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Consolidated Communications Holdings, Inc. d/b/a Consolidated Communications of Texas Company and Communications Workers of America, AFL-CIO, Local 6218. Cases 16-CA-187792 and 16-CA-192050

August 27, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On September 28, 2017, Administrative Law Judge Robert A. Ringler issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Charging Party filed exceptions containing supporting argument, the Respondent filed answering briefs, and the General Counsel and Charging Party each filed a reply brief. The Respondent filed cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,¹

¹ The General Counsel excepts to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by telling employee Kim Thompson that she should have known better than to engage in union business. The General Counsel, however, does not state, either in his exceptions or supporting brief, the grounds on which he contends that this purportedly erroneous finding should be overturned. Therefore, in accordance with Sec. 102.46(a)(1)(i)(D) and (ii) of the Board's Rules and Regulations, we shall disregard this exception. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694 fn. 1 (2005), *enfd.* 456 F.3d 265 (1st Cir. 2006).

The Charging Party excepts to the judge's dismissal of the allegation that the Respondent unlawfully created an impression of surveillance in violation of Sec. 8(a)(1) by telling Thompson that her conduct had been reported, on the grounds that the Respondent's statement suggested that it learned of employees' protected activities through secretive means. We disagree. In determining whether an employer's statement created an unlawful impression of surveillance, the test is an objective one based on "whether the employees would reasonably assume from the statement that their union activities had been placed under surveillance." *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007), quoting *Flexsteel Industries*, 311 NLRB 257, 257 (1993). The gravamen of such violation is that employees are led to believe that the employer has placed union activities under its watch. *Id.* Here, the union activity at issue occurred in plain sight of supervisors and fellow employees, and the Respondent merely communicated that the open demonstration had been reported. In these circumstances, the Respondent's statement could not be reasonably interpreted to mean that it was secretly or coercively monitoring protected activities. We affirm the dismissal on this basis.

and conclusions only to the extent consistent with this Decision and Order.²

The General Counsel alleged that the Respondent violated Section 8(a)(3) and (1) by issuing written discipline to employee Kim Thompson for her role in organizing and participating in a brief stand-and-stretch demonstration in her workplace. The judge dismissed the allegation, finding that the demonstration constituted an unprotected work stoppage. For the reasons set forth below, we reverse.

Facts

The Respondent provides broadband data and video services to residential and commercial customers. It has a longstanding collective-bargaining relationship with the Charging Party Union (Union), which represents a unit of employees including customer service representatives working at the Respondent's facility in Conroe, Texas. The Respondent and the Union were parties to a collective-bargaining agreement with an effective term of October 16, 2013, to October 16, 2016. By mid-October 2016,³ the Union's bargaining committee had communicated to the unit members that successor contract negotiations were proving to be difficult.

At the Respondent's Conroe office, customer service representatives work in cubicles seated in front of computers and respond to customer phone calls wearing headsets. Their duties include selling and upgrading services, answering questions, and taking payments over the phone. The representatives are generally seated to enable access to their keyboards, but they are able to stand and walk a short distance without disconnecting from their headsets. Discriminatee Kim Thompson spent the bulk of her time entering data and occasionally answering phone calls; other customer service representatives spent most of the day on the phone. During the workday, it was commonplace for customer service representatives to stand up at their work stations to stretch if they wished. Standing and stretching was not against the Respondent's rules, and the Respondent had never reprimanded or taken action against employees for doing so.⁴

On October 13, with the expiration of the collective-bargaining agreement nearing, Union President Darrell Novark solicited Thompson, who served as an area representative for the Union, to ask her coworkers to stand up and stretch in unison at 2 p.m. to show support for the

² We have amended the judge's conclusions of law and modified his recommended Order consistent with our findings herein.

³ All dates herein are to 2016 unless otherwise noted.

⁴ Every witness at the hearing, including supervisor Diona Kelley, testified that employees are allowed to stand and stretch if they want, and the employees testified they did so on a regular basis.

Union's bargaining position. Thompson proceeded during nonworking time to ask several coworkers to participate in such a demonstration.

At 2 p.m. that day, Thompson and about five coworkers stood up at their cubicles and stretched. All continued to wear their headsets. Thompson stood for about 1 to 2 minutes. The record indicates that customer service representative Kristi Lindsey stood for about 30 to 45 seconds, before sitting down when a new call entered her queue. While standing, Thompson and Lindsey took photographs of the demonstration using their cellphones. The judge found that, during the demonstration, none of the participants said anything, passed anything out, or left their workstations. The record indicates that, during the protest, one of the customer service representatives contacted Supervisor Diona Kelley and told her that employees had been asked, by Thompson, to stand in solidarity with the Union and that individuals were taking pictures. Kelley stepped out of her office and asked another employee if Thompson had asked employees to stand; the employee replied that she was asked by Thompson and had stood.

