

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5 SUBREGION 33

In the Matter of:)
)
HARBOR RAIL SERVICES COMPANY,)
) NO. 25-CA-174952
Respondent,)
and)
)
ERIC SCHULTZ, an Individual,)
)
)
Charging Party.)

**POST-HEARING BRIEF ON BEHALF OF
RESPONDENT HARBOR RAIL SERVICES COMPANY**

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Pursuant to Section 102.42 of The National Labor Relations Board's Rules and Regulations, Harbor Rail Services Company ("Harbor" or "Company") submits this Post-Hearing Brief as follows:

I. STATEMENT OF THE CASE AND PROCEDURAL HISTORY¹

This case involves a Charge alleging wrongful discharge in violation of Section 7 of the Act, filed against Harbor by a former employee, Eric Schultz ("Schultz" or "Charging Party"). Charging Party filed his original charge on April 27, 2016. (GC Ex. 1(a)). On October 28, 2016, Charging Party filed an amended charge alleging that "[about] January 8, 2016, [Harbor] discriminated against employee Eric Schultz by discharging him in retaliation for and in order to discourage protected concerted activities." (GC Ex. 1(c)). The amended charge withdrew claims that Harbor illegally questioned employees regarding union activity and (discriminated against Schultz by discharging him "in order to discourage union activities and membership." (GC Ex. 1(a) and (c)). On November 20, 2016, the General Counsel filed a Complaint and Notice of Hearing consistent with the amended Charge, alleging that Harbor violated Section 8(a)(1) of the National Labor Relations Act by terminating Charging Party. (GC Ex. 1(e)). On March 1, 2017, the General Counsel further amended her Complaint to allege that Kenyada Clark was a supervisor of Charging Party.

Administrative Law Judge Andrew Gollin heard this matter on March 15, 2017, in Rockford, Illinois.

II. FACTUAL BACKGROUND

A. Harbor's Belvidere Illinois Facility

¹ Citations in this Brief will be as follows: "Tr. ___" to indicate the Hearing transcript's page numbers; "GC Ex. ___" to indicate an Exhibit of the General Counsel; and "Resp. Ex. ___" to indicate an Exhibit of Harbor.

Harbor is a company that operates repair and maintenance facilities for rail cars for Union Pacific and other rail carriers throughout the country, including an operation in Belvidere, Illinois. (Tr. 21, 28).

Harbor began operations in Belvidere in October of 2015. (Tr. 28). A company called Road & Rail operated the Belvidere facility prior to Harbor. (Tr. 29). General Manager Albert DeLeon oversees the operations at Belvidere from his offices in Texas. (Tr. 27).

Harbor employs approximately ten individuals at the Belvidere facility. (Tr. 37). The job classifications at the Belvidere facility include pretrip laborer, repairman, welder, and inventory clerk. (Tr. 38). A pretrip laborer is responsible for cleaning out the inside of the rail car, inspecting wheel chocks, removing debris, replacing door edges, and performing any other work necessary to get the rail car ready for further repair. (Tr. 38, 67-68). All of this work is performed outside in all types of weather conditions. (Tr. 38). The volume of railcars inspected per day varies depending on the requests by Harbor's principal client, Union Pacific. (Tr. 38). A repairman is responsible for replacing parts on the rail car. (Tr. 39). An inventory clerk is a laborer who is responsible for tracking all inventory at the facility. (Tr. 39). This individual is also required to perform inspections of the rail car. (Tr. 39).

A lead man is a laborer with the added responsibility for limited oversight of the work on the rail yard. (Tr. 160). A lead man works in the yard with the preppers and would help preppers and fill in when the workforce was shorthanded. (Tr. 160). A lead man typically assigns the routine, repetitive cleaning and minor repair tasks for the day to the preppers. (Tr. 161). A lead man receives instructions from the site supervisor as to the duties that needed to be performed on a given day. (Tr. 105). A lead man is charged with notifying the supervisor if there were any issues on the yard. (Tr. 126). A lead man does not have authority to hire, fire, or suspend

individuals. (Tr. 146, 161). A lead man always informs the supervisor of anything that occurred on the yard. (Tr. 147).

