

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

VOLVO PARTS NORTH AMERICA, LLC

and

WALTER EVANS, AN INDIVIDUAL

Cases 15-CA-179071
15-CA-184912
15-CA-195183
15-CA-204842

BRIEF OF COUNSEL FOR THE GENERAL COUNSEL
ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD

BEFORE: SHARON STECKLER
ADMINISTRATIVE LAW JUDGE

Respectfully Submitted by:

William T. Hearne
Counsel for General Counsel
National Labor Relations Board
Subregion 26
80 Monroe Avenue, Suite 350
Memphis, Tennessee 38103

I. BACKGROUND FACTS

A. Respondent's Business Operations

Respondent operates a warehouse in Byhalia, Mississippi where it receives, stores and ships Volvo and Mack truck parts for distribution to its customers. (Tr. 634-5).¹ The Byhalia facility opened in about November 2014 and replaced a warehouse Respondent operated in Memphis, Tennessee. (Tr. 634-5). The facility was staffed by employees who transferred from the Memphis warehouse and other warehouses around the United States. (Tr. 634-5). During the relevant time period for this case, the facility was overseen by Director Onur Orcun. (GCX 63). During 2016, the facility's Human Resources Manager was Leslie Thompson and, in her absence, Human Resources Director Theresa Thomas, who was based at Respondent's headquarters in Greensboro, North Carolina. (Tr. 259-60). Beginning in August 2016, Lonny Otto took over as human resources manager at the Byhalia facility and continued in that position during the relevant time period in this case. (Tr. 897-8).

The facility has several departments within the warehouse, including inbound, outbound, inventory, and Mack. (Tr. 1003-4). During the time period for this case, the outbound department was overseen by Manager Kevin Bush and the inbound department was overseen by Derrick Haire. (Tr. 1005-6). Bush became the acting inbound manager in January 2016 and was placed in the position permanently in May 2016. (Tr. 1005-6). Prior to becoming inbound manager, Bush served as the operations support supervisor where he was responsible for overseeing operations throughout the warehouse and handling safety issues. (Tr. 1004). Bush was replaced as operations support supervisor by Burt Barton. (Tr. 906).

¹ Herein, all references to the transcript and exhibits shall be as follows: Transcript - Tr. page(s); General Counsel Exhibits - GCX; Respondent Exhibits - RX; and Joint Exhibits - JTX.

In the inbound and outbound departments, there are at least three or more supervisors who report directly to the department manager. (Tr. 1006). During the time period when Charging Party Walter Evans worked in inbound, the supervisors were Robert Buckingham, Arnold Ayikwei, Max Sims and Shanette Folsom. (Tr. 1006). Evans was supervised by Buckingham in 2015 and in by Ayikwei in 2016, although Buckingham continued to supervise Evans in some instances. (Tr. 738). After Evans transferred to outbound in May 2016, he was supervised largely by supervisor Bobby Clark. (Tr. 693-4).

Because the inbound and outbound departments are somewhat large, the unit employees are assigned to teams of about 10-12 employees where their day-to-day work is overseen by a team lead. (Tr. 109-10). The team leads are not part of the bargaining unit. (Tr. 107). The team leads conduct pre-shift meetings with the employees assigned to their team and provide instructions on the work to be performed by the team in general and each individual team member on a daily basis. (Tr. 108, 113, 704-710). As testified to by team leads Arthur Braggs and Deadrick Simelton, the team leads have discretion in selecting employees for work assignments, including special work assignments or temporary transfers to other teams. (Tr. 130-2, 807-9). Braggs, Simelton and former team lead Bobby Clark also testified they have the authority to conduct “coaching” sessions with team members in order to correct work performance or rules of conduct violations. (Tr. 120-7, 707-8, 811-15). Braggs, Simelton, and Clark testified that, while they do not have the authority to issue a Disciplinary Action Report (DAR) to team members, they have discretion whether to report a coaching discussion with an employee to the supervisor, what information to provide to the supervisor, and whether to make recommendations concerning whether additional disciplinary action is warranted. (Tr. 120-7, 707-8, 811-15).

The employees at the Byhalia facility are represented by the United Auto Workers Local 2406 (the Union). (JTX 3). Respondent and the Union have a current collective-bargaining agreement which went into effect on December 17, 2010 and is set to expire on December 16, 2020. (JTX 3). Article 20 of the agreement provides for a grievance procedure and binding arbitration of disputes which arise under the agreement. (JTX 3).

II. FACTS

A. Walter Evans Employment, Union and Protected Concerted Activities

Evans began working for Respondent at a facility in Columbus, Ohio in September 2014. (Tr. 167). Because of downsizing at the Columbus facility, Evans accepted a transfer to the Byhalia facility and began work in Byhalia in May 2014. (Tr. 167). Evans was assigned to work as an equipment operator (referred to by Respondent as “Industrial Worker” or “IW”) in the inbound department on the third shift. (Tr. 167). The equipment operated by Evans while working in inbound included sit-down and stand-up reach trucks, which are used to lift, move, and place items on racking in the warehouse. (Tr. 171-3). Evans was first supervised by Inbound Supervisor Robert Buckingham and later, in 2016, supervised by Supervisor Arnold Ayikwei. (Tr. 169). Evans’ team lead, starting about August 2016 was Arthur Braggs, who was promoted from a unit position to that position. (Tr. 105, 170).

Evans had joined the United Auto Workers local union which represented employees at the Columbus facility when he worked there and continued his membership in the Union by joining the Local Union upon his transfer to Byhalia. (Tr. 177-8). Evans’ union and protected concerted activities began soon after his arrival at the Byhalia facility. On July 6, 2015, Evans initiated a grievance on behalf of himself and other third shift unit employees who he asserted were improperly denied the opportunity to work voluntary overtime over the Independence Day

holiday. (Tr. 179-91; GCX 4). On July 28, 2016, Respondent proposed to resolve the grievance by paying Union Committeeperson Kerrick Adams and Arthur Braggs 8 hours of double time pay for the missed overtime. (Tr. 179-91; GCX 4). However, Evans protested this proposed settlement to then-manager Don Moledoux, and secured the signatures of at least seven other employees, who disagreed with the settlement. (Tr. 179-91; GCX 4). Even once the settlement was finalized, Evans continued to protest the decision to pay only the shift Union steward and Braggs as part of the settlement. (Tr. 179-91; GCX 4).²

Evans filed another grievance on November 15, 2016 in which he alleged Respondent was continuing to improperly post solicitations for employees to work overtime and not properly assigning overtime work according to the collective-bargaining agreement. (Tr. 179-91; GCX 5). After the November 15 grievance was denied, Evans personally appealed the grievance to step 2 of the grievance procedure. (Tr. 179-91; GCX 6). Evans testified that Manager Moledoux was working with the Union to attempt to resolve the grievance before Moledoux's employment ended. Evans did not know the eventual outcome of the grievance except that Respondent began following the language of the agreement in making overtime assignments. (Tr. 190-1).

In the midst of filing these grievances in 2015, Evans regularly raised complaints during pre-shift meetings conducted by Braggs and Buckingham about how Buckingham was not following the provisions of the agreement in making overtime assignments. However, Evans was unable to get the issue resolved through these communications. (Tr. 863-4).

