UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

SCHUFF STEEL

and Case 20–CA–204378

DEREK DIXON, an Individual

Matthew C. Petersen, Esq., for the General Counsel.
Patrick R. Scully, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. This case was tried in San Francisco, California, from April 23 to 24, 2018. Derek Dixon (Dixon), an individual, filed the original charge on August 14, 2017,[1] and the General Counsel issued the complaint and notice of hearing on January 31, 2018. Schuff Steel (Respondent) filed a timely answer to the complaint.

The General Counsel alleges at complaint paragraph 5 that on or about June 3, Dixon engaged in concerted activity with other employees for the purposes of mutual aid and protection by challenging Respondent's discharge of another employee. Furthermore, complaint paragraph 6 alleges that on or about June 12, Respondent's general foreman, Marcel Rodriguez (Rodriguez), laid off Dixon. The General Counsel alleges that Respondent laid off Dixon because he challenged Respondent's discharge of another employee, and to discourage employees from engaging in that or other concerted activity. As a result, the General Counsel alleges that Respondent has interfered with, restrained, and coerced employees in the exercise of their rights under Section 7 of the Act in violation of Section 8(a)(1)of the Act. Respondent argues that it laid off Dixon pursuant to the collective-bargaining agreement and without regard to any protected concerted activity on his part.

[1] All dates hereinafter are 2017 unless otherwise specified.

On the entire record,[2] including my observation of the demeanor of witnesses,[3] and after considering the briefs filed by the General Counsel and Respondent,[4] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Delaware corporation with various places of business located within the State of California including an office and facility located at 2324 Navy Drive, Stockton, California, is a fabricator and erector of structural steel. During the calendar year ending December 31, 2017, Respondent sold and shipped from its California facilities goods valued in excess of $50,000 directly to customers located outside the State of California. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE FACEBOOK PROJECT

Sometime prior to May 2017, Facebook contracted with Respondent to perform steel erection and fabrication work, to be completed in about 55 days, on the construction of its new building in Menlo Park, California (the Facebook project) (GC Exh. 4). The Facebook project lasted from April to early July. Respondent hired over 200 welders during the weekdays, and brought on another 40 to 50 welders from other jobs on the weekends, to fast-track completion of the Facebook project. On the Facebook project, Respondent divided the employees it hired into gangs, or teams, specific to work functions such as the raising gang, the bolt up gang, safety gang, plumb up gang, and others. Respondent hired employees through the International Association of Ironworkers (Union) Local 377 hiring hall pursuant to the relevant collective-bargaining agreement (CBA) between the Western Steel Council and the Union (R. Exh. 10).[5] Through the CBA, Respondent retained the ability to determine whether an employee's work functions were sufficient for a particular project. If the employee is not suitable for a particular

[2] The transcripts and exhibits in this case generally are accurate, but I hereby make the following corrections to the record: Transcript (Tr. 133), Line (L. 22), Tr. 140, L. 17, Tr. 330, L. 25; Tr. 348, L. 13, 19 and 20: the speaker is Mr. Peterson, not Mr. Scully; Tr. 233, L. 7: "La Joya" should be "La Jolla"; throughout the transcript the name "Chinn" is misspelled as "Chin" and "Dickson" should be "Dixon."

[3] Although I have included several citations to the evidentiary record in this decision to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those citations, but rather are based on my review of the entire record for this case.

[4] Other abbreviations used in this decision are as follows: "GC Exh." for the General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "GC Br." for the General Counsel's brief; and "R. Br." for Respondent's brief. In addition, on June 26, 2018, Respondent filed a motion to strike section II of the General Counsel's posthearing brief which referenced hearsay testimony. The General Counsel filed an opposition on July 9, 2018. After reviewing both pleadings, I deny Respondent's motion to strike but instead rely upon my credibility determinations when determining the outcome of this matter.

[5] The term period for the CBA was from July 1, 2014 to June 30, 2017.

project, Respondent generally lays off employees rather than terminating the employee for any specific wrongdoing. As area superintendent, Randall Chinn (Chinn) explained, Respondent lays off employees rather than noting the true reason for removal so the employee can quickly move onto another project (Tr. 259). A layoff is not a disciplinary action (Tr. 260). Respondent presented numerous layoff notices for the month of June which indicated layoff due to lack of work despite the true reason for the layoff which was the employee taking extended breaks.

Through the Union Local 377 hiring hall, on May 23, Respondent hired Dixon for the Facebook project as a production welder (R. Exh. 6).[6] Dixon has been a journeyman production welder since 1998, and currently is a member of Union Local 433 located in Los Angeles, California. Before being hired for the Facebook project, Dixon spoke with Rodriguez about his interest in being employed by Respondent for that project, and Rodriguez ultimately hired Dixon.[7] Dixon worked on the production welding gang which consisted of approximately 12 employees who are journeymen production welders and apprentices.[8] The number of employees on the other gangs varied.

Once Respondent hired Dixon, General Foreman GW Swartz (Swartz) became his supervisor (Exh. 6).[9] Dixon worked 12-hour shifts, Monday to Friday, and 8- to 10-hour shifts on Saturdays during the Facebook project. During his shift, Dixon received three breaks: morning, lunch, and afternoon. These breaks were established during the Facebook project by the foremen, general foremen, and superintendent. The foremen had discretion in the starting and stopping of break times (Tr. 320). Dixon's gang would take their breaks together at generally the same time each day but the employees did not gather together in one common area for their breaks or lunches. Dixon testified that he knew to take his break by looking at his watch or when the foreman or apprentice would shut down the power supply to their tools. Dixon testified that employees knew when their breaks were over by looking at their watches or when the power supply was turned back on. Dixon also testified that there were times that he worked past a break start time because he was involved in his work, and the power supply was not turned off. In those instances, Dixon would inform the foreman or apprentice that he needed to take his break and would do so. Dixon claimed that he missed his break a couple times during his employment with Respondent, and he observed other employees take their breaks late as well.

