UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ALLIED CRAWFORD STEEL (Respondent)

and Case No. 4–CA–174095

TEAMSTERS LOCAL 776 (Charging Party)

Fallon Schumsky, Esq., and
Rebecca Leaf, Esq.,
for the General Counsel.
Brandon S. Williams, Esq. (Capozzi Adler, P.C.),
for the Respondent.
Ed Sutton,
for Charging Party.

DECISION

STATEMENT OF THE CASE

Robert A. Giannasi, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania on April 18, 2017. The complaint, as amended, alleges that Respondent violated Section 8(a)(4),(3), and (1) of the Act by transferring employee Kevin Berry from one shift to another and denying subsequent requests by Berry to transfer to other shifts because of his union activities and because he testified on behalf of the Charging Party Union in a Board representation case. The Respondent filed an answer denying the essential allegations in the complaint.

After the trial, the General Counsel and Respondent filed briefs, which I have read and considered. Based on those briefs and the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. Jurisdiction

Respondent, a Pennsylvania corporation with a warehouse distribution center located in Middletown, Pennsylvania, is engaged in steel distribution activities at that location. In a representative one-year period, Respondent purchased and received, at its Middletown location, goods valued in excess of $50,000 from points outside the Commonwealth of Pennsylvania. Accordingly, I find, as Respondent admits, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

I also find, as Respondent admits, that the Charging Party Union (hereafter, the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Background

Respondent is owned by Gary Stern, who is based in Toronto, Canada. Its Middletown facility, also known as the Harrisburg facility, is one of 11 U.S. facilities operated by Respondent. The Harrisburg facility is a warehouse operation that handles incoming steel shipments, which Respondent unloads and stores, and which, after the steel is sold to its customers, it then reloads onto trucks and ships out of the facility. Most of the Harrisburg personnel are warehouse workers, crane operators or truck drivers; others are office workers, salespeople, supervisors and managers. The Harrisburg facility hired its first employees in the summer of 2015 and opened to the public in October of 2015. At that time, the facility had only one shift—the first shift from 7 am to 3:30 pm.[1]

In September of 2015, crane operator Kevin Berry called Ed Sutton, a business agent for the Union, to ask about union representation for Respondent's employees. He met several times with Sutton to discuss organizing Respondent's employees. Two fellow employees, Devin Washington and Eric Carter, joined Berry in the organizing effort among the warehouse employees. On September 29, 2015, the Union filed a petition for a Board-sponsored representation election in the warehouse unit. A hearing on the petition was held on October 9, 2015. The main issue at the hearing was whether the petition was premature, as Respondent alleged, because the unit was expanding. The Board's regional office thereafter ordered an election in the existing unit, described as "[a]ll full-time and regular part time warehouse laborers and drivers," at the Harrisburg facility. The election was held on October 28, 2015. The employees rejected the Union by a vote of 6 to 5.

[1] The Respondent admitted in its answer that the following managers who were involved in the operation of the Harrisburg facility were supervisors under Section 2(11) of the Act and agents under Section 2(13) of the Act: Owner Gary Stern; Patrick Coburn, Regional Warehouse Manager; Alex Kovacs, VP of Growth; Tim Schauman, General Manager; Dave Viola, Plant Manager; John Weltmer, Shipper/Receiver/Plant Manager; and Anthony Heckman, General Manager/Plant Manager/Outside Sales.

Berry testified on behalf of the Union at the October 9 representation hearing and he also served as the Union's election observer at the morning session of the October 28 election. In the interim, during the election campaign, the Respondent vigorously opposed union representation. Stern spent some time at the Harrisburg facility in October. He met with employees both individually and in group sessions. His notes of some of the meetings were introduced into evidence. In what was probably the first group meeting, Stern thanked the employees for a successful startup at the Harrisburg facility. And he told the employees that Respondent was going to add a second shift and eventually a third shift. G.C. Exh. 7.[2]