The facility supervisor is in charge of site inventory, interviewing, hiring, firing, and disciplining employees, and conducting the daily safety meetings. (Tr. 121). The supervisor communicates with the general manager on a regular basis throughout the week via phone or email. (Tr. 127). The supervisor informs the general manager if there were any issues with personnel, including performance. (Tr. 128).

Ryan Schanfish assumed the role of location supervisor in November 2015. (Tr. 30). Following the departure of the incumbent, the lead man position was left unfilled between November 2015 and January 1, 2016, q Kenya Clark assumed the role. (Tr. 32-33, 159).

Starting in October 2015, Harbor hired its laborers at the Belvidere facility through a temporary employment agency called Network Staffing Solutions. (Tr. 40). These employees were in a probationary status that usually lasted about 90 days. (Tr. 41-42, 131). After the 90 day period, the temporary employees could become full-time employees of Harbor. (Tr. 131). The general manager and the supervisor were both involved in the employee disciplinary process. (Tr. 40, 116). The general manager made the ultimate decision on discipline of employees, both temporary and permanent. (Tr. 40).

Harbor has an employee handbook that applies to all Harbor employees. (Tr. 41; GC Ex. 4). The handbook prohibits conduct that is disrespectful or unprofessional. (Tr. 148, GC Ex. 4, p. 5). The handbook also notes that “[a]ll hourly employees working five or more hours in a day will receive one 30 minute unpaid meal period. Company management will establish the meal time schedule for each employee.” (GC Ex. 4, p. 11).

The timing of lunch breaks varies daily at the Belvidere facility. (Tr. 57). The breaks usually fall around the five hour mark depending on the work load. (Tr. 57). Breaks were frequently discussed and negotiated by the crew, lead man, and supervisor. (Tr. 57). The supervisor would determine the amount of work done and left to do. (Tr. 85). If the number of cars that needed to be inspected could be completed prior to the five hour mark, an earlier break was taken. (Tr. 57, 84). Similarly, if the number of cars that needed to be inspected would take more than five hours, the lunch break could occur later. (Tr. 57, 84).

When considering setting a lunch break later than five hours into the workday, the supervisor would generally get consent from the laborers to work past the five hour mark. (Tr. 58, 170). On days when all the cars assigned could be completed within six hours or so, the supervisor could give the employees the option to work through lunch and then leave early for the day. (Tr. 57-58, 169). Employees were required to sign in and out for their lunch breaks on a log. (Tr. 99, 152).

B. Eric Schultz's Employment at Harbor's Belvidere Facility

Eric Schultz began working for Harbor as a temporary employee at the Belvidere facility in October of 2015. (Tr. 67). Schultz was hired as a pretrip laborer. (Tr. 48, 67). Supervisor Schanfish believed Schultz was a chronic complainer and looked for ways to avoid having to work. (Tr. 50, 141, Resp. Ex. 2). He would often argue about doing his job. (Tr. 162). He worked to be assigned to the less demanding task of driving the buggy used to deliver supplies to the other laborers throughout the yard. (Tr. 50, 95, 162). This task was meant to be rotated on a regular basis among all pretrip laborers. (Tr. 94). If assigned to the drive the buggy, the job would consume the entire workday. (Tr. 96). Although Schultz was never formally disciplined prior to January 8, 2016, he had a history of lying to his supervisors. (Tr. 51, 144, Resp. Ex. 2).

C. Eric Schultz's Termination

Schultz was terminated on January 8, 2016 for insubordination—specifically for using abusive language towards an employee in violation of company policy. (Tr. 48, 51, 149). On that day, there were about 60 cars to be inspected.² (Tr. 163). Clark observed Schultz talking to his co-workers and disrupting their work. (Tr. 165). Clark approached Schultz and told him to get back to work. (Tr. 165). At that time, Schultz became belligerent towards Clark. (Tr. 165). Schultz called Clark “a fat F’er [and] fucking F’n nigger.” (Tr. 50, 166,171). Schultz also yelled “fuck this job.” (Tr. 49, 172, GC Ex. 8). There was no mention of lunch breaks during Schultz’s rant. (Tr. 171, 174).