The morning break was 15 minutes and afternoon breaks were 10 minutes each while the lunch break was 30 minutes. During the afternoon breaks, employees would take their breaks in areas close to their work area while during the morning and lunch breaks employees could leave their work area locations.[10] Welder Mario Marcial, Jr. (Marcial), whose foreman was Alex

[6] At least 10 times in Dixon's career, Respondent hired him to work on a variety of construction projects.

[7] Respondent admits Rodriguez is a supervisor or agent within the meaning of Sec. 2(11) or (13) of the Act during all relevant times. Rodriguez did not testify.

[8] The apprentices assist the journeymen in performing the latters' assigned tasks.

[9] Respondent admits Swartz was a supervisor or agent within the meaning of Sec. 2(11) or (13) of the Act during all relevant times.

[10] Sec. 6, B-2 of the CBA covers rest periods and specifies that rest periods may take place as designated by the employer and limited to the employees' immediate work areas or work point (term used in the CBA). In addition, Respondent permitted employees to take 15-minute morning breaks despite the CBA indicating that the morning break is 10 minutes. In addition, to

Reyes (Reyes) and whose supervisor was Rodriguez and Swartz, testified similarly regarding how his breaks functioned during the Facebook project although he testified that morning breaks were 20 minutes in length. Marcial did not work on the same crew as Dixon.

Welding Foreman Chuck Kelly (Kelly) gave the employees in Dixon's welding gang their daily tasks during their morning meetings.[11] During these morning meetings, which lasted 15 to 20 minutes, Kelly generally discussed safety issues before informing the employees of their assigned tasks for the day. Kelly received his gang's assignments every morning via meetings held with Swartz (Tr. 283). Swartz testified that he met daily with employees in large groups as well and would discuss work procedures such as breaks (Tr. 323). Respondent frequently, if not daily, shared information regarding breaks during the morning meetings (Tr. 320–-321). Also on Tuesday mornings, various gangs, including the production welding gang, would attend an all-hands safety meeting where Respondent and other onsite employers would discuss general safety issues, the status of the project, and other topics pertinent to all employees.

Dixon testified that during the workday Kelly would occasionally check on the welders to see if they needed anything; Dixon did not observe Kelly performing welding tasks. Kelly moved around the worksite on a golf cart, often times with Rodriguez, who was Kelly's supervisor. On a daily basis, Dixon interacted with Kelly. Dixon did not interact with Swartz or Rodriguez while he was on the Facebook project. Swartz explained that he spent half of the day in his onsite office and the other half on the site with the employees.

III. The Alleged Protected Concerted Activity

One Saturday in June, approximately June 3, Dixon arrived at the Facebook project site and attended the morning meeting. Kelly did not attend this meeting. Thereafter, Dixon proceeded to his assigned welding location. On his way to his welding location, Dixon approached the restroom, and as he did so, he noticed an unnamed apprentice appearing to leave the premises as he surmised since he had his tools with him. Dixon asked the apprentice where he was going, and the apprentice responded (Tr. 67).[12] Based upon the apprentice's response that he was asked to leave the worksite, Dixon asked the apprentice to wait while he went to speak to Kelly.[13]

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perform his various tasks, Dixon's work area could be near the variety of equipment he used such as an aerial lift, float, and beam chair to weld in the higher portions of the structure. He also welded on the lower portions of the structure.

[11] Respondent denied Kelly's supervisory and agent status.

[12] Dixon could not recall the identity of the apprentice to whom he spoke. Nevertheless, the General Counsel sought to introduce what the apprentice said to Dixon. Respondent objected on several basis including due process and hearsay grounds. What the apprentice actually said to Dixon is not relevant; what is relevant is that Dixon assumed that the apprentice was leaving the worksite after being asked to do so, which then led to Dixon's subsequent interaction with Kelly. As for Respondent's due process argument, Respondent is aware of the allegations in this complaint.

[13] The record lacks any evidence of what actually happened to the apprentice, which makes sense as he could not be identified by Dixon. For purposes of the facts presented, I credit Dixon's testimony that the apprentice's working conditions were altered which prompted him to speak on behalf of the apprentice to Kelly and Rodriguez.

As Dixon went to find Kelly, Dixon saw Kelly coming toward him. Dixon asked Kelly what was happening with the apprentice and why was he going home (Tr. 75). Kelly responded to Dixon.[14] Dixon then told Kelly that it was their job as journeymen to teach an apprentice how to perform his job, and that maybe the apprentice could be moved to another gang. Kelly again responded to Dixon. Dixon replied that he planned to talk with Rodriguez to place the apprentice in another gang.