Respondent acknowledged that Evans engaged in protected activities during pre-shift meetings and that it considered his conduct to be problematic. For example, during the hearing, both Buckingham and Braggs testified that Evans regularly raised issues concerning the

² In his testimony, Braggs claims, without any supporting evidence, that he was the individual who filed a grievance concerning employees being improperly denied vacation overtime work over the Independence Day holiday in July 2016 and he and Adams were paid for 8 hours of overtime pay for the missed hours. (Tr. 892).

collective-bargaining agreement during pre-shift meetings in 2015 and continuing into 2016, including making complaints about how employees were selected for overtime and Respondent's rules concerning gap time by employees.. (Tr. 761-2, 877-9). Regarding his perception of Evans's complaints, Buckingham testified that he considered Evans' complaints to be disruptions of his meetings and he "[doesn't] like disruptions in his meetings." (Tr. 761-2). Buckingham also claimed that he discussed Evans' disruptions of the pre-shift meetings with Braggs because Braggs had similar issues with Evans raising complaints about contract violations during the pre-shift meetings. (Tr. 761-2; 877-9).

Like Buckingham, Braggs also testified that he also had problems with Evans interrupting pre-shift meetings with his claims of contract violations because it was disruptive to getting work done. (Tr. 877-9). Braggs even opined that Evans had a reputation as an employee who was constantly complaining to anyone who would listen about Respondent's violations of the bargaining agreement and he found this conduct to also be disruptive to getting their work done. (Tr. 877-9).

Evans continued his protected activities in the second half of 2015 by repeatedly raising safety issues during pre-shift meetings and one-on-one conversations with Supervisor Buckingham and in roundtable meetings with Manager Moledoux and Buckingham. (Tr. 194-202). The safety issues Evans raised during this time stemmed from his observation that employees were placing heavy items on racks which were not designed to bear large amounts of weight and were causing some racks to sag and appear near collapse (Tr. 194-202). Buckingham testified Evans did raise this safety issue on more than one occasion which led to Respondent to install heavy-duty racks which could handle the heavier items. (Tr. 766-8). Buckingham also assigned a group of employees to ensure that heavier items were placed correctly on the racks so

the safety issues identified by Evans could be avoided. (Tr. 195-202). Another safety issue Evans brought to Respondent's attention concerned equipment operators parking their equipment in way that blocked the aisles and prevented employees from traversing the aisles without incident in getting work done. (Tr. 771-2; GCX 5).

In addition to his protected activity of raising various work-related complaints, Evans was elected as an alternate committeeperson (which is the equivalent of a steward) for the third shift employees in October 2015. (Tr. 177-8; GCX 3). As means to keep unit employees informed about Union-related issued and to help build support for the Union, Evans regularly passed out union and union-related materials at the facility to employees before and after work and during non-work time in the break room and other non-work areas starting in July 2015 and continuing until his transfer to first shift on May 1, 2016. (Tr. 191-4; GCX 4).

B. March 23, 2016 Written Warning Issued to Evans

On March 23, 2016, Supervisor Buckingham issued a written warning DAR to Evans for allegedly wasting time on March 22 by being in the front break room watching television 25 minutes prior to the start of breaks. (GCX 12). The events which led to the March 23 DAR occurred on the prior shift, which encompassed March 21 and 22. (Tr. 228-40).³ In March 2016, Evans was working in inbound where his job duties primarily involved retrieving items from the inbound docks using a reach truck and moving the items to racks within the warehouse for storage. (Tr. 228-40). Prior to the start of lunch at 2:00 a.m., Evans claims that he performed a put-away of a pallet of coolant on aisle 621. This put-away is reflects in Evans' DLX log for March 21-22, 2016. (GCX 13). As witnesses testified, the DLX log is a record of the work performed by employees during their shift. (Tr. 111-2). The DLX log includes several items of

³ In March and April 2016, Evans worked on the third shift. At that time, the third shift began at about 10:00 p.m. and ran until about 6:30 a.m., the morning of the following day. (Tr. 848).

information, most importantly the description of the item being moved, the location from which the item was picked up, the location where the item was placed, and the time when the item was placed in the storage location. (Tr. 111-2, 225; GCX 13). In performing a put-away, the employee is required to pick up the item to be moved, travel to the storage location, ensure that the space on the racks for the item is clear, remove any empty pallets or storage containers, and then place the item on the rack in the correct location. (Tr. 230-5). During the put-away process, the employee scans the item to be stored when picking it up on the docks and again when the item is placed in the racks for storage. (Tr. 230-5). As reflected on the DLX log, the transaction time is the time when the item was scanned when the employee is at the rack storage location and is preparing to place the item in the racks. (Tr. 230-5). Once the item is stored in the racks, the employee is then required to remove any pallets or empty containers which were removed from the racks and transport these items to the appropriate location within the warehouse. (Tr. 230-5).

Evans' DLX log for March 21-22 shows that prior to the start of lunch at 2:00 a.m., Evans performed a put-away of a pallet of coolant on aisle 621 at 1:32 a.m. (GCX 13). Evans testified he did not specifically recall having to remove any empty pallets or containers in performing this specific put-away but it was common to have to do so for items which are stored on pallets. (Tr. 230-5). As Evans explained, the DLX log shows he scanned the pallet of coolant for the put-away at 1:32 a.m., but this does not specifically show the time he actually completed the put-away. (Tr. 230-5). As such, the actual put-away and later removal of any empty pallets could have added several minutes to this specific task. (Tr. 234-5). Witnesses, including Evans, Supervisor Buckingham and Team Lead Braggs, testified that aisle 621 is at the far end of the warehouse opposite from the location of the break room where Evans went for lunch on March

22. (Tr. 149-50, 230-5, 728). Evans testified he drove his reach truck via one of the three main aisles, stopping at intersections when required, to the parking area for equipment. (Tr. 228-40). The equipment parking area is located along the warehouse wall on the end of the warehouse where the main break room is located. (Tr. 231-5). Evans plugged in his reach truck for recharging, as is required during breaks and lunch, and first walked to the bathroom, which is located near the main break room. (Tr. 228-40). After using the restroom, Evans walked to the main break room to begin his lunch period. (Tr. 228-40). Evans testified he arrived at the main break room about 5-6 minutes early and, when he arrived, at least 8-10 other employees were already in the break room starting their lunch period. (Tr. 228-40).

Evans testified he was standing at the sink in the break room getting a drink of water when team lead Braggs entered the break room through the door at the far end of the break room. (Tr. 237-40). When Braggs entered, Evans said Braggs looked at him and he looked at Braggs but Braggs did not say anything to Evans to attempt to approach him to speak with him. (Tr. 237-40). Evans said he looked at the clock in the break room when Braggs looked at him and saw that it was about 1:54 or 1:55 a.m. (Tr. 237-40). Evans then continued with his lunch and finished his shift without incident. (Tr. 237-40).