Kelley relayed this information to her supervisor, Director of Customer Care Kari Juni, and asked Juni to confirm that Thompson "is not supposed to discuss, meet or talk about the union unless she is requested to be in a disciplinary agent meeting." Juni replied affirmatively and told Kelley that they "need to address Kim [Thompson] immediately because she shouldn't be conducting union business on company time except for grievance. She needs to stop anything like this now and in the future."

A few minutes after 2:30 p.m., Kelley called Thompson into her office and said that it had been brought to her attention by two sources that Thompson asked employees to stand in solidarity with the Union. Kelley told Thompson that her behavior was against the rules and that Thompson should not have done it and should have known better.

On October 18, the Respondent issued Thompson a written warning stating: "On 10/13/16 at 2:00 pm, Kim [Thompson] conducted union business on company time and requested agents to stand for a photo to demonstrate union solidarity. As an area rep for the union, Kim is aware that this action is against company and union policies." No other employees were disciplined for standing. At the hearing in this case, Juni testified that the disciplinary warning was necessary because Thompson inter-

rupted work and violated the no strike/no slowdown provision of the collective-bargaining agreement.⁵

The Judge's Decision

The judge found that the Respondent's disciplinary action against Thompson was lawful primarily because Thompson's participation in the demonstration violated the service interruption clause of the parties' collective-bargaining agreement and was unprotected under the Act. Specifically, the judge found that Thompson was not performing work functions during the demonstration and that it was highly likely that the other participants were not doing so either. Accordingly, the judge concluded that the discipline administered to Thompson did not violate the Act.

Analysis

The central issue in this case is whether Thompson's involvement in the demonstration was statutorily protected. Contrary to the judge, we find that it was. Section 7 of the Act expressly protects the right to "assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining," 29 U.S.C. §157, and "it is surely beyond dispute that employees' manifestations of support for their union's bargaining proposals and of opposition to their employer's bargaining positions or tactics generally fall within that protection."⁶ Here, Thompson and her coworkers engaged in the demonstration, timed to coincide with the start of that day's bargaining session, as a show of solidarity with the Union during its contract negotiations with the Respondent. Accordingly, Thompson's organization of and participation in the demonstration constituted protected concerted activity.

The Respondent argues that, in accordance with the judge's finding, Thompson's demonstration was an unprotected work slowdown. We disagree. Although the Board has declined to extend statutory protection to employees who collectively attempt to exert economic pressure on their employer by work slowdowns or by refusing to perform tasks,⁷ Thompson did not refuse to perform duties or reduce the rate of work, nor did the demonstration have a disruptive effect. Instead, Thomp-

⁵ The parties' collective-bargaining agreement provided that: "During the term of this agreement, the parties mutually agree that they will not disrupt the work contemplated by this agreement by strike, . . . slow down, sick out or lock out."

⁶ *Durham Transportation, Inc.*, 317 NLRB 785, 785-786 (1995). See also *Midstate Telephone Corp.*, 262 NLRB 1291, 1291-1292 (1982), enf. denied in part on other grounds 706 F.2d 401 (2d Cir. 1983).

⁷ See, e.g., *Davis Electrical Constructors, Inc.*, 216 NLRB 102 (1975); *General Electric Co.*, 155 NLRB 208 (1965); *Elk Lumber Co.*, 91 NLRB 333 (1950).

son and those who joined her stood up and stretched quietly and briefly, as they were allowed to do, and continued working at a normal pace.⁸ Indeed, the record indicates that at least one employee who participated in the standing demonstration sat down immediately when she received a new call.

The activity of Thompson and her coworkers is in stark contrast to the circumstances present in cases where the Board has found that a slowdown occurred. The judge and our dissenting colleague rely primarily on *DaimlerChrysler Corp.*, 344 NLRB 1324 (2005), for the proposition that the demonstration here constituted an unprotected slowdown. In that case, however, a union steward directed coworkers to take steps to undermine the employer's carpool program and "back track" so that they would not save time; the steward expressly encouraged these measures in order to pressure the employer to change its carpool program. The Board found that the steward's efforts would "confound the [r]espondent's efforts to provide pool cars . . . and would result in lost work time;" the Board also emphasized that the steward sought "to frustrate and interfere with the [r]espondent's operations in order to modify the current contract or to obtain leverage in some future negotiation." *Id.* at 1325.⁹ Here, Thompson simply asked coworkers to do what they were otherwise permitted to do—stand up and stretch—as a symbolic show of solidarity. Her brief demonstration did not interfere with operations or result in lost work time, nor was it intended to exert economic pressure on the Respondent.¹⁰