Dixon testified that Wright observed and listened to Dixon's conversation with Kelly.[15] After Dixon's conversation with Kelly concluded, Wright and Dixon discussed the interaction between Kelly and Dixon. Within 5 minutes of Dixon's conversation with Kelly ending, Dixon saw Rodriguez riding by on a golf cart. Dixon flagged down Rodriguez. Dixon told Rodriguez that Kelly was trying to get rid of an apprentice in their group, and told Rodriguez that Kelly told the apprentice to go home as he was "not worth shit" (Tr. 78). Dixon told Rodriguez that he has been on other jobs where if an apprentice is not performing his work properly he is moved to another gang and not terminated. Also within earshot of Dixon's conversation with Rodriguez was Wright and Coleman.[16] Dixon asked Rodriguez not to send the apprentice home but to consider putting him in another gang. Rodriguez responded that he knew the apprentice, and said, "I'll handle it" (Tr. 78). Rodriguez went back into the golf cart, and drove 20 feet away to Kelly. Dixon testified that he next saw Rodriguez "fussing" at Kelly but could not hear what was said (Tr. 79).[17] Dixon then went back to his work area, and although he saw the apprentice

[14] Dixon testified that Kelly responded that the apprentice was "not worth shit" and could not do his job. Furthermore, Dixon testified that Kelly stated if he did not like how the apprentice was being treated he could leave too. Dixon responded, "I'm not going anywhere" (Tr. 75). At the hearing, the General Counsel claimed that Kelly's responses to Dixon during this conversation were not hearsay as the testimony was not offered for the truth of the matter asserted. At the time, I overruled Respondent's hearsay objection but stated that I would reconsider my ruling in the decision after I reviewed the entire record. At this time, I sustain Respondent's objection as Dixon's testimony is hearsay. In *RJR Communications, Inc.*, 248 NLRB 920, 921 (1980), the Board noted that courts have long recognized that hearsay evidence is admissible before administrative agencies, if rationally probative in force and if corroborated by something more than the slightest amount of other evidence. Here, Dixon's testimony regarding this conversation is uncorroborated, cannot be proven by any other means, is not inherently reliable, and accordingly is entitled to little weight. *W. D. Manor Mechanical Contractors, Inc.*, 357 NLRB 1526 (2011) (uncorroborated hearsay entitled to "little weight").

[15] The General Counsel issued a subpoena ad testificandum to Wright, but he did not appear at the hearing. The General Counsel did not seek enforcement of the subpoena. Again, Dixon's testimony as to Wright's response during their conversation is hearsay, and will not be considered.

[16] Coleman did not testify.

[17] Marcial testified that one Friday, approximately June 9, Rodriguez, who had never spoken to him except when he was hired and on his first day of work, approached Marcial and another employee. Rodriguez started talking about an incident *that day* involving Dixon, the apprentice and the foreman (Tr. 192). Marcial testified that Rodriguez told them that the foreman did not think the apprentice was performing his job well, wanting to lay him off and Dixon did not think laying off the apprentice was appropriate so Dixon spoke up about the issue. Rodriguez then made comments to the effect of who does Dixon think he is and why does he care. Rodriguez

standing in another area he did not go to speak with him again because Rodriguez said he would handle it. Dixon learned that the apprentice continued to work on the Facebook project.[18]

IV. Respondent Lays Off Dixon

On Monday, June 12, between 2:45 to 3:00 p.m., Rodriguez waved at Dixon to come down from the aerial lift in which he was working.[19] Rodriguez handed Dixon two checks. Again, Wright was present for this interaction between Dixon and Rodriguez. Rodriguez told Dixon he was laying him off due to taking long or extended breaks, and said the decision was out of his hands. Dixon denied taking long breaks. Rodriguez told Dixon that Wright was being laid off for the same reason as well as four other employees in another section of the building. Rodriguez told Dixon, "They're cracking down on that [long breaks]" (Tr. 82) (R. Exh. 17).[20] The paperwork provided to Dixon only indicates that he was permanently laid off by Swartz at the end of his shift due to lack of work (R. Exh. 6). As Dixon gathered his tools, he saw Kelly, and asked him if he knew what was going on. Kelly responded.[21]

Swartz, who made the decision to lay off Dixon, testified that only another general foreman (not Rodriguez), the superintendent, and he made the decision to lay off employees (Tr. 284). Swartz testified that employees were laid off every day on the Facebook project due to

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also commented that Dixon felt it was a racial issue since the apprentice is African-American, and Rodriguez said that the foreman is not racist at all. Marcial further testified that Rodriguez said he had been told about Dixon, that he had sued others over racial issues, and that he was "not going to have this bullshit on the job site" (Tr. 192). Marcial testified that Rodriguez said the foreman (Kelly) was "scared" to tell Dixon about taking extended breaks because Dixon would say that the issue is his race (Tr. 194). Marcial testified that Rodriguez stated that Respondent would remove Dixon from the worksite due to his extended breaks, and Rodriguez told the foreman to document Dixon's breaks (Tr. 195). According to Marcial, Rodriguez told him that Dixon told the foreman that the apprentice was not being treated right, and that the apprentice's race was why he was being treated in such a manner (Tr. 194). I decline to credit Marcial's testimony as it seems improbable that a supervisor, who does not even know Marcial, would confess his plans to remove Dixon from the workplace. In addition, the timing of events does not comport with Marcial's testimony. The incident between Dixon and Kelly occurred 1 week prior, not 1 week later as indicated by Marcial's testimony. Moreover, based on Dixon's testimony, he never told Kelly that he thought the apprentice's race was a factor. These are a couple but not all of the reasons I decline to credit Marcial's testimony. My further discussion regarding Marcial's testimony is found in the general credibility section of this decision.

[18] Respondent requests that I make an adverse inference that Dixon's conversations with Kelly and Rodriguez did not occur as Wright and Coleman failed to testify. I decline to do so as an adverse inference is unnecessary based on my credibility assessment of Dixon.

[19] During the hearing, Dixon testified that his lay off occurred on June 22 or 23 which is clearly erroneous based on the documentary evidence.

[20] Swartz also supervised Wright, who was hired on June 3 as a Union journeyman welder. Swartz laid off Wright after receiving complaints from Kelly about his extended breaks and not being at his worksite (Tr. 303–304). However, Swartz admitted he never observed Wright taking extended breaks.