Braggs, however, testified that he observed Evans in the main break room watching television at 1:35 a.m. on March 22, 2016 which he documented in an email he sent to Supervisor Buckingham at 2:07 a.m. on March 22. (Tr. 134-5; GCX 44). Braggs provided thoroughly implausible testimony about how he came to find Evans in the break room at 1:35 a.m. Braggs claims that at about 1:32 a.m., he decided to go look for Evans to speak with Evans about some multi-location issues with parts Evans had put away on March 9 and 11, 2016. (Tr. 138-9, RX 2). The multi-location issue had been brought to Braggs' attention when he received

an email from Supervisor Michael Tomko on March 14, 2016. (RX 2). Braggs testified he did not take any action on these multi-location issues (which according to Braggs were a serious issue that needed to be addressed) until March 22, 2016 when he was instructed by Supervisor Ayikwei to discuss the issues with Evans. (Tr. 868-9). This claim was directly contradicted Supervisor Buckingham who testified that Ayikwei was on an extended vacation on March 22, 2016 and, thus, would not have been present at the facility to tell Braggs to speak with Evans. (Tr. 739-40). Buckingham had a very specific recall of this information. He explained that, during the week including March 22, 2016, he was working a split shift (which meant he arrived at the facility at 2:00 a.m.) as he transitioned to first shift and Braggs was serving as an acting supervisor in the inbound department in his and Ayikwei's absence. (Tr. 739-40).

Braggs then testified, once he decided to go look for Evans to discuss the multi-location issues, he looked at Evans' DLX log in order to ascertain where Evans could be found. (Tr. 140-1). As reflected in the DLX log, for the hour prior to Braggs deciding to look for Evans, Evans had been retrieving items from dock platform 17 and moving items to racks located at the end of the warehouse opposite the main break room. (Tr. 146-9; GCX 13). Braggs claimed when he checked the DLX log at about 1:32 a.m., Evans was not signed in (even though Evans had just completed a put-away at 1:32 a.m.) and had gone to the bathroom. (Tr. 140-3). Braggs could not offer an explanation as to how he knew that Evans was in the restroom when he looked at his DLX log as this information is not shown in the log. (Tr. 140-3). Braggs further testified he began looking for Evans immediately after Evans' last scan on aisle 621 but did not go to aisle 621, dock platform 17 or any other area at that end of the warehouse to look for Evans even though that was Evans' last known location. (Tr. 146-9). Instead, Braggs went from his desk, which at that time was on the same end of the warehouse as the main break room, walked to the

main aisle near the equipment parking area, and walked to the break room where he found Evans. (Tr. 146-9). Braggs testified he did not recall whether he said anything to Evans when he saw Evans in the break room at 1:35 a.m. and did not recall ever speaking with Evans about the allegedly serious multi-location issues which was Braggs claimed reason for attempting to find Evans. (Tr. 153-5). Braggs also insisted that there were no other employees in the break room when he found Evans there. (Tr. 160).

At 2:07 a.m. on March 22, 2016, Braggs sent an email to Supervisor Buckingham in which he alleged he found Evans in the break room at 1:35 a.m. that shift. (GCX 44). Braggs was unable to explain why he sent the email to Buckingham and failed to copy Ayikwei on the email even though Ayikwei was Evans' supervisor at that time. (Tr. 869-71). In the email, Braggs states he found Evans in the break room watching television at 1:35 a.m. and goes on to opine about Evans' conduct. (GCX 44). Braggs states that Evans "has no concerns for the rules or code of conduct" and, based on Evans' history, he believed disciplinary action was warranted. (GCX 44).

Supervisor Buckingham testified he received the email from Braggs and spoke with Braggs directly about the information Braggs had provided and whether discipline was warranted in this situation. (Tr. 748-9). Buckingham testified he reviewed Evans' DLX log after speaking with Braggs and proceeded to prepare the written warning DAR for Evans. (Tr. 724-5). Buckingham admitted he did not make any attempt to speak with Evans or perform any additional investigation beyond Braggs' assertions before deciding to discipline Evans. (Tr. 755). Buckingham further admitted that, even after Evans provided a lengthy statement on the March 23, 2016 DAR in which he explained that he could not have engaged in the alleged rule violation

as claimed by Braggs, he did not perform any additional investigation to determine whether the March 23, 2016 DAR was warranted. (Tr. 759-60; GCX 12).

After receiving the March 23, 2016 DAR, Evans requested a meeting with Inbound Manager Kevin Bush to attempt to get the DAR removed from his disciplinary record. (Tr. 304). The meeting was held on the morning of March 31, 2016 in the main office area at the warehouse. (Tr. 303-4). The meeting was attended by Evans, Union Committeeperson Roderick Simpson, Bush, Buckingham and Braggs, although Buckingham and Braggs claimed they did not recall attending the meeting. (Tr. 303-4, 760, 1010, JTX 3). In this meeting, Evans attempted to explain to Bush how he could not have been in the break room at 1:35 a.m. as claimed by Braggs and that, while he had arrived at the break room a few minutes early, there were several other employees already present and arriving to the break room early was a common practice at the warehouse. (Tr. 302-11).⁴ Evans recalled that, when he said he was standing at the sink getting a drink of water when Braggs came in the break room, and not watching television as Braggs had claimed, Braggs responded, “What difference does it make?” (Tr. 311). Bush listened to Evans and Simpson and raised concerns that Evans allegedly had some gap time issues which Evans disputed. (Tr. 306-7). At the end of the meeting, Evans requested copies of his DLX logs for the past 30 days which Bush later provided to Evans. (Tr. 307-8).

Following this meeting, Evans prepared and submitted two separate letters to Bush concerning the March 23, 2016 DAR, Bush’s claims that Evans had gap time issues, and Evans’ belief that he was being singled out for discipline and harassment by Buckingham, Braggs, and other supervisors because of his union activities and protected concerted activities. The first

⁴ Notably, HR Director Thomas admitted that in the June 30, 2016 grievance meeting conducted after Evans’ discharge, Human Resources Generalist Cynthia Hayes confirmed that Respondent had later investigated whether other employees were in the break room with Evans on March 22, 2016. Despite the fact that Respondent determined that eight to nine other employees were present in the break room, no other employees were disciplined in any form. (Tr. 281, GCX 36).

letter is dated March 31, 2016 and specifically addresses the March 23, 2016 DAR. (Tr. 311-3; GCX 14). Because Bush failed to respond to the March 31, 2016 letter, Evans prepared a second letter dated April 12, 2016 in which he detailed his objection to the March 22, 2016 DAR and Bush's claim that Evans had gap time issues. (Tr. 314-8; RX 1). The April 12 letter goes on to state that Evans believes the actions taken against him are retaliation for his union activities, including his prior grievance filing activities, and his complaints about Braggs' performance as team lead. (Tr. 314-8; RX 1). The April 12, 2016 letter also included 13 pages of attachments, which included copies of his prior grievances alleging violations of the collective-bargaining agreement by Buckingham and Braggs. (RX 1). Evans said he delivered both letters to a receptionist in the main office area at the warehouse so they could be provided to Bush. (Tr. 311-8). Bush testified that he recalled receiving a couple of envelopes with documents from Evans but he did not bother to read them and simply handed them off to HR Manager Thompson. (Tr. 1080).