It is telling that although the Respondent belatedly asserted at the hearing and on exceptions that the demonstration constituted an unprotected slowdown, the Respondent's disciplinary notice to Thompson cited, as her

only offense, conducting union business during work time.¹¹ Indeed, even at the time of the protest and during its immediate aftermath—when any potential effect on the Respondent's operation would have been most acute—the Respondent did not regard Thompson's demonstration as a work slowdown. For all of these reasons, we find on the facts here that (1) Thompson's demonstration did not constitute a prohibited slowdown under the parties' collective-bargaining agreement; and (2) Thompson's demonstration did not constitute an unprotected slowdown under Board law.

Our dissenting colleague asserts that Thompson's demonstration "interfere[d] with operations and result[ed] in lost work time." In doing so, however, he has not cited—and the Respondent has not adduced—any specific evidence that the demonstration actually resulted in any loss of productivity or work time. Nor does he cite any evidence that the demonstration was even intended to put any economic pressure on the Respondent. Our dissenting colleague also fails to acknowledge that the Respondent permitted, and even encouraged, employees to take brief stand-and-stretch breaks during the day. Even assuming that the employees involved in the demonstration stopped working completely for 1-2 minutes—which is not established by the evidence—such a brief break would have been well within the scope of what had been previously condoned by the Respondent. Contrary to our dissenting colleague, we are not purporting to assess whether the employees' conduct was a "de minimis" work stoppage; we find that the Respondent has failed to establish that any slowdown or concerted interruption of operations actually occurred at all.

Having concluded that Thompson's involvement in the October 13 demonstration constituted protected concerted activity, and that the demonstration was not an unprotected slowdown,¹² we find that the Respondent's disci-

⁸ The judge stated that Counsel for the General Counsel "conceded in her brief that some services were, in fact, withheld during the demonstration." This mischaracterizes the General Counsel's argument. The General Counsel pointed out that employees occasionally stretched at work, and that the Respondent was well aware of and accepted this practice. Therefore, those who did so on October 13 were not deliberately withholding their labor in a manner that supports finding a slowdown occurred.

⁹ Although Member Pearce expresses no view whether *DaimlerChrysler* was correctly decided, he agrees that it is distinguishable.

¹⁰ The Respondent cites several other cases involving work slowdowns which it argues support finding that Thompson instigated and participated in a slowdown. The cases cited, however, reflect factual scenarios varying significantly from that here—namely, the employees in those cases actually withheld their labor in deliberate contravention of established work policies. See *Russell Packing Co.*, 133 NLRB 194 (1961) (finding slowdown where two employees abandoned their work station); *Potter Electrical Engineering & Construction Co., Inc.*, 181 NLRB 743 (1970) (finding slowdown where employees did not report to work); *Arizona Public Service Co.*, 292 NLRB 1311 (1989) (same).

¹¹ Indeed, the testimony from Director of Customer Care Kari Juni, cited by our dissenting colleague, that Thompson was disciplined primarily because the demonstration "disrupted [the Respondent's] ability to serve [its] customers" was adduced at the hearing and was not consistent with the contemporaneous notice that the Respondent issued at the time of Thompson's discipline.

¹² The Respondent argues that, pursuant to the Board's decision in *Randell Warehouse of Arizona, Inc.*, 347 NLRB 591 (2006), Thompson improperly photographed employees engaging in protected activity. We find no merit in this contention. The issue in *Randell Warehouse* was whether a union's unexplained photographing of employees' protected activities constituted objectionable campaigning conduct. Even assuming arguendo that *Randell Warehouse* has application in this unfair labor practice case, there is no basis to find that employees here, who were expressly informed of the purpose of the standing demonstration and voluntarily participated, experienced any interference with their Sec. 7 rights through Thompson's limited use of photography.

plinary action against Thompson for participating in the demonstration violated Section 8(a)(3) and (1). See, e.g., *CGLM, Inc.*, 350 NLRB 974, 974 fn. 2 (2007), *enfd.* 280 Fed. Appx. 366 (5th Cir. 2008); *Mac Smith Garment Co., Inc.*, 107 NLRB 84 (1953), *enfd.* 219 F.2d 469 (5th Cir. 1955).¹³

Amended Conclusions of Law

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) of the Act by issuing employee Kim Thompson a disciplinary warning because of her activities in support of the Union.