[21] Again, Dixon's testimony regarding Kelly's response is hearsay, and his testimony is given little weight.

lack of work in certain areas and lack of production from employees which included taking extended breaks. According to Swartz, lack of production was common on the Facebook project as it was a large project with many employees. In June, Respondent laid off approximately 20 employees due to extended breaks.[22] Swartz explained, similarly to Chinn, that employees are laid off rather than terminated for their actual infraction to ensure that they can go on another job right away (Tr. 306).

Swartz testified that he had heard complaints from Kelly and Flores about Dixon's lack of production due to afternoon breaks away from his work area which results in extended breaks.[23] First, Kelly reported to Swartz 1 week prior to June 12 that Dixon was not at his work area during the breaks as required (Tr. 305, 341). Kelly also reported that Dixon and Wright were taking afternoon breaks not near their work areas, and they were not being responsive to instructions to end their breaks. Next, Flores reported seeing Dixon and Wright taking a break in his work area during a nonbreak period despite working in another area for a different gang (Tr. 305, 343). The day prior to his layoff, Kelly complained again about Dixon taking his break away from his work area. Thereafter, Swartz specifically sought to observe Dixon's break period which he observed once where Dixon again took an extended break (Tr. 302). Swartz then decided to lay off Dixon; Swartz did not personally warn Dixon for taking extended breaks although he testified that Kelly had told Dixon and Wright to end their breaks.[24] Swartz denied any knowledge of Dixon complaining about an apprentice being removed from the job (Tr. 301). Nor was Swartz aware of any other workplace complaints concerning Dixon. Swartz also denied laying off Dixon for anything said to him by Rodriguez. Swartz stated that he learned about Dixon's allegations regarding the apprentice 1 week prior to the hearing in this matter.

After being laid off, Dixon contacted the Union in San Francisco, California. Dixon complained that his layoff was unlawful, but the Union did not file a grievance on his behalf. Dixon also did not file a grievance against Respondent (Tr. 103–104). Swartz spoke with the Union's business agent regarding Dixon, and explained that he was laid off for taking extended breaks and being nonproductive after being warned by Kelly (Tr. 353).

Marcial testified that he told Dixon about his conversation with Rodriguez the day after Dixon was laid off. Marcial also testified that a superintendent, likely Swartz, warned the

[22] Respondent provided many examples of other journeyman welders who were laid off for taking extended breaks in May and June during the Facebook project. The layoff notices did not indicate that the layoff was for extended breaks but instead noted lack of work as the reason for the layoff which is the reason provided on Dixon's notice. For example, John Hernandez, a journeyman welder, was laid off on June 8 for taking extended breaks after being warned by Swartz directly who saw him (R. Exh. 11, Tr. 290). Respondent provided examples of other employees who were laid off by Swartz for taking extended breaks which he personally observed or relied upon reports from foremen (R. Exhs. 12, 13, 14, 15, 16, and 17). Swartz stated that he would typically warn employees about their extended breaks via their foremen (Tr. 325).

[23] Flores did not testify.

[24] In contrast, Dixon testified that he never was warned or notified about taking extended breaks when on the Facebook project. As discussed further in the general credibility section of this decision, I do not credit Dixon's testimony regarding breaks but instead rely on Swartz's testimony.

employees at a Tuesday morning meeting that they all needed to watch their breaks as they laid off two employees the day prior for taking extended breaks.

V. General Credibility Conclusions

In addition to my credibility assessments already explained above, I will set forth my general credibility conclusions of the witnesses for each party. This decision hinges upon my credibility determinations regarding various conversations. Credibility determinations may rely on various factors, including the context of witness' testimony, the witness' testimonial demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Additionally, it is well established that the trier of fact may believe some, but not all, of a witness's testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

The General Counsel and Respondent each presented two witnesses for testimony: Dixon and Marcial for the General Counsel, and Chinn and Swartz for Respondent. Respondent's witnesses provided reliable, comprehensive, and concrete testimony regarding the events at issue in this matter. The demeanor of both Swartz and Chinn remained calm, patient, and confident. Swartz, who made the decision to lay off Dixon, provided extremely detailed testimony as to several employees who were laid off during June, including Dixon, and why he made his decisions. In addition, the documentary evidence corroborated his testimony regarding the layoffs of the employees he testified about. He recalled who oversaw the various gangs during the relatively brief but large construction project. On cross-examination, Swartz did not waiver in his testimony, remaining steadfast. Overall, Swartz provided impressive testimony which makes him more believable than either of the General Counsel's witnesses. Thus, I credit his testimony when contradicted by conflicting testimony. I also credit his testimony that he was unaware of any incident regarding Dixon speaking on behalf of an apprentice to Kelly or Rodriguez. When responding to this question about whether he had heard of an incident involving Dixon and an apprentice, Swartz repeatedly denied knowledge of the incident, and admitted he had only learned of the issue the week prior to the hearing. Swartz testified matter-of-factly that he laid off Dixon due to his numerous breaks away from his work area. Chinn also testified persuasively although he had no involvement or knowledge of the decision to lay off Dixon. Based upon my observations of Chinn and Swartz' demeanor as well as the entire record, I can only conclude that they provided credible and reliable testimony, and were far more believable than Dixon and Marcial as to the complaint allegations.