Evans also mailed a copy of a April 12, 2016 letter and attachments to HR Director Theresa Thomas so she would be aware of the issues Evans was having at the warehouse and his belief that Respondent's actions against him violated the National Labor Relations Act. (Tr. 314-8; RX). Evans said he sent a copy of the letter to Thomas because when Thomas met with employees at the facility in March 2016, she told employees they could contact her regarding any problems they were having. (Tr. 314-8). Thomas testified she did receive the April 12 letter and attachments and, after reviewing the documents, decided that there was nothing she could do about the matter since she believed these were grievance issues and placed the document in her "Walter Evans" file. (Tr. 264-7). Despite Evans making assertions that Respondent was retaliating against him in violation of the NLRA and was engaged in other violations of the

contract, Thomas admitted she did not contact Labor Relations Manager Curt Youngdale or anyone at the Byhalia warehouse concerning any of the issues Evans raised. (Tr. 267-8).

C. April 21, 2016 Accident and Respondent's Decision to Suspend Evans

On April 21, 2016, Evans had an accident which led to a damaged windshield he was attempting to move to the racks for storage. (Tr. 319-21). Evans testified he was attempting to lift two stacked pallets holding windshields from an inbound dock when the top pallet tipped forward and fell to the ground. (Tr. 319-21; GCX 16). Evans testified he believed the top pallet tipped over because it had not been properly secured to the bottom pallet during the moving or unloading process. (Tr. 319-21). Evans reported the incident to Supervisor Ayikwei and completed the form provided to him by Ayikwei to document what had occurred. (Tr. 321-4; GCX 16). Evans testified he did not engage in any unsafe or improper practice when lifting the pallet, which was not rebutted by any testimony from Respondent's witnesses. (Tr. 319-24, 1074-5). While Ayikwei prepared a "Safety Log Item," he did not prepare an incident report which would have detailed his investigation of the safety incident and his conclusions about the cause of the incident. (Tr. 1069-71; GCX 65). Witnesses, including Evans, Roderick Simpson and Glenn Dobson, testified items commonly fall off of pallets during transport around the warehouse and do not result in discipline unless the employee has engaged in some unsafe practice while moving the pallets. (Tr. 61-3, 658).

Despite the lack of any documentation to reflect that Evans had violated rule 5 in Respondent's Rules of Conduct by failing to comply with safety rules, regulations and common safety practices, Respondent decided to discipline Evans for the April 21, 2016 incident. (Tr. 1069-75; GCX 65). Supervisor Ayikwei prepared a proposed DAR with a 5 day suspension for Evans which he provided to HR Manager Thompson for review. (GCX 65, 66). On April 26,

2016, Thompson sent the proposed DAR to Labor Relations Manager Youngdale (with a copy to HR Director Thomas) for review. (GCX 66). In the email, Thompson noted that Evans had another incident on the third shift and “his continued behaviors are posting (*sic*) a lot of disruption on the 3rd [shift].” (GCX 66). Youngdale responded the same day that the suspension should be 30 days and they could proceed since Thompson said they had all the documentation for the incident. (GCX 66). Youngdale further noted Thompson should confirm other employees had been disciplined for similar incidents because Evans has “claimed he is being targeted and retaliated against.” (GCX 66).⁵ Respondent did not address whether Thompson or any other human resources personnel reviewed prior discipline at the facility as suggested by Youngdale but the disciplinary records provided by Respondent reflect that, prior to April 26, 2016, with the exception of the December 23, 2015 verbal reminder issued to Evans, no other employee had been disciplined for an incident which involved items falling or tipping off the forks of a reach truck or order picker. (GCX 39).⁶

D. May 3, 2016 Suspension Meeting and Discharge of Evans

Evans was not informed about Respondent’s decision to suspend him for 30 days until May 3, 2016. (Tr. 334). During that time, Evans had bid on and been transferred to a first shift position in the outbound department. (Tr. 333-4). According to Evans and Simpson, Respondent waited until May 3, 2016 to conduct the suspension meeting so that Inbound Manager Bush could be present at and conduct the meeting. (Tr. 45-6, 332-3). The suspension meeting was held on the afternoon of May 3, 2016 in a conference room in the main office area of the

⁵ Because neither Thompson nor Youngdale testified at the hearing, Respondent offered no explanation for what behaviors by Evans disrupted the third shift or how Youngdale became aware that Evans was claiming he was being singled out for retaliation as Evans had not filed grievances over his three prior disciplinary warnings.

⁶ The first instance of an employee other than Evans being disciplined for pallets tipping off the forks of a reach truck occurred, oddly enough, on April 27, 2016 when Supervisor Ayikwei issued a written warning to Monique Gullede after a stack of pallets she was lifting tipped off her forks. (GCX 66, pp.16-18).

warehouse. (Tr. 334). The meeting was attended by Evans, Union Committeeperson Simpson, Bush and Supervisor Ayikwei. (Tr. 334).

At the beginning of the meeting, Manager Bush informed Evans he was being suspended for 30 days and handed Evans a DAR form to review. (Tr. 334-9). The form did not specify the rule Evans allegedly violated and only stated that Evans was being suspended for 30 days under the fourth step of the progressive discipline policy. (GCX 18). Simpson asked Bush what this was about and Bush said it was because of the windshields Evans had damaged in April. (Tr. 337-8). Simpson attempted to discuss the discipline with Bush but Bush cut him off and asked Evans to sign the DAR. (Tr. 48-51, 337-8). After Evans refused to sign the form, Bush moved to open the conference room door to signal that the meeting was over. (Tr. 53, 337-9).

Evans exited the conference room before Simpson and passed by Manager Bush, who was standing at the doorway. (Tr. 53-4, 338-9). Evans said head of security Candid Patino was standing outside the conference room to escort him out. (Tr. 338-40). On his way out of the conference room, Evans told Bush, "You have no integrity." (Tr. 54, 339). As Evans walked down the hallway away from the conference room, Evans said to Bush, "The reason things around here are all fucked up is because of people like you," and "If you think you can get away with shit like this, I'll see you in court." (Tr. 54, 340). When Evans made these statements, he was more than 10 feet away from Bush and both Simpson and Patino were standing between him and Bush. (Tr. 54-5, 340-1). Simpson urged Evans to continue moving toward the exit and Simpson and Patino followed Evans as he collected his things and left the facility. (Tr. 54-5, 341-4). On his way out, Evans told Simpson that he wanted to file a grievance over his suspension. (Tr. 343). Evans then left the facility.

According to Simpson, after they left the conference room, Evans told Manager Bush that the Employer would not make it with people like Bush in charge, Bush did not have any integrity, and if Bush thought this was over, he would see Evans and his lawyer. (Tr. 54). In the statement he provided for Respondent's investigation of Evans, Bush said "Evans told me 'I had no fucking integrity,' [and] 'this was not over and that he would see me in court.'" (GCX 48). Bush testified he also asked Patino to prepare a statement for the investigation. (Tr. 1085). In her statement, Patino claimed Evans was "in a rage" and pointing his finger at Bush while speaking loudly to him. (JTX 3). Patino wrote that Evans said, "This isn't over, you think you can get away with this, no, I'm going to get your ass. You think you can do this shit and get away with it, I will see you in court. Better yet, I will see you in 30 days and we will handle it then." (JTX 3). Patino testified that she prepared the statement but could not independently remember any of the details concerning the events of that day. (Tr. 985, 995-8). Bush and HR Director Theresa Thomas testified that other office staff were nearby when Evans made statements to him after leaving the conference room (and several specific individuals were later identified to Respondent by the Union), but none of the other witnesses to the incident, including Simpson, were questioned by Respondent as part of its investigation into Evans' conduct on May 3, 2016. (Tr. 282-6, 1084-5).⁷