4. The above violation is an unfair labor practice that affects commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) of the Act by disciplining employee Kim Thompson because of her activities in support of the Union, we shall order the Respondent to cease and desist from engaging in such conduct. We shall also order the Respondent to remove from its files any reference to the unlawful discipline taken against Thompson and notify her in writing that it has done so and that this discipline will not be used against her in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Consolidated Communications Holdings, Inc. d/b/a Consolidated Communications of Texas Company, Conroe, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

¹³ In addition to finding that Thompson was unlawfully disciplined for participating in protected activity, Member Pearce would also find her discipline unlawful under the *Wright Line* framework used by the judge. 251 NLRB 1083 (1980), *enfd.* 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). Thus, although Member Pearce agrees with the judge that the General Counsel met his initial burden under *Wright Line*, he would further find, contrary to the judge, that the Respondent failed to demonstrate that Thompson would have received the same discipline absent her protected activity.

(a) Disciplining employees because they engage in protected concerted activities.

(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.

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

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline issued to Kim Thompson, and within 3 days thereafter, notify her in writing that this has been done and that the discipline will not be used against her in any way.

(b) Within 14 days after service by the Region, post at its Conroe, Texas facility copies of the attached notice marked "Appendix."¹⁴ Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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 employees and former employees employed by the Respondent at any time since October 18, 2016.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 16 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 27, 2018

Mark Gaston Pearce,

Member

¹⁴ 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."

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER EMANUEL, dissenting in part.

Contrary to my colleagues, I agree with the judge's conclusion that the Respondent acted lawfully in issuing a verbal warning (documented in written form) to customer service representative Kim Thompson after she engaged in conduct that amounted to a work slowdown. Under the Board's decision in *DaimlerChrysler Corp.*, 344 NLRB 1324 (2005), employees who engage in slowdowns or encourage other employees to do so are not protected, and discipline for such activity does not violate the Act. Here, the only issue is whether there was a slowdown, and the judge correctly found that there was. Accordingly, I would dismiss the allegation that the Respondent's issuance of discipline violated Section 8(a)(1).¹

On October 13, 2016, Thompson, a union steward for Communications Workers of America (the Union), asked about 25 of the 30 or so customer service representatives at the Respondent's Conroe, Texas facility to engage in a demonstration in their workplace. Employees were asked to stand and stretch at their workstations at 2:00 that afternoon to show their support for the Union's stance in the Union's ongoing contract negotiations with the Respondent. Although Thompson testified that she did not speak to any of the other employees about the planned action during her own work time, she acknowledged that most of her coworkers were supposed to be working when she spoke to them.²

Most of the customer service representatives perform their jobs by responding to customers' telephone calls regarding accounts, billing, etc. and looking up accounts and orders on their computers. They wear cordless or corded headphones to take calls. Thompson's job is somewhat different from that of the other customer service representatives: although she has a headset and sometimes uses the telephone for work, Thompson spends most of her working time updating the databases

¹ I join my colleagues in dismissing the allegations that the Respondent violated Sec. 8(a)(1) by telling Thompson that she should have known better than to engage in the conduct for which it disciplined her and by creating an impression of surveillance of employees' open activity.

² My colleagues, who state that "Thompson proceeded during non-working time to ask several coworkers to participate" in the demonstration, fail to acknowledge Thompson's testimony that most of those coworkers were on working time when she asked them to participate, even if Thompson herself was not.

for telephone directories, proofreading the directory, and recording caller-ID complaints. Thus, her work involves less time talking on the telephone and much more time spent typing.

Thompson and the other customer service representatives generally must be seated to work, according to the consistent testimony of employees Kristi Lindsey and Mary Schnee, Customer Service Supervisor Diona Kelley (Thompson's direct supervisor), and Director of Customer Care Kari Juni (Thompson's second-level supervisor). That is, even if the customer service representatives' headsets would allow them to remain on a telephone call while standing or walking a short distance to their printers, the employees cannot comfortably reach their keyboards to type accurately or read their computer screens while standing. Further, because of the low cubicle walls, telephone calls while an employee is standing are noisy and disruptive to their coworkers. And Thompson, the only employee disciplined, performed data-entry work that required constant access to her keyboard for accurate typing, work that she could clearly not perform while standing.³ Kelley expressly testified that an employee in Thompson's role would not have been able to perform work while standing, a fact that, as Thompson's direct supervisor, she would be well situated to know.