In contrast, I found Dixon's overall testimony to be self-serving and implausible. I accept Dixon's testimony that he approached Kelly to discuss the tenure of the apprentice, and also accept that he spoke to Rodriguez after speaking with Kelly. As far as his conversation with Kelly, I cannot accept his testimony as to the truthfulness of their conversation as it was uncorroborated hearsay. But even if I were to accept as truth his testimony regarding Kelly ordering him to leave the workplace if he did not like how Kelly was treating the apprentice, I still cannot credit Dixon's version as it seems highly unlikely that Dixon would not have reported Kelly's comment to Rodriguez. When subsequently speaking to Rodriguez, Dixon only spoke on behalf of the apprentice, not himself. Moreover, after his conversations with Kelly and Rodriguez, Dixon acted reasonably when he did not speak again with the apprentice as he thought the matter would be resolved by Rodriguez. Accepting such testimony undermines

Dixon's belief that Respondent laid him off for speaking on behalf of the apprentice. After a seemingly dramatic confrontation with Kelly, the whole issue regarding the apprentice seemed to have been handled and closed. Thus, it makes little sense to believe that thereafter Respondent laid off Dixon for questioning how the apprentice's work performance was being addressed.

Nor can I credit Dixon's testimony regarding breaks. He testified that Respondent never spoke about extended breaks but the credited testimony of Swartz directly contradicts Dixon. Swartz testified that breaks were discussed almost every day with the employees. Swartz also admitted he did not personally warn Dixon not to take extended breaks and instead relied upon reports from the foremen. Accepting Swartz' testimony due to his candor, Dixon was told to get back to work after taking an extended break by Kelly as well as another foreman. In sum, Dixon's testimony that he was never told about taking extended breaks when taking his afternoon break away from his worksite is simply not believable.

The General Counsel's only other witness Marcial also did not testify credibly. In fact, Marcial's testimony was simply too good to be true, and appeared to be rehearsed. Marcial testified that Rodriguez randomly came up to him and a coworker and began complaining about Dixon's interference regarding the apprentice. Marcial's testimony makes little sense in light of the credited testimony of Dixon who explained that Rodriguez handled the incident with Kelly and the apprentice. Dixon did not testify that Rodriguez displayed any animosity or irritation towards his actions of standing up for the apprentice. Marcial's testimony defies belief as it seems implausible that the general foreman would confess to two employees he had never spoken to about laying off Dixon for support of the apprentice and also explaining how he planned to cover up his misdeeds. Marcial's testimony was simply not reliable. In addition, Marcial admitted that his father had been friends with Dixon for many years, and despite Marcial himself not being friendly with Dixon, he met with Dixon the night before the hearing. However, Marcial testified that they spoke about work, and not his testimony. Moreover, although Marcial had not reviewed his affidavit prior to the hearing, the morning of the hearing, when he reviewed it in the presence of Dixon, he crossed out one significant statement: that Dixon *had* been warned for taking extended breaks. Only one other minor edit was made to this affidavit.[25] All of these facts lead me to the conclusion that I simply cannot rely upon Marcial's testimony.

The General Counsel argues that I should take an adverse inference against Respondent for failing to call Rodriguez, Kelly, and Flores. Similarly, Respondent requests that an adverse inference be taken against Dixon's version of events regarding his conversation with the apprentice and Kelly because the General Counsel did not call Kelly or welders Robert Wright (Wright) and Larry Coleman (Coleman) to testify. I decline to take any adverse inferences in this matter but instead focus on the credibility of the witnesses who were called to testify. An adverse inference may be drawn from the failure of an employer to call a current manager, supervisor, or agent, but current employees cannot be considered predisposed to testify in one

[25] Respondent argues that I should strike Marcial's testimony or impose sanctions due to his action of changing a significant statement in his August 2 affidavit the first day of the hearing. Despite many phone calls and emails from the General Counsel during the investigation, Marcial admitted to failing to return these messages and therefore, only reviewed and signed his affidavit the first of the hearing. Despite my general skepticism of Marcial's testimony, I decline to strike it testimony or impose sanctions because he had not reviewed his statement until that day.

manner or another, and are equally available to both parties. See *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 fn. 6 (1996), enfd. 123 F.3d 899, 907 (6th Cir. 1997). In addition, the General Counsel failed to prove Kelly, who is no longer employed by Respondent, was a supervisor or agent during the time period at issue. Likewise, the General Counsel failed to prove Flores, who is employed by Respondent, was a supervisor or agent during the time period at issue. Thus an adverse inference against Respondent for failing to call Kelly and Flores is not warranted. In addition, I decline to take an adverse inference against Respondent for failing to call Rodriguez who is employed by Respondent. The credibility of Rodriguez only concerns two conversations. As for Dixon's conversation with Rodriguez about the apprentice, I have credited Dixon's testimony. As for Rodriguez' colloquy with Marcial concerning Dixon and the apprentice, I decline to take an adverse inference against Respondent as I do not rely on Marcial's uncredited testimony. Thus, Rodriguez' testimony is unnecessary.

ANALYSIS AND DISCUSSION

A. Deferral is not appropriate

Before considering the merits of this complaint's allegations, I must first determine whether this matter should be deferred to the parties' grievance-arbitration provision set forth in its CBA as argued by Respondent at the hearing.[26] *St. Francis Regional Medical Center*, 363 NLRB No. 99, slip op. at 17 (2015); see also *Collyer Insulated Wire*, 192 NLRB 837 (1971) (describing the Board's rationale for prearbitration deferral). The burden of proof lies with Respondent, the moving party. *King Soopers*, 364 NLRB No. 93, slip op. at 22–23 (2016), enfd. in relevant part 859 F.3d 23, 30 (D.C. Cir. 2017).