Based solely on Patino's May 3, 2016 handwritten statement and Bush's May 4, 2016 email statement, in which Bush asked for permission to begin the process for terminating Evans, the Employer discharged Evans for work rule 9 (using abusive language toward any person) and

⁷ HR Director Thomas testified that, following the grievance meeting held on June 30, 2016, she contacted Sammie Dance, who was working as an IT contractor at the Byhalia facility at that time. (Tr. 286-7). Thomas spoke with Dance on July 21, 2016 by telephone and reduced her notes of the call to writing on July 22, 2016 in an email she forwarded to Labor Relations Manager Youngdale. (Tr. 286-7; GCX 50). In her July 22, 2016 email, Thomas writes that she asked Dance about Evans's conduct on May 3, 2016 and Dance specifically rebutted the claims made by Bush and Patino that Evans cursed at or threatened Bush following the May 3, 2016 suspension meeting. (GCX 50). Thomas admitted that no one from Respondent provided this information to anyone from the Union or to Evans. (Tr. 296).

work rule 20 (threatening, harassing, intimidating, interfering or coercing any other employee at any time, including the brandishing of any instrument with the intent of causing bodily harm). (JTX 3; GCX 19, GCX 57). Evans was informed about his discharge by a letter dated May 11, 2016. (GCX 19).

E. Settlement of Evans' Grievances and Return to Work in August 2016

The Union filed grievances for Evans concerning his suspension and discharge. (GCX 34 and 35). The grievances were processed through step 3 of the contractual grievance procedure. The step 3 meeting on Evans' grievances was conducted on June 30, 2016. (GCX 36). Evans did not attend the grievance meeting and was represented by Union Committeeperson Simpson and Union International Representative Chuck Davenport. (Tr. 348; GCX 36). Respondent's representatives at the meeting were HR Director Thomas, Manager Bush, and HR Generalist Cynthia Hayes. (GCX 36). Hayes took detailed notes during the meeting which were reduced to typewritten form following the meeting. (Tr. 278-82; GCX 36). Thomas testified the typewritten notes were an accurate representation of the statements made by the meeting participants. (Tr. 278-82).

On July 8, 2018, Labor Relations Manager Youngdale provided Respondent's third step answer to the Evans suspension and discharge grievances to Davenport. (GCX 37). In the grievance answer, Youngdale proposed to rescind the 30 day suspension issued to Evans for the incident on April 21, 2016 and convert the discharge to a 30 day suspension. (GCX 37). On an unknown date after July 8, but prior to July 27, 2018, Davenport decided to accept the proposed grievance settlement without first notifying Evans. (Tr. 349). Evans testified he received a call from Davenport informing him about the grievance settlement and that Evans would be contacted shortly by Respondent about returning to work. (Tr. 349-50).

Evans testified he received a call from HR Generalist Hayes a day or two later informing him that he would need to return to work on August 1, 2016. (Tr. 350-1). Evans said he asked Hayes several questions about the grievance settlement which she was unable to answer. (Tr. 350-1). In response, on July 31, 2016, Evans emailed Davenport to get more information about the grievance settlement to which the Union had agreed. (Tr. 353-5; GCX 22). Davenport replied to Evans that same day with some additional information about the grievance settlement and attached a copy of the settlement for Evans to review. (Tr. 355-6; GCX 23). Evans testified that he was wholly unaware of the grievance settlement until he was contacted by Davenport on July 27, 2016 and was not provided a copy of the grievance settlement until after the Union had agreed to the settlement. (Tr. 350-6).

Evans returned to work on August 1, 2016 and was placed in the outbound department which he had been transferred to on May 1, 2016. (Tr. 333-4, 350). There is no evidence to show that Evans committed any type of misconduct or rule violation or had been accused of performance issues from the time he returned to work until March 17, 2017. (Tr. 960).

After he returned to work, Evans did continue his advocacy on behalf of the Union by distributing materials about supporting the Union and union-related issues to employees during non-work time in non-work areas in the last half of 2016 and the first three months of 2017. (GCX 28). Using about \$1,400 of his own money, Evans also purchased t-shirts with the UAW logo on them for the unit employees at the facility. (Tr. 365-8; GCX 27). Evans distributed the shirts during non-work time in non-work areas at the warehouse in August, September, and October of 2016 to all employees who requested them. (Tr. 365-8). Evans also requested the Union file at least one grievance against Respondent concerning an overtime issue for which he and other employees received backpay as part of a grievance settlement. (Tr. 370-1). Finally, in

June 2016, while he was off work following his discharge, Evans filed safety complaints and a separate whistleblower complaint against Respondent with the Occupational Health and Safety Administration. (Tr. 356-8; GCX 24). The OSHA complaints were eventually closed by that agency in August 2016 with no action taken against Respondent. (GCX 24).

F. March 16, 2017 Announcement of Stricter Enforcement of the Buzzer System

For the majority of the time the Byhalia warehouse has been in operation, Respondent has had a buzzer system which alerts employees about the start of break, lunch, and the end of a shift. For breaks and lunch, there are four buzzers in total. (Tr. 429-31, 666-7, 1045-6; GCX 63). The first sounds 3 minutes prior to the start of the break and the second sounds at the start of the break period. (Tr. 429-31, 666-7, 1045-6; GCX 63). The third buzzer sounds 5 minutes prior to the end of the break period and the final buzzer sounds at the end of the break period. (Tr. 429-31, 666-7, 1045-6). At the end of a shift, there is a buzzer which sounds 3 minutes prior to the end of the shift and a second buzzer which sounds at the end of the shift. (Tr. 429-31, 666-7, 1045-6). Prior to March 16, 2017, the only changes which had been made to the buzzer system had been to reduce the timing of the first buzzer from 5 minutes to 3 minutes in 2016. (Tr. 429-31, 1045-6).

At the time of the implementation of the buzzer system, employees had been informed that they were expected to continue working up to the first buzzer and were not permitted to begin breaks or clock out prior to the second buzzer. (Tr. 429-31, 667). Despite this information being provided to employees, the rules concerning the buzzer system were not enforced against employees prior to March 16, 2017. (Tr. 163, 431-2, 646-8, 1045-6, 1101-2; GCX 63). Employees Glenn Dobson and Andrew Gray testified they both saw employees stop work prior to the first buzzer and leave the warehouse prior to the second buzzer on a daily or near-daily

basis. (Tr. 431-2, 643-8). Manager Bush and Team Lead Braggs also testified that employees consistently stopped work prior to the first buzzer and would be at the door leading from the warehouse to the break room area prior to the first buzzer nearly every day. (Tr. 163, 1045-6, 1101-2). Despite the daily violation of the buzzer rules, Respondent had never disciplined any employee for stopping work prior to the first buzzer or leaving the warehouse area prior to the second buzzer prior to March 17, 2017. (GCX 40).

Director Onur Orcun, whose testimony was presented by Board affidavit as he was unable to appear at the hearing to testify in person, claims he was aware of the daily violation of the buzzer system rules because he conducted a daily meeting in the area near where employees would line up prior to the start of breaks. (GCX 63). Orcun said he had asked managers and supervisors to address this issue with employees but employees continued to arrive to begin breaks prior to the first buzzer alert on a daily basis. (GCX 63). In response, Orcun directed Manager Bush to conduct meetings with employees to inform employees that violations of the buzzer system rules had to stop and Respondent would begin strictly enforcing the rules. (GCX 63; Tr. 1100-1). No evidence was presented by Respondent to show that the Union was notified about this change in enforcement of the buzzer system rules prior to March 16, 2017.

