. The nature of their discharge, along with the other factors I have enumerated, serves to create an inference that Respondent was aware of their union activities at the time of their termination. In this regard, the timing of their termination, just 3 months after the Union established a visual presence at Respondent's facility strongly supports such a finding. Therefore, the burden shifts to Respondent to establish it would have discharged them even absent their union activity. However, for the reasons set forth below, I find the reasons advanced by Respondent for the discharge of Sindt and Douglas to be pretextual.

3. The pretextual nature of the discharges

a. Douglas

Douglas was hired as a fabricator on April 5, 2010. When Douglas first started working Shaffer was his supervisor, and at the time of his termination Benboe was his supervisor. Douglas testified Benboe supervised him from August 2010 until his termination except for a small percentage of his time which Douglas spent working in the rust unit. On August 26, 2010, Douglas received a written verbal warning for a violation blue flag violation, that is failing to remove his blue flag from a project after completing his work. In August or September 2010, Benboe told Douglas that Bachman had placed Douglas on probation because he was taking too long on a snowplow project. As a result, Douglas met with Benboe and Bachman

during which Douglas explained the reasons why the project was taking so long.

Douglas received an evaluation for the period of April 5 to December 9, 2010. The evaluation was not signed by Douglas or Crall who reviewed it with Douglas. Douglas received a raise from \$15 to \$15.50 an hour at the time of the evaluation. The evaluation contained handwritten notations under weaknesses showing Douglas received a notice for job performance with a 30-day review and he had four attendance points. It stated he needed to stay on task, needed to work on his fabrication skills, and he needed to become a certified welder. The evaluation stated Respondent needed to see further improvement in quantity and quality. Douglas was not offered a chance to see the written review, although Crall discussed it with him. During the review, Crall mentioned that Douglas's attendance was where it should be, that Douglas was not there very long, and Crall did not expect him to have a high level of knowledge of the shop at the time. Crall told Douglas that he had a good safety record.

Douglas next received a review covering the period of December 1, 2010, to June 1, 2011, which Douglas signed for on August 24, 2011. Douglas testified he was never shown a copy of this evaluation. Written remarks on page one of the evaluation showed Douglas had 8 attendance points. Under summary of weaknesses the following were listed on page one: attendance, attitude, needs to become certified in welding processes, has become certified since evaluation was written. The second page of the evaluation includes statements that Douglas needs to work on communication with supervisor and to stay at assigned job. It states under goals or improvement programs: attendance issue; need to work on attitude and the way he interacts with supervisors. It states in section E of the evaluation "probation for above." Douglas testified he did see the second page of the evaluation. Douglas testified that he did not understand that he was on probation at the time of the evaluation. While it is reflected in the evaluation that Douglas was on probation in the section right above Douglas' signature, Douglas testified he did not pay any attention to it and he could not say if it was there or not at the time he signed for the evaluation. Douglas testified he did not recall whether he was told he was on probation. Douglas testified that, during the evaluation meeting, Benboe mentioned to Douglas that he needs to improve his communication with his supervisor and he needed to stay at his assigned job. Douglas testified he argued the point with Benboe. Douglas testified Benboe told him he needs to work on his attitude and the way he interacts with supervisors. Douglas testified Benboe did not say anything about an attendance issue. Douglas testified he signed the document without bothering to look at it because he was frustrated with what Benboe was telling him. Douglas became certified as a welder at the end of June 2011. Douglas testified that during the evaluation meeting when Benboe mentioned he needed to become certified, Douglas told Benboe that he had and Benboe penciled it in. Douglas received a \$1-an-hour raise after he became a certified welder several months after the fact. Douglas was issued a 3-day suspension on July 22, 2011, for a second violation of Respondent's blue flag policy.

The credited testimony reveals, during the period between the August 24 meeting and his January 2, 2012 termination, Benboe mentioned “attaboys” to Douglas concerning his work performance and had come up to him telling him good job on projects that Douglas had completed. Benboe praised Douglas performance on more than one occasion including in November or December 2011. Douglas testified, as confirmed by Sindt, that on one occasion in front of all the shop employees at the morning meeting, Benboe commended Douglas for a job well done on some doors on a snowblower. Benboe said Douglas had done a really good job and saved Respondent money. Benboe indicated he informed Bachman that Douglas had done a good job and saved Respondent money. Sindt testified he only heard Benboe complement an employee for their work one time at these meetings and that was Douglas in December.