At the designated time, while the employees should have been working, Thompson and about 5 other customer service representatives simultaneously stood up at their workstations for about 1–2 minutes. Thompson took 9 photographs of the employees participating in the demonstration, and Lindsey took at least one photograph. During the stand-up demonstration, Thompson and the other participants stopped working. Thompson testified inconsistently on this point, initially claiming that she was working during a portion of the demonstration, but then admitting on cross-examination that she was not performing any work for the Respondent for the duration of the demonstration. She also admitted, with no inconsistency or dispute, that, while holding her camera and taking photos, she was not working and did not have her hands on her keyboard. Clearly, the demonstration disrupted productivity. The judge, therefore, properly found that the demonstration constituted a slowdown, because the evidence showed that: (1) Thompson, by her own admission, was not performing any work function during the demonstration; (2) Thompson and Lindsey were clearly unable to work while taking photographs; and (3)

³ Nor did Thompson's role, unlike that of the other customer service representatives, involve waiting for a call to enter her queue, and no party suggests that she had no work awaiting her attention during the demonstration.

it was highly likely that the other 4 employees who participated did not engage in any work during the demonstration.⁴

In *DaimlerChrysler Corp.*, the Board explained that “[i]t is well-settled that employees who engage in deliberate ‘slowdowns’ of work or encourage others to do so are engaged in activities not protected by the Act, and their discipline for such activity does not violate the Act.”⁵ *DaimlerChrysler*, 344 NLRB at 1325 (citing *Davis Electric Contractors, Inc.*, 216 NLRB 102 (1975); *New Fairview Hall Convalescent Home*, 206 NLRB 688 (1973); *General Electric Co.*, 155 NLRB 208, 220-221 (1965); and *Elk Lumber Co.*, 91 NLRB 333, 337, 338 (1950)). See also *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998, 1004, 1005 (8th Cir. 1969) (“deliberate ‘slowdowns’ and ‘walkouts’ by the employees to exert pressure on the employer to accept the union’s bargaining demands were unprotected concerted activities, and the employer was free to discharge the participating employees for their unlawful disloyal tactics”). Thompson not only engaged in the slowdown but also encouraged others to do so, thus engaging in both types of activities described in *DaimlerChrysler* as not protected by the Act.

In *DaimlerChrysler*, union steward Keith Valentin sent messages to the employees in his bargaining unit suggesting that employees demonstrate their dissatisfaction with their employer’s negotiating stances by engaging in tactics that (although they may have seemed legitimate on the surface) would necessarily result in lost work time. The Board found that “Valentin’s messages were an attempt to frustrate and interfere with the [r]espondent’s operations in order to modify the current contract or to obtain leverage in some future negotiation.” *Id.* at 1325. Similarly, in this case, the October 13 demonstration was a deliberate effort, by means of conduct that disrupted operations, to gain leverage in con-

tract negotiations and force the Respondent to change its bargaining position. Director of Customer Care Juni testified that the effect on operations was her primary reason for deciding that Thompson should be disciplined for the demonstration: “Because the action that was taken disrupted our workflow, and it disrupted our ability to serve our customers.”⁶ The seemingly innocuous nature of the conduct should not blind the Board to its foreseeable effect on the Respondent’s ability to serve its customers. My colleagues argue that *DaimlerChrysler* is distinguishable, but, to support that conclusion, they incorrectly claim that the demonstration here did not interfere with operations or result in lost work time. As detailed above, the demonstration *did* interfere with operations and result in lost work time.⁷ Contrary to my colleagues, I therefore conclude that the demonstration constituted a work slowdown that was unprotected under Board law.⁸

In short, the Respondent issued a minor disciplinary action to an employee who both participated in and encouraged others to participate in conduct that disrupted the facility’s workflow and constituted an unprotected slowdown. Yet, my colleagues would find that, by doing so, the Respondent violated the Act. I respectfully disagree.

Dated, Washington, D.C. August 27, 2018

William J. Emanuel,

Member

NATIONAL LABOR RELATIONS BOARD

⁴ Lindsey received a new call in her queue during the demonstration, and she sat down to respond to the call even though she had her headset on while standing. She testified that she sat down because she needed to be seated in order to access her computer to work. The other customer service representatives participating in the demonstration would similarly have been unable to access their computers to work while standing.

⁵ Because the slowdown was unprotected under Board law, the lawfulness of Thompson’s warning does not turn on the collective-bargaining agreement’s “Service Interruption” provision. The judge therefore erred in stating, in footnote 13 of his decision, that the slowdown would have been protected, and Thompson would not have been subject to discipline, if the slowdown had occurred after the collective-bargaining agreement expired 3 days later. Under Board law, the employees could have engaged in a strike after the agreement expired, but still could not have engaged in a slowdown. Nonetheless, the judge’s misstatement does not affect the validity of his conclusions that the October 13 demonstration was a slowdown and that it was unprotected.