These meetings were conducted with employees on March 16, 2017. Evans attended the meeting for inbound employees along with Andrew Gray. (Tr. 372-81, 432-8). The meeting was conducted by Director Orcun and Manager Bush, while the outbound manager and supervisors were also present. (Tr. 372-81, 432-8). Evans and Gray testified Orcun and Bush rarely, if ever, attended the pre-shift meeting for outbound employees. (Tr. 372-81, 432-8). At the start of the meeting, Orcun and Bush said there would be changes to how the buzzer system and, from that point on, employees would not be permitted to stop work and head toward the break room until

the first buzzer sounded and would not be permitted to leave the warehouse area prior to the second buzzer sounding. (Tr. 372-81, 432-8). They said any employee observed violating these rules would be disciplined. (Tr. 372-81, 432-8). Orcun said that the buzzer system allowed employees enough time to stop work and begin breaks on time and too much time was being wasted by employees. (Tr. 437). Orcun and Bush opened the floor for questions and Gray asked Orcun whether the rule would really be strictly enforced or whether enforcement of the rule would be up to management's discretion, to which Orcun responded management would have discretion in enforcement of the rule. (Tr. 437-8). Evans then protested that the announcement of stricter enforcement of the buzzer system was a change in employee terms and conditions of employment. (Tr. 378-9).

Orcun responded that it was not a change in their terms and conditions of employment. (Tr. 378-9). In his affidavit, Orcun testified that Evans protested that this was a change to employee terms and conditions of employment and he responded that this was not a change since there was nothing that regulated the use of buzzers in the operation of the warehouse. (GCX 63). In his affidavit, Orcun said he did not know who Evans was when he protested during the meeting and had to ask Manager Bush for Evans's name after the meeting concluded. (GCX 63).

Following the March 16, 2017 meeting, Respondent began enforcement of the buzzer system rules. (GCX 40). The first discipline issued under the stricter enforcement of the rules occurred on March 17, 2017, the day after the meeting announcing the change. (GCX 40). On this day, employee Emanuel Thomas was observed leaving the warehouse area prior to the start of lunch at 10:00 a.m. and was issued a written warning for this violation. (GCX 40). Other employees were disciplined under stricter enforcement of these rules on March 23, 2017, May 14, 2017, and August 17, 2017

G. March 17, 2017 Discharge of Evans and Arbitration of His Grievance

On March 17, 2017, while performing his work in outbound, Evans was observed backing out of an aisle by Manager Bush, other supervisors, and a team lead. Evans testified that he was in the process of picking items for a customer order and needed to get to aisle 127 to retrieve the next item for the order. (Tr. 383-5). At Respondent's warehouse, most aisles, including aisles 126, 127, and 128, are designated as one-way for traffic purposes. (Tr. 391; GCX 61). As shown in the diagram on which Evans mapped his route to aisle 127 on March 17, 2017, even numbered aisles travel one direction while odd numbered aisles travel the opposite direction. (GCX 61). Because of the direction from which Evans approached aisle 127, Evans needed to travel down an adjacent aisle in order to be able to turn onto aisle 127 in the correct direction. (Tr. 385-6, 390-1; GCX 61). Evans testified he initially turned onto aisle 126 but, after turning onto the aisle, found it was blocked by operators who were attempting to move pallets of products which had tipped over. (Tr. 385-91). Because he would be unable to travel down aisle 126 far enough to turn onto aisle 127, he slowly and carefully began to back his equipment out of aisle 126. (Tr. 393-6). In doing so, Evans testified he looked behind him to ensure there was no cross traffic and sounded the horn on his order picker to alert anyone nearby that he was exiting the aisle. (Tr. 393-6). As Evans was backing out of the aisle, Supervisor Bobby Clark stopped him and told him that he was not supposed to be backing out of aisles. Evans said he knew and pointed out that the aisle was blocked. (Tr. 396-400). Evans testified he did not observe Operations Support Manager Barton come over to inspect the aisle while he was speaking with Clark or before he left to continue his work. (Tr. 407).

According to Respondent witnesses, Evans was observed backing out of aisle 128 at about 1:35 a.m. (Tr. 697, 794, 1035-6). Inbound Manager Bush was conducting a daily meeting

with Supervisor Clark, Manager Barton, Manager Randy Sheeley and Team Lead Deadrick Simelton at the time. (Tr. 694, 793, 1034). Bush testified he observed Evans backing an order picker out of aisle 128 and announced this to the other attendees at the meeting. (Tr. 1035-6). Supervisor Clark, who was Evans' supervisor at that time, walked over to speak with Evans and Barton allegedly walked over to where Evans had stopped to inspect what was happening. (Tr. 698-700).⁸ Clark testified he informed Evans that backing out of the aisle was a safety violation and Evans responded he had to back out of the aisle because it was blocked. (Tr. 698-700; JTX 3). Clark testified he then permitted Evans to continue backing out of the aisle so Evans could proceed with his work. (Tr. 714-16). Clark testified he did not know why he permitted Evans to continue to back out of the aisle instead of having Evans proceed down the aisle except that the aisle may have been blocked. (Tr. 714-16).

Bush testified he informed Human Resources Manager Lonny Otto about Evans' alleged safety violation at another management meeting at about 9:30 a.m. (Tr. 1037). Otto testified he spoke with Bush and Clark at that time and received statements by email from Bush, Clark, Barton, Sheeley and Simelton later that morning. (Tr. 903-5). Immediately after speaking with Bush and Clark, Otto said he contacted Labor Relations Manager Youngdale to inform him about the situation with Evans as Otto knew that an administrative hearing concerning Evans' unfair labor practice charges was set to begin on March 27, 2017. (Tr. 958).

⁸ Barton did not testify at the hearing for Respondent and Respondent did not provide any evidence to show that Barton was unavailable to testify at the hearing or had refused to honor a properly served subpoena ad testificandum. Respondent witnesses, including HR Manager Lonny Otto and Manager Bush, claim that Barton, in addition to providing a statement by email to Otto, took photographs of aisle 128 at the time Evans backed out of an aisle. These photographs were not offered as a separate exhibit by Respondent at the hearing but the photos were offered as an exhibit at the Evans arbitration hearing and were thus included with Joint Exhibit 3. General Counsel objected at the hearing that the photographs should be given no evidentiary weight as the photographs could not be properly authenticated pursuant to Rule 901(a) of the Federal Rules of Evidence (FRE) without the testimony of Barton and the photographs do not fall within any of the exceptions as listed in FRE Rule 901(b). General Counsel further argues that Barton's testimony at the arbitration hearing is not an appropriate basis to permit testimony concerning the photographs as General Counsel was not a party at the arbitration hearing and never had the opportunity to cross-examine Barton concerning the photographs or his statement to Otto.