After several minutes of enduring the abuse, Clark radioed Schanfish telling him everything Clark had said and requesting that he come to the yard. (Tr. 165, 166). Schultz was still being disruptive and acting aggressively when Schanfish arrived. (Tr. 167, 178). Schanfish took Schultz back to the yard office, (Tr. 166-167), where Schanfish called DeLeon and told him that Schultz was using abusive language towards Clark. (Tr. 49).The final decision to terminate Schultz was made by DeLeon after DeLeon spoke with Schanfish. (Tr. 48). Schultz was terminated for violation of the company policy against harassment and abusive language. (Tr. 49).

² In an effort to inflate his workload, and presumably sympathy for his position, Schultz testified to there regularly being between 80 and 100 cars to inspect. (Tr. 84-85). But only 63 cars could fit on the track at the facility. (Tr. 165).

III. LAW AND ARGUMENT

A. Credibility of Eric Schultz and Ryan Schanfish

When determining the credibility of a witness, the Board considers: (1) the context of the witness's testimony; (2) the witness's demeanor; (3) the weight of the respective evidence; (4) the establishment of admitted facts; (5) inherent probabilities; and (6) reasonable inferences that may be drawn from the records as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). An Administrative Law Judge should not give testimony weight when it is self-serving, inconsistent, contradictory, impeachable, and irreconcilable with other witnesses' testimony. *Americare Concalescent Ctr.*, 280 NLRB 1206, 1210 (1986) (witnesses' self-serving statements are not accepted when contradicted by the record as a whole); *Grand Cent. P'ship*, 327 NLRB 966, 969 (1990) (discrediting former supervisor who was contradicted by other witness).

Charging Party Schultz is not a credible witness and the Administrative Law Judge should disregard his testimony. Schultz's testimony was often contradicted by the testimony of other witnesses as well as his own. Schultz's account of the events on January 8, 2016, for example, is not supported by any other evidence introduced at the hearing. Schultz's testimony is clearly self-serving and not supported by the record as a whole.

Schultz testified that on January 8, 2016, there were 80 to 100 cars "in line." (Tr. 84-85). This is clearly false as the rail yard only had capacity for 63 cars at one time. (Tr. 165). Schultz also testified that there were approximately six individuals around when he had the conversation with Clark regarding a lunch break, but he was unable to provide the name of even a single one of these individuals. (Tr. 87).

Schultz contradicted his own testimony a number of times. On direct examination, Schultz testified that most of the time, he did not log in an out for his lunch break. (Tr. 86). On

cross examination, Schultz reversed himself to say that most of the time he did clock in and out during his lunch break. (Tr. 99-100).

Schultz's characterization of his work ethic is also suspect and contradicted by other witnesses. Perhaps most importantly Schultz failed in any way to rebut Schanfish's testimony that Schultz previously lied to him when Schanfish was conducting an investigation into damaged company property.

Schultz provided evasive answers when asked by Harbor's counsel whether he ever used obscenities towards Clark. Schultz admitted to often using obscenities. But when asked if he ever directed obscenities towards Clark, he skirted the issue:

Q: Let me ask you about this particular time. So I want to make sure it's clear, you used obscenities to you lead – your lead man, in this context of trying to see if he would give you a break for lunch?

A: During normal discussions, yes.

Q: So did you tell him to fuck off?

A: No, I did not.

...

Q: Yes sir. I agree. I have the same problem. So you did not use the F word, you didn't say fuck you, or fuck this, or fuck you, or fuck the job, to Clark?

A: Specifically towards him, no.

...

Q: So if obscenities were being used in the course of that conversation, who was using the obscenities?

A: There was multiple people standing around me. I couldn't tell you who said what, what was being said. There was a lot of obscenities being said. And to pinpoint exactly who was doing it, I don't know.

(Tr. 88-89).

In addition to the disingenuous and self-serving language, Schultz's demeanor during this exchange was evasive and confusing. His testimony should not be given any weight--it was self-serving, inconsistent, contradictory, and irreconcilable with other witnesses' testimony.

Schanfish is the only disinterested witness to testify. Schanfish was an obviously reluctant witness; his demeanor and selective loss of memory showed that he clearly did not want to get involved. But although reluctant to testify, when his was confronted with his prior statement (Resp. Ex. 2), he testified consistent with his prior observations concerning Schultz's veracity, work ethic, and argumentativeness. (Tr. 142-43, 144-45).

A. The General Counsel Fails to Prove that Eric Schultz's Termination was in Violation of Section 7 of the Act

The General Counsel wholly failed to prove that Harbor terminated Schultz for engaging in protected activity. The General Counsel fails to present any link between Schultz's unsupported assertion that he complained about lunch breaks, which he received within 10 minutes of asking for one, and his termination.

The Complaint alleges that “[a]bout January 8, 2016, [Harbor's] employee Eric Schultz concertedly complained to [Harbor] regarding the wages, hours, and working conditions of [Harbor's] employees, by demanding [Harbor] provide employees a lunch break.” (GC Ex. 1(e), ¶ 4(a)). But the General Counsel did not provide any credible evidence that Schultz engaged in any protected or concerted activity on January 8, 2016.

The National Labor Relations Act (the “Act”) prohibits an employer from interfering with, restraining, and/or coercing employees engaged in any protected concerted activity as outlined in Section 7 of the Act. 29 U.S.C. § 158(a)(1). Section 7 of the Act grants employees “the right to self-organization, to form, join, or assist labor organization, to bargain collectively , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection....” 29 U.S.C. § 157.

In order to establish a violation, the General Counsel must prove that “antiunion animus was a substantial or motivating factor in the employment action.” *Wright Line*, 251 NLRB 1083

(1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, 102 S. Ct. 1612, 71 L. Ed. 2d 848 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 103 S. Ct. 2469, 76 L. Ed. 2d 667 (1983). The General Counsel must prove this by a preponderance of the evidence. *Verizon Wireless*, 2016 NLRB Lexis 561 (2016)

To establish her *prima facie* case, the General Counsel must prove: (1) That the employee engaged in protected activity; (2) that the employer knew of the employee's protected activity; (3) that the employee was subject to an adverse employment action; and (4) that the employer harbored unlawful animus or that some other nexus existed between the employee's protected activity and the adverse employment action. *Am. Gardens Mgt. Co.*, 338 NLRB 644, 645 (2002); *see also Tracker Marine*, 337 NLRB 644, 646 (2002); *see also Burnup & Sons*, 379 U.S. 21 (1964).

If the General Counsel establishes its *prima facie* burden, the employer will still avoid liability if it can show it would have taken the same action in the absence of protected conduct. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958 (2004). The employer need only show this by a preponderance of the evidence. *Avondale Industries, Inc.*, 329 NLRB 1064, 1066 (1999). The record does not have to be perfectly consistent on this demonstration; a "defense does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it." *Id.*; quoting *Merillat Industries*, 307 NLRB 1301, 1303 (1992).

1. Harbor Terminated Schultz for a Legitimate Reason

"It is the Respondent's burden to show that it had an honest belief that the employee engaged in misconduct." *Akal Sec., Inc. & United Gov't Sec. Officers of Am., Local 118*, 354 NLRB 122, 124-28 (2009). The burden then shifts to the General Counsel to prove by a preponderance of the evidence that the employee did not, in fact, engage in that misconduct. *Id.*

(citing *Marshall Engineered Products Co.*, 351 NLRB 767 (2007); *Pepsi-Cola Co.*, 330 NLRB 474, 475 fn. 7 (2000)).