⁶ Although the majority argues that Juni’s rationale was not consistent with the notice issued to Thompson at the time of her warning, the judge clearly credited Juni’s testimony in finding that Thompson instigated an unprotected slowdown that “formed a reasonable disciplinary basis.” No party has excepted to the judge’s credibility determinations.

⁷ The majority claims that the Respondent has not provided, and that I have not cited, any evidence that the demonstration interfered with work. But Thompson’s own testimony, detailed above, establishes that she and other employees stopped working in order to engage in the demonstration.

⁸ That the demonstration and interruption of work lasted no more than 2 minutes is irrelevant to the question of whether it constituted a slowdown. As the judge explained, Sec. 501(2) expansively defines a strike or work stoppage as including “any concerted slowdown or other concerted interruption of operations by employees.” The Board has never recognized a de minimis exception to the rule.

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discipline you because you engaged in protected concerted activities.

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

WE WILL within 14 days from the date of this Order, remove from our files any reference to the unlawful discipline of Kim Thompson, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discipline will not be used against her in any way.

CONSOLIDATED COMMUNICATIONS HOLDINGS,
 INC. D/B/A CONSOLIDATED COMMUNICATIONS
 OF TEXAS CO.

The Board's decision can be found at www.nlr.gov/case/16-CA-187792 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.



Laurie M. Duggan, Esq., for the General Counsel.
Matthew Holder, Esq. (David Van Os & Associates, P.C.), for the Charging Party.
David Lonergan and Amber M. Rogers, Esqs. (Hunton & Williams, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was heard in Houston, Texas, on August 7, 2017. The complaint alleged that Consolidated Communications Holdings, Inc. (Consolidated or the Respondent) violated §8(a)(1) and (3) of the National Labor Relations Act (the Act). On the entire record, including my observation of the witnesses' demeanors, and after considering the parties' posthearing briefs, I make the following

FINDINGS OF FACT¹

I. JURISDICTION

At all material times, Consolidated, a corporation with an office and place of business in Conroe, Texas (the Conroe office), has provided telecommunication services. Annually, it derives gross revenues in excess of \$100,000, and provides services worth more than \$5000 directly outside of Texas. It, thus, admits, and I find, that it is an employer engaged in commerce, within the meaning of §2(2), (6), and (7) of the Act. It also admits, and I find, that the Communication Workers of America, AFL-CIO, Local 6218 (the Union) is a labor organization, within the meaning of §2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

Consolidated provides internet, phone, television, and security products to residential and commercial customers. This litigation involves its Conroe office, and concerns: Kim Thompson, a customer service representative (CSR)² and union official;³ Diona Kelley, her first-line supervisor; and Kari Juni, her second-line supervisor. The pertinent facts are mainly undisputed.

B. Collective-Bargaining Unit

The parties have a longstanding collective-bargaining relationship. The Union is the exclusive collective-bargaining representative of a unit of CSRs, technicians, installers, and line workers employed at the Conroe facility (the unit).⁴ (Jt. Exh. 1 at Art. 2, Exhs. A-C.) Respondent's recognition of the Union has been embodied in successive contracts, the most recent of which ran from October 16, 2013, to October 16, 2016 (the 2013-2016 CBA).⁵ (Id.)

¹ Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

² CSRs work in partitioned-cubicles on computer stations. They speak to customers via telephone headsets.

³ Thompson presents grievances and represents workers at disciplinary meetings.

⁴ There are approximately 50 employees in the unit.

⁵ All dates herein are in 2016, unless otherwise stated.

C. Negotiations for a Successor Contract

This litigation involves the parties' efforts to negotiate a successor contract to the 2013–16 CBA (the successor CBA). Bargaining for the successor CBA proved difficult, and did not conclude until May 2017.

D. October 13—Union Demonstration and Dispute

Given that successor CBA negotiations were protracted and the 2013–2016 CBA was set to expire on October 16, Union president Darrell Novark solicited Thompson to ask CSRs to stand and stretch for a short duration during the workday on October 13, in order to demonstrate the unit's support for the Union's bargaining stance. Thompson, accordingly, solicited 25 unit CSRs to participate in the demonstration.

At about 2 p.m. on October 13, Thompson and roughly 5 CSRs arose and stretched during working hours for about a minute to show solidarity. Thompson related that she was mostly able to continue working during the demonstration, although she conceded that she paused while photographing the demonstration.⁶ Neither Thompson nor the other CSRs said anything, passed anything out, or left their workstations during the demonstration. Thompson, who indicated that employees can arrive late without issue and use restrooms at any time, averred that the demonstration had only a minor effect on productivity.