Prior to receiving any of the statements from Bush, Clark, and the others, Otto conducted a meeting with Evans to investigate the alleged safety violation. (Tr. 407-10, 915-6). Union committeeperson Richard Greene was also present for this meeting. (Tr. 407-8, 913-4). When the meeting began, Otto explained why he had requested the meeting with Evans and asked Evans to explain what had happened that morning. (Tr. 407-10, 915-6). Evans explained that he had turned down aisle 126 as part of his work and found that the aisle was blocked by operators attempting to return a stored embellage or pallet to an upright position. (Tr. 409-10). After some discussion, Otto asked Evans to provide a written statement about what had happened. (Tr. 409-10, 916-7). Because it was time for Evans' lunch break, Evans agreed to return with Greene to prepare the handwritten statement prepared by Otto following lunch break. (Tr. 409-10, 916-7). After lunch break ended, Evans prepared a handwritten statement for Otto in which he explained that he was unable to proceed down aisle 126 because the aisle was blocked and backed out of the aisle in order to proceed with his work. (Tr. 412-3, 916-7; GCX 30).⁹ Evans later provided Otto with his DLX log showing the work he was performing in the area around aisles 126, 127, and 128 that morning. (Tr. 954; GCX 29).

Otto testified he received the statements of the management personnel after he spoke with Evans but before Evans provided him with his handwritten statement. (Tr. 917-9). Otto admitted that he did not confront Evans with the claim by Bush, Clark and the others that he was backing out of aisle 128 instead of aisle 126, as he had asserted. (Tr. 954-5). Otto also admitted that, once he reviewed Evans' DLX log and determined that Evans did not have a pick on aisle 126 to perform at about 8:35 a.m., he did not speak with Evans again to seek clarification about why Evans wrote that he turned onto aisle 126 to perform a pick on that aisle. (Tr. 954-5). Otto

⁹ In his handwritten statement, Evans wrote that he turned down aisle 126 in order to perform a pick on that aisle. (GCX 30). Evans testified he was mistaken when he wrote that on the statement and that the pick he was attempting to perform was on aisle 127. (Tr. 414).

testified that, after he had received the management personnel statements, Evans' statement and Evans' DLX log, he decided discipline was warranted and reviewed Evans' disciplinary history to determine the step at which Evans was. (Tr. 921-2). Because Evans had returned to work in August 2016 after a 30 day suspension, Otto determined Evans should be terminated under the progressive discipline policy. (Tr. 921-3). Otto testified he began preparing an investigation summary along with a recommendation that Evans be discharged. (Tr. 920-1; GCX 51). Otto testified he did not complete the investigation summary until the following Monday, March 20, 2017, after he claims he received verbal confirmation from maintenance personnel that aisle 126 had not been blocked off on March 17, 2017 for maintenance work. (Tr. 917-9). Otto sent the investigation summary with his recommendation that Evans be discharged to Youngdale and HR Director Thomas for review on March 20, 2017. (Tr. 920-1). Otto testified that neither Youngdale nor Thomas disagreed with his report or recommendation and he informed Evans about his discharge on the afternoon of March 20, 2017. (Tr. 926-7). The discharge notice prepared by Otto specified that Evans violated safety rules by backing out of aisle 128 and failing to sound his horn when backing out, even though none of the management witnesses specified in their statements that they had not heard Evans sound his horn when backing out of the aisle. (Tr. 718-9, 837; GCX 31, 51; JTX 3).

Regarding the practice of backing out of aisles, witnesses at the hearing, including Roderick Simpson, Glenn Dobson and Andrew Gray, testified that they observe employees backing into or out of aisles on a daily basis around the warehouse. (Tr. 64-5, 438-42, 653-5). Employee Gray testified that, a few weeks prior to the hearing, he spoke with Team Lead Ahmad Rafee about backing into or out of aisles. (Tr. 438-42). Gray said he raised this issue with Rafee because he wanted to be sure he knew what the policy was as he was continuing to observe

employees backing into and out of aisles. (Tr. 438-42). Gray testified Rafee informed him that, if he needed to back into or out of an aisle in order to speed up his work, then do it but be careful when doing it. (Tr. 438-42). Respondent did not present Rafee at the hearing to rebut Gray's testimony concerning their conversation.

Even though witnesses testified that equipment operators back into and out of aisles on a daily basis and Respondent considers this to be a serious safety violation, Respondent's disciplinary records show that, prior to Evans' discharge, no employee had ever been disciplined in any manner for backing into or out of an aisle. (GCX 41). The disciplinary records reflect that since Evans' discharge on March 20, 2017, only two employees have been disciplined for this violation: one on May 5, 2017 and the other on March 9, 2018. (GCX 41).

Following his discharge, the Union filed a grievance for Evans concerning the discharge. (GCX 32). The grievance was denied by Respondent and heard before arbitrator Donald T. Ryce in a hearing conducted on October 4, 2017. (JTX 4). In his decision, arbitrator Ryce wrote that the issue he considered was whether Evans was discharged for just cause under the collective-bargaining agreement. He noted that Respondent requested he consider whether Evans was discharged because of his union and protected concerted activities or because Evans filed charges with the National Labor Relations Board. (JTX 4, p.2). In his decision, arbitrator Ryce refused to consider or decide whether Evans' discharge was an unfair labor practice. (JTX 4, p.15). He wrote that the issues concerning Evans' union and protected concerted activity were barely discussed in the hearing and there was no evidence presented concerning the specific unfair labor practices alleged by Evans or any of the facts concerning these allegations. (JTX 4, p.15). Arbitrator Ryce wrote that, because the arbitration record was wholly undeveloped as to the alleged unfair labor practices (as Respondent failed to present any evidence on these issues

during the hearing), he was unwilling to address the unfair labor practice issues and limited his decision to the contractual just cause issue only. (JTX 4, p.15).

III. ARGUMENT AND ANALYSIS

A. Team Leads are Supervisors under Section 2(11) and Agents under Section 2(13) of the Act

As described earlier in this brief, team leads conduct pre-shift meetings with employees assigned to their team and provide instructions on the work to be performed by the team in general and each individual team member on a daily basis. (Tr. 108, 113, 704-710). Team leads also have discretion in selecting employees for work assignments, including special work assignments or temporary transfers to other teams. (Tr. 130-2, 807-9). Further, team leads have the authority to conduct “coaching” sessions with team members in order to correct work performance or rules of conduct violations. While team leads do not have the authority to issue DARs to employees, they have discretion whether to report a coaching discussion with an employee to the supervisor, what information to provide to the supervisor and whether to make recommendations concerning whether additional disciplinary action is warranted. (Tr. 120-7, 707-8, 811-15).

General Counsel contends that, in the performance of their duties, teams leads are supervisors within the meaning of Section 2(11) of the Act. 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 River Community Care*, 532 U.S. 706 (2001)). Sec. 2(11) provides that a supervisor is one who possesses “authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct

them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.”

The testimony in this case shows that team leads responsibly direct and exercise the authority to effectively recommend discipline against employees. As admitted by team leads Braggs and Simelton, team leads assign work to their team members on a daily basis and exercise discretion in selecting employees for special work assignments or transfers to other teams. (Tr. 130-2, 807-9). They both said that they select employees for these assignments based on their estimation of the employees work performance, experience, and other factors. (Tr. 130-2, 807-9).