Stern also urged employees to reject the Union. There is uncontradicted testimony from Eric Carter and Devin Washington that, in one of the group meetings, Stern told employees that he heard someone had contacted the Union and that he did not have to negotiate with the Union. He also asked the employees to give him a chance. Tr. 40-42, 55. He also spoke to employees in one-on-one meetings in a private office. He made clear to employees in those meetings that he wanted them to reject the Union. He actually met twice with Washington. In the first meeting Stern asked Washington if he knew anything about the Union; and, in the second, the day before the election, he urged Washington to vote against the Union, repeating that he did not have to agree to its terms. Tr. 42-43, 54-56. Then-General Manager Anthony Heckman also talked to employees about the Union, repeating some of the views that Stern had expressed. Tr. 44-45. At still another group meeting, led by Regional Warehouse Manager Patrick Coburn and Human Resources Regional Manager Tanja Bowdoin, the latter read a statement from Stern urging rejection of the Union. In the statement, Stern asked the employees to give him a chance and he would see what he could do about complaints. Tr. 45-46.[3]

Coburn, who is based in Greenville, South Carolina, spent the entire month of October 2015 at the Harrisburg facility. Tr. 144, 158. He testified that he was there to

[2] The original of this exhibit was in Stern's handwriting, which is difficult to read. After the hearing closed, the parties provided me, at my request, an agreed-upon typed version of the exhibit, which I have included with the original both in the hard-copy and the electronic record of the exhibits.

[3] I also note that the above uncontradicted testimony from Carter and Washington was supported by the affidavit of Kevin Berry, which was admitted in evidence as past recollection recorded. According to his affidavit, Berry too attended group meetings where Stern's anti-union position was expressed; and he was summoned for a one-on-one meeting with Stern. See G.C. Exh. 9. By the time of the hearing, Berry had been promoted to a position he identified as logistics coordinator or dispatcher. Tr. 61, 75. This is a salaried and office job. Tr. 75-77, 208-209. He was thus removed from the unit in which the Union sought representation rights. Although Berry testified at the trial, he was a very reluctant witness because he had obviously switched his allegiance from the Union to the Respondent. And he had a remarkable and convenient loss of memory. He claimed he could not remember very much about what happened during the union campaign and his shift change requests, the very subject of this case, based on charges filed by the Union on his behalf. He did confirm, however, that his signed affidavit was a truthful account of what happened. Based on his unimpressive demeanor and his rambling evasiveness, I did not find his testimony reliable unless confirmed by his affidavit or by other documentary evidence.

train the warehouse employees and assess their abilities (Tr. 124-125), but he also testified he was aware of the union campaign that was underway in October (Tr. 143). And, as indicated above, he led one of the group meetings at which Stern's statement in opposition to the Union was read to the employees.

Coburn prepared weekly notes on his assessment of the employees, which were introduced into evidence. His assessment of Berry, Carter and Washington, all pro-union employees, was not favorable. Coburn noted that all three hung around together and talked. He had a particularly negative assessment of Berry. He said that Berry had an "attitude" problem and called him "slow" and "lazy." Coburn also noted that another employee was good unless he "gets caught up" with Berry, Carter and Washington. In his last notes, prepared at the end of October, Coburn noted that Berry was still "slow" and had an "attitude," further stating that, if Berry did not improve, Respondent might have to "let him go." Coburn also noted that Berry was now on second shift and he hoped that, on that shift, Berry would "break all the bad habits that he has." G.C. Exhs. 15-18.

The Union filed objections to the election it lost; it also filed unfair labor practice charges alleging that Respondent had coerced employees during the election campaign and discriminatorily terminated Carter and Washington shortly after the election. A complaint issued on the unfair labor practice charges. The Board also authorized the filing of a Section 10(j) injunction in United States District Court to remedy the unfair labor practices. All those matters were subsequently resolved by a settlement agreement dated March 11, 2016. G.C. Exhs. 5 and 6.

Except in terms of background, the settlement does not affect the complaint allegations in this case, which are based on separate charges asserting that Respondent violated the Act by discriminatorily transferring Berry from his existing shift and denying his subsequent shift transfer requests. Since initially contacting the Union and until late February 2016, Berry maintained regular contact with Union Business Agent Ed Sutton. See Tr. 31-34, G.C. Exh. 3. He also maintained contact with Board agents investigating and preparing this matter, particularly in email exchanges, two of which were entered into the record in this case. For example, as late as May 2, 2016, Berry sent an email to a Board agent stating that he felt he was "being forced to work on 2nd shift. I am dealing with a lot of emotional stress and missing out on part time job opportunities just to stay afloat while (sic). All while (sic) I'm being underpaid and overworked every day." G.C. Exh. 13.