Generally, Section 8(a)(3) or (1) allegations claiming employer animus toward employee's exercise of protected rights is "not eminently well suited to arbitration." *St. Francis Regional Medical Center*, supra, slip op. at 3 (citing *Collyer Insulated Wire*, supra). However, the Board has deferred these types of allegations to arbitration, and instead relies on a determination of whether the facts show "a sufficient degree of hostility, either on the facts of the case at bar alone or in the light of prior unlawful conduct of which the immediate dispute may fairly be said to be simply a continuation." *United Aircraft Corp.*, 204 NLRB 879, 879 (1972). Here, Dixon credibly testified that the Union refused to file a grievance on his behalf when he complained that his layoff was unlawful. In addition, rather than permitting arbitration, the CBA calls for a board of adjustment which consists of representatives appointed by the Union and Employer. During the hearing, Respondent's counsel asserted that Respondent would be willing to waive any time limits for the filing of a grievance under the procedures of the CBA. Even accepting such an assertion, the record is devoid of any evidence regarding the Union's position. Thus, this matter is not appropriate for deferral.

B. Kelly is not a supervisor or agent as defined by Section 2(11) and 2(13) of the Act

Respondent denied the General Counsel's allegation that Kelly was a supervisor or agent as defined by Section 2(11) and (13) of the Act. Section 2(11) of the Act provides that a

[26] Respondent failed to present any argument in its posthearing brief regarding deferral. It is unclear whether Respondent has now abandoned its claim but since it was raised in its answer as well as opening statement during the hearing, I will address this issue.

supervisor is one who possesses, "authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." Under Board and Supreme Court precedent, in order to be a statutory supervisor, an individual must have the authority to effectuate or effectively recommend at least one of the supervisory indicia enumerated in Section 2(11) of the Act, using independent judgment in the interest of the employer. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006) (citing *NLRB v. Kentucky Community Care*, 532 U.S. 706 (2001)). It is well settled that the party asserting supervisory status bears the burden of proof on the issue by a preponderance of the evidence. Id. at 694.

The General Counsel has fallen short in its burden of proof. The credited evidence demonstrates that Foreman Kelly received daily assignments from General Foreman Swartz; Kelly then distributed these assignments to the employees. The only responsibility it appears that Kelly had was to adjust the break schedule as needed each day. The evidence does not show that Kelly had any other responsibility or even input into decisions to hire, terminate, or discipline employees. Kelly merely reported to Swartz when employees' production was lacking such as when they took extended breaks. See *Cablevision Systems Co.*, 251 NLRB 1319, 1323 (1980) (foremen not supervisors where they merely pass out assignments provided by office personnel, provide routine directions, and exercise no independent judgment). Kelly did not issue warnings that were disciplinary in nature but rather the foremen appear to have enforced break rules. Moreover, the evidence fails to show that Kelly had any role in the layoff of employees including Dixon. Thus, Kelly is not a supervisor under the Act.

The Board applies common-law agency principles when examining whether an employee is an agent of an employer as defined by Section 2(13) of the Act. The question to be asked is whether under all the circumstances, the employees "would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 426–427 (1987) (citing *Einhorn Enterprises*, 279 NLRB 576 (1986), citing *Community Cash Stores*, 238 NLRB 265 (1978)). The party who has the burden to prove agency must establish an agency relationship with regard to the specific conduct alleged to be unlawful. *Pan-Oston Co.*, 336 NLRB 305 (2001). Again, the record contains no evidence that Kelly acted as an agent of Respondent. Clearly Dixon did not believe Kelly acted on behalf of management as he sought to override Kelly's alleged decision to remove the apprentice. Moreover, assuming for the sake of argument that Kelly told Dixon to leave the workplace as well if he did not like how the apprentice was being treated, Dixon certainly did not believe Kelly had such authority as he did not even report the comment to Rodriguez. Accordingly, I cannot conclude that Kelly acted at any time as an agent of Respondent, and no statements or conduct may be imputed to Respondent. Thus, the General Counsel failed to prove Kelly was a supervisor or agent as defined by the Act during the relevant time period.

C. The General Counsel Failed to Prove that Respondent Violated Section 8(a)(1) When it Made the Decision to Lay Off Dixon

The General Counsel alleges Respondent via Rodriguez laid off Dixon because he engaged in protected concerted activity when he challenged the termination of an apprentice.

Respondent denies the allegation stating Dixon had not engaged in protected concerted activity, and even if he had, he was terminated for his extended breaks.

Based on the credited facts, it should be noted that the General Counsel's complaint allegations are not supported. First, the record contains no evidence that the apprentice was discharged by Kelly at any time. Second, the record is clear that Rodriguez did not lay off Dixon but instead only delivered the layoff notice; Swartz laid off Dixon which is apparent from the layoff notice as well as Swartz' testimony.

To prove an adverse action violates Section 8(a)(1) of the Act, the General Counsel has the initial burden of establishing that an employee's protected activity was a motivating factor in an employer's decision to take adverse action against an employee.[27] *Wright Line*, 251 NLRB 1083 (1980), enfd. 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). To prove such a motivating factor, the General Counsel must show protected activity, employer knowledge of that activity, and animus on the part of the employer. See *Allstate Power Vac, Inc.*, 357 NLRB 344, 346 (2011) (citing *Willamette Industries*, 341 NLRB 560, 562 (2004)); see also *Austal USA, LLC*, 356 NLRB 363, 363 (2010). The demonstration of a causal nexus is not an element of the General Counsel's initial burden. See, e.g., *Amalgamated Transit Union Local 689*, 363 NLRB No. 43, slip op. at 1 fn. 1 (2015) (quoting *Libertyville Toyota*, 360 NLRB 1298, 1301 fn. 10 (2014), enfd. 801 F.3d 767 (7th Cir. 2015)) (internal quotation marks omitted); *Mesker Door, Inc.*, 357 NLRB 591, 592 fn. 5 (2011) ("[T]he *Wright Line* standard does not require the General Counsel to show … some additional, undefined 'nexus' between the employee's protected activity and the adverse action."). Instead, the inquiry is whether the employer took action because of its animus which may be inferred from direct or circumstantial evidence with circumstantial evidence of motive as most likely to be shown. *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995) (citations omitted), enfg. 312 NLRB 155 (1993).