In addition, this supervisory authority is demonstrated by Braggs’ report to Supervisor Buckingham that he observed Evans in the break room prior to the start of lunch and his recommendation that Evans be disciplined for this violation of the rules of conduct. (GCX 44). While Braggs was not able to issue the DAR to Evans himself, Buckingham decided to issue the March 23, 2016 DAR to Evans based solely on the information provided by Braggs, without conducting any independent investigation of Evans’ alleged misconduct. (Tr. 755, 759-60). The Board has consistently applied the principle that authority effectively to recommend generally means that the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed. *Children’s Farm Home*, 324 NLRB 61 (1997); *Hawaiian Telephone Co.*, 186 NLRB 1 (1970). Based on these facts, a finding that Respondent’s team leads are supervisors under Section 2(11) of the Act is warranted.

Even if team leads are not deemed to be supervisors within the meaning of Section 2(11) of the Act, the facts establish that they are agents of Respondent under Section 2(13) of the

Act. The Board applies common law principles of agency when it examines whether an employee is an agent of the employer while making a particular statement or taking a particular action. Under these common law principles, the Board may find agency based on either actual or apparent authority to act for the employer. As to the latter, “[a]pparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question.” *Cooper Hand Tools, Division of Cooper Industries, Inc.*, 328 NLRB 145 (1999); *Southern Bag Corp.*, 315 NLRB 725 (1994). The test is whether, under all the circumstances, 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). See also *In re D&F Industries, Inc.*, 339 NLRB 618 (2003). Section 2(13) states that “whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.” *In re D&F Industries, Inc.*, at 618-9.

In *D&F Industries, Inc.*, the Board found that assistants to the packaging manager were agents because these assistants gave work assignments at the beginning of the shift, monitored the work of the employees in their areas to ensure the work was being completed properly, confronted employees concerning work performance issues or rules infractions, reported these issues to the packaging manager, and selected employees for overtime or special work assignments. *Id.* at 619. In this case, the team leads make work assignments on a daily basis, conduct pre-shift meetings to convey information from management to the employees on their teams, monitor the work performance of the team members, coach employees for work performance issues or violations of the rules of conduct, report these issues to a supervisor or

manager when they believe it is appropriate, and select employees for special work assignments or transfers to other teams based solely on their evaluation of the team members abilities and work performance. (Tr. 120-7, 130-2, 707-8, 807-9, 811-15). Under these circumstances, the unit employees working under a team lead would reasonably believe that the team leads were reflecting company policy and speaking and acting for management and a finding that team leads are agents under Section 2(13) of the Act is appropriate.

B. Respondent Issued the March 23, 2016 Written Warning to Evans in Violation of Section 8(a)(1) and (3) of the Act

In cases where an employer's motivation for a personnel action is in issue, the Board utilizes the test outlined in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982). To establish a violation under *Wright Line*, the General Counsel bears the initial burden of showing that the employee's Section 7 activity was a motivating or substantial factor in the adverse employment action. The three elements required to support such a showing are: (1) the employee engaged in union and/or other protected concerted activity; (2) the employer had knowledge of that activity; and (3) the animus on the part of the employer. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 11 (May 31, 2018). If these elements are met, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's union or other protected concerted activity. See, e.g., *Libertyville Toyota*, 360 NLRB 1298, 1301 (2014), enfd. 801 F.3d 767 (7th Cir 2015). The employer will not sustain its burden merely by establishing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Kitsap Tenant Support Services*, supra, citing *Bruce Packing Co.*, 357 NLRB 1084, 1086-1087 (2011), enfd. in pertinent part 795 F.3d 18 (D.C. Cir. 2015). Unlawful motivation may be established by evidence which

includes, among other things, (1) the timing of the employer's adverse action in relationship to the employee's protected activity, (2) the presence of other unfair labor practices, (3) statements and actions showing the employer's general and specific animus, (4) the disparate treatment of the discriminatee(s), (5) departure from past practice, and (6) evidence that an employer's proffered explanation for the adverse action is a pretext. *National Dance Institute—New Mexico, Inc.*, 364 NLRB No. 35, slip op. at 10 (2016). Employer conduct which reflects hostility toward protected activities may be relied on as evidence of animus, even if that conduct is not itself unlawful. See *Braun Electric Company*, 324 NLRB 1 (1997); *Stoody Company*, 312 NLRB 1175, 1181-82 (1993).

In this case, it is undisputed that throughout his employment, Evans engaged in union and protected concerted activities, well beyond his Union membership, and Respondent was aware of these activities. As discussed in prior sections of this brief, in the period of time prior to Evans' written warning, suspension, and discharge in 2016, Evans had filed grievances against Respondent concerning overtime assignment issues; repeatedly raised complaints about alleged violations of the collective-bargaining agreement in pre-shift meetings conducted by Supervisor Buckingham and Team Lead Braggs; raised safety issues with Supervisor Buckingham and then-Manager Moledoux concerning the storage of heavy items on racks and operators blocking aisles; distributed Union and union-related literature to employees at the facility; and asserted on several occasions that he believed he was being singled out for retaliation because of his union and protected concerted activities. As shown by Labor Relations Manager Youngdale's April 26, 2016 email, Respondent was aware that Evans "claimed he is being targeted and retaliated against" because of his union and protected concerted activities. (GCX 66).

As to the March 23, 2016 written warning issued to Evans for allegedly being in the break room 25 minutes prior to the start of lunch, the evidence establishes both Supervisor Buckingham and Team Lead Braggs harbored animus toward Evans because of his union and protected concerted activities before the warning was ever issued. Supervisor Buckingham's disdain for Evans' protected activity is reflected in his testimony regarding his characterization of Evans' conduct during pre-shift meetings. Buckingham testified, without equivocation, that when Evans raised issues or complaints about alleged contract violations in pre-shift meetings, he considered those complaints to be disruptive to his meetings. (Tr. 761-2). Team Lead Braggs also harbored similar negative views about Evans' work-related complaints. Braggs testified in clear and unmistakable terms that he considered Evans' complaints about Respondent to other employees outside pre-shift meetings to be disruptive to getting work done. (Tr. 892).

Evidence of this animus is further shown by the implausible and false story offered by Team Lead Braggs to explain how he happened to come upon Evans in the break room 25 minutes prior to the start of lunch on March 22, 2016. According to Braggs, he went to look for Evans at the direction of Supervisor Ayikwei (who Supervisor Buckingham testified was not at work on that day or the surrounding days) to discuss allegedly serious multi-location errors to which he had been alerted eight days earlier. (Tr. 868-9; RX 2). Braggs testified, when he began looking for Evans shortly after 1:30 a.m., he could not find Evans pursuant to the DLX logs even though the logs show Evans was completing a put-away at the far end of the warehouse at 1:32 a.m. (Tr. 147-50; GCX 13). Braggs then claimed that, at the time he began to look for Evans, Evans had "logged out" of the system in order to use the restroom, even though this information would not be shown on the DLX log. (Tr. 140-9). Braggs went on to claim that, even though Evans' last scan put him at the far end of the warehouse at 1:32 a.m., he did not feel the need to

look for Evans beyond the equipment parking area and the break room. (Tr. 140-9). Finally, Braggs insisted that Evans was the only employee in the break room when he claims to have found him there at 1:35 a.m. even though Respondent later admitted that there were several other employees in the break room at the same time when Braggs spotted Evans there and that none of these employees were identified by Braggs or disciplined by Respondent. (Tr. 281; