

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STAHL SPECIALTY COMPANY

and

Case 17-CA-088639

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL #1464
affiliated with the INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, AFL-CIO

COUNSEL FOR THE GENERAL COUNSEL'S
ANSWERING BRIEF TO RESPONDENT STAHL SPECIALTY
COMPANY'S EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE

Respectfully submitted by
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I. PREFACE

A hearing in this proceeding was held on January 15-18, and March 28, 2013, before Administrative Law Judge Christine Dibble, ALJ Dibble issued her decision on September 30, 2013 and issued an *Order Ratifying and Adopting Decision* on April 22, 2016. Based on the record, and her credibility resolutions, Judge Dibble correctly found that Respondent violated Sections 8(a)(3) and (1) of the Act by discharging employee Chris Armstrong and through several independent statements, writings and actions that restrained employees in the exercise of their Section 7 rights. Respondent now takes exceptions to the Judge's decision, based on both procedural and factual grounds. In fact, Respondent's exceptions appear to encompass nearly every fact, credibility determination, and legal conclusion made by the Judge. However, when viewed as a whole, the crux of Respondent's exceptions is a request that the Board reverse the very specific and well supported credibility resolutions made by the Judge. The Judge was present for the testimony of the witnesses and based on her observation of those witnesses made credibility findings adverse to Respondent. The Board has long been loath to overturn an administrative law judge's credibility resolutions.¹ A full review of the record in the instant case will fully support that the Judge's credibility findings were sound, as where her legal conclusions based on the credited testimony.²

II. RESPONDENT'S CHALLENGES TO THE AUTHORITY OF THE ACTING GENERAL COUNSEL AND THE ADMINISTRATIVE LAW JUDGE HAVE NO MERIT

1. The General Counsel's Ratification of the Underlying Complaint and its Prosecution Renders Moot any Concerns about the Former Acting General Counsel's Authority.

Respondent asserts (Br. 19-20) that the "Acting General Counsel lacked authority to issue the Complaint and authorize proceedings in this matter given the circumstances of his appointment and provisions of the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. §§ 3345 *et seq.*" Respondent's

¹ *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3rd Cir. 1951).

² All references to the transcript in this hearing will appear as the letter "T" followed by the number(s) of the page(s). General Counsel's exhibits will appear as "GC" followed by the number(s). Respondent's exhibits appear as "R" followed by the number(s). The Union's exhibits appear as "CP" followed by the number(s). References to the Administrative Law Judge's Decision appear as "JD" followed by the number(s) of the page(s).

challenge to the complaint and prosecution of the case based on the claimed improper post-nomination service of Acting General Counsel Lafe Solomon under the Federal Vacancy Reform Act of 1998, 5 U.S.C. §§ 3345 et seq., is without merit. First, the question of Acting General Counsel Solomon's authority under the FVRA remains in litigation. See *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir., Aug. 7, 2015), *rehearing denied*, Jan. 20, 2016, *petition for certiorari filed* April 6, 2016. It is the position of the United States that *SW General* was wrongly decided.

In any event, any challenge to Solomon's authority is moot because General Counsel Richard Griffin, who was appointed by the President and confirmed by the Senate in November 2013, ratified Solomon's actions in this case in a Notice of Ratification issued September 25, 2015. See *The Boeing Co*, 362 NLRB No. 195, slip op. at 1-2 n. 1 (ratification by General Counsel Griffin of complaint issued by Solomon "renders moot any argument that *S.W. General* precludes further litigation in this matter"), ptn for review filed (9th Cir. 15-72894). Citing Section 3348(e)(1) of the FVRA, which exempts the Board's General Counsel from the FVRA provisions that would otherwise preclude ratification of persons found to have served in violation of the FVRA, General Counsel Griffin stated that "[a]fter appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act." General Counsel Griffin's ratification is legally effective. See *Doolin Security Sav. Bank v. Office of Thrift Supervision*, 139 F. 3d 203, 214 (D.C. Cir 1988) (Court upheld cease-and-desist order issued by the validly-appointed Director of the Office of Thrift Supervision, which effectively ratified action of the "acting director" who initiated the case, even if acting director was, as the bank claimed, illegally appointed). Further, General Counsel Griffin's ratification of the issuance and continued prosecution of the complaint, based on his independent review of the case record, redressed any defect stemming from Acting General Counsel Solomon's assertedly invalid service under the FVRA. See *Braniff Airways, Inc. v. Civil Aeronautics Bd.*, 379 F.2d 453, 460 (D.C. Cir. 1967) (A strong presumption of

regularity supports the inference that when administrative officials purport to decide weighty issues within their domain they have conscientiously considered the issues. . . .”)

2. After her Reappointment and the Board’s Remand of this Case, the ALJ Fully Reviewed this Matter, Ratified her Decision, and her Decision Should Stand

Respondent proceeds to argue (Br. 20) that the Board and the ALJ’s actions in affirming the ALJ’s prior decision does not cure “fatal flaws” because the procedures lacked any substantive, meaningful review or reconsideration and did not present Respondent any opportunity to object or be heard. Those arguments are without merit. The actions by the Board and ALJ Dibble are in accord with similar actions taken by other agencies and approved by courts.

First, the properly-constituted Board ratified and expressly authorized ALJ Dibble’s selection. That ratification cured any defect in Dibble’s appointment. See *Advanced Disposal Servs. E., Inc. v. N.L.R.B.*, No. 15-2229, 2016 WL 1598607, at 6 (3d Cir. Apr. 21, 2016) (concluding that properly-constituted Board properly ratified selection of Regional Director originally appointed by the Board that included recess appointees). See also *FEC v. Legi-Tech*, 75 F.3d 704, 706 (D.C.Cir.1996) (Court held that reconstituted FEC could properly ratify prior decision made when it was unconstitutionally constituted); *Doolin Security Sav. Bank v. Office of Thrift Supervisions*, supra, 139 F.3d at 213-14; *Laurel Baye Healthcare of Lake Lanier, Inc. v. N.L.R.B.*, 564 F.3d 469, 476 (D.C. Cir. 2009) (in holding that two-member Board lacked required quorum, Court suggested that “a properly constituted Board . . . may also minimize the dislocations engendered by our decision by ratifying or otherwise reinstating . . . previous decisions”).

Thereafter, and in response to Respondent’s argument that ALJ Dibble had no authority to act, the Board remanded the case to ALJ Dibble to consider “anew the issues presented now that her appointment as been ratified by a fully confirmed five-member Board.” (April 15, 2016 Order). Dibble then “fully reviewed” her previous decision “in light of the alleged allegations and Respondent’s defenses,” and,

determined that her decision was “based on the entire record . . . remains correct and should stand on its entirety.” ALJD 2 p.2.

The Board’s remand to the ALJ and the ALJ’s full review of her prior decision also is in accord with the precedent cited above approving ratification as a remedy for decisions issued by improperly appointed government official or bodies. Indeed, *Advanced Disposal* and *Legi-Tech* demonstrate that the same official or body that made the original decision may properly ratify that prior decision. Thus the Third Circuit, in *Advanced Disposal*, upheld the ratification by a Board regional director of all of his actions from the time of his appointment by the recess Board through the properly-constituted Board’s explicit ratification of his appointment. *Advanced Disposal Servs. E., Inc. v. N.L.R.B.*, 2016 WL 1598607, at 8-9. Similarly, in *Legi-Tech*, the D.C. Circuit upheld a decision by a properly reconstituted FEC reaffirming a previous decision issued by an improperly constituted FEC that included non-voting, ex officio members, where the reconstituted FEC was composed of the same voting members as the improperly constituted FEC. *FEC v. Legi-Tech*, 75 F.3d at 708-09.

Here, the ALJ explained that she fully reviewed her prior decision pursuant to the Board’s remand and based on that review concluded that it remains correct. Respondent has not made any claim that undermines the “presumption of regularity,” under which it is presumed that public officials have properly discharged their official duties, absent “clear evidence to the contrary.” *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)); accord *Advanced Disposal Servs. E., Inc. v. N.L.R.B.*, 2016 WL 1598607, at *8. The Board made a reasonable judgment in this case that ALJ Dibble could make an appropriately detached review. See *Legi-Tech*, 75 F.3d at 708-09 (rejecting Legi-Tech’s demand that the FEC repeat the entire administrative process); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 126 (D.C. Cir. 2015) (upholding determination of reconstituted board that “each party had ample opportunity to present its case in initial

proceedings, and no party provided any specific reason why it was necessary to reopen the record and take further evidence”).

In these circumstances, the Board should reject Respondent’s challenge to the authority of the ALJ to hear and decide this case. While the ALJ did mistakenly include one 8(a)(1) violation in the ALJ’s Conclusions of Law and Order, Respondent’s assertions that the ALJ’s review and reaffirmation were a “sham” based solely on the fact that the ALJ has reaffirmed her previous decision is insufficient to demonstrate that the procedure the Board followed here was improper or inadequate.

III. FACTS SUPPORTING JUDGE DIBBLE’S DECISION

In its exceptions, Respondent’s Counsel excepts to nearly all of the Judge’s factual findings. The following facts, relied on the by Counsel for the General Counsel in support of her contentions, and relied on by the Judge in making her decision, paint a much different picture than that asserted by Respondent.

1. Chris Armstrong’s Union Activity

Chris Armstrong began employment with Respondent in October 1994, and worked in a variety of jobs. The last of his jobs with Respondent was a lead man in the Machining Department. (T. 122-123). There have been three union campaigns at Respondent’s facility in the last ten years. Armstrong was a leader in all of them. (T. 134, 244). During the first union campaign, in approximately 2001-2002, Armstrong invited the United Auto Workers to come and meet with him and other employees, joined the organizing committee, and attended every union meeting. (T. 134, 244). During the second union campaign in 2006, Armstrong helped solicit signatures on union authorization cards for the Teamsters, helped run meetings, and answered employees’ questions about the union. (T. 135, 244).

The third union campaign began on April 1, 2012,³ when Armstrong’s coworker, Michelle Little, contacted the International Brotherhood of Electrical Workers Local #1464 and hosted a number of meetings for employees with the IBEW representatives at her home. (T. 133-134, 245). Armstrong was at

³ All dates hereinafter occurred in 2012 unless otherwise noted.

the very first meeting at Little's house and regularly attended the weekly meetings thereafter at local restaurants, hotels, public parks, and the parking lot next door to Respondent. (T. 133, 194, 212, 245). Armstrong immediately took a leadership role in the union campaign by joining the employee organizing committee, soliciting authorization cards from other employees, frequently talking to employees about the union, and later openly handbilling for the union. (T. 133, 134, 194-195, 245-246, GC. 2a).

2. Respondent's Discovery of Union Activity

It did not take long for the Employer to become aware of the burgeoning union activity of its employees. On the morning of May 2, 2012, Maintenance Manager Jerry Helms and Foundry Manager Jim McBride reported to Plant Manager Krishnan Venkatesan that they had heard there was some union activity going on at the plant and that some employees were trying to organize. (T. 404, 689, 712). Venkatesan immediately called Respondent's President Spalding in Kingsville and passed on the information. (T. 689-690, 712). On the same morning that Venkatesan reported union activity in Warrensburg to President Spalding, Human Resources Manager Courtney Wilkins heard from another manager that there had been a union meeting or barbeque that employees had attended. Wilkins had the same reaction as Venkatesan: she immediately reported the information to President Spalding. (T. 391, 393, 395, 806, CP. 2). By 10:00 a.m. on May 2, the "very big news," as described by Human Resources Manager Courtney Wilkins, had spread all the way to the president of the company and all of Respondent's top managers and supervisors. (T. 806; CP. 2).

Spalding, Venkatesan, and Wilkins met and discussed the need to get better information about this union "meeting" or "barbeque." Specifically, Spalding assigned Wilkins the task of investigating the union's campaign and gathering "some data or statistics" that would really help them "paint a picture" for employees about the horrible impact unions have on business and jobs. (T. 693, 713; CP. 9, p. 4, CP. 10, p. 1).