During Douglas’ January 2, 2012 termination meeting, Benboe handed Douglas a piece of paper, which stated Douglas was being terminated for lack of performance. Douglas asked Benboe, “Are you fucking kidding me?” Benboe responded, “No, I’m not.” Douglas stated, “What about the attaboys” and “the job well done that I had in the past?” Benboe said in response that was not always the case. Douglas testified Benboe gave no further explanation as to why Douglas was terminated. Douglas testified he asked Benboe why, and Douglas even asked Benboe for an example. In this regard, he testified he asked Benboe, “What are you talking about?” Douglas testified Benboe did not say anything in response. Douglas testified Benboe just shut down the conversation and did not want to say anything further. Douglas’ January 2, 2012 termination letter read, “This letter is to inform you that your employment at RELCO Locomotives, INC. has ended today January 2, 2012, due to poor job performance. The required improvements on your last employee performance review have not been met.” Douglas testified that Benboe did not mention Douglas’ blue flag violations during Douglas’ January 2 termination meeting. Douglas testified Benboe not get into the specifics of Douglas’ performance problems, but Benboe did state Douglas’ issues were not an everyday thing.

Respondent’s defense concerning Douglas was premised on the testimony of Benboe and Bachman, yet their testimony was marked by inconsistency between witnesses and poor recall. Benboe like Douglas testified he did not recall Douglas being placed on probation during the period of his evaluation ending June 1, 2011. The only evidence that he was placed on probation was Bachman’s handwritten note on the evaluation to that effect. Even assuming Douglas was placed on probation, the credited testimony of Sindt and Douglas reveals that Douglas had been praised by Benboe on several occasions following that evaluation, including one announcement to the whole staff during a morning meeting. In addition, between the time the evaluation was written and then verbally presented to Douglas, he had passed his welding certification. Bachman and Benboe testified to the importance of a fabricator obtaining their welding certification, otherwise they could not do certain work. In fact, Benboe admitted that as of December 2011, 8 to 9 of Respondent’s approximately 30 fabricators had not become certified, despite Benboe’s entreaties that they do so. Thus, I do not credit, Bachman’s claim that Douglas was one of Respondent’s

more limited employees as a fabricator, as the recent praise he had received prior to his termination, and his obtaining his welding certificate belie that assertion.

Moreover, while both Bachman and Benboe cited Douglas’ attendance as part of the cause for his discharge, attendance was not mentioned in his termination letter. Yet, it was Benboe who testified he instructed what was to be placed in both Sindt and Douglas’ termination letters and that if attendance played a role in the discharge it would have been listed in the letter. Douglas did not meet the 12-point requirement under Respondent’s attendance policy to be automatically terminated for attendance. The failure of Benboe to list attendance in the termination letter, based on his own standards, supports a conclusion that it was only after the termination took place that Respondent’s officials went back and reviewed records to justify their actions to prepare for the trial in this case. This conclusion is substantiated by the fact that Benboe claimed to have recommended Douglas termination to Bachman, but Bachman had no recollection of him making such a recommendation, and only stated it may have occurred at the suggestion of Respondent’s counsel. I do not credit Benboe’s testimony that he recommended to Bachman that Douglas be terminated. I have concluded that if such a recommendation occurred, Bachman would have remembered it. I found Bachman’s testimony also not worthy of belief concerning the decision to terminate Douglas. Bachman gave an affidavit in April 2012, wherein he could not recall the specifics behind Douglas discharge, which had only occurred 3 months earlier. At the trial, Bachman also could not cite any specific performance problems with Douglas after his appraisal ending June 6, 2011, when he was purportedly placed on probation, although Bachman claimed he personally observed Douglas’ work. I find that after his evaluation ending June 1, 2011, Douglas had been complimented about his work, and had obtained his welding certificate, a qualification several of the retained fabricators did not have. I find the given the inconsistent nature of the testimony of Respondent’s officials, and their lack of recall, that the reasons put forth for Douglas discharge were concocted after the fact and were pretextual. Accordingly, I find that Douglas was discharged for his union activity in violation of Section 8(a)(1) and (3) of the Act.³⁸