Kristi Lindsey, another CSR, testified that she stood during the demonstration. She said that she took photos, and was not disciplined.⁷

Kelley indicated that certain CSRs advised her about Thompson's actions. She stated that she reported the situation to Juni, who instructed her to meet with Thompson.

E. October 13 Meeting and October 18 Warning

On October 13 at 2:15 p.m., Thompson met with Kelley. She recalled this exchange:

She said that ... two sources [told her about] ... this picture taking and ... standing up for solidarity for CWA, and that it was inappropriate, ... against [the] rules, ... [and] I knew better I said, "who told on me[?]," because if two other sources had told on me, she didn't see me [S]he said that that was ... confidential ... but the behavior was inappropriate and I should know better.

I said, "well, is that it[?]," and she said, "yeah, that's it unless you have anything to say," and I didn't, so I went back to my desk.

(Tr. 40); see also (GC Exh. 3). Kelley generally corroborated Thompson's account.⁸

On October 18, Thompson received a verbal warning. (Jt. Exh. 2.) Juni stated that a verbal warning was warranted because she interrupted work and violated the 2013–2016 CBA's

⁶ She contrarily stated during cross-examination that she was not working during the demonstration. (Tr. 47.)

⁷ There was no evidence that Consolidated knew about her actions prior to the hearing.

⁸ She made a minor clarification; she said that the "two sources" only told her that Thompson had solicited them.

no strike/no slowdown provision. She denied that Union animus played any role in the discipline. Thompson acknowledged that, as a Union official, she maintained a generally cordial relationship with Consolidated. (Tr. 50.)

F. Relevant Provisions of the 2013–2016 CBA⁹

Art. 5, *Service Interruption* of the 2013–2016 CBA provided that, "[d]uring the term of this agreement, the parties mutually agree that they will not disrupt ... work ... by strike, walkout, ..., slow down, sick out or lockout." (Jt. Exh. 1.) Consolidated avers that Thompson violated the above-described provision. It is undisputed that the demonstration occurred before the 2013–2016 CBA expired.

III. ANALYSIS

A. 8(a)(3) Allegation¹⁰

Thompson's warning was valid. In assessing whether a personnel action violates §8(a)(3), the Board applies a mixed motive analysis. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 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 (the GC) must first demonstrate, by a preponderance of the evidence, that a worker's protected conduct was a motivating factor in the adverse action. He satisfies this initial burden by showing: (1) the individual's protected activity; (2) employer knowledge of such activity; and (3) animus. The Board has held that animus can be inferred from, *inter alia*, suspicious timing, false reasons given in defense of the contested action, inadequate investigation, departures from past practices, past tolerance of the behavior at issue and disparate treatment. *Medic One, Inc.*, 331 NLRB 464, 475 (2000). If the GC meets his initial burden, the burden shifts to the employer to prove that it would have taken the adverse action, even absent the protected activity. *Mesker Door*, 357 NLRB 591, 592 (2011). The employer cannot meet its burden, however, merely by showing that it had a legitimate reason for its action; rather, it must show that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011). If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), it fails to show that it would have taken the same action regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).

1. Prima facie case

The GC presented a prima facie case. Thompson engaged in Union activity by presenting grievances. Consolidated knew of her activities. Animus for the purpose of the prima facie case can be inferred from the fact that, although 6 workers participated in the slowdown, only Thompson, a Union official, was disciplined. *Medic One, Inc.*, *supra* (inference of animus from disparate treatment).

⁹ Thompson's actions occurred on October 13 (i.e., just days before the 2013–2016 CBA expired on October 16).

¹⁰ This allegation is listed under complaint pars. 10 and 14.

2. Employer's reply

Consolidated persuasively demonstrated that Thompson would have received a verbal warning absent her protected activity. *First*, although she undisputedly engaged in protected activity as a Union representative handling grievances, her instigation of a slowdown, while the 2013–2016 CBA's strike and slow down prohibition was effective, was unprotected and formed a reasonable disciplinary basis.¹¹ See, e.g., *Daimler Chrysler Corp.*, 344 NLRB 1324, 1325 (2005) (“employees who engage in deliberate ‘slowdowns’ of work or encourage others to do so are engaged in activities not protected by the Act, and their discipline for such activity does not violate the Act.”); *Davis Electric Contractors, Inc.*, 216 NLRB 102 (1975); *Elk Lumber Co.*, 91 NLRB 333, 337, 338 (1950); *General Electric Co.*, 155 NLRB 208, 220–221 (1965); *New Fairview Hall Convalescent Home*, 206 NLRB 688 (1973). Moreover, Thompson's warning solely focused upon her unprotected slowdown instigation, and bore no connection to her protected grievance-handling activities. *Second*, although Consolidated disciplined Thompson more severely than the roughly 5 other rank-and-file CSRs, who also participated in the slowdown (i.e., only Thompson received discipline), the Board has held that an employer can lawfully discipline a Union official such as Thompson, who instigates a work stoppage, more severely than non-instigator employee participants.¹² See, e.g., *Midwest Precision Castings Co.*, 244 NLRB 597, 599 (1979) (an employer faced with an unprotected strike in the face of a no-strike clause need not discharge or otherwise discipline all employees who participate); *California Cotton Cooperative Association, Ltd.*, 110 NLRB 1494 (1954); *McLean Trucking Company*, 175 NLRB 440, 450–451 (1969); *Chrysler Corp., Dodge Truck Plant*, 232 NLRB 466 (1977). *Third*, there is no evidence that Consolidated has a poor relationship with the Union. On the contrary, Thompson conceded that she enjoyed a generally cordial relationship. *Finally*, Thompson's punishment (i.e., a de minimis verbal warning) hardly exceeded the bounds of reasonableness. Or put another way, Consolidated did not seize upon Thompson's unprotected actions as a venue to devastate a Union advocate during hard bargaining. It, instead, meted out

¹¹ Although the GC contends that the demonstration was neither a slowdown nor a strike, this argument is invalid for several reasons. *First*, Thompson conceded that she was not performing any work function during the demonstration. (Tr. 47.) *Second*, she and Lindsey were clearly unable to work, while taking photos. *Third*, it is highly likely that the other 4 employee-participants did not engage in any work during the stand and stretch demonstration. The GC failed to have them testify, and establish otherwise. *Lastly*, the GC conceded in her brief that some services were, in fact, withheld during the demonstration. GC Br. at 10 (“[e]mployees either continued working or *immediately returned to working after stretching*.” (Emphasis added.)). I find, as a result, that the demonstration was at least a slowdown covered by the 2013–2016 CBA's *Service Interruption* clause (i.e., it was minimally a concerted delay and interruption of the CSRs' work duties). See §501(2) of the Act (expansively defining a “strike” or work stoppage as “any strike or other concerted stoppage of work by employees . . . and any concerted slowdown or other concerted interruption of operations by employees.” (Emphasis added)).

¹² Thompson organized the slowdown, solicited 25 CSRs to participate, and took connected photos for the Union.

the industrial equivalent of a slap on the wrist that primarily educated a workplace leader about a misunderstood rule. I find, as a result, that the verbal warning was lawful, and that Consolidated abundantly demonstrated that it took a very minor disciplinary action against Thompson on the basis of her unprotected instigation of a slowdown that violated the 2013–16 CBA.¹³

B. 8(a)(1) Allegations¹⁴

1. Impression of surveillance allegation

Kelley lawfully told Thompson that “2 sources” reported the slowdown. An employer creates an unlawful impression of surveillance when reasonable employees would assume that their *protected activities* are being watched. *Stevens Creek Chrysler*, 353 NLRB 1294, 1295–1296 (2009). As a result, when an employer tells employees that it is aware of their *protected activities*, but, fails to identify their source, an unlawful impression of surveillance is created because employees could reasonably surmise that employer monitoring has occurred. *Conley Trucking*, 349 NLRB 308, 315 (2007). In the instant case, however, Kelley only cited Thompson's *unprotected activities*, and there was no basis for Thompson to assume that her protected activities were under surveillance. These comments were, therefore, valid.

2. Alleged threat

Kelley lawfully told Thompson that she should have “known better.” Given that the underlying verbal warning itself was valid, Kelley's connected statement that Thompson, a Union leader, who enforces the contract, should understand the basis for her valid discipline and how to apply the *Service Interruption* clause going forward was fair and rational.

CONCLUSIONS OF LAW

1. Consolidated is an employer engaged in commerce within the meaning of §2(2), (6), and (7) of the Act.

2. Consolidated did not violate the Act in the manner alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended¹⁵

ORDER

The complaint is dismissed in its entirety.

Dated Washington, D.C. September 28, 2017

¹³ It's noteworthy, and mildly disappointing, that the Union could have easily waited a mere 3 days (i.e., when the 2013–2016 CBA expired on October 16) for the slowdown to become protected. Had it done so, the *Service Interruption* clause would have expired, and Thompson would not have been subject to disciplinary jeopardy at her employer's discretion. See, e.g., *Lincoln Lutheran of Racine*, 362 NLRB No. 188, slip op. at 4 (2015).

¹⁴ These allegations are listed under complaint pars. 11 through 13.

¹⁵ If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.