Once the General Counsel proves its burden, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have been take even in the absence of the protected conduct." *Allstate Power Vac*, supra at 346 (quoting *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004)). "An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007) (quoting *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996)). Moreover, the employer's burden is substantial if the General Counsel makes a strong showing of discriminatory motivation. See, e.g., *Bally's Park Place, Inc.*, 355 NLRB 1319, 1321 (2010) (reversing judge and finding violation because the judge "did not consider the strength of the

[27] Sec. 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]." Sec. 7 provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively though representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

General Counsel's case in finding that the Respondent met its *Wright Line* rebuttal burden"), enfd. 646 F.3d 929 (D.C. Cir. 2011).

Prior to applying this burden-shifting framework to Dixon's layoff, I must first decide whether Dixon engaged in protected concerted activity when he spoke to Kelly and Rodriguez about the apprentice. To be protected under Section 7 of the Act, employee conduct must be both concerted and engaged in for the purpose of mutual aid or protection. Concerted activity includes activity that is engaged in with or on the authority of other employees, but also activity where individual employees seek to initiate or to induce or to prepare for group action as well as individual employees bringing truly group complaints to the attention of management. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984); *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity does not include activities of a purely personal nature that do not envision group action. See *United Association of Journeymen and Apprentices of the Pipefitting Industry of the United States and Canada, Local Union 412*, 328 NLRB 1079 (1999); *Hospital of St. Raphael*, 273 NLRB 46, 47 (1984). The standard is objective, not subjective. *Dries & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 328 fn. 10 (7th Cir. 1976) ("what is crucial is that the purpose of the conduct relate to collective bargaining, working conditions and hours, or other matters of 'mutual aid or protection' of employees"). The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the circumstances. *National Specialties Installations*, 344 NLRB 191, 196 (2005). It is clear that the Act protects discussions between two or more employees concerning their terms and conditions of employment. However, protection is not denied because employees have not authorized another employee to act as their spokesperson. *NLRB v. City Disposal Systems,* 465 U.S. 822, 835 (1984); see also *Circle K Corp.*, 305 NLRB 932, 933 (1991) (solicited employees do not need to share an interest in the matter raised by the soliciting employee for the activity to be concerted). Furthermore, the concept of "mutual aid or protection" focuses on the goal of the concerted activity—such as whether the employees involved are seeking to improve terms and conditions of employment. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

I find in this instance that the credited evidence shows that Dixon, upon learning that the terms and conditions of the apprentice's employment were changing, approached Kelly to discuss this action. Dixon also approached Rodriguez to discuss the apprentice's employment, arguing that their job as journeymen was to teach apprentices and that the apprentice should be moved to another gang. The Act protects Dixon, who upon learning of the apprentice's work-related concerns, voiced those concerns to Kelly and Rodriguez even if he had not received permission from the apprentice. Thus, objectively, Dixon's conversations with Kelly and Rodriguez about the apprentice are considered to be concerted activity and engaged in for the purpose of mutual aid or protection.

Applying the burden-shifting framework to Dixon's lay off, I find that the General Counsel did not met his initial burden of showing that Dixon's protected activity was a motivating factor in his layoff. [28] As discussed above, Dixon engaged in protected concerted

[28] Contrary to Respondent's assertion that Dixon's layoff was not an adverse action, I find

activity. Moreover, Rodriguez, who is an admitted supervisor, knew of Dixon's actions. Dixon credibly testified that he spoke to Rodriguez about the issue regarding the apprentice, and Rodriguez stated that he would take care of the issue. However, Swartz, who made the decision to lay off Dixon, credibly testified that he did not know about the incident regarding Dixon and the apprentice at the time he made the decision to lay off Dixon due to extended breaks. Usually the Board will impute a supervisor's knowledge of an employee's protected activity to the employer, but when it has been established that the supervisor who knew of the protected activity did not pass the information along to others, the knowledge will not be imputed to the employer. See *State Plaza Hotel*, 347 NLRB 755, 756 (2006); *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82 (1983); *Kimball Tire Co.*, 240 NLRB 343, 344 (1979). Again, Swartz credibly testified he was not aware of Dixon's advocacy of the apprentice. Swartz testimony makes sense as Rodriguez told Dixon he would take care of the issue regarding the apprentice. Dixon relied upon Rodriguez's statements, and did not follow up with the apprentice. The issue appeared to be resolved, and thus it makes little sense for Swartz to be made aware of the issue which comports with his credited testimony. Thus, Rodriguez's knowledge of Dixon's protected activity cannot be imputed to Respondent.

The General Counsel argues that knowledge should be imputed to Respondent under the "cat's paw" theory as set forth in *Staub v. Proctor*, 562 U.S. 411, 422 (2011). In *Staub v. Proctor*, the Supreme Court held that an employer is liable for employment discrimination if a supervisor performs an act that has a discriminatory motive that is intended to cause an adverse action, and the act is a proximate cause of the adverse action. In *JM2*, 363 NLRB No. 149 (2016), then-Member Miscamarra provided such an alternative rationale where it would be unnecessary to prove that the decision maker of the adverse action knew of the protected activity, and the discriminatory animus of the supervisor who influenced the employment decision would be a motivating factor in the employer's action. Even assuming such an alternative rationale, the record fails to show that Rodriguez had any animus towards Dixon's advocacy for the apprentice. Moreover, the General Counsel failed to prove that Kelly was a supervisor or agent of Respondent. The only evidence of Rodriguez's animus presented was an uncorroborated, incredible, and unreliable account by Marcial.