³⁸ I do not place much reliance here on Douglas and Sindt’s final evaluations written in December. The evaluations were never presented to them, and they were composed by the two officials who I have concluded unlawfully discharged them. Counsel for the Acting General Counsel introduced evaluations of other employees in an effort to show disparate treatment between those employees and Douglas and Sindt. I did not find it necessary to rely on those evaluations here and note most of the employees were employed for different lengths of time, or may have had different employment histories making them difficult to compare their status with that of Sindt and Douglas. However, Bachman admitted one of the referenced employees was comparable to Sindt and Douglas and only retained because Respondent did not want to incur worker’s compensation related litigation. Since, I have concluded Respondent was aware of Douglas and Sindt’s union adherent status at the time of their termination, with respect to the retention of this other employee as opposed to them was evidence of disparate treatment as Respondent was no stranger to litigation involving the termination of

b. Sindt

Sindt was hired by Respondent as a general laborer on April 5, 2010. Sindt was promoted to mechanic around June 2010, at which time he received a \$4-an-hour raise. As a mechanic, he worked in the truckshop tearing down trucks, de-trucking locomotives, and on the general rebuild of the trucks. Sindt testified Benboe was his supervisor at the time of his termination. When Sindt was first hired Dalman was his supervisor. Around August or September 2011, Sindt worked under Cronin for about a week or two when Sindt did the hinges in the battery box in the fabrication department. Sindt thought Shipp supervised him around July to August 2011. Sindt was also supervised by Bjornson around December 2011 when Sindt worked on bilevel trucks.

Sindt's initial evaluation at Respondent covered the period of June 7 to November 10, 2010. The evaluation does not contain Sindt's signature. Sindt testified he never saw the written evaluation but he met with Dalman for the review. The evaluation contains handwritten notations under strengths "welding really needs to be tested very good welds" and "do whatever it takes." Under weaknesses it states "need to learn more also he needs to clean up area after working." In the summary section its states in handwritten notes, "hard work very good welder, good at trucks, need to work fast, need to clean up area." Sindt testified he was told he needed to get his welding tested and that he needed to learn more. He testified he was told he needed to clean up his area after working. There is a handwritten notation on the evaluation that Sindt was given a 75-cent-an-hour raise on December 21, 2010.

Sindt, performing as a mechanic, worked on around 10 bilevel trucks during his employment. Sindt learned about bilevel trucks from a schematic given to him by Dalman when the first contract came for bilevel trucks at Respondent. Sindt's supervisor for the bilevel trucks called the DART project was Bjornson. Sindt testified Respondent had two different contracts for bilevel cars and he worked on them in the fall of 2010, the beginning of 2011 and in December 2011. He considered the bilevel truck work to be mechanical rather than fabrication. Sindt testified there were no other mechanics working on the last set of bilevel trucks. He testified that most of the mechanical work done on the DART bilevel trucks was either by Sindt or an assistant he trained late in the process. Sindt testified that in addition to the work on the trucks in the last part of his employment he performed work Benboe assigned him. Sindt credibly testified Benboe never said he had a problem with Sindt's work.

Sindt's credited testimony revealed that, in the summer of 2011, Respondent began cross-training many of its employees, and Sindt began to be cross-trained in fabrication. Sindt, however, received very little cross-training in fabrication, and only worked on a couple of small fabrication jobs that summer. Sindt testified that as a mechanic he did not require a welding certification as he only performed occasional welding, and not all welding required a certification. Sindt was given assign-

ments by Benboe to clean the shop around 40 to 50 percent of his time during the time period of October 2011 to January 2, 2012. During this time, Dalman asked Sindt why he was cleaning and Sindt said it was on his daily sheet. Dalman told Sindt if Benboe was not going to utilize Sindt to potential Dalman was going to try to get Sindt back into the truck shop.

Sindt testified Respondent wanted him to obtain his welding certificate which is required for structural welding. Without the welding certificate there was some work he could not do. He testified welding is an important part of the fabricator's job. However welding is not the only thing a fabricator does. They build things without welding and tear things down. Sindt testified there was some work in the truck shop as a mechanic that he could also not do because he did not have a welding certificate.

Sindt testified the welding certification involves a two-part test, a vertical test and an overhead test. He testified he passed vertical welding visual test in July 2011 but did not pass overhead welding which he took twice and failed both visuals for Benboe, who administers the test. Sindt testified he took the test for overhead welding in August and September 2011. Sindt gave earlier dates for these tests in his prehearing affidavit stating that he took the overhead test in June and August. Sindt testified the second time he failed the overhead test Benboe was upset. Sindt testified he had planned to take the overhead portion of the test again after the first of the year in 2012. Sindt credibly testified that before the shutdown he told Benboe he would like to take the overhead test after the first of the year. He testified Benboe said that would be fine. Sindt estimated that this conversation was a couple of weeks before the shutdown. Sindt testified in his affidavit he told Benboe he would take the test again after the first of the year after the second time Sindt failed the overhead test.

Sindt received an evaluation covering the period of December 1, 2010, to June 1, 2011, which Sindt signed for on September 15, 2011. Sindt testified he received and reviewed both pages of the evaluation at the time of his review and Shipp gave the review. Sindt testified at the time his job was a fabricator. He testified he was told he needed to become certified as a welder in order to do his job as a fabricator. Sindt testified he was never made aware of the time period where he had to become certified. The evaluation under strengths contains the handwritten remark "willingness to accept direction" and under weakness it lists "drive and initiative is lacking." The evaluation contains other handwritten remarks such as "has learned and worked in general locomotive areas." It states, "Jerry needs to become more proactive and have greater initiative." The evaluation states Sindt needs to become certified as a welder and he needed to cross-train as a fabricator. It states Sindt has started cross-training as a fabricator since July. Sindt visited Bachman after receiving this review. Sindt told Bachman that Sindt liked doing mechanical work, and that he did not like working for Benboe. Sindt also told Bachman he did not want to be doing fabrication work as he preferred working as a mechanic. Sindt testified Bachman told Sindt he needed to do the fabrication work as Respondent had more fabrication work than mechanical. Sindt credibly testified he did not have another conversation with Bachman in December 2011.

union adherents, but nevertheless had no second thoughts about terminating Douglas and Sindt.

Sindt's credited testimony reveals that following Respondent's annual Christmas shutdown, Sindt returned to work on January 2, 2012. At around 2:30 p.m., Benboe instructed Sindt to follow him, and Benboe asked Shipp to serve as a witness. Benboe then handed Sindt a sheet which stated he was terminated for poor performance. Upon reading the sheet, Sindt stated, "You got to be fucking kidding me." Shipp asked Sindt what happened and he had Shipp read the sheet. Shipp then also said "You got to be fucking kidding me" to Benboe. Shipp said you are firing the only guy who knows anything about the bi-level cars. Benboe shrugged his shoulders and shook his head yes. Benboe asked Shipp to walk with Sindt to pick up his tools and then Shipp and Sindt proceeded to Sindt's toolbox. While they were at the toolbox, Shipp said he did not know what Sindt had done wrong. Shipp said from what he had seen that Sindt was a really good worker. Sindt testified the last time he had worked on bilevel trucks was during two weeks in December. Sindt testified the work he was doing on the bilevel trucks was complete at the time of his termination. Sindt never received any written warnings during his time at Respondent.

I found the testimony of Respondent's witnesses to be contradictory as to the reasons Sindt was terminated. Benboe testified he thought he supervised Sindt at times in the latter half of 2011, during which time Sindt was being cross trained as a fabricator. Benboe testified he never told Sindt individually that he needed to get his welding certificate, rather he had conversations with the entire fabrication crew about 3 or 4 weeks before their midyear evaluations which issued in June where he told them as a group they needed to become certified welders. Benboe testified that at the time they were about 35 members of the fabrication crew and about 10 or 12 were not certified welders. He testified Sindt was there for this discussion.³⁹ Benboe estimated that by the end of the year 2011 around 4 or 5 of the 10 or 12 became certified. He estimated about 8 or 9 did not become certified welders. Yet, although he had just started cross-training in fabrication Sindt was the only one of those 8 or 9 individuals who was terminated.

Benboe testified that Sindt tried to pass the welding test twice in the first part of 2011. Benboe testified he thought Sindt tried to pass the test again in the second half of 2011. Benboe testified he thought Sindt only took the overhead once in 2011. Benboe testified he thought Sindt took the vertical up twice and passed it the second time. In fact, Sindt credibly testified he passed the vertical test on his first try, and took the overhead test twice in 2011. Benboe testified he did not tell Sindt he could not take any more tests in 2011. Benboe testified he never had a conversation with Sindt about taking the welding test in 2012. However, I have credited Sindt that he informed Benboe that he would retake the welding test in 2012 and that Benboe agreed. Moreover, when asked if Respondent has timelines that employees must obtain the welding certifications by, Benboe initially testified that timelines would be their evaluations. He testified when they are given their evaluation they are asked that before their next evaluation that this certifi-

cation will be completed. Yet, Benboe claimed that he told 10 to 12 fabricators before their midyear evaluations in 2011 that they needed to become certified welders. However, 8 or 9 of those individuals did not become certified by the end of the year. Respondent provided no evidence that any of these individuals were warned or otherwise disciplined. The only one who received any discipline was Sindt, who had just begun training as a fabricator, had received no prior disciplinary action, and more than coincidentally was soliciting employees to sign union cards. In fact, Sindt received no progressive discipline for his alleged transgression; rather he was abruptly terminated on the same day Douglas the leading union adherent was terminated. I find Respondent's action here establishes evidence of disparate treatment.

Benboe testified that at some point in the latter part of 2011 he came to the decision that Sindt should be discharged. Benboe claimed Sindt would only stay on task for the jobs he wanted to do, and that other times, he would find him anywhere in the shop. However, Benboe could only provide one specific instance when Sindt did not finish an assignment in what Benboe thought to be a timely fashion.

Benboe testified that when he the prepared yearend 2011 evaluations for Sindt and Douglas he gave them to Bachman. Benboe testified he made a recommendation at the time he handed in the evaluations to Bachman that these two employees were below average performers and Respondent was not getting any benefit from them being there. However, while Benboe claimed he recommended to Bachman that Sindt be discharged when he tendered Sindt's evaluation to Bachman, Benboe wrote in the evaluation, "If Jerry stays in fabrication, he will need to become certified in welding." Implicit in this statement was Benboe was not planning on Sindt's termination, and that it was his understanding that Sindt was to be given another opportunity to pass the welding exam.

Bachman testified it was his decision to terminate Sindt. Yet, in Bachman's affidavit, dated April 6, 2012, Bachman stated, "I don't recall the exact reasons for Jerry Sindt's termination. I made the final decision to terminate him. I believe the majority of the reasons was based on his performance over the period of time. I don't recall the specifics of his poor performance or how many times it happened, without going through documentation." I find Bachman's inability to recall the specifics as to the reason he terminated Sindt and Douglas so close in time to their termination as indicative that his decision to terminate these leading union adherents was not based on a review of their work, but was due to their union activities, and that Respondent's current assertions concerning the terminations are pretextual.

At the hearing, Bachman testified Respondent ran out of the truck work and placed Sindt into fabrication where the majority of his work was welding during the spring or summer of 2011. Bachman testified he was aware Sindt had not received his welding certification because when Sindt was in the truck rebuild area he could perform basic welding functions, but Respondent had to move a certified welder there to do critical welds so they needed two people to do one person's job. Bachman testified he felt it was a problem that Sindt did not get a welding certificate because the job he was doing as a truck

³⁹ Sindt's evaluations reveal he began cross training in fabrication in July.

mechanic and the job he was placed in fabrication severely limited what Respondent could use him for. Bachman testified Respondent could not continue to have people without their progressing into the certification level. Bachman testified there are employees Respondent retains who do not have a welding certification, if they show fluent skills in other areas at Respondent. Bachman testified in the latter part of 2011 Sindt was assigned in part to do some basic cleanup work and scraping. Bachman testified Sindt was given these assignments because they were limited in what they could use him for. Bachman testified Sindt put forth no effort to further himself. However, Sindt did attempt to take Respondent's welding certification test on multiple occasions, and passing one aspect of the two part test in 2011. For reasons stated earlier in this decision, I have not credited Bachman's claim that he spoke to Sindt in December 2011, and told him he needed to get certified quickly, or that Sindt agreed to do so prior to the yearend review. In this regard, Sindt credibly denied the conversation, and Benboe who would have had to administer the test never claimed he was informed of such a requirement by Bachman. In this regard, Benboe claimed he spoke to Bachman as least twice about Sindt in December, once when he handed him Sindt's yearend review, and again about 5 to 7 days later when he asked for the review back. Bachman's failure to discuss such a deadline with Benboe, Sindt's supervisor and the person who administered the test in the circumstances here serves to confirm my conclusion that Bachman's conversation with Sindt never took place, and that no deadline was given.

Bachman testified while, he made the final decision to terminate Sindt, Benboe recommended the termination during the end of year reviewing process. Bachman testified he recalled talking to Benboe about his frustration with Sindt. Benboe said basically that Sindt was giving up not wanting to weld, constantly complaining about the job he was in and that he wants to get back to truck rebuild. Bachman testified he thought he discussed with Benboe that when Bachman was in the shop he observed Sindt was kind of lackadaisical, not staying on task, and wandering around. Bachman testified that Benboe pretty much agreed and Bachman told him to write up what he needed to write up in the review and they would review it. Bachman testified he had the secretaries pull up Sindt's prior reviews to see what they established and he made his decision based off that. I do not credit Benboe or Bachman's testimony that Benboe recommended that Sindt be terminated to Bachman. In this regard, as previously stated in Benboe's final review of Sindt, he just stated, "If Jerry stays in fabrication he will need to become certified in welding." Implicit in that statement was that Sindt would be given another opportunity to be complete the welding exam, and that if he failed it he would be transferred. Moreover, Benboe testified he recommended Sindt and Douglas be terminated to Bachman during the same conversation. Yet, Bachman could not recall such a recommendation concerning Douglas from Benboe. The inconsistency in testimony between witnesses belies their contention that such a recommendation was made pertaining either Sindt or Douglas.

Bachman testified he had a meeting with Benboe after he provided Bachman with his year in review for Sindt for 2011. Bachman testified it was informal meeting. He testified he

talked to Benboe and the other foreman stating they would be terminating Douglas and Sindt and that Bachman did not want to do it at the end of the year when they gave them their review. Bachman testified he told the foremen to hold the reviews until the first of the year. Bachman testified he decided to terminate Sindt because he was unwilling to progress and get a certification, because of his abilities, and his performance. Bachman testified instances of poor performance that Bachman observed was Sindt's unwillingness, almost to the level of insubordination to do a particular job, and that he had a lackadaisical attitude. Bachman cited Sindt's constant complaints to the foremen about what job they placed him on. Bachman testified he witnessed this. Here again, Bachman's testimony was undercut by that of his foreman. Benboe testified he was not officially informed that Sindt would be terminated until January 2, 2012, when the employees returned from their Christmas break. Benboe did testify he asked Bachman for the return of Douglas and Sindt's appraisals prior to the Christmas break, but he was told Bachman wanted to return them after the break because he did not want to administer discipline prior to Christmas. Benboe did not name anyone else as being present for this conversation. Similarly, Shipp, who testified he was inconvenienced by Sindt's termination in that he was given no notice to find a replacement, testified he was not notified of Sindt's termination until January 2, when he was called in to be a witness for the termination meeting. Shipp testified he was not previously informed or consulted about the termination.

Bachman testified he did not think they had any supervisors in the mechanical area or truck shop at the end of the year. He testified Shipp worked there as a supervisor but they did not have consistent activity in the truck shop at that time. It was just on a daily basis when they were building trucks. Bachman testified Shipp was of the same opinion as Bachman that Sindt was extremely lacking in his true mechanical abilities which would be consisting of rebuilding engines and the type of work Sindt was doing was more of an entry-level mechanic. Bachman testified they did not have a need for an entry-level mechanic so there was no place to put Sindt. Contrary to Bachman's claims, I have credited Sindt that Shipp was upset and had a strong negative reaction to Sindt's abrupt termination. Shipp exclaimed to Benboe that Sindt was the only one who knew anything about bilevel cars. Sindt's testimony reveals that Shipp informed Sindt that he was a good worker, and Shipp did not know why Sindt was being terminated. While Shipp gave a different version of the events of January 2, 2012, then Sindt, for reasons previously stated, I have credited Sindt's testimony. Shipp, however, did admit stating that Shipp now he had to go find someone else to do the current bilevel truck work so Shipp was going to have to pull someone from another job. Shipp testified that he borrowed Jeff Maddy and Michael May to replace Sindt to finish the trucks and that he had to get them on the work next day on the project. Thus, despite Bachman's claims that Sindt had a skill deficiency; it took two employees to replace him.

While Sindt testified he had completed his work on the bilevel trucks in December, I have credited Shipp's testimony that there was more work to be done on the project in early January which specifically called for Sindt's knowledge and

skills. I have also credited Shipp that he had to transfer in two employees the next day to replace Sindt in the truck shop. I find Respondent's officials would have been aware of this when they terminated Sindt, as Shipp informed Benboe of the need for Sindt's skills during the termination interview. I also find any failure to investigate the ramifications of Sindt's termination leads to the conclusion it was done for his union activities rather than any contended work deficiencies. Thus, I find contrary to Bachman's testimony, that Respondent was in need of Sindt's services at the time it abruptly discharged him. Bachman's failure to consult Shipp about the affect of the discharge on its work flow in his haste to rush Sindt out the door, serves to confirm my conclusion that reasons advanced for the discharge were pretextual. The Board has long held that an inference of unlawful motivation is strengthened when an employer fails to consult with an employee's immediate supervisor before taking action against the employee. See *Williams Services, Inc.* 302 NLRB 492, 500 (1991); *Lancer Corp.*, 271 NLRB 1426, 1427 fn. 6 (1984), enfd. 759 F.2d 458 (5th Cir. 1985); *Industry General Corp.*, 225 NLRB 1230, 1233 (1976), enfd. 564 F.2d 99 (6th Cir. 1977); *Midwest Hanger Co.*, 193 NLRB 616, 627 (1971), enfd. in relevant part 474 F.2d 1155, 1159-1160 (8th Cir.), cert. denied 414 U.S. 823 (1973). At Respondent, employees were assigned to supervision on a project basis. Sindt had been working on the bilevel trucks prior to the Christmas break, and as Shipp testified, it was his understanding that Sindt was to be working on under him on those trucks at the start of the New Year.

In sum, leading union adherents Douglas and Sindt, who had each worked for Respondent for two years, were terminated on the same day, midday, just 3 months after the Union had established a visual presence at Respondent's facility. I have found that Respondent interrogated these employees, and solicited grievances at the facility to combat the union drive, among other things. The timing of the discharges suggests they were in response to the employees' union activities. Concerning Sindt, he had only recently started cross-training as a fabricator, and contrary to assertions that he was not motivated he had attempted to pass the welding test. In fact, he had passed part of the exam. There were eight or nine other employees in fabrication that did not pass the test during the same time period. There was no evidence that any of them were warned or disciplined. The testimony of Respondent's officials Bachman, Benboe, and Shipp was inconsistent between witnesses as to the decision to terminate Sindt, and as to what took place at the termination interview. Moreover, Shipp, to whom Sindt was assigned at the time of his termination, was not consulted about the discharge, and he testified he had to transfer in two employees the next day to replace Sindt. I find for these, and other reasons previously mentioned, the reasons advanced for the discharge of Sindt by Respondent were pretextual. Since I have found counsel for the Acting General Counsel has established a

prima facie case concerning the discharge, I find Sindt was discharged because of his union activities in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

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

2. International Brotherhood of Electrical Workers, Local Union No. 347 is a labor organization within the meaning of Section 2(5) of the Act.

3. By in October 2011 coercively interrogating employee Jerry Sindt about his union activities, Respondent has violated Section 8(a)(1) of the Act.

4. By in December 2011 coercively interrogating employee Mark Douglas about his union activities, Respondent has violated Section 8(a)(1) of the Act.

5. By in December 2011 instructing employees not to distribute union authorization cards on company time, Respondent has violated Section 8(a)(1) of the Act.

6. By in November or early December 2011 soliciting employee complaints and grievances, and impliedly promising to remedy those complaints and grievances in response to employee union activities, Respondent has violated Section 8(a)(1) of the Act.

7. By maintaining a solicitation and distribution policy requiring employees to seek authorization from management before employees engaged in any solicitation and distributions, Respondent has violated Section 8(a)(1) of the Act.

8. By discharging Mark Douglas and Jerry Sindt on January 2, 2012, because they engaged in union and other protected concerted activities and in order to discourage its employees participation and or membership in a labor organization, Respondent has violated Section 8(a)(1) and (3) of the Act.

9. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent having discriminatorily discharged employees Mark Douglas and Jerry Sindt must offer them reinstatement and make them whole for any loss of earnings and other benefits from January 2, 2012, the date of their discharge to the date of a proper offer of reinstatement, less any net interim earnings. Backpay shall be computed as prescribed in *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).

[Recommended Order omitted from publication.]