Spalding did not waste any time trying to hunt down more information himself. Within hours of first receiving the “news” from Venkatesan and Wilkins, Spalding drove to the Warrensburg plant and went straight to the source of the information about the union campaign. (CP. 2). Venkatesan had reported that Foundry Manager McBride heard about the union barbeque from someone in the Maintenance Department. (T. 396, 397, 399, 404, 408). Based on this report, Spalding tracked down Maintenance Manager Jerry Helms while he was on the work room floor and told him, “I understand that one of your guys was invited to a meeting.” (T. 395-396, 409, 411). Helms told Spalding it was true. He gave Spalding the employee’s name. (T. 395-396, 409) Helms told Spalding that none of his guys in maintenance were interested in the union, but he was sure that there were people talking about organizing. (T. 409, 410).

That afternoon Wilkins and Spalding called a lawyer and Spalding began drafting an impassioned anti-union speech that he delivered to employees the following Tuesday, May 8, and again on July 25 and 26. (T. 136, 222, 248, 310, 419-422; GC. 5, pgs. 1-2). Spalding drove back to Warrensburg several times that week trying to find out anything he could about the union campaign. Spalding admitted that he asked McBride, “Are you hearing a lot of noise about unions? Are people talking about this?” (T. 425). McBride admitted that there were several people talking about it. (T. 423-425). Spalding also questioned Human Resources Administrator Jeanne Adams, who told him that an employee had also reported to her that some employees had met over the weekend about a union campaign. (T. 807, 808).

3. Respondent Threatened Employees with Plant Closure for Engaging in Union Activities

On Tuesday, May 8, Spalding made his first speech to employees regarding the union campaign. He told employees that it was no accident that all of the other aluminum foundries owned by Ligon Industries, Respondent’s owner, are non-union and that Ligon prefers to operate non-union companies. He said that Ligon has made expensive investments in the Warrensburg plant, that Ligon invests in plants that make a profit, and that unions make it harder to earn a profit. Spalding said this is why so many union plants close. Continuing on, Spalding threatened employees’ jobs by telling them that Ligon can invest its money

wherever it wants, that it's currently investing it in Warrensburg, and he does not want that to change. Finally, Spalding told employees to "just say no" if the union asks them to sign a card or attend a meeting and, "That will end it!" Spalding cautioned, "If it doesn't end it, I'll be back here talking to you again." (GC. 5, T. 136, 222-223, 248, 310).

4. Respondent Posted Literature Making Unlawful Threats of Permanent Job Loss

No more than 12 days after Respondent first discovered employees had attended a union barbeque, Respondent began flooding employees with a barrage of anti-union flyers, bulletins, news articles, and other literature, which it most often posted on the bulletin board in the employee break room, but which it also hung on signs in the facility or distributed to employees by hand. (T. 860-861; CP. 4, CP. 9, pgs. 9, 33, and CP. 10). Respondent's postings included one flyer that included an unlawful threat of permanent job loss for employees replaced during a strike. (CP. 4 and 10, pgs. 47-48). Other literature Respondent distributed included language such as, "Sick of Union Questions and Propaganda? So are we!...What time is it? Time to tell them to GO AWAY!...Would you sign a blank check and give it to a stranger?" (CP. 9, p. 33-34); "IF YOU HAVE SIGNED A CARD...Please be pro-active and request that your signed card be returned to you." (CP. 9, p. 50). Respondent also made up packets for the break room with letters that could be sent to the union asking for a signed card to be returned. (CP. 9, p. 49).

5. Respondent Unlawfully Engaged in Surveillance of Employees' Union Activities

The Respondent's anti-union campaign did not stop there. At the end of May the union began distributing handbills at the entrance to Respondent's employee parking lot. (T. 195, GC. 2 and 2a). Venkatesan testified that Spalding instructed him to keep an eye on the handbillers. (T. 740) Human Resources Administrator Jeanne Adams, also at Spalding's direction, began driving into the employee parking lot and parking for several minutes at a time with her car positioned to watch the handbillers. (T. 141-144, 198, 820, 835). Union Organizer Jerry Guilizia testified that he saw Adams do this 8-12 times from the beginning of May until just after the union filed Board charges in August. (T. 198-199). Employee

witness Michelle Little corroborated Gulizia's testimony. Little testified that she recognized Adams' white SUV from having seen it parked in the managers' parking lot. Little said she had never seen Adams in the employee parking lot other than these instances when the union was handbilling. (T. 141-144).

6. Results of Respondent's Initial Investigation

By the end of May, Respondent admits that management had learned the names of all the employees who had attended union meetings: Chris Armstrong, Michelle Little, Andrew Hoskins, Jared Hunsburger, and Darwin Todd, as well as names of a few other union supporters. (T. 435, 454, 549, 551, 714, 813). Spalding also suspected other employees in the Machining Department and two in the Foundry Department of attending meetings as well. (T. 437).

7. Respondent Threatened Employees with Plant Closure for Engaging in Union Activities and Interrogated Armstrong about his Union Activity

At the end of July, Spalding held a second mandatory employee meeting in the basement of the plant. (T. 246, 247). As supported by witness testimony and as admitted by Respondent, Spalding read the same speech he had given on May 8 at the July employee meeting, again warning employees to get rid of the union and foretelling that the plant could close or jobs would be eliminated through his statements that Ligon would not continue to invest in Warrensburg as it had in the past if the union succeeded. (T. 136, 222-223, 248, 310, 422, 818-819, GC. 5).

After the meeting, Machining Supervisor Ken Stewart called Armstrong into Stewart's office for a private conversation. (T. 248, 577-579). He asked Armstrong why no one spoke up or said anything at the meeting. (T. 248, 577-579). Armstrong said because they all know what everyone's problem is, that Spalding was just waiting for someone to speak up so he could argue with them, and that to speak up would be to "red flag" themselves. (T. 249, 577-579). Stewart asked if Armstrong wanted a union and if he had been in a union. (T. 249, 577-579, 607, 622). Armstrong told him he had been in a union before, that

his father had started two unions, and that he thought a union would be a good idea for Respondent's employees. (T. 249, 577-579, 607, 622).

8. Respondent Terminated Armstrong

a. Lead Man Duties

As the lead man in the Machining Department, Armstrong's duties were to set up all the machines, assign the operators their duties, deliver unmachined parts to the operators, remove finished/machined parts from the operators' machines, deliver empty containers to operators for refilling, ensure machined parts were ready for inspection, transport finished parts to the warehouse, fix machines, change tools on the machines, empty scrap metal into the chip reclaimer, and generally provide the operators any other necessary support. (T. 155, 156, 241, 242, 250, 251, 284, 286, 316, 331, 340, 347, R. 2). As a lead man Armstrong rarely, if ever, ran a machine himself. Armstrong's testimony on this fact was corroborated by all the operators on Armstrong's shift, as well as the lead man on the day shift. (T. 190, 331, 339, 370, 631, CP. 5, R. 2). If Armstrong did run a machine it was only during voluntary overtime on the weekends. (T. 190, 191). In the five months he was supervised by Ken Stewart, Armstrong only ran a machine once during the regular work week. (T. 267).

b. Supervisory Structure

During the last week of August 2012, Armstrong was working the C Shift, from 11 p.m. until 7 a.m. (T. 242). Armstrong's supervisor, Ken Stewart, worked days. (T. 242, 576-577). The only person with any supervisory authority on Armstrong's shift was Vince Stowell, the Foundry Manager. (T. 243, 269, 517). Armstrong sought Stowell's assistance if he had minor employee work performance issues he couldn't resolve, but he did not report to Stowell. (T. 243, 517). If Armstrong had any serious personnel problems he called Stewart at home. (T. 243, 269). For help with technical problems Armstrong called Manufacturing Engineer Richard "Richy" G. Moore, Jr., who worked the A Shift, from 7 a.m. until 3 p.m. If the technical

problem was something that did not need immediate attention, Armstrong waited until the next morning to talk to Moore. (T. 243, 269).

c. Armstrong Received His Orders from Stewart

As he routinely did on Sunday evenings before the start of the work week, at 9:38 p.m. on Sunday, August 26, Armstrong received a text message from Stewart with instructions for that night's shift. (T. 251-252, 584-587, 600-606, GC. 4 and 12). When Armstrong arrived at the plant at about 10:30 p.m., the Machining Department was in a state of disarray. (T. 249). Before he began setting things in order, Armstrong assessed the machines and determined that he would be able to carry out all of Stewart's orders except for one. Stewart's text had instructed Armstrong to assign operators to run the following five machines: Okuma 3, Okuma 4, Okuma 5, A77 and A81. He had told Armstrong to run Detroit Diesel parts on the Okumas and Volvo parts on the A77 and A81. Stewart's text further instructed Armstrong that he did not have to run Getrag parts on the Okumas 1 and 2. (T. 253-257, GC. 4, 7 and 12). Armstrong saw that the Okumas 3, 4, and 5 were ready to run Detroit Diesel parts and that the A77 was ready to run Volvo parts. The problem was the A81 machine. He could not run Volvo parts on the A81 because there were not enough Volvo parts for that machine. The parts are cast in the Foundry, tested in Heat Treat, and arrive in Armstrong's department to be machined. When Armstrong arrived at work, the Heat Treat Department had not delivered Volvo parts ready for machining on the A81. It was not Armstrong's responsibility to ensure he had adequate parts available. He was merely responsible for machining what came down to him from the Foundry. (T. 260-262).

d. It Was Impossible For Armstrong to Carry Out All of Stewart's Orders

The A81 machine is capable of running both Volvo parts and a part called the Mercury Cradle. Manufacturing Engineer Moore is the employee responsible for installing or changing the computer programs to tell the machines what part is going to be run and what function to perform on that part. (T. 175, 177, 262). When a particular part has not been run on a machine for as long as two weeks, Moore

often changes or tweaks the program for that part such that Armstrong cannot run that part until Moore communicates with him about the changes and what needs to be done. (T. 263) As of August 26, Mercury Cradles had not run on the A81 for a couple weeks. (T. 262). Armstrong did not receive the same training as Moore, and he could not ascertain from looking at the A81 if Moore had changed or tweaked the Mercury Cradles' program. If Moore had, Armstrong could not run Cradles on the A81. (T. 263, 264). It was Moore's practice to tell Armstrong when Moore had changed a program on a machine and when that machine was ready to run that part. Moore had not told Armstrong the A81 was ready to run the Mercury Cradles before or on August 26. (T. 263).

What's more, it had always been Supervisor Stewart's and Moore's practice to tell Armstrong which parts were a priority. Thus, if the Mercury Cradles had been a priority, Stewart or Moore would normally have told Armstrong. (T. 263). But neither Stewart nor Moore had told Armstrong the Mercury Cradles were a priority. (T. 263). In fact, Stewart's text had explicitly listed that Volvo and Detroit Diesel parts were a priority for the shift on August 26, not Mercury Cradles. (T. 263-264, GC. 4 and 12). For these reasons, Armstrong did not call Moore at home and wake him up to find out if the Mercury Cradles could be run on the A81. (T. 263). Instead, Armstrong assigned Randy Tucker, the employee who he had put on the A77, to run Getrag parts on the Okuma 2, which is situated near the A77 machine. (CP. 5). Armstrong testified that he did this because there were plenty of Getrag parts ready for machining, and that the Okuma 2 was ready to run Getrag parts. (T. 263, 347). Armstrong assigned Tucker to both the Okuma 2 and to the A77 because Respondent's policy is that any operator working on the A77 and A81 platform should be running more than one machine. (T. 271).

e. Armstrong Assigned Operators to Machines

In addition to Randy Tucker, the operators who were working that night in Machining were Mary Meade, Mike Ridge, and Jessica Timmons. (T. 258, 339-340, 346, 356, 371). Armstrong assigned Ridge to run the air check machine because Ridge had only worked for the Respondent a few weeks and didn't

know how to run any of the other machines. (T. 260, 270-271, 276, 355, 357). Armstrong assigned Meade and Timmons to the Okumas 3, 4 and 5, running Detroit Diesel parts. (T. 270-271, 340, 341). With that, and based on his past practice, Armstrong believed he had carried out Stewart's instructions as closely as possible, because any machine that was not being run was either not operational, had no parts available, or had not received Moore's authorization. (T. 275).

f. Armstrong's Work Performance on August 26-27

After Armstrong started warming up the machines and gave Tucker, Meade, Ridge, and Timmons their assignments, he got to work cleaning up the disarray left by the previous shift. He checked to make sure there were enough parts to get all the machines through the night. (T. 265). He then used the fork lift to clear the parts that had been left strewn around the Okuma 3 machine, and picked up baskets full of machined parts and drove them to the area where they would be inspected. (T. 265). After parts had been inspected, he transported them out to the warehouse. Throughout his shift, he continuously brought operators empty baskets to be refilled and new parts to be machined. (T. 265-268, 341, 343, 348, 353, 361, 371). During his shift, Armstrong was also called on to fix air tools; check machine oil levels; and sweep floors. (T. 265, 371). Throughout his shift, he answered operators' questions about their machines, including adjusting the scribe on Jessica Timmons' machine several times. (T. 283, 341, 357). During the shift, Armstrong also checked the Hubbel handles and reworked and manually buffed them. (T. 274, 348, 352).

g. Armstrong Received Venkatesan's Order From Stowell

Shortly after the shift started, around 11:10 p.m., Foundry Supervisor Vince Stowell walked into the Machining Department and told Armstrong that Venkatesan had been in an hour before and had said he wanted Armstrong to take one person off the Detroit platform (Okumas 3, 4 and 5), and put him or her on the Volvo platform (A77 and A81), and he wanted Armstrong to run a machine. (T. 269-270, 519-520). This was the first time Stowell had ever relayed a message from Venkatesan to Armstrong, and the first time

Armstrong had received an order from the plant manager at all. (T. 305-306, 518, 753). Armstrong was confused because Venkatesan's instructions directly conflicted with Stewart's. (T. 257-258, 276, 374). Stewart had told Armstrong to put two operators on Detroit Diesel parts (the Okumas 3, 4 and 5) and one operator on the Volvos (the A77 and A81). (T. 257). Armstrong knew that he had to have one operator run the air check machine because the air check machine runs continuously on every shift. (T. 276-277). Stewart had not told Armstrong to run a machine. (T. 258; GC. 4 and 12).

Venkatesan's order, on the other hand, was to put one operator on Detroit and two operators on Volvo. To comply with Venkatesan's instruction Armstrong could not also comply with Stewart's. To comply with Venkatesan's order, Armstrong would have to move either Timmons or Meade off the Okumas and over to the Volvo platform with Tucker. However, as explained above, there were only two machines on the Volvo platform that Armstrong was certain could be run – the A77 and Okuma 2 – and Tucker was already on them. Venkatesan's instruction, unlike Stewart's, was for Armstrong to also run a machine. But there was no machine for Armstrong to run. Every machine that was operational was already running. Based on Venkatesan's and Stewart's instructions, it was clear to Armstrong that neither one was aware that the A81 was out of Volvo parts. (T. 277). If Armstrong took over one of Meade's, Timmons' or Tucker's machines, he would run afoul of Respondent's rule that every operator should always be running at least two machines. (T. 271). Moreover, even if there had been a machine for Armstrong to run, he had so much work to do cleaning up the department and supporting the other operators that it would not have been possible for him to run a machine and still complete his regular, mandatory lead duties. Finally, the operators could not have performed their duties if Armstrong did not perform his supporting lead man duties, such as bringing them new parts, emptying their crates and fixing their machines. (T. 258, 265, 283, 343, 348, 352, 357).

Because of these concerns, Armstrong told Stowell that he wasn't going to have time to run a machine. (T. 270, 35-360, 520). Armstrong testified, and Stowell admits, that after relaying Venkatesan's instruction,

Stowell didn't see Armstrong again until after 3 a.m. (T. 277, 523). As such, it is perplexing that at 12:23 a.m., less than an hour and a half after delivering Venkatesan's message, Stowell sent Venkatesan the following email:

Krishnan,

I talked with Chris Armstrong and told him what to run tonight and instructed him to run a machine as well, per our conversation. At this writing none of this has been done.

I shall start the write up and await for further instructions. [sic] (T. 528, CP. 8).

Stowell did not follow up with Armstrong prior to sending the email. (T. 277, 527). In fact, he saw him only once, when he delivered Venkatesan's message ten minutes into the shift. The second and last time Stowell saw Armstrong was after 3:00 that morning, when Armstrong was buffing Hubbel handles. Stowell did not attempt to speak to Armstrong at that time. (T. 277, 526-527).

After Armstrong got Venkatesan's message from Stowell at around 11:10 p.m., he called Stewart for clarification. Stewart did not answer the phone. (T. 277, 591, CP. 8, p. 2). Armstrong testified and Stewart admits that Armstrong left him a voicemail explaining the situation with the A81 (that it was out of Volvo parts and not clearly readied for Mercury Cradles) and asking him for guidance. (T. 277, 591; CP. 8, p. 2). After leaving the message, Armstrong continued cleaning up and attending to the operators. (T. 265). After he got caught up on most of his regular duties, Armstrong went to the SH1 machine to try to run the Hubbel handles. (T. 272). Before he could run the machine, Armstrong saw that there were about 400 Hubbel handles sitting in crates around the SH1 machine. (T. 273, 611). They were all in various stages of processing. Some had arrived from the Heat Treat Department and needed to be manually buffed down before they could be sent back to the Heat Treat Department to be wheel abraded. (T. 274, 610). Some had been buffed, wheel abraded, and were ready to be machined. Some had been buffed, wheel abraded, machined and were ready for inspection before shipping. (T. 273-274, 610-614). Armstrong sat down and reworked and rebuffed many of the parts because he could see that many of them had imperfections or

had not been buffed properly the first time. (T. 274, 281-282, 614). Before his shift ended he saw Stowell cross through Machining two or three times. They never spoke. No one ever told Armstrong that night that Stowell was looking for him. Armstrong heard Timmons page him over the intercom when her machine broke, but he was never paged by Stowell. (T. 277-278).

h. Armstrong Talked to Moore

As he typically did at the end of his shift, Armstrong crossed paths with Manufacturing Engineer Moore and updated him on the status of the machines. (T. 278). He told him about the problem with the scribe on Timmons' machine and that he had difficulty adjusting it. Moore showed him how to do it. (T. 278-279). He also told Moore that he had rebuffed Hubble parts. He showed him those he had reworked, those with flaws that he had scrapped, and those that were sitting in the box finished, but that needed to be scrapped. Armstrong testified that he didn't want the day shift to continue processing the flawed parts and that the flaws could not necessarily be detected without close inspection. (T. 279, 281-282). Armstrong did not see Stewart before he left work, which was not unusual because Armstrong frequently left before Stewart arrived. (T. 282, 592, 615).

i. Armstrong's Suspension

On Monday night, August 27, when Armstrong arrived at work, Stewart was still at the facility. (T. 282). Armstrong had not heard anything from Stewart since his text with instructions for the shift on Sunday night. Stewart called Armstrong into his office and told him Venkatesan was mad because Armstrong hadn't done what he'd told him to do. (T. 282-283). Armstrong told Stewart he had tried calling him to find out what to do because Stewart had told him to do one thing and Venkatesan had told him to do another, and because it wasn't possible to run the A81 because it was out of Volvo parts. He also told Stewart he had been so busy cleaning up from the previous shift, adjusting Timmons' machine, reworking handles, emptying scrap metal in the chip reclaimer, and performing all of his other regular duties, and he just didn't know what else to do. (T. 283, 284). Stewart responded, "When the Plant manager tells you to do something, you do it." (T.

284). During their meeting, Stewart further informed Armstrong that Stowell had sent him and Venkatesan an email saying he'd come looking for Armstrong and couldn't find him. (T. 284). Armstrong told Stewart that he had been in either the Machining Department or near the chip reclaimer all night long. He asked Stewart why Stowell didn't ask any of the operators where he was, because they would have known. He told Stewart that Stowell never paged him and that he had seen Stowell walk through Machining several times, and that Stowell had never attempted to speak to him. (T. 285). Stewart told Armstrong he was suspended and that someone would contact him the next day. (T. 285-286).

On Tuesday morning, August 28, Armstrong called Venkatesan from home. (T. 286, 652-6533; CP. 8). Armstrong tried to explain to Venkatesan what he had been doing during his shift Sunday night and why he didn't put an operator on the A81 or run a machine himself. He said he had to perform his lead duties or he knew he'd be in trouble. Armstrong said he had tried to do the best he could with the Hubble handles since there wasn't any machine that he could run. Armstrong also told Venkatesan that he did not understand why Stowell couldn't find him because he was in Machining or at the chip reclaimer all night long. Armstrong pointed out, as he had to Stewart, that Stowell hadn't asked any of the other operators where Armstrong was and hadn't paged Armstrong either. (T. 286). Venkatesan told Armstrong he had checked on Armstrong's work and Armstrong didn't do any of the things he said he had done. (T. 287, 652-653).

That afternoon, Armstrong sent a text to Stewart and asked him if he was supposed to come into work that night. Stewart sent a text back saying not to come in, that he was still suspended, and someone would contact him Wednesday. (T. 287; GC. 12). When no one contacted him on Wednesday, Armstrong again sent a text to Stewart asking if he should come to work Wednesday night. Stewart's response was the same that he was still suspended and someone would contact him. (T. 288; GC. 12).

On Thursday morning Armstrong finally got a call from Human Resources Manager Courtney Wilkins. She asked him to come into the plant on Friday morning. (T. 288, 794). When Armstrong arrived, Venkatesan called Armstrong into his office. Wilkins was also present. (T. 288, 655-656, 794-795; R. 5;

CP. 7). Armstrong again tried to explain himself and why he did what he did on the Sunday night/Monday morning shift. He said that he didn't believe Stowell had been looking for him because they had seen each other and Stowell did not say anything to him; and Stowell never asked anyone where Armstrong was or had Armstrong paged. (T. 289). Venkatesan did all the speaking for Respondent. He told Armstrong they were not there to discuss the matter and then handed him a termination letter. (T. 655, 796; R. 5; CP. 7). The letter explained that Armstrong was terminated for gross negligence of his assigned duties and for making false reports of his activities. (GC. 6). Armstrong left the office, got his things from his drawer, and left the plant. (T. 290).

III. LEGAL ANALYSIS SUPPORTING JUDGE DIBBLE'S DECISION

A. The Administrative Law Judge correctly found that Respondent Unlawfully Terminated Chris Armstrong

The Judge applied the correct legal standards to determine whether an employee's termination violates Section 8(a)(3) of the Act, the Board utilizing the analytical framework articulated in *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). As analyzed by the Judge, under this framework, the General Counsel must present sufficient evidence to support an inference that protected conduct was a motivating factor the Employer's decision to terminate its employee. To establish that protected conduct was a motivating factor, the General Counsel must demonstrate the following: (1) the employee engaged in protected activity; (2) the employer knew about the employee's protected activity; (3) the employee suffered an adverse employment action; and (4) a nexus exists between the employee's protected activity and the adverse employment action. See e.g. *American Gardens Management Company*, 338 NLRB No. 76, slip op. at 2 (2002). (JD 17).

If the General Counsel establishes that an employee's protected conduct was a motivating factor in the employer's decision, the employer must establish that the same action would have taken place even in the absence of the employee's protected conduct. See *Wright Line*, 251 NLRB at 1089.

1. Armstrong Engaged in Union Activity

Despite the Respondent's contentions in its exceptions, the Judge correctly found that Armstrong's "acts were the epitome of union activity." (JD 17-18). Armstrong, Little, and Gulizia all testified that Armstrong openly and publicly supported the union, and Respondent put on no evidence to the contrary. (T. 133, 134, 194-195, 212, 245-246, GC. 2a). Armstrong was at the very first union meetings with the union representatives at Little's house and regularly attended the subsequent weekly meetings. He was on the employee organizing committee. He talked to employees about the union and solicited employees' signatures on union authorization cards. (T. 133, 134, 194-195, 245-246, GC. 2a).

2. Respondent Had Knowledge of Armstrong's Union Activity

Additionally, the Judge's finding that Respondent had full knowledge of Armstrong's Union activities is well supported. (JD 18). In fact, the evidence establishing Respondent had knowledge of Armstrong's union activities is incontrovertible. John McBride, an admitted supervisor and agent of Respondent, testified that Armstrong was one of the "original" five employees who McBride learned supported the union and that he knew prior to May 4 that Armstrong had attended union meetings.⁴ (T. 77, 548-550). McBride also testified that he heard Armstrong talking about the union and union meetings at work with other employees. (T. 553-554). McBride admitted that he communicated this information to Venkatesan. (T. 550). Further, while not specifically cited for evidence of Respondent's knowledge of Armstrong's Union activities by the Judge, Armstrong credibly testified that he told Ken Stewart at the meeting in Stewart's office on July 26 that he had been in a union before, that his father had started two unions, and that he thought a union was a good idea. (T. 249).

a. McBride's Credibility

⁴ McBride testified that he knew about Armstrong's (and four other employees') union activity prior to the first supervisors' meeting at which Respondent's attorney, Mark Flaherty, was present. (T. 557-559). This meeting was on Friday, May 4. (T. 427-428, 703, 809)

As the Judge found, McBride's knowledge of Armstrong's union activity on its own establishes Respondent's knowledge. (JD 18). As a statutory supervisor and agent of Respondent his knowledge may be imputed to Respondent. (T.77, 550). See *State Plaza, Inc.*, 347 NLRB 755, 756-757 (2006); *Dobbs International Services*, 335 NLRB 972, 973 (2001). It is not necessary to prove McBride told any other managers what he knew about Armstrong's union activity in order to establish Respondent's knowledge. Nonetheless, McBride testified that he did in fact tell other managers. McBride specifically testified twice that before the start of the summer he had a conversation with Venkatesan about the people who were involved with the union and that he told Venkatesan Armstrong was one of these people. (T. 550). See *Volair Contractors, Inc.*, 341 NLRB 673, 676 fn. 17 (2004) (where the Board held failure to retaliate against all union supporters does not preclude the finding of unlawful motivation as to the discharge of another). Just after McBride admitted to this conversation, a second time, he suddenly and without explanation renounced his previous testimony that he had told Venkatesan about all of the employees' names he knew to be involved in the union and claimed instead that he only identified Michelle Little's name. The Judge found that McBride's subsequent denial of his earlier testimony was not credible. (JD 18). The Judge's refusal to credit McBride's subsequent denials is fully supported by the record. First, it is highly improbable that McBride would have reported to Venkatesan that he knew employees had gone to union meetings, but would have only told him the name of one of those employees. Second, both times McBride admitted that he told Venkatesan about Armstrong's union activities McBride's recollection was stronger and his testimony more complete than when he testified that he only told Venkatesan about Michelle Little. McBride initially recounted details of his conversation with Venkatesan. He said they spoke in Venkatesan's office, that no one else was there but the two of them, and that it was just before summer. (T. 555). He recalled specifically, "I told Krishnan that I'd heard *people* talking about the union and that *they'd* been having some kind of a meeting." [*italics added*] (T. 555). It was only after Charging Party's counsel asked McBride one last time to confirm that he told Venkatesan the names of all of the five employees that

McBride had earlier named as known union supporters that McBride abruptly changed course. He did not deny that he told Venkatesan he had heard “people” talking about the union, just that he had told Venkatesan any other name than Michelle Little’s. (T. 555-556). Charging Party’s counsel noted, “Okay, I thought earlier you said you had talked to him about these employees...after you listed the names, I asked you if you’d told Krishnan about it. I thought I understood you to say that you had told him about these folks that you had just named.” (T. 556). McBride responded only, and without explanation, “[Y]ou understood that wrong.” (T. 556). When Charging Party’s Counsel asked McBride what Venkatesan’s response was when McBride told him that employees had attended a union meeting and that Little was one of them, McBride said, “He just nodded at me and smiled,” an unusual and unbelievable response from someone who had been told by his superior, President Spalding, to gather information about the union campaign. (T. 408, 554-556, 692-693. 704, 713). If Venkatesan had truly responded the way McBride represented, Venkatesan would have been acting contrary to Spalding’s orders, and contrary to Venkatesan’s own testimony that the campaign was an urgent matter that he personally worked to defeat. (T. 744).

b. Stewart’s Interrogation

While not specifically referenced by Judge Dibble to support knowledge, Respondent also had knowledge of Armstrong’s Union activities through Ken Stewart. As found by the Judge, during their July 26th conversation in Stewart’s office Armstrong told Stewart in response to Stewart’s unlawful interrogation that he supported the Union. (JD 27-28). Stewart denied having ever had this conversation with Armstrong. He maintained that he never spoke to Armstrong about the union at all. (T. 577-579, 607, 622). The Judge correctly credited Armstrong’s testimony and found that there was a conversation between Stewart and Armstrong and that it amounted to an interrogation. (JD 27-28). The Judge’s finding is fully supported by the preponderance of the record evidence.

Stewart was fully discredited as a witness by the documentary evidence. (GC. 4 and 12). Stewart testified repeatedly and emphatically that he sent Armstrong a message telling him explicitly to run a

machine. He insisted that there were texts not included in General Counsel's Exhibit 4 that he sent later in the evening in which he told Armstrong, "run a machine." General Counsel's Exhibit 12 shows otherwise. It illustrates that Stewart's messages to Armstrong were just as Armstrong testified, and that Stewart never told Armstrong to run a machine. (T. 251, 258, 601, 604; GC. 4 and 12). Stewart's testimony was also frequently incoherent and conflicted with the evidence on points other than just his imaginary texts to Armstrong. (T. 628, 630). Stewart said that upon investigation he found a suspension on Armstrong's record, which Armstrong and all of Respondent's other witnesses said does not exist. (T. 628, 764-765, 791, 796, 822).

Finally, Stewart's testimony concerning the July 26th conversation in Stewart's office stands in stark contrast to Armstrong's. Armstrong recalled specific details about their meeting: where it occurred, where Armstrong was when Stewart approached him, who was present during the meeting, and what was said by whom during their conversation. Stewart, on the other hand, reeled off a string of curt, one-word denials. On further questioning Stewart changed his testimony, claiming he could not recall if he had met with Armstrong in his office or whether Armstrong had told Stewart that Armstrong's father had started a union. (T. 577, 607, 622). When asked if Armstrong told him no one spoke up in the employee meeting because they didn't want to be red-flagged, Stewart said, "Not that I know of." (T. 578). In conclusion, Stewart's testimony concerning knowledge of Armstrong's union activity, which consisted solely of general denials and failures to recall were properly ignored by the Judge in the face of Armstrong's specific and complete recollection.

3. Respondent Exhibited Union Animus

Unlike Respondent's contentions to the Judge, the witness testimony and documentary evidence firmly establish and vividly illustrate Respondent's strong animus toward the union. From the moment it learned there was a union campaign underway, Respondent sprung into action to defeat it, and worked zealously to discourage employee support of the union ever since. While an employer is free to dislike unions and to

communicate this view to employees, the immediacy of an employer's opposition to a union campaign shows animus, which may be considered when ascertaining the true motive for a discharge. See *Photo Drive Up*, 267 NLRB 329, 359 and fn. 189 (1983). Once John McBride and Jerry Helms reported to Venkatesan on the morning of May 2 that there were "rumors" of union activity in the plant, it took just a few hours for the news to spread to every one of Respondent's top managers, including the president, Jim Spalding. (T. 393, 404, 689, 690, 712, 806; CP 2). By late morning to early afternoon Spalding, Wilkins and Venkatesan had convened, formed a plan, and begun questioning its front line supervisors about employees' involvement with the union. (T. 395-397, 399, 404, 407, 409, 411, 413-414, 693, 696, 704, 713). By late afternoon Spalding had spoken with an attorney and had begun drafting a speech which unlawfully threatened employees with closure of the facility or job loss should they support the union. Spalding finished by warning employees to "just say no" to the union or he would drag them back in for another speech. (T. 413-414, 420-421, 422, 430, GC. 5). Respondent's investigation and anti-union campaign was in full swing before the end of the first day. By the end of the week Spalding had notified his boss about the union, all supervisors and managers had met with Respondent's attorney regarding how to respond to a union campaign, and Spalding continued to make the 20-minute drive to Warrensburg to question his managers about if or what they had heard people saying about the union. (T. 415-419, 425-426, 703, 809).

The evidence supports that Respondent responded not just swiftly, but with vehemence. Emails exchanged between managers and supervisors demonstrate Respondent's desperation to defeat the union campaign and the daily, relentless efforts it undertook to succeed in that endeavor. (CP. 9). Many of Human Resources Manager Wilkins' emails to supervisors include the anti-union "Topic of the Day" and encourage them to "keep up the fight!" (CP. 9, p. 70). The correspondence is primarily between Wilkins, Human Resources Administrator Jeanne Adams, Spalding, and Venkatesan but sometimes includes other supervisors and managers as well. It shows Respondent carefully monitored the union's activities and the

employees' union activities that have occurred at work *and away* from work (CP 9, pgs. 27-32, 42, 74, 78, 82, 88, 100-103, 105-106, 115, 116, 124-126, 135, 144-146, 147-148); distributed to employees individually and by postings in the employee break room and elsewhere in the plant anti-union bulletins, pamphlets, signs, news articles, and other data alleging that unions have a negative impact on business and jobs (T. 860; CP 9 pgs. 4, 33-34, 47-48, 56, 67-69, 70-72, 95-96, 98-99, 113-114, 122-123, 127-128, 131-132, 140-141, 150-151; CP 10, pgs. 1, 22); threatened employees that if a union is voted in, Respondent is more likely to shut down (CP 9, pgs. 59, 68); warned employees that if the union is voted in employees may pay more for health insurance and may have their wages cut or frozen (CP 9., pgs. 113-114); encouraged employees to withdraw their union authorization cards and distributed ready-made letters addressed to the union asking that authorization cards be returned, together with envelopes addressed to the union (CP 9, pgs. 43-44, 49-50); regularly talked to employees about why a union is bad for them (CP 9, pgs. 70, 78); and encouraged its managers to talk to employees about the union, even at the risk of violating the law (CP 9, p. 51, 70).

Charging Party's Exhibit 10 contains 66 pages of anti-union literature that was distributed to employees, including news articles about the failure of union companies. Wilkins testified that Respondent posted at least some and possibly most of these documents on the bulletin board in the employees' break room. (T. 860-862).