Clark and DeLeon both testified in detail regarding Schultz's conduct and statements towards Clark. Both testified to Schultz's use of obscenities directed towards Clark and Schultz's refusal to do his job and follow Clark's orders. In addition to Schultz's general disregard and disrespect for his job, Schultz directed the most offensive of insults at Clark. Schultz called Clark names including "a fat F'er [and] fucking F'n nigger." (Tr. 50, 166, 171). These were personal attacks on Clark, Schultz's lead man, and were in clear violation of company policy and grounds for termination. These were not just words of frustration. Ultimately, because Schultz was out of control and refused to comply with Clark's requests, Clark had no choice but to call supervisor Schanfish to assess and assist in the situation. (Tr. 166)

Even when Schanfish arrived, Schultz continued his disrespectful and outrageous conduct. (Tr. 167, 178). Based on Schultz's conduct, Harbor had an honest belief that Schultz engaged in misconduct and that it had legitimate grounds to terminate him. The General Counsel, on the other hand, cannot prove by a preponderance of the evidence that Schultz did not engage in any misconduct. Her sole evidence on this point is Schultz's unsupported denials that he did not say "fuck this, fuck this job," or that he did not call Clark "a fat F'er [and] fucking F'n nigger." (Tr. 180). As described above, Schultz is incredible on this point and his version of events cannot be given any weight. Therefore, the General Counsel cannot establish that Schultz was not engaged in misconduct at the time of his termination.

2. Schultz was Not Engaging In Protected Activity

Schultz was not engaging in protected activity, and the General Counsel's *prima facie* case fails to meet even the first element of her claim. Activity is concerted if it is "engaged in, with, or on the authority of other employees, and not solely by and on behalf of the employee

himself.” *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984); *see also NLRB v. City Disposal Sys.*, 465 U.S. 822, 830 (“The term ‘concerted activit[y]’ is not defined in the [Act but it ... embraces the activities of employees who have joined together in order to achieve common goals”). Whether an activity is considered concerted is based on the totality of the circumstances. *Nat’l Specialties Installations*, 344 NLRB 19 (2005).

The General Counsel has provided no credible evidence that Schultz was complaining about lunch breaks at the time of his discharge, much less that those complaints were a substantial or motivating factor in his termination. A discussion regarding the timing for lunch breaks was a common occurrence on the rail yard. (Tr. 57). The timing of lunch breaks was determined on a daily basis. (Tr. 57). Factors such as the amount of cars needed to be inspected were taken into account. (Tr. 57, 85). There was a regular back and forth between the supervisor and the laborers to determine the timing of the breaks to ensure that the required work was being completed. (Tr. 57).

Schultz testified consistent with this process. Schultz asked Clark whether the laborers could take their lunch break, which was in line with the way timing of breaks was determined. (Tr. 74-75). Although Schultz testified that Clark originally stated they needed to finish the line of cars currently needing inspecting, he stated that Clark made a phone call and less than 10 minutes after he asked for a lunch break, one was given to him. (Tr. 75-76). Schultz offered no testimony that he ever complained before about lunch breaks or that he disagreed with Harbor’s lunch break policy. (Tr. 75-76). His testimony only concerned this one day in which he was tired and wanted to take a lunch break, which he was granted almost immediately, per the normal practice at the Belvidere facility.

Even assuming Schultz was engaging in protected concerted activity on January 8, 2016, his behavior was not protected by the Act. Schultz's behavior was so outrageous that he lost protection under the Act. "[A]n employee who is engaged in [protected activity] can, by opprobrious conduct, lose the protection the [Act].'" Although 'employees are permitted some leeway for impulsive behavior when engaging in concerted activity, this leeway is balanced against an employer's right to maintain order and respect' in the workplace." *Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 26 (D.C. Cir. 2011). The Act does not protect against threats or threatening conduct made by an employee. *Id.* An employee loses protection of the Act if his conduct is "so violent" or "of such character as to render [the employee] unfit for further service." *Walkerstorfer Co.*, 305 NLRB 592, fn. 2 (1991); *Hawthorne Mazda*, 251 NLRB 313, 316 (1980). Schultz's conduct clearly falls under this exception.

The Board considers a number of facts when determining whether an employee's conduct is so egregious as to lose the Act's protection including: (1) the place of the incident; (2) the subject matter of the discussion; (3) the nature of the employee's conduct; and (4) whether the conduct was provoked by the employer's unfair labor practice. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).

The first factor weighs heavily against protection of the Act. The Board should consider the presence or absence of other employees and the possible effect on future discipline. *Piper Realty Co.* 313 NLRB 1289 (1994). The Board will weigh this factor against protection where an employee is leveling obscenities at a superior in the presence of other employees because that may jeopardize the disciplinary systems. *Datwyler Rubber and Plastics*, 350 NLRB 669, 670 (2007).

Schultz's outburst occurred on the rail yard. There is conflicting evidence of whether other employees were present at the time of his outburst. Even if there were no other employees around, Schultz's outburst occurred in an area that could easily have been overheard by others.

During his outburst, Schultz raised his voice and continuously shouted racially inflammatory obscenities at Clark. (Tr. 50, 166, 171). He was told to calm down by Clark but refused. (Tr. 165). Schultz repeatedly refused to follow Clark's order to get back to work. (Tr. 165). Schultz's insubordination occurred in an area where other employees could have easily observed his conduct, serving to undermine Harbor's ability to control its workers. *See King Soopers, Inc. & Marie Butt, and Individual & United Food & Commercial Workers, Local Union 7*, 2007 WL 1598704 (NLRB Division of Judges) (May 18, 2001). All of Schultz's behavior occurred on the rail yard in close proximity to other employees; therefore the location factor weighs against the Act's protection.

The second factor—the subject matter of the discussion—also weighs heavily against protection of the Act. On January 8, 2016, the subject matter of Schultz's outburst was his continued refusal to perform the work required of him as a pretrip laborer. (Tr. 165). This refusal is consistent with Schanfish's testimony that Schultz was a chronic complainer who regularly argued about having to perform his assigned tasks. (Tr. 141). At no point during Schultz's abusive rant towards Clark was there any mention of a lunch break or a complaint about not receiving a lunch break. Once Schanfish came out to the yard to get Schultz, there was still no mention of lunch breaks. Schultz continued to hurl abusive insults at Clark and continued to refuse to work. Therefore, the second factor weighs against protection of the Act.

The third factor—the nature of the employee's conduct—also weighs heavily against protection of the Act. “Ad hominem attacks” are beyond the bounds of protected activity. *In Re*

Mead Corp., 331 NLRB 509 (2000). Although merely raising one's voice is does not result in loss of protection of the Act, (*Severance Tool Industries*, 301 NLRB 116, 1169 (1991)). Schultz did more than just raise his voice on January 8, 2016. Schultz continuously used the "F" word in refusing to follow Clark's orders, and compounded the insult by calling Clark a "nigger". (Tr. 50, 166, 171). As detailed above, Schultz's conduct on January 8, 2016, clearly rises to the level of opprobriousness, and therefore is not entitled to the protection of the Act.

The fourth factor also weighs against protection of the Act. The General Counsel provided no evidence that Schultz's outburst was provoked by any unfair labor practice by Harbor. Schultz testified that he asked Clark for a lunch break, Clark went to the car to make a phone call, and then Clark came out and gave them a lunch break. Schultz testified that this happened in a matter of minutes.³ (Tr. 75-76).

Schultz's behavior was not provoked by any action by Clark or any one at Harbor. Schultz began cursing and causing a scene before Clark even approached him. (Tr. 165). Before Clark even approached Schultz, Schultz was already saying "fuck this, fuck this job!" (Tr. 49, 172, GC Ex. 8). Clark then approached Schultz to tell him to calm down and get back to work, at which point, Schultz's behavior escalated into hurling racist insults towards Clark. (Tr. 165-166). Clark was well within his rights and duties as a lead man to enforce work rules and ensure that all employees were performing their job duties. Thus, Schultz's conduct on January 8, 2016, was entirely unprovoked by any alleged unfair labor practice and was, instead, caused by his

³ Harbor disputes that this ever occurred and the General Counsel only presented evidence that it happened through Schultz's testimony, which is not credible. Schultz testified that there were approximately six other people present. (Tr. 87). The General Counsel did not call any of those other six individuals to testify. Harbor has presented testimony through three credible witnesses disputing this account.

unwillingness to perform his job of pretrip laborer. This factor also weighs against protection of the Act.

The balancing of the four factors outlined in *Atlantic Steel* demonstrates that this situation was well outside the conduct normally protected by the Act. Schultz's behavior was so outrageous and opprobrious that even if he was engaging in any protected concerted activity, he is not entitled to be protected from his employer's understandable action to terminate him.