However, on July 21, 2016, Berry was promoted to a salaried office position in the shipping and receiving department. G.C. Exh. 22. On July 25, 2016, Berry confirmed in an email to a Board agent that he had been promoted and that he was waiving his right to be transferred to the third shift. G.C. Exh. 12.

The Transfer of Berry from First Shift to Second Shift

Berry was hired in June 2015 as a crane operator at $11 per hour. His resume in Respondent's file includes a notation made by a management official that Berry

preferred to work on the first shift. G.C. Exh. 8. And that is where he started. But, on October 21, 2015, he was transferred, involuntarily, to the second shift.[4]

Respondent instituted its second shift at the Harrisburg facility in October of 2016.[5] Coburn testified that he was involved, along with Stern and other top management people, in the decision to transfer employees from the first shift to the second shift at that time. Tr. 145, 149. The announcement as to which employees were to be transferred to the newly established second shift was made by Gary Stern in an employee meeting at the Harrisburg facility on October 15, 2015. The employees who were to go to the second shift included: Kevin Berry, Wayne Bruce, Dennis Woland, Jeremy Rosati, and Devin Washington. Tr. 149. Washington never went to the second shift, however, because, on the same day he was targeted for the second shift, Respondent granted his request to stay on first shift for personal reasons. Tr. 57, 137-138.[6]

Coburn was the only witness who testified about why Berry was selected to move to the second shift.[7] He testified that the people selected for the second shift, including Berry, were people with experience, good work ethic, availability, and appropriate skills. Tr. 145, 149-152. Coburn agreed that the second shift required the "better people." Tr. 165. But that testimony is at odds with Coburn's contemporary assessment of Berry's attitude and skills, as reflected in his written notes taken in October 2015 and discussed above. Tr. 153-155. Indeed, Coburn testified that, in October 2015, when Berry was transferred to the second shift, Berry was not a very good employee because he was hanging around too much with Washington and Carter, who were the only "bad influences" on him. Tr. 177-178. And, as indicated above, in his written assessment of employees in late October, Coburn stated that Berry was slow, had an attitude problem, and Respondent was considering terminating him. When Coburn was asked why Berry was transferred to the second shift, he gave this explanation (Tr. 174-175):

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[4] In its answer, Respondent admitted that it transferred Berry from the first shift to the second shift on October 21, 2015.

[5] The first shift off-loaded incoming steel deliveries, stored them in an organized fashion, and loaded steel products for delivery. Tr. 116. The second shift "pulled steel," which means that the employees prepared the steel for shipping, and loaded the steel onto trucks. At the time of the hearing, the Respondent operated 3 shifts: The first shift runs from 7 am to 3:30 pm; the second shift runs from 3 pm to 11:30 pm; and the third shift, added sometime in January 2016, runs from 11 pm to 7:30 am. The third shift mainly loads the steel on to trucks. Tr. 115-120.

[6] It does not appear that, at this point—October 15, Washington, unlike Berry, who had testified on behalf of the Union at the Board representation hearing on October 9, was known by Respondent to have been a union leader or supporter. In his first one-on-one meeting with Stern, early in October, Washington denied knowing anything about the Union. In the second meeting, on the day before the election, Stern told Washington, "we pretty much know which way you're going to vote," but he was still trying to obtain Washington's vote in the election. Tr. 53-57.

[7] Stern did not testify in this proceeding. But his notes of meetings with employees, received in evidence as G.C. Exh. 7, included his report of meetings with Berry about the latter's transfer to the second shift. Those notes indicate that, after Berry learned that he would be transferred to the second shift, Berry came to Stern on two occasions to plead that he be permitted to stay on the first shift for personal reasons and because of his greater seniority than other employees who were slated to remain on first shift. Stern denied those requests and indicated that Berry seemed angry after his pleas were denied.

> Because he can't—Kevin started off a little rough. He then—after he took upon him to get away from some people, he did very well. He would—attention to detail. He would actually go to his bay; take his paperwork; and he would pull the material.

The explanation does not really address why Berry was transferred to the second shift. It seems to address his alleged improvement after he started working on the second shift and was separated from "some people," meaning Carter and Washington.

Denials of Berry's Requests to Transfer Out of Second Shift

In November 2015, Berry asked for a transfer from the second shift back to the first shift. That request was denied. Coburn testified that he was responsible for denying Berry's request to transfer from the second shift to the first shift on this occasion, although Berry made his request to the on-site manager, Anthony Heckman, and Coburn's decision was relayed through Heckman. Coburn testified that the reason for his decision in denying the transfer request was that "we have to get established. . . . I said and not at this time. I didn't say it was indefinite; I said not at this time; six months to a year maybe." Tr. 130-131. There is no evidence that Berry was notified of this reason at the time his request was denied.

Later, sometime in January 2016, after the Respondent added a third shift, Berry again asked to transfer out of the second shift, this time to the third shift. The reason given by Berry for his request on this occasion was that he had lost his driver's license, which made it difficult for him to continue on the second shift. Heckman forwarded the request to Coburn, who again denied the transfer. When testifying about his denial of Berry's request on this occasion, Coburn gave no reason for his denial of the request. Tr. 132-133.

There was still another request by Berry to move to the third shift in April of 2016. That request was made to the new on-site general manager at the time, Tim Schauman, and it was based on an accommodation to Berry' personal life. Schauman agreed to the transfer, as did David Viola, the plant manager at the time. Tr. 133-134, 180-181, 193-194, 196. Respondent was about to move another employee to the third shift and Schauman believed it would not be a problem to move Berry instead. Tr. 194-195.[8]

[8] Schauman, who has 40 years of experience in the industry, came to the Harrisburg facility in November 2015, after the union campaign and the Board election. Tr. 191-192, 197-198. At the time he granted Berry's transfer request, Schauman had no idea that Berry had been an activist on behalf of the Union during October of 2015. Tr. 197. In his testimony, Coburn tried to downplay Schauman's ability to assess employees in terms of granting shift transfers. I do not credit Coburn's testimony on this issue. By the time of Coburn's reversal of Schauman's decision to transfer Berry, Schauman had been general manager at the Harrisburg facility for six months and, in approving the transfer request, he had the agreement of another experienced manager at the facility, David Viola. They surely knew how to run the facility on a day-to-day basis better than Coburn, if, indeed, such decisions were going to be based on legitimate business reasons.

Coburn, however, overruled Schauman and Viola and denied Berry's transfer request; that decision was then transmitted to Berry. 133-134, 196-198. According to Coburn, Berry's was one of several requests to transfer out of the second shift at the time. His explanation for the denial of Berry's request was as follows (Tr. 135):

> Because we were still establishing second shift. And without pulling somebody that knows what they're doing away from there, then I had—nobody else to run that bay. So therefore, for our service and our customers next-day, we'd have problems getting steel out. So therefore, everybody wanted to move, but they wouldn't let us get established.

At another point in his testimony, Coburn suggested that Berry was too valuable an employee to transfer out of the second shift. Tr. 175-176. Here again, there is no evidence that this reason for the reversal of the grant of Berry's transfer request was transmitted to Berry at the time. Nor is there any evidence, other than Coburn's own testimony, that Berry had improved in such a way from Coburn's earlier assessment to make himself too valuable to transfer out of the second shift.

Coburn acknowledged that other employees were permitted to transfer shifts. One employee was hired in November 2015 to work on the third shift and he was trained on the first shift. When it was time for him to move to the third shift, in early 2016, that employee changed his mind and said it would be a burden on his family to move to the third shift. Coburn initially denied the transfer, but later relented and permitted the transfer when that employee threatened to quit. Tr. 136-137. Also in early 2016, two other employees, one of whom had been "on the job" for only two weeks, were permitted to switch shifts, one from second to third and the other from third to second. Tr. 138-141, 158. Still another employee, who was transferred to the second shift when Berry was, asked for and received a transfer to the third shift when it was created in early 2016. Tr. 141-142. And a newly hired employee on the third shift was permitted to transfer to the second shift in early May of 2016. Tr. 164-165. Other shift transfers were permitted based on personal considerations and were made even though the employees transferred had little prior experience. Tr. 142-143, 164-169.[9]

Documentary evidence shows that the warehouse employee workforce at the Harrisburg facility increased from 11 employees at the time of the Board election to 23 employees in May of 2016. G.C. Exh. 20. During that time, Respondent hired numerous employees, and, after some training, placed them on all three shifts. G.C. Exhs. 19 and 20.

[9] Coburn also testified that he denied transfer requests from six or seven employees, in addition to Berry, but he could not name the employees or give any details as to why their transfer requests were denied. He also testified that those employees were no longer employed by Respondent. Tr. 178-180. When asked when those denials took place, Coburn answered, "I have not a clue." Tr. 185. Because of its obvious lack of detail and unreliability, I do not credit Coburn's testimony in this respect.

Discussion and Analysis

In determining whether an employer's adverse employment actions are unlawful, the Board applies the mixed motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enf'd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must satisfy an initial burden of showing, by a preponderance of the evidence, that the employee's protected activity was a motivating factor in an employer's adverse action. If the General Counsel satisfies that initial burden, the burden shifts to the employer to show it would have taken the same action even absent the employee's protected activity. The employer does not meet its burden merely by showing it had a legitimate reason for the action; it must demonstrate, persuasively, that it would have taken the same action in the absence of the protected conduct. And if the employer's proffered reasons are pretextual—either false or not actually relied on—the employer fails by definition to meet its burden of showing it would have taken the same action for those reasons absent the protected activity. See also *Boothwyn Fire Company No. 1*, 363 NLRB No. 191, slip op. 7 (2016).[10]

A finding of pretext also supports an initial showing of discrimination. See *Wright Line*, supra, 251 NLRB at 1088 n. 12, citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F. 2d 466, 470 (9th Cir. 1966) (Where a respondent's reasons are false, it can be inferred "that the [real] motive is one that the [respondent] desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference."). See also *Lucky Cab Co.,* 360 NLRB 271, 273-274 (2014). Moreover, a trier of fact may not only reject a witness's testimony about his reasons for an adverse action, but also find that the truth is the opposite of that testimony. See *Pratt (Corrugated Logistics), LLC,* 360 NLRB 304, 314 (2014) and cases there cited.

Applying the above principles to the facts in this case, I find that Respondent transferred Berry to the second shift on October 21 because of his union activities and because he testified in the Board representation proceeding less than 2 weeks before. I also find that Respondent refused Berry's several requests to transfer out of the second shift, including on the last occasion in April 2016, because of the same discriminatory reasons. I further find that the reasons given by Regional Warehouse Manager Coburn for Respondent's actions were not believable and therefore amounted to pretexts. Even without that finding of pretext, however, I would find that Respondent has not shown persuasively that its decisions on Berry's shift assignments would have been taken in the absence of his union activities and his testimony on behalf of the Union's position in the representation case.

The General Counsel has easily met the initial burden of showing that the decision to transfer Berry to the second shift on October 21 was made for unlawful and discriminatory reasons. It is clear that Berry was the chief supporter of the Union among the warehouse employees. And he was known as such to the Respondent. He

[10] The *Wright Line* analysis applies not only to the Section 8(a)(3) allegations in the complaint, but also to the Section 8(a)(4) allegations. *American Gardens Management Co.,* 338 NLRB 644, 645 (2002).

not only testified on behalf of the Union's position at the Board representation hearing on October 9, but he was the Union's observer at the morning session of the Board election on October 28. Respondent's anti-union position was made clear in numerous meetings with the small number of warehouse employees on board in October 2015. Owner Gary Stern and Warehouse Regional Manager Coburn spent much time at the Harrisburg facility during the month of October. Stern and other management officials made clear Stern's opposition to the Union, his vows not to deal with the Union, and also his interest in resolving employee complaints if given the chance without a Union on the scene. Indeed, in one of his early group meetings, Stern told employees that he heard someone had contacted the Union—that someone, of course, was Berry.[11]

The timing of the October 21 transfer of Berry to the second shift during the intensity of the anti-union campaign solidifies the inference that the transfer was made to punish him for his leadership role in the Union's effort to represent the warehouse employees. Also significant in this respect is Respondent's effort to accommodate employees' personal reasons for a shift preference—something Respondent did not do for Berry, whose preference for the first shift was made clear to Respondent from his date of hire. Indeed, Stern's notes show that Respondent tried to place employees on the shift they requested. G.C. Exh. 7. I therefore find that the General Counsel has initially shown that the October 21 transfer of Berry to the second shift was discriminatorily motivated.

As shown in the factual statement, Respondent's defense to the transfer of Berry to the second shift was provided by Coburn's testimony. That testimony is not only unconvincing, but Coburn's explanation is nonsense. It does not even address why Berry was transferred to the second shift, except perhaps in its reference to Berry's hoped-for improvement after he "g[o]t away from some people," meaning Carter and Washington, two other pro-union employees. Moreover, both before and after the transfer, Coburn's contemporary notes reflected a highly negative view of Berry's work and his work ethic. These were supposedly necessary criteria for placing employees on the second shift, according to Coburn, who also thought only the "better" employees should work on the second shift. Indeed, his late October notes—written *after* the transfer—show that Coburn considered terminating Berry. Thus, Coburn's testimony on this issue is hopelessly inconsistent and I do not credit it. But, as I have indicated, Coburn's non-explanation implied that Berry's transfer separated him from other pro-union employees, which confirms an anti-union motive for the transfer. Respondent has therefore not met its burden to rebut the General Counsel's showing of discrimination. On the contrary, Coburn's unconvincing explanation strengthens the finding of discrimination in the October 21 transfer of Berry to the second shift.

The record shows that Berry remained on the second shift for at least 6 months, from October 21, 2015 through at least May 2, 2016, despite repeated attempts to transfer to other shifts. On May 2, Berry complained to a Board agent that he was being

[11] It is well settled that evidence on matters that were subject to a settlement agreement may be used as background in determining the motive of an employer's actions in other matters. See *St. Mary's Nursing Home*, 342 NLRB 979, 980 (2004).

"forced" to work on the second shift and that caused him a "lot of emotional stress." The initial discriminatory transfer of Berry to the second shift provides context for the Respondent's subsequent denials to transfer him out of the second shift. The first denial of Berry's transfer request was in November 2015, just a few weeks after the original discriminatory transfer. I also note that, at the time of the first two denials, both the objections case and the unfair labor practice case against the Respondent were still pending and had not yet been settled. I therefore find, at least as an initial matter, that the discrimination against Berry in October 2015 continued when Respondent denied Berry's three requests to transfer out of the second shift—one in November 2015 to the first shift; and twice to the newly instituted third shift, first in January 2016 and finally in April 2016.

Respondent's defense to these denials of the requests to transfer out of the second shift was provided again by Coburn's testimony, which was as unconvincing as his explanation for the original transfer to the second shift. His explanation for the November 2015 denial of Berry's transfer request to the first shift was that Respondent was still "establishing" the second shift and he thought that perhaps in six months or a year the transfer request might be granted. This reason is a pretext. The same inconsistency in Coburn's testimony about Berry's transfer to the second shift in late October applies here with respect to the denial of Berry's request to transfer to the first shift. Moreover, it does not appear that the reasons mentioned by Coburn in his testimony, including the possibility of a later transfer, were communicated to Berry. Indeed, the alleged promise of a future transfer was bogus. Berry remained on the second shift, despite his desire to go back to the first shift, which was his acknowledged preference from the time of his hire, and despite other transfers both in and out of the second shift. In short, I reject Coburn's explanation and I find that the November 2015 refusal to transfer Berry was discriminatory.

The next denial of Berry's request to leave the second shift, this time to the newly created third shift came in January 2016. Here again, the earlier discriminatory actions against Berry support the inference that the discrimination against Berry continued. Significantly, Respondent was still hiring new employees and moving them to the third shift, which had just been instituted. One would think, if only legitimate reasons motivated an employer, that Berry, who was allegedly one of the "better" employees originally transferred to the second shift and was already trained, would be easily moved to the third shift at his request for personal reasons. Significantly, in his testimony, Coburn gave no explanation at all for this denial of Berry's transfer request. Accordingly, I find that Respondent discriminatorily denied Berry's January 2016 request to transfer from the second shift to the third shift.

The final denial of Berry's request to transfer to the third shift in April 2016 is really the strongest example of the continuing discrimination against Berry. The three earlier findings of discrimination provide context for this, the fourth alleged instance of discrimination. But, on this occasion, two on-site managers, Tim Schauman, the general manager, and Dave Viola, the plant manager, had approved Berry's request, for personal reasons, to transfer to the third shift—only to be reversed by Coburn. By now, the increase in the Harrisburg warehouse workforce was significant and the record

shows that many employees were transferred from one shift to another for personal and other reasons. The disparate treatment accorded to Berry simply strengthens the case of discrimination against him for his protected activity. I therefore find that, here again, the General Counsel has established an initial case of discrimination.

Coburn's explanation for this last refusal to transfer Berry is as unconvincing as his other explanations for Respondent's obvious discriminatory treatment of Berry. But here the explanation borders on the ridiculous. The employee (Berry) who, in late October, was such a poor employee that Coburn considered terminating him was now, according to Coburn, so valuable he could not be spared from the second shift. Indeed, aside from Coburn's unreliable testimony, there is no evidence of Berry's alleged improvement to such an extent that he was now considered too valuable to be accorded the transfer he so desperately wanted. Indeed, two on-site managers approved Berry's request to transfer, thus refuting any notion that Berry was too valuable to move out of the second shift. Here again, as in previous Coburn decisions against Berry, neither Coburn nor anyone else told Berry he was too valuable to move out of the second shift. This for an employee who was suffering from emotional stress at being forced to work the second shift. Moreover, Coburn's testimony that his denial of this transfer request was because "we were still establishing second shift" is ludicrous. By the time of Berry's April 2016 request to transfer to the third shift, the second shift had been in operation for six months; indeed the third shift had been in operation for three months. As for Coburn's claim that he had a better understanding, from his South Carolina location, about the propriety of shift transfer requests than Harrisburg on-site General Manager Schauman, I have earlier discredited that testimony. Accordingly, I find that Respondent has not rebutted the General Counsel's strong case of discrimination with respect to the April 2016 denial of Berry's request to transfer to the third shift.

Conclusions of Law

1. By transferring employee Kevin Berry to the second shift, and, thereafter, over a period of six months, denying his requests to transfer to another shift, because of his union activities and because he testified in a Board representation case, Respondent violated Section 8(a)(4), (3) and (1) of the Act.

2. The above violation is an unfair labor practice within the meaning of the Act.

Remedy

Having found that Respondent has engaged in unfair labor practices, I find that it must be ordered to cease and desist from its unlawful conduct and to take certain affirmative action designed to effectuate the policies of the Act, including the posting of an appropriate notice.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[12]

ORDER

Respondent, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Transferring employees from one shift to another or refusing to transfer employees from one shift to another because of their union or other protected concerted activity or because they testified in a Board proceeding or otherwise cooperated with the Board.

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

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

(a) Within 14 days after service by the Region, post at its Harrisburg facility copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent since April 14, 2016.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 4, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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

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

Dated at Washington, D.C., June 5, 2017.

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Robert A. Giannasi
Administrative Law Judge

APPENDIX.

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT transfer you from one shift to another or deny transfer requests from one shift to another because of your union or other protected activity or because you have testified in a National Labor Relations Board proceeding or otherwise cooperated with the Board.

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

ALLIED CRAWFORD STEEL

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

615 Chestnut Street, 7th Floor, Philadelphia, PA 19106-4404
(215) 597-7601, Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/04-CA-174095 or by using the QR code below. Alternatively, you can obtain a copy of the

decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (215) 597-5354.