Finally, as was found by the Judge, Respondent demonstrated union animus by its repeated violations of Section 8(a)(1) as more fully analyzed below, which included unlawful threats, interrogations and surveillance of employees' union activities. See *St. George Warehouse*, 349 NLRB 870, 878 (2007) and *Wallace International de Puerto Rico*, 324 NLRB 1046, n. 1 (1997). As outlined in the fact section, Spalding unlawfully threatened plant closure or job loss in retaliation for employees choosing the union in the speech he delivered to employees at the end of July (either July 25 or 26), which witnesses testified, Respondent admitted, and which the script of the meeting shows, mirrored the speech Spalding gave on

May 8. (T. 136, 222, 248, 310, 818-819; GC. 5, CP. 9, p. 9). Immediately following the meeting at the end of July, Maintenance Supervisor Ken Stewart cornered Armstrong in Stewart's office and unlawfully interrogated Armstrong about his support for the union. (T. 246, 248, 249, 577-579, 607, 622). On approximately 8-12 different occasions from the end of May through early August Human Resources Administrator Jeanne Adams parked in the employee parking lot and unlawfully surveilled employees taking handbills from the union as they entered or exited the parking lot and forwarded information she gathered on to Spalding, Wilkins and Venkatesan. (T. 141-144, 195, 198, 740, 820, 835; GC. 2, GC. 2a; CP. 9, pgs. 82, 88-91, 107, 116, 118, 135-139). Adams only ceased her surveillance right after the union filed Board charges against Respondent. (T. 199). Lastly, amongst the onslaught of anti-union bulletins Respondent posted on the employee break room bulletin board was a bulletin that unlawfully misleads and threatens employees that striking employees permanently lose their jobs. (T. 474, 780; CP. 4; CP. 9, pgs. 47-48; CP. 10, p. 16).

4. Respondent Was Motivated to Discharge Armstrong Because of His Union Activity

As found by the Judge, Respondent was motivated to discharge Armstrong because of his union activity. Respondent did no investigation prior to making the decision to terminate Armstrong and it did not follow its progressive disciplinary policy as laid out in detail in its employee handbook. Based on the this failure to investigate and follow its disciplinary system as outlined below, and the animus exhibited by the Respondent, the Judge was well founded in determining that Respondent was going to terminate Armstrong regardless of what actually occurred on the night and early morning of August 26 and 27, and regardless of Armstrong's prior disciplinary record. (JD 19-24).

c. Respondent Failed to Adequately Investigate

(i) Respondent Did Not Interview Any Witnesses

Animus and discriminatory motivation may be inferred when an employer fails to adequately investigate alleged misconduct. See *Washington Nursing Home*, 321 NLRB 366, 375 (1996) citing *Adco Electric*, 307

NLRB 1113, 1128 (1990), enfd. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *Asociacion Hospital del Maestro*, 291 NLRB 198, 204 (1988); and *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988). At the time Respondent terminated Armstrong, there was no dispute that Armstrong did not run a machine during his shift. However, there was a question as to what work Armstrong *did* perform on his last shift. Armstrong testified that he was extremely busy the entire night carrying out his regular lead man duties. (T. 249, 260, 265-268, 270-271, 274, 276, 283). Respondent contends that Armstrong did none of this work and said that it therefore terminated him for “gross negligence of assigned duties” and for “making false reports” of his activities. (T. 287; GC. 6).

There were four eye witnesses to Armstrong’s activities who worked with Armstrong in the Machining department during the entire shift, who were obviously in the best position to have observed Armstrong, and who testified and have confirmed Armstrong’s account of that evening, and who would have confirmed for Respondent Armstrong’s account of his work activities had they been asked. (T. 339-343, 346, 348, 353, 355-357, 361, 371). Yet Respondent interviewed not one of them prior to terminating Armstrong. (T. 342, 351, 357-358, 372, 626-627). Ken Stewart admitted that when he came into work Monday morning he saw Mary Meade, Randy Tucker, Mike Ridge and Jessica Timmons, but that he did not talk to any of them. (T. 615). Thus, Stewart did not learn from Timmons, for instance, that the scribe had broken on her machine and that Armstrong had spent a significant amount of the shift adjusting it. (T. 625). Neither did Plant Manager Krishnan Venkatesan talk to any of the employee witnesses during the morning after he arrived at the plant, and he never attempted to interview them at any time after that. (T. 659, 665-666, 675, 709). Venkatesan admitted that when he arrived at the facility on the morning of August 27, he didn’t even look for Armstrong to see if he was still at the facility and could explain himself. (T. 709). An employer’s limited investigation of alleged misconduct and a cursory decision to discharge an employee supports a conclusion that the discharge was discriminatorily motivated and not based on a reasonable belief of

misconduct. See *Alstyle Apparel*, 351 NLRB 1287 (2007) and *Midnight Rose Hotel*, 343 NLRB 1003, 1005 (2004).

There is a fifth witness to Armstrong's activities who Respondent could have interviewed but did not: Manufacturing Engineer Richard "Richy" G. Moore, Jr. (T. 633). Moore was intimately familiar with Armstrong's job. They communicated regularly about technical problems and various other day-to-day issues in the machining department. Armstrong frequently called Moore at home with questions during the night shift. (T. 304). That Monday morning, August 27, before Armstrong went home and just as Moore was coming on the shift, Armstrong gave Moore a rundown of everything Armstrong had done the last eight hours, including what machines had problems, which ones he had tried to fix, and what parts he had reworked. This morning briefing was their regular practice. (T. 278-279, 281-282). Although Moore was not physically present during Armstrong's shift to see what Armstrong was doing, Moore saw the proof of Armstrong's work. He got a detailed account of Armstrong's activities from Armstrong, before Armstrong knew that he was being accused of anything. An employer's investigation is evidence of discriminatory motive when it fails to interview key witnesses like Moore. See *American Crane Corp.*, 326 NLRB 1401, 1417 (1998). Respondent fully testified concerning its investigation into Armstrong's wrongdoing, including who it spoke with, and Moore was not interviewed by Respondent. The Charging Party and Counsel for the Acting General Counsel issued subpoenas ad testificandum to compel Moore's testimony, but he did not appear to testify. The Judge accorded appropriate significance to Respondent's failure to speak to Moore and his failure to appear despite being subpoenaed to testify. (JD 20-21).

(ii) Respondent Did Not Check Armstrong's Work

The Judge correctly denied Respondent's claims that Armstrong did not complete any of the tasks he said he did on August 26-27, particularly where Respondent never actually thoroughly inspected Armstrong's work. (JD 19-22). The facts surrounding Respondent's investigation fully support the Judge's conclusion. Venkatesan testified that sometime before 8:45 Monday morning he went to the Machining

department and looked only at the A77 and A81 machines, ignoring all seven other machines. (T. 666-668). He saw that there were full chip baskets behind the A77 and A81 and assumed that meant Armstrong had not emptied them during the night shift. Venkatesan admitted during his testimony though that it only takes a few hours for an operator to fill the chip baskets and that it is possible they could have been filled, emptied by Armstrong during the night shift, and then filled again. (T. 668-669). In fact, depending on how close to 8:45 it was when Venkatesan looked at the chip baskets next to the A77 and A81 machines, it is likely that what he saw was not even representative of the night shift's work at all. He could have been looking at the product of the day shift's work since they had been working for close to two hours by that point.

Venkatesan also made uninformed and unsubstantiated assumptions about what work it was possible for Armstrong to have completed. He testified that when he was at the plant at 8:00 p.m. Sunday night he saw "some Volvo parts" in the machining department that could have been run on either the A77 or A81. (T. 669). However, Venkatesan could not remember how many Volvo parts there were, and he admitted that he is familiar with the operation of the A77 and A81 only "to an extent." (T. 669). Respondent did not establish that Venkatesan has the expertise to distinguish between which parts could be run on which of the two machines. In that vein, while Venkatesan said he observed that both the A77 and A81 were set up to run Volvo parts, he acknowledged that he does not know how to switch the program on the A81 to run Mercury Cradles and that he does not know if Armstrong has been trained on how to switch programs either. (T. 669-671). In short, Venkatesan did not *really* know whether there were enough Volvo parts for the A81, if the Volvo parts he saw could be run on the A81 or only on the A77, or whether Armstrong knew how to switch the A81 to run Mercury cradles should there not be enough Volvo parts. Armstrong could have clarified all of this for Venkatesan, but Venkatesan did not bother even looking for him. (T. 709).

Similarly, Venkatesan assumed that the Okuma 1 operational during Armstrong's shift because they were operating the previous Friday the 24th and on the day shift on Monday the 27th. (T. 673-674).

However, the difference between Armstrong's Sunday night C shift and the Friday and Monday day shifts is that Richy Moore, the authority on the operation and programming of the machines, was on duty on those day shifts. If there were problems with any of the machines during those other shifts Moore was there to fix them, change their programs so they could run other parts, or do whatever needed to be done. Venkatesan did not take this into consideration. A reasonable and good-faith investigation would have uncovered these facts. See *Alstyle Apparel* at 1301.

Ken Stewart testified that when he got to the plant at 6:30 Monday morning he immediately talked to Armstrong, checked Armstrong's work, and could see Armstrong had not done what he said he did. (T. 591). On the contrary, as described more fully below, the record reveals that Stewart gave Armstrong's work only the most cursory check, if any at all, and that he never spoke to or even actually saw Armstrong. As discussed previously, Stewart is an unreliable witness whose testimony is wholly inconsistent with the record in a number of ways. Here too, Stewart's testimony is rife with inconsistencies and contradictions and the Judge correctly found this was so. (JD 21-22).

Stewart said he walked around the Machining Department and saw that none of the chip baskets had been emptied. (T. 593-594). Contrary to Venkatesan, Stewart testified that it takes eight hours to fill one chip basket, not just a few (a 5-hour difference). (T. 594, 668-669). Stewart said near the Mori Seiki (SH2) machine he saw 400 Hubbel handles, which are each approximately 2 ½ feet long by 2-6 inches wide, packed together vertically, standing up, in a crate about 6 feet long. (T. 609, 613). He claimed that by looking at the handles he could see that only about 15-20 had been buffed. (T. 593-594, 611). However, out of the 400 handles Stewart only picked up and looked at two or three. (T. 614). The handles often arrive from the foundry with cracks or blemishes as small as a dime that have to be buffed off or reworked by hand. (T. 613). Whether or not a handle's imperfection is large enough to warrant reworking or whether the operator passes it along down the line for further processing is a judgment call made by the operator. What one operator would rework or trash altogether another may not. (T. 613-614). Armstrong testified that he

spent a significant part of his shift reworking and manually buffing handles and that you could not tell by glancing at them which ones were flawed and which were not. (T. 274, 348, 357). It is impossible that Stewart could have accurately judged how many of these 400 handles Armstrong had worked only by looking at the crate and picking up two or three.

There is a credibility conflict between Armstrong and Stewart as to whether or not the two actually met and spoke on Monday morning, August 27. The Judge concluded that Stewart never met with Armstrong. (JD 20). The Judge's conclusion is supported by the record. Armstrong testified that after Stewart's Sunday night text message he did not see or speak to Stewart again until Monday evening when he came in for work and Stewart told him he was suspended. (T. 282-283). In contrast, Stewart contended that when he got into work on Monday morning he called Armstrong into his office, talked to him about why he had not run a machine, walked around the Machining Department to check Armstrong's work, and then talked to Armstrong again for another few minutes. (T. 591-592). A close evaluation of the record reveals that this Monday morning meeting between Armstrong and Stewart never took place.

Stewart testified that he got to work at 6:30 a.m. and that the first person he talked to was Armstrong. According to Stewart it took a total of 20-30 minutes for Stewart to talk to Armstrong and check his work. (T. 591-592). Venkatesan testified that by the time he talked to Stewart that morning it was after 7:00 a.m., by which time Stewart would already have met with Armstrong, by Stewart's account. (T. 591, 649, 650). Perplexingly though, Venkatesan said when he found Stewart and told him to investigate what Armstrong had done on the previous night's shift Stewart's response was that he would look into it, not that he had already talked to Armstrong. (T. 666, 675). Moreover, Armstrong's shift ended at 7:00, and Venkatesan corroborated that Armstrong was likely gone from the plant by then. (T. 709). Armstrong testified Stewart was not always at the plant by the time Armstrong left. (T. 282). Since Armstrong left shortly after 7:00, and Venkatesan and Stewart spoke shortly after 7:00, and Stewart indicated to Venkatesan when they spoke

that he had not seen Armstrong yet, there is no way Stewart could have met with Armstrong Monday morning.

The rest of the testimonial evidence supports this conclusion. It is doubtful that Stewart was even at the plant by 6:30 a.m., as he claims. Stowell testified that he did not see or speak to Stewart on Monday morning. (T. 536). Jim Spalding testified that he did not talk to Stewart that morning. (T. 502-504). Stewart cannot list one person that he spoke to prior to 7:00 a.m., other than Armstrong, and Armstrong denies he even saw Stewart. Stewart admitted that no one witnessed him talking to Armstrong on Monday morning. (T. 637). Stewart admitted he made no notes contemporaneous with his meeting with Armstrong. (T. 637). The summary Stewart emailed to Wilkins detailing his alleged conversation with Armstrong left out significant details – such as Armstrong’s failure to follow Stewart’s Sunday evening order to run a machine (CP.8, p. 2), as Stewart was still professing to have texted to Armstrong, an assertion which as outlined above, proved to be false. Stewart’s explanation for this particular omission in his email to Wilkins: “I didn’t think it would be relevant now.” (T. 607). Yet, Stewart knew as of the date and time he drafted and emailed his summary that the supposed cause of the investigation and Venkatesan’s anger was Armstrong’s failure to run a machine. His failure to include any mention of Armstrong’s failure to run a machine, together with all the other evidence, suggests Stewart’s summary is fabricated. (CP. 8, p. 2).

Venkatesan, Stewart, Wilkins and Spalding based their conclusions to a large degree on Vince Stowell’s observations of Armstrong’s performance. (T. 788). Yet Stowell’s account of Armstrong’s work should have made it clear to everyone that Stowell had very little knowledge about Armstrong’s activities that night. Stowell testified that he passed the machining department about six times but only saw Armstrong twice. (T. 526). One of the two times Stowell saw Armstrong was at the beginning of the shift when he delivered Venkatesan’s message and Armstrong had just begun warming up the machines. (T. 519). The next time he saw Armstrong, Armstrong was buffing handles, which corroborates Armstrong’s testimony exactly. (T. 274, 348, 357, 527). Stowell did not see Armstrong the other four times he passed

through machining, but that does not prove Armstrong was not engaged in the tasks he claimed. As discussed below, had any investigation been conducted, it would have been clear that Stowell's passing observations were unfounded.

(iii) Respondent Did No Follow-Up Investigation

When Respondent's investigation of the events of August 26-27 exposed significant inconsistencies, suggesting it would be prudent to inquire further, neither Spalding nor Wilkins dug any deeper. Wilkins asked Stowell why, before he suggested Armstrong be disciplined, he did not follow up with Armstrong to see why Armstrong was not running a machine (or really, what she should have asked Stowell was why he didn't follow up to see *if* Armstrong was running a machine, since Stowell recommended discipline less than an hour and a half into the shift, before he actually checked to see if Armstrong was running a machine or not). (T. 527, 530, 788; R. 8, p. 1). Stowell told Wilkins he did not have time to follow up because he was busy in the foundry. (T. 530, 788). If he was too busy to ask Armstrong a question, it defies logic that he would have had time to write and send an email about Armstrong's activities and prepare a write-up.

Wilkins also failed to ask Stowell some additional and very basic questions. She admitted on cross-examination that she does not know what times of the night Stowell observed Armstrong and did not ask. (T. 805). She admitted she did not know that it takes 10-15 minutes to warm up the machines, which is what Armstrong was doing when Stowell relayed Venkatesan's message. (T. 805). Wilkins admitted she did not know that Stowell saw Armstrong buffing handles the second time he saw Armstrong. (T. 805). She testified that she never looked at Armstrong's application for employment and did not know that Armstrong was nearly an 18-year employee. (T. 804).

Spalding testified that he knew Ken Stewart had exchanged text messages with Armstrong concerning Stewart's instructions for Armstrong on Sunday, August 26. Yet prior to deciding to terminate Armstrong, Spalding never asked Stewart for copies of the text messages or even to see them. (T. 505-506, 632).

Spalding also acknowledged that Stowell acted far too quickly in recommending Armstrong's discipline. (T. 494-495). Venkatesan testified that he could not recall Stowell ever having made a disciplinary recommendation so quickly, in fact, except for on matters of safety. (T. 664). Even so, neither Spalding nor Venkatesan pressed Stowell for any further explanation. They were quite satisfied to terminate based on the information they had.

d. Respondent Did Not Follow Its Progressive Disciplinary Policy

The Judge made findings of fact and credibility resolutions on this issue, and correctly reasoned that Respondent's failure to follow its disciplinary procedure supported a finding that Respondent was discriminatorily motivated. (JD 23-24). The Judge was faced with the following record evidence in making her findings. Respondent has a progressive disciplinary policy that is set forth in the employee handbook and which consists of four steps: Step 1- Verbal Warning: Clarifying Expectations; Step 2 - Written Warning: Developing Commitment; Step 3 - Written Warning: Decision Making; and Step 4 - Termination of Employment, and states, "In most cases, progressive corrective action will occur in [that] sequence." (GC. 3. pgs. 47-48). Venkatesan confirmed that "The employee handbook has everything the employee needs to know about disciplinary policies. It's all included in this." (T. 679-680). Venkatesan testified that Respondent requires every employee to sign the employee handbook because Respondent believes it is important for employees to know the policies in the handbook. (T. 679). Wilkins corroborated Venkatesan, affirming that the source of Respondent's policies, rules and regulations about discipline and employee conduct is the employee handbook. (T. 778). The documentary evidence substantiates this fact. On each of Armstrong's write-ups, in the section titled, "Consequences of Further Infractions," Respondent wrote that it would take action according to the employee handbook's progressive disciplinary policy. (GC. 8, 9, 10, 11).

Despite the foregoing, in Armstrong's case Respondent inexplicably jumped from step 1, verbal warning, to step 4, termination. Such failure to follow its progressive disciplinary system is evidence of

unlawful motive. See *2 Sisters Food Group*, 357 NLRB No. 168 (2011), citing *Toll Mfg. Co.*, 321 NLRB 832, 833 (2004); and *Guardian Automotive Trim, Inc.*, 340 NLRB 475, 475 fn. 1 (2003). Respondent argues that the policy is discretionary and, through Spalding's testimony, claims it has the right to "jump the steps" if it so chooses. (T. 501). However, Respondent provided no evidence showing why bypassing steps 2 and 3 was justified. On the contrary, Respondent's own Human Resources Manager, Courtney Wilkins initially recommended against termination and urged Spalding and Venkatesan to issue Armstrong a suspension only. (CP. 8).

Clearly, Wilkins was right; Armstrong's record certainly did not warrant termination. As the lead man on his shift Armstrong was held responsible for his shift's production numbers. At the time of his termination he had two verbal warnings on his record for low production, one issued on March 25, 2012, and one issued June 29, 2012. (GC. 10 and 11). On March 25 Armstrong was working voluntary weekend overtime when the chip reclaimer broke. Armstrong was clocked onto another machine at the time, a rare occasion for him or any team leader. (T.190-191, 294-295). He stopped what he was doing to go and fix the chip reclaimer. Before he went to fix it though, he did not first clock off the job he was on. This caused Armstrong's production numbers to drop for that shift, for which he was issued the verbal warning. Since he rarely ever clocked onto a machine he was not used to clocking on and off jobs. (T. 294-295; GC 10).

On June 29, 2012, Stewart issued Armstrong a verbal warning because his shift had low production numbers. Armstrong explained that the operators were not clocking on and off their jobs correctly and that this caused the system to calculate that they were taking longer to produce parts than they actually were. (T. 295; GC. 11). Armstrong was surprised when he received this warning because two days prior to that Stewart had told him that his shift's production numbers were good. (T. 295).

Armstrong also had one verbal warning on his record for violation of the attendance policy. (T. 292-293; GC. 9). He testified that Respondent gives every employee 40 hours of leave or "attendance bank" every six months. What constitutes proper use of leave is entirely within Respondent's discretion. Armstrong

testified that Respondent writes up employees who use their leave merely in a way Respondent does not agree with, even if they have not used more than 40 hours within six months. (T. 292-293). Armstrong was admonished on March 19 simply to “Call into work less often.” (GC. 9).

Respondent argues there is a fourth verbal warning on Armstrong’s record from July 18, 2011, but this write-up was no longer valid. (GC. 8). Armstrong testified that every supervisor or manager who ever issued him discipline told him discipline falls off your record after a year. (T. 299). The June 2011 write-up, which Armstrong received this write-up for changing out a tool improperly on the A77, was off his record by August. (T. 293-294). Respondent tried to deny it has such a policy, (T. 678, 803), but Armstrong specifically recalled he was told this is the policy by Supervisor John McBride and Bob Brown when Brown was the Foundry Supervisor. (T. 299-300).

e. Respondent Intended to Terminate Armstrong Despite His Record or the Results of the Investigation

As found by the Judge, the evidence overwhelmingly demonstrates that Respondent simply did not want to know the facts and that it was going to terminate Armstrong regardless of his disciplinary record or what the investigation revealed. (JD 24). Respondent ignored glaring inconsistencies; drew conclusions based on little evidence or faulty information; refused to reverse its conclusions even after its conclusions had been challenged by new information; and rushed to impose a penalty with no apparent need for immediate action. See *Astyle Apparel* at 1301 (where Employer’s rush to penalize and its reliance on flawed investigatory findings evidence an improper motive and seriously undercut employer’s defense), citing *Midnight Rose Hotel*, supra at 1005 (failure to conduct fair investigation before imposing discipline defeats claim of reasonable belief of misconduct).

Venkatesan wanted Armstrong fired as soon as he saw Vince Stowell’s email at 7:00 a.m. on Monday morning, August 27. When asked whether he thought at that time that Armstrong should be terminated, Venkatesan’s response was, “Absolutely.” (T. 661). Yet Venkatesan admitted that at that moment he did

not know for sure how many disciplines were on Armstrong's record. He thought there were maybe two. He had never seen Armstrong's personnel file. Regardless of what might be on Armstrong's disciplinary record, Venkatesan wanted him fired. Venkatesan testified that the fact that he had not seen Armstrong's file "doesn't matter." (T. 661-662). Venkatesan's decision was made. Even after later discovering he was wrong in his assumption that Armstrong had had a 3-day suspension, he did not change his mind about Armstrong's termination. Nor did he send out a correcting email to Spalding notifying him of his error. (T. 658, 764-769, 767, 771-774; CP. 8, p. 1). Venkatesan did not *want* to know the facts because they were irrelevant to his conclusion that Armstrong needed to be "let go." (CP. 8, p. 1).

Jim Spalding had essentially approved Venkatesan's recommendation to terminate Armstrong about 2 ½ hours after Armstrong's shift ended Monday morning. At 9:27 a.m. Spalding sent Venkatesan and Wilkins an email saying that if Venkatesan felt Armstrong had been blatantly insubordinate then he agreed with Venkatesan that Armstrong should be fired. (CP. 8, p.1).

Lastly, as cited by the Judge Respondent's own Human Resources Manager recommended against termination, stating that it was not warranted and that Armstrong should at the most be suspended. (JD 23). (CP. 8, p.11). Wilkins sent Venkatesan, Spalding and Jeanne Adams an email on Tuesday, August 28, at 3:20 p.m. saying that she and Adams had only found two write-ups in Armstrong's file: a March 19, 2012 verbal warning for attendance violation and a June 29, 2012 verbal warning for substandard work. Wilkins continued by recommending that she did not see enough information to support termination. (CP. 8, p. 11).

Even Vince Stowell, the Foundry Supervisor, had questionable motives in recommending discipline. Stowell's 12:23 a.m. email to Venkatesan begs at least two questions: (1) Why did Stowell tell Venkatesan that Armstrong was not running a machine if Stowell had not even *seen* Armstrong since giving Armstrong the order?; and (2) Why was Stowell so eager to issue Armstrong discipline, only an hour and a half into the shift and without first following up with Armstrong? Stowell failed to answer either of these questions. Stowell admitted that he did not know if or what other orders Armstrong may have received besides those

Stowell relayed from Venkatesan and that he never asked. (T. 533-534). Wilkins herself noted in her email to Venkatesan that Stowell's response was suspicious. (CP. 8, p. 3).

(i) Venkatesan's Credibility

The Judge correctly found that Respondent's defenses failed in no small part because of the lack of credibility of its witnesses, particularly Plant Manager Krishnan Venkatesan, who the Judge discredited as to all but his name and job title. (JD 18, 19, 21, and 23). The Judge's failure to credit Venkatesan is completely supported by the record. Venkatesan was especially evasive on the subject of Respondent's response to news of the union campaign. He admitted he talked to Spalding about the union campaign but that Spalding did "not really" ask him to gather more information. (T. 691). Then he testified that Spalding did *not* ask him to gather more information about the campaign but "probably" did ask Wilkins to get more information. (T. 691). Then he testified that he couldn't remember if Spalding told him they needed to get better information about the campaign. (T. 702-703, 712). Finally, after repeated and prolonged attempts to dodge the subject, Venkatesan admitted definitively that Spalding in fact told Venkatesan and Wilkins they needed to get more information about the campaign and specifically instructed Wilkins to get that information. (T. 713).

While Venkatesan ultimately admitted that management did want more information about the rumors of employee union activity and talked about getting more information, he would not say what they discussed, who was a part of those discussions, what attempts they made to gather more information, or what information was gathered. (T. 692-693). Venkatesan further testified that the union campaign was "disruptive," but then would not answer the question of how it was disruptive. (T. 733-737). As observed by the Judge, Venkatesan constantly changed his answers, took inexplicably long pauses before answering simple questions, and often refused to answer at all, sometimes very clearly in an attempt to assist Respondent's case.

(ii) Spalding's Credibility

Likewise, as found by the Judge, Spalding testimony was evasive and calculated to be misleading. (JD 18). In support of Judge's credibility resolution, it should be noted that Spalding claimed he only knew of one employee who supported the union, Michelle Little. Then he admitted a moment later that he learned in July that employee Jared Hunsburger attended a union meeting. (T. 456). He continuously tried dodging questions about how or what he or any other managers learned about employees' union activity. (T. 410, 431-433, 436, 475). He testified that Maintenance Supervisor Jerry Helms told him that Helms' guys were not interested in the union, but wouldn't say how Helms knew that and claimed that he didn't ask Helms how he knew either. (T.410). It is unbelievable that Spalding would have driven the approximately 25 miles from Kingsville to Warrensburg specifically to get more information about the union campaign, and then when he's told by Helms that some of Helms guys had been invited to a union barbeque would not have asked Helms how he knew this.

Similarly, Spalding testified that he asked John McBride, "John, tell me what you know. What's going on?...Are you hearing a lot of noise about unions? Are people talking about this?" Spalding said that McBride told him yes, several people are. (T. 424-425). Peculiarly though, Spalding claimed his memory completely fails after that and that he can't remember anything else about the conversation. (T. 425). It is equally unbelievable that after McBride told Spalding several people are talking about the union that Spalding would not have asked *who*. Nor is it believable that McBride, who knew the names of five employees who had been attending union meetings and discussing the union at work, would not have shared these names with Spalding, the president of the company, when Spalding asked McBride to tell him what he knows.

5. Respondent Failed to Establish that It Terminated Armstrong for Non-Discriminatory Reasons

The Judge found, based on substantial and properly credited evidence, that Armstrong was an active union supporter; that Respondent knew that Armstrong engaged in such union activity; that Armstrong

suffered an adverse employment action through his termination; that there was ample exhibited union animus, and that Respondent's failure to investigate Armstrong's alleged wrongdoing, and failure to follow its progressive disciplinary policy supported a finding that its claimed defenses were pretextual. (JD 17-24). The Judge's conclusions that Respondent's defenses are pretextual are fully supported by record testimony.

a. Respondent's Purported Reason That It Terminated Armstrong Because of His Disciplinary Record Is Pretextual

Respondent contends that Armstrong had a lengthy and serious disciplinary record and that this, in combination with his negligence on the August 26-27 shift and his making false reports about his activities, led to his termination. Respondent, through the testimony of Jim Spalding, Courtney Wilkins and Krishnan Venkatesan, contends that Armstrong had four verbal warnings on his record, one for an attendance infraction and three for substandard work. (T. 677, 791, 822-825; GC. 8-11). However, as concluded by the Judge, these write-ups fall far from establishing that Armstrong had a lengthy or serious disciplinary record, and even farther from establishing that his disciplinary record led to his termination.

First, Respondent claims that Armstrong's disciplinary record was serious, yet it did not even know what was *on* that record. When questioned on cross-examination, Spalding, the president of the company, the person who made the final decision that Armstrong should be terminated, did not even know if Armstrong's disciplines were verbal or written. (T. 466, 832). Spalding changed his conclusions about the severity of Armstrong's record twice. First he said the failure to run a machine, the lying about his activities, and the June 2012 disciplinary infraction are each terminable offenses on their own. (T. 825). Then he said they are *not* each terminable offenses, and that he had never said they were. (T. 832-833). Spalding then changed his testimony yet again, claiming they are stand-alone terminable offenses. (T. 833). Ken Stewart testified that when he investigated Armstrong's record between August 26 and 30, he discovered that Armstrong had received a 3-day suspension in March 2012. (T. 628). The documentary evidence and the

testimony of all the other witnesses, including Respondent's own Human Resources Manager, contradict this statement. In fact, Respondent's witnesses testified at some length about the fact that Armstrong's record contained absolutely no suspensions. (T. 500, 501, 653-654, 764-769, 501). Without sufficiently familiarizing itself with Armstrong's record, Respondent could not possibly have based its decision on Armstrong's record.

Second, Armstrong's disciplinary record was far from severe. All of his write-ups are only first-step verbal warnings. There were actually only two write-ups on Armstrong's record that are of any significance. One of the four warnings upon which Respondent claims its termination decision is based, dated July 17, 2011, is invalid because of its age. Armstrong testified that every single time he received discipline Respondent told him, by a number of its supervisors and agents, that disciplinary action falls off employees' records a year after its issuance. While Respondent denied such a policy, the Judge correctly found that such a policy existed. (JD 23).

Another of the warnings, the one for an attendance infraction, is so minor and immaterial that it hardly warrants consideration. Employees are issued 40 hours of leave every six months. Taking more than 40 hours within six months results in automatic termination. (T. 292-293; GC. 3, p.29). Armstrong had not taken more than 40 hours, he simply used more than Respondent would have liked. (T. 292-293; GC. 9).

That leaves just two verbal warnings, both of which were discussed in a foregoing section. One was issued on March 25, 2012, for failing to clock out on one machine while repairing another machine, which brought Armstrong's overall production numbers down for that shift. (T.190-191, 294-295; GC. 10). The other was issued on June 29, 2012, for Armstrong's shift's failure to clock on and off their machines properly, which was causing the machines' computers to calculate that the operators were producing parts at a slower rate than they actually were, which naturally brought down their production numbers. (T. 295; GC. 11). Plus, two days prior to June 29 Stewart told Armstrong his shift's production numbers were good, further weakening the import of the June 29 warning. (T. 295).

Finally, Respondent contends that sometime during the summer of 2012, prior to June 29, Ken Stewart called operator Charlie Collins into his office to talk to him about his low production and that Collins told Stewart that Armstrong had told him not to work so hard because it made the rest of the employees look bad. (T. 567, 581). Even crediting Stewart and Collins that Collins reported such a statement, as Courtney Wilkin's noted in her recommendation that Armstrong not be terminated, the conversation about Armstrong's "so-called" involvement was not disciplinary as Armstrong was issued no discipline, and it is completely undocumented. (CP 8, p.11). Respondent's attempts to rely on non-disciplinary, undocumented matters such as this to bolster its case against Armstrong, in fact, support pretext and unlawful motive.

Stewart made no mention of this supposed incident in Armstrong's June 29 write-up, and Stewart claimed the Collins incident took place *before* June 29, so he could have included it in that write-up. (T. 497-498, 827; GC. 11). Stewart admitted he did not mention it, either, when he issued the June 29 write-up to Armstrong. (T. 582-583). Nor did Stewart ever issue a separate discipline concerning this supposed report from Collins. If this alleged conversation between Stewart and Collins actually took place, and if Respondent considered it to be such a severe offense, it defies logic that Stewart would not have noted it in the June 29 write up or at the very least said something about it to Armstrong.

Moreover, Stewart admitted that at the time he had this alleged conversation with Collins all the other operators on Armstrong's shift were producing well. (T. 623, 828-829). It does not make sense that Armstrong would have told Collins to slow down but would not have said the same to the other operators, which, they testified, he did not. (T. 343, 377).

Finally, Respondent attempted to paint a picture of Armstrong as a generally difficult employee, but it offers no evidence to substantiate its claims. In his summary to Wilkins, Stewart claimed that Armstrong on occasion "willfully disobeys" instructions. (T. 634; CP. 8, p. 2). When questioned about this on cross-examination, Stewart could give no specific instances of when Armstrong had been willfully disobedient. Stewart said he had made note of it in a personal log he kept for himself, where he kept notes of when he

received “some kind of pushback” from an operator. Conveniently, Stewart was unable to supply those notes. (T. 634). All of these facts support the Judge’s pretext finding.

b. Respondent’s Arguments That Armstrong Was Grossly Negligent and Made False Reports Are Contrived

(iii) Armstrong Was Not Grossly Negligent

The Judge’s findings that Armstrong was not grossly negligent for failing to run a machine on the August 26-27 shift are also supported by the record. In that vein, Respondent asserts that the plant manager gave an order; Armstrong failed to follow that order; and that is all there is to it. However, the Judge’s nuanced decision supports that is a gross simplification of the facts. An examination of all the evidence available to the Judge reveals that Armstrong’s actions that night were far from negligent and that he did the best anyone could have in the situation Respondent created, and the Judge so found. (JD 24).

As already discussed above, it is unquestionable that Armstrong’s immediate supervisor, the individual who always gave Armstrong his work instructions, never told Armstrong to run a machine. (T. 840-844; GC. 12). Stewart’s instructions to Armstrong were just as Armstrong testified. In fact, day shift lead man Andy King, who is as familiar with the operations of the Machining Department as Armstrong, testified that he would have interpreted Stewart’s instruction just as Armstrong did and would have made the same operator assignments as Armstrong. (T. 334-335, 337; GC. 12). Armstrong then received an order from Venkatesan through Vince Stowell that conflicted with the order he had received from Stewart. (T. 257-258, 276, 374). Venkatesan’s instruction was for Armstrong to take one person off the Detroit platform (Okumas 3, 4 and 5) and put him or her on the Volvo platform (A77 and A81) and for Armstrong to run a machine. (T. 269-270, 519-520). To carry out Venkatesan’s order meant Stewart would have to take one person off the Okumas 3, 4 and 5 (Meade or Timmons) and put them on the Volvo platform with Tucker. But there were only two machines on the Volvo platform that Armstrong was

certain could be run, the A77 and Okuma 2 machines. Tucker was already running those. If he'd moved Meade or Timmons onto either the A77 or Okuma 2 then Tucker would be running one machine and Meade or Timmons running one machine, which was against Respondent's policy that each operator should run at least two machines. If he moved Tucker and put Meade or Timmons on both the A77 and Okuma 2, then Tucker would have no machine to run. (T. 254, 257, 271). This was an extremely unusual circumstance for two reasons. First, as Armstrong, all the employees on Armstrong's shift, employee Michelle Little, and day shift lead man Andy King all testified, leads almost never run machines themselves.(T. 190, 331, 339, 370, 631, CP. 5, R. 2). Second, this was the first time Armstrong had ever received an order directly from the plant manager. (T. 305-306, 753). Armstrong did the most logical thing he could think of to do. He called his supervisor for clarification. However, Stewart did not answer his phone, or return the call, despite Stewart's attempts at prevarication that he sent a text to Armstrong. (T. 277, 591; T. 251, 258, 601, 604; GC. 4 and 12).

Moreover, both Venkatesan's and Stewart's instruction to run the A81 could only be carried out if (1) there were enough Volvo parts to be run on the A81, which there were not, or (2) the A81 was programmed to run Mercury Cradles, which Armstrong could not verify it was and was not trained on how to program it himself. (T. 264-264).

(iv) Armstrong Did Not Make False Reports

Respondent claims that Venkatesan and Stewart checked and found that Armstrong had not done any of the things on the August 26-27 shift that he reported. As found by the Judge, the evidence overwhelmingly demonstrates that Armstrong in fact did exactly what he reported, and that Respondent failed to conduct any credible investigation to substantiate the work Armstrong performed. (JD 19-22, 24).

In support, all the employee witnesses to Armstrong's activities on August 26-27 corroborated Armstrong's account of what he did that night. Armstrong said he emptied baskets full of machined parts, dropped machined parts off for inspection, brought new parts to operators, adjusted the scribe on Jessica

Timmons' machine, swept floors, answered operators' questions about their machines, and buffed and reworked the Hubbel handles, among other things. (T. 265-268, 274, 283, 341, 343, 348, 352, 353, 361, 371). Timmons corroborated that Armstrong spent time during the shift fixing her machine. (T. 343). Employee Mike Ridge testified that Armstrong answered Ridge's questions about his machine. (T. 357). Employee Meade testified that she saw Armstrong sweeping the floor and driving the fork lift, the latter of which is required for emptying or returning baskets and dropping off parts to operators, among many other things Armstrong did that night. (T. 371). Employee Randy Tucker testified that Armstrong brought him parts during the shift and that he observed Armstrong buffing handles. (T. 348). Even Respondent's own witness, Vince Stowell, corroborated that he observed Armstrong buffing Hubbel handles during the shift in question. (T. 527).

The Judge correctly discredited Ken Stewart and Krishnan Venkatesan. As the record shows, there are at least five witnesses corroborate Armstrong's account of his work on his shift. The weight of Armstrong's and the other witnesses' testimonial evidence is eminently more reliable than Venkatesan's, and especially Stewart's testimony. Venkatesan is not qualified to accurately assess what he saw in the Machining Department Sunday night where he only checked two of seven machines; where he does not know what Armstrong's training encompasses with regard to the machines; and where there is ambiguity as to which shift's work he observed when he thought he was reviewing Armstrong's work. (T. 666-671).

For all of these reasons, the Judge correctly concluded that Respondent violated Section 8(a)(3) when it terminated long term employee Armstrong because of his activities on behalf of the union.

B. Section 8(a)(1) Violations

As to the 8(a)(1) violations, the Judge was correctly applied her credited facts to properly find independent 8(a)(1) violations.⁵

⁵ Respondent makes much of the fact that the Judge inadvertently included an 8(a)(1) violation in her Conclusions of Law and Order dealing an allegation that she dismissed. Far from "egregious" as cited by Respondent, the Judge's inclusion of a remedy over which the General

1. The Judge Correctly Found that Respondent Engaged in Surveillance of Employees' Union Activities

While the Board has made clear that an employer does not have to close its eyes to union activity conducted on or near company premises, it does not permit the employer to enhance its vision by activities that would be out of the ordinary, such as patrolling cars, cameras or videotape. See *Fairfax Hospital*, 310 NLRB 299, 310 (1993). While Respondent argues in its brief that Venkatesan's actions did not amount to surveillance, it fails completely to deal with the Judge's findings that admitted agent Adam's actions amounted to surveillance. (JD 24-25). The record clearly supports that Human Resources Administrator Jeanne Adams' practice of driving her SUV from its normal parking lot to the employee parking lot for the sole purpose of viewing the hand billing constitutes conduct that was "out of the ordinary" and would have the tendency to unreasonably chill the exercise of employees' section 7 rights. Legally, Respondent is responsible for the actions of its agents. See *Uniontown Hospital Assn.*, 277 NLRB 1298, 1299 (1985); *In re D&F Indus., Inc.*, 339 NLRB 618, 619 (2003). Adams is an admitted agent of Respondent, and as such, her actions are attributable to Respondent.

2. The Judge Correctly Found that Respondent Threatened Employees with Facility Closure for Engaging in Union Activities

An employer's statement to employees violates 8(a)(1) if the remark would reasonably tend to interfere with employee's exercise of their Section 7 rights. It does not look at the motivation behind the remark or the success or failure of the coercion. See *Dorsey Trailers, Inc. Northumberland, PA Plant*, 327 NLRB 835, 851 (1999) citing *Joy Recovery Technology Corp.*, 320 NLRB 356, 365 (1995); *Miami Systems Corp.*, 320 NLRB 71 fn. 4 (1995). This is an objective standard that evaluates the employer's remarks under the totality of the circumstances. See *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1217-18 (1985); *Rossmore House*, 269 NLRB 1176, 1177-78 (1984).

Counsel failed to prevail was merely a mistake, and in no way undercuts her correct decisions on other matters. In fact, her mistaken inclusion of the additional 8(a)(1) concerning a threat not to hire a relative was likely included based on an earlier decision by her on this very close issue.

Under this standard, the Judge correctly found that Spalding's statements to employees in the late July meeting are clearly implied threats of plant closure or job loss in violation of 8(a)(1).⁶ (JD 28-30). Based on employee testimony and Respondent's script of the meeting, Spalding told employees that the other aluminum casting companies owned by Ligon, Respondent's owner, are non-union; that that is no accident, because Ligon prefers not to operate union companies; that Ligon invests in plants that make a profit and unions make it harder to earn a profit; that Ligon can invest wherever it wants; and that it is investing in Stahl right now, but Spalding doesn't want that to change. (T. 136, 222, 248, 310; GC. 5, pgs. 1-2). The totality of those statements convey a threat to not operate or of job loss if the union is elected. Moreover, Spalding initiated the meeting; the meeting was mandatory; the Plant Manager and Human Resources Manager were also present; and the remarks were made as part of a passionately anti-union speech. (GC. 5). In the context of this heated antiunion campaign in which the Respondent has engaged in other unlawful and objectionable conduct any ambiguity, if there is any, as to the remarks' coercive implications must be resolved against the perpetrator. See *House of Raeford Farms, Inc.*, 308 NLRB 568 (1992).

3. The Judge Correctly Found that Respondent Interrogated Employees Concerning Their Union Activities

Pursuant to Section 8(a)(1), an Employer may not interrogate its employees about their protected concerted activities or the protected activities of other employees. See *Bremol Electric, Inc.*, 271 NLRB 1557, 1567 (1984). An employer unlawfully interrogates its employees if, under all of the circumstances, its actions tend to interfere with, restrain or coerce employees in the exercise of their Section 7 rights. See

⁶ Spalding also made the same comments to employees at a meeting at the facility on May 8. While not alleged in the Complaint as a violation of Section 8(a)(1), such comments were repeated at the facility during the meeting at the end of July, comments which are alleged in the Complaint. Spalding's comments from the May 8 meeting, while not alleged as unfair labor practices, may be considered as animus. See *Kanawha Stone Company, Inc.*, 334 NLRB 235, 237 (2001) (conduct that exhibits animus but that is not independently alleged or found to violate the Act may nevertheless be used to shed light on the motive for other conduct that is alleged to be unlawful); *Sunrise Health Care Corp.*, 334 NLRB 902 (2001) (while protected speech, such as an employer's expression of its views or opinions against a union, cannot be deemed a violation in and of itself, it can nonetheless be used as background evidence of antiunion animus on the part of the employer).

Sunnyvale Medical Clinic at 1217-18; *Rossmore House* at 1177-78 (1984). In evaluating the circumstances of the alleged interrogation, the Board considers the background, the nature of the information sought, the identity of the questioner, and the place and method of the conversation. See *Sunnyvale*, 277 NLRB at 1218.

Under this standard, the Judge correctly found that Ken Stewart's statements to Armstrong after the employee meeting at the end of July, pleaded in the Complaint as July 26, 2012, were undoubtedly a coercive interrogation. (JD 27-28). The record evidence relied on by the Judge shows that Stewart asked Armstrong why no one said anything when Spalding asked for comments at the meeting. Armstrong responded that it would not have done any good because Spalding was just looking for an argument, and it would have red flagged that employee. Stewart then asked Armstrong if he had been in a union before. Armstrong responded that he had and that his father had started two unions. Stewart asked Armstrong why he thought he needed a union. Armstrong said he thought the company wasn't going to address people's issues by itself and a union would be a good idea. (T. 248-249, 577-579, 607, 622). Stewart is an admitted supervisor and agent of Respondent. The conversation was initiated by Stewart and took place in his office, which supports that it would have been more intimidating than a casual question on the work floor. In that same vein, Stewart and Armstrong were alone. Finally the conversation was immediately after a mandatory, anti-union speech delivered by the president of the company, which contained an unlawful threat of plant closure or job loss. Under all of these circumstances, the Judge correctly concluded that Stewart's questioning of Armstrong amounted to an unlawful interrogation.

4. The Judge Correctly Found that Respondent Posted Literature Threatening Employees With Permanent Job Loss for Engaging in Protected Activities

While it is true an employer is free to discuss the give and take of negotiations and the implications of employees choosing to strike, by posting the literature contained in Charging Party's Exhibit 4, the Judge correctly concluded that Stahl went further than that and unlawfully outlined employees' rights during a

strike. JD 30. While an employer may address the subject of strike replacement without fully detailing the protections enumerated in *Laidlaw*, 171 NLRB 1366 (1968), it may not threaten that as a result of a strike employees will be deprived of their rights in a manner inconsistent with those detailed in *Laidlaw*. In *Laidlaw*, the Board held that permanently replaced strikers, who have made unconditional offers to return to work, receive full reinstatement once replacements depart. See, *Eagle Comtronics*, 363 NLRB 515 (1982). In its posting Respondent crossed the legal line of what is acceptable. Respondent's posting states:

Strikers often lose their jobs. The Company has the right to continue operating during a strike and can hire new workers to replace strikers. When that happens, strikers lose their jobs – even if they give up on the strike and ask to come back to work. (T. 472-475, 780; CP. 4).

As found by the Judge, Respondent's posting went beyond merely informing employees that they could be permanently replaced, and instead threatened, contrary to *Laidlaw*, that as a result of the strike, employees are not automatically entitled to their jobs when the strike ends, or to be put on a preferential hire list. *Fern Terrace Lodge*, 297 NLRB 8 (1989); *Connecticut Humane Society*, 351 NLRB 1, 62 (2012). The Employer may be allowed to be incomplete in its communications concerning the implications of employees striking, but it may not be misleading. In the instant case, the Judge correctly found that Respondent was misleading.

V. CONCLUSION

Counsel for the General Counsel respectfully submits that, for all the reasons set forth above, the Decision issued by Administrative Law Judge Christine E. Dibble on September 30, 2013, which was then ratified and adopted by ALJ Dibble on April 22, 2016, be upheld in its entirety.

Dated: June 15, 2016

Respectfully submitted,

/s/ Lauren M. Fletcher

Lauren M. Fletcher

Counsel for the General Counsel

STATEMENT OF SERVICE

I hereby certify that I have this date served copies of the foregoing *Counsel for the General Counsel's Answering Brief to Respondent Stahl Specialty Company's Exceptions to the Decision of the Administrative Law Judge* on all parties listed below pursuant to the National Labor Relations Board's Rules and Regulations 102.114(i) by electronically filing with the Office of the Executive Secretary and by electronic mail to Counsel for Respondent, Counsel for the Charging Party, and Charging Party Jerry Gulizia.

Dated: June 15, 2016

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