3. Harbor Had No Knowledge of Any Protected Activity

Even assuming arguendo that Schultz was engaging in protected activity--which General Counsel has failed to show--there is no evidence that Harbor was aware of this conduct. "[I]t is axiomatic that the employer could not have been 'motivated' by the employee's protected activity if the employer didn't know about such activity. Accordingly, credible proof of 'knowledge' is a necessary part of the General Counsel's threshold burden, and without it, the complaint cannot survive." *Tomatek, Inc.*, 333 NLRB 1350, 1353 (2001); *Stanford Linear Accelerator Center*, 328 NLRB 464 (1999). The burden of proving that the employer had knowledge rests solely on the General Counsel. *Gestamp S.C. LLC v. NLRB*, 769 F.3d 254, 262 (4th Cir. 2014); *Firestone Tire & Rubber Co. v. NLRB*, 539 F.2d 1335, 1338-39 (4th Cir. 1976). Where the individuals involved in issuing the alleged adverse employment action testify they were unaware of the employee's protected activity, no knowledge exists, and the allegation must be dismissed. *Mission Foods*, 350 NLRB 336, 338 (2007).

There is no evidence to show that Harbor and those involved in the ultimate decision to terminate Schultz had any knowledge of his alleged concerted activity. DeLeon was the ultimate decision maker in Schultz's termination. DeLeon testified that when he spoke with Schanfish, there was no mention that Schultz had been complaining about lunch breaks. (Tr. 57). The General Counsel failed to present any evidence to the contrary. The General Counsel also failed

to present any evidence that DeLeon was not the individual that made the ultimate decision to terminate Schultz.

4. The General Counsel Failed to Establish Animus Or Any Nexus Between Schultz's Alleged Protected Activity and His Termination

The General Counsel wholly fails to put forth any evidence even remotely suggesting that Schultz was terminated for engaging in any protected activity. There is no evidence that Harbor suppressed or retaliated against employees who complained about working conditions, or even that this particular situation was anything out of the ordinary. Schultz himself did not even testify that he was terminated for complaining about lunch breaks. Schultz testified to being given the opportunity to ask DeLeon why he was terminated. Schultz failed to do this.

DeLeon made the ultimate decision to terminate Schultz. (Tr. 48). DeLeon testified that when he received the call from Schanfish, there was no mention of complaints regarding lunch breaks. (Tr. 57). Schanfish told DeLeon about Schultz's insubordinate and abusive behavior and that is why DeLeon made the decision to terminate Schultz. (Tr. 49, 57).

5. Harbor Would Have Terminated Schultz Absent Any Protected Conduct

Even if the General Counsel could meet her burden to show animus, the Complaint must still be dismissed under *Wright Line* because Harbor would have terminated Schultz in the absence of the alleged protected concerted activity. The Harbor Employee Handbook "prohibits harassment, disrespectful or unprofessional conduct...." (GC Ex. 4, p. 5). This conduct includes "[v]erbal conduct such as epithets, derogatory jokes or comments, slurs or unwanted sexual advances, invitations or comments[.]" *Id.* "Any employee determined by the Company to be responsible for harassment or other prohibited conduct will be subject to appropriate disciplinary action, up to, and including termination." *Id.* at p. 6.

Schultz's conduct was clearly prohibited within the language of Harbor's Handbook. Schanfish himself testified that the conduct described by Clark would be a violation of Harbor policy. (Tr. 149). In accordance with the Handbook, Clark notified his supervisor, Schanfish, of Schultz's conduct. Schanfish then notified DeLeon and DeLeon made the decision to terminate Schultz for insubordination.

B. Clark Was Not A Supervisor

The General Counsel amended the Complaint at the last minute to reflect that the lead man, Ken Clark, was in fact a statutory supervisor. Apparently this status is necessary under the theory that Clark made the decision to terminate Schultz. As noted above, this is not the case. But regardless, it is clear from the record that Clark was not a supervisor at the time Schultz was fired.

The burden of proving that an individual is a statutory supervisor is on the party asserting that supervisory status. *Dean & DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003). The supervisory status must be proven by a preponderance of the evidence. *Id.* The General Counsel has failed to prove that Clark was a supervisor on January 8, 2016.

Section 2(11) of the National Labor Relations Act (the "Act") defines "supervisor" as:

Any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing exercise of such authority is not of a *merely routine or clerical nature, but requires the use of independent judgment.*

29 U.S.C. § 152(11) (emphasis added). Individuals are supervisors under this definition if "(1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., 'assign' or 'responsibly to direct') listed in Section 2(11); (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment'; and (3) their

authority is held ‘in the interest of the employer.’” *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006) (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 702, 713 (2001)).

The authority to “assign” refers to “the act of designating an employee to a place (such as a location, department, or wind), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee In sum, to ‘assign’ for purposes of Section 2(11) refers to the ... designation of significant overall duties to an employee, no to the ... ad hoc instruction that the employee perform a discrete task.” *Oakwood Healthcare*, 348 NLRB No. 37 slip op. at 4.

The authority “responsibly to direct” is “not limited to department heads,” but occurs “[i]f a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ ... provided that the direction is both ‘responsible’ ... and carried out with independent judgment.” *Id.* slip op. at 6. “[F]or direction to be ‘responsible,’ the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly.” *Id.* slip. op. at 7. “Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It must also be shown that there is a prospect of adverse consequences if he does not take these steps.” *Id.*

“[T]o exercise ‘independent judgment,’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data.” *Id.* slip. op. at 8. “[A] judgment is not independent if it is dictated or

controlled by detailed company policies or rules, the verbal instruction of a higher authority, or in the provisions of a collective-bargaining agreement.” *Id.*

In *Croft Metal, Inc.*, the Board held that lead persons at a manufacturing facility were not statutory supervisors. 348 NLRB 717, 721 (2006). At Croft, the lead persons are not responsible to preparing work schedules or to determine which employees will be working on which lines, shifts, department or overtimes periods. *Id.* The lead persons do not give any significant overall duties to employees. *Id.* The lead persons work alongside with the regular line and crew members “who perform, consistent with their classifications, the same task or job on the line or in their department every day.” *Id.* The lead persons would occasionally switch the tasks of those employees within their department. *Id.* at 721.

The Board determined that the “sporadic rotation of different tasks by the lead persons more closely resembles an ‘ad hoc instruction that the employee perform a discrete task’ during the shift and such is insufficient to confer supervisory status on the lead persons pursuant to Section 2(11).” *Id.* The Board determined that although the lead persons may direct individuals when they decide what job or task should be done next and which individual to do it and they are held accountable for the job performance of their assigned employees, the lead persons do not do this with independent judgment. *Id.* The lead person’s direction was merely “routine or clerical.” *Id.* Because of these reasons, the Board held that the lead persons were not statutory supervisors.

Like the lead persons in *Croft*, Clark’s assignment of tasks was nothing more than an *ad hoc* instruction. (Tr. 161). Clark would do no more as a lead man than tell a prepper which level of the railcar to clean. (Tr. 161). The task being performed by the preppers, and Clark himself, were no more than routine tasks that needed to be performed each shift. (Tr. 161). Clark also possessed no authority to hire, transfer, suspend, lie off, recall, promote, discharge, reward, or

discipline those employees assigned to him. (Tr. 161). Therefore, Clark was not a supervisor within the definition of Section 2(11).

IV. CONCLUSION

Harbor did not violate the Act by terminating Schultz on January 8, 2016. Schultz's insubordinate and opprobrious behavior caused him to lose any protection of the Act. Moreover, Schultz did not engage in any protected concerted activity as to even warrant protection of the Act. The General Counsel has wholly failed to present any evidence that Schultz was terminated for any protected concerted activity or rebut Harbor's stated reason for termination for insubordination. For the foregoing reasons, the Complaint must be dismissed in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Respondent Harbor Rail Services Company's Post-Hearing Brief to the Administrative Law Judge has been electronically filed with the Division of Judges through the Board's E-Filing System this 19th day of April 2017. Copies of the said filing are being served upon the following persons by electronic mail:

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