Even assuming Dixon engaged in protected concerted activity which Respondent was aware, the General Counsel must next prove animus toward the protected activity. Improper motivation may be inferred from several factors, including pretextual and shifting reasons given for the employee's discharge, the timing between an employee's protected activities and the discharge, inconsistent treatment of employees, and the failure to adequately investigate alleged

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that it was. The Facebook project continued for a few more weeks after Dixon was laid off, and Dixon could have potentially continued to work there. Hence, Dixon suffered a change for the worse in his term of employment. See *Northeast Iowa Telephone Co.*, 346 NLRB 465, 476 (2006) (an adverse employment action is a change in an employee's terms and conditions of employment in an unfavorable way). Respondent cites *Piqua Steel Co.*, 329 NLRB 704, 706 (1999) (crane operator lawfully laid off for lack of work after his refusal to operate crane due to safety concerns; no other work available; once crane repaired, operator was recalled), for the proposition that a lay off due to lack of work is not an adverse action. However, the credited evidence shows that Respondent laid off Dixon for his extended breaks, and not due to lack of work, despite the language on the layoff notice. It is also undisputed that the work continued on the Facebook project. Thus, Respondent's layoff of Dixon was an adverse action.

misconduct. *Temp Masters, Inc.*, 344 NLRB 1188, 1193 (2005); *Promedica Health Systems, Inc.*, 343 NLRB 1351, 1361 (2004); *Fluor Daniel, Inc.* 311 NLRB 498 (1993). Discriminatory motive may also be established by showing departure from past practice or disparate treatment. See *JAMCO*, 294 NLRB 896, 905 (1989), affd. mem., 927 F.2d 614 (11th Cir. 1991), cert. denied 502 U.S. 814 (1991); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999). The overwhelming evidence establishes that Dixon was laid off for taking extended breaks, not for engaging in protected concerted activity. The only factor which supports the General Counsel's theory is the timing of the events. Dixon appears to have complained about the treatment of the apprentice at around the same time Kelly, as relied upon by Swartz, complained that Dixon was taking extended breaks. However, the timing alone is not sufficient in this matter to demonstrate animus towards Dixon's protected concerted activity. Swartz convincingly testified that he laid off Dixon for extended breaks after receiving several reports from two foremen. In addition, Swartz laid off 20 employees that month for the same reason. All these employees, including Dixon, were laid off for lack of work as noted on their documentation but Swartz testified that the actual reason was extended breaks. Thus, all the employees were treated the same with some employees receiving warnings to get back to work by Swartz and others being warned by their foremen. These "warnings" appear to be akin to reminders, and the record lacks any evidence of these warnings were disciplinary in nature. Swartz' decision to lay off Dixon along with other employees for extended breaks rings true considering Respondent had a short deadline to complete the Facebook project. Respondent clearly did not tolerate the conduct for which Dixon was laid off.

The General Counsel claims that Respondent treated Dixon differently from similarly situated employees and failed to conduct an adequate investigation. However, there is no evidence to support such a claim. Swartz "investigated" these accusations of extended breaks by usually observing the employees to ensure such accusations were true before laying off the employees. The evidence shows that Swartz made the decision to lay off other employees for taking extended breaks with the same or similar circumstances. First, Swartz or the foremen would notice employees taking extended breaks. They would then tell the employee to get back to work. Thereafter, if Swartz received more reports of such action, he made the decision to lay off the employees. Under this scenario, the General Counsel has not shown that the investigation was suspiciously inadequate. In fact, Swartz admitted that he did not observe Wright taking extended breaks before he laid him off at the same time as Dixon,

The General Counsel claims that this is "one of those rare cases" in which there is direct evidence of animus (GC Br. at 44). I disagree. I explained at length that I discredited Marcial's testimony which was completely unreliable. Without crediting Marcial's testimony that Rodriguez "confessed" to him and a coworker about Dixon's protected concerted activity, and how Rodriguez intended to lay off Dixon unlawfully, the General Counsel cannot prove direct animus. Moreover, Respondent's reason to lay off Dixon is not pretextual. This entire case relies upon the testimony of witnesses. Ultimately, the trier-of-fact must decide who should be credited and during which events or conversations. As such and as explained above, I rely upon Swartz' credible testimony that two foremen including Kelly reported Dixon taking extended breaks. Thereafter, Swartz observed Dixon taking an extended break and decided to lay him off.

Based on the foregoing, I find that the General Counsel has failed to meet its burden to prove that animus toward Dixon's protected concerted activities motivated Respondent's decision to lay him off.

Even assuming the General Counsel met the required initial burden of proving discriminatory motive, I find that Respondent proved that Dixon would have been terminated even if he had not engaged in protected concerted activities. Swartz made the decision to lay off Dixon, and credibly testified that he did not know about Dixon's advocacy on behalf of the apprentice. Swartz laid off many employees in June for the same conduct as Dixon, including Wright on the same day. I therefore find that the General Counsel failed to prove that Respondent laid off Dixon for unlawful reasons, and Respondent did not violate Section 8(a)(1) of the Act. Accordingly, I will dismiss the complaint.

CONCLUSIONS OF LAW

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

2. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act, as alleged in the complaint.

On the basis of the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I issue the following recommended[29]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. September 18, 2018

Amita B. Tracy
Administrative Law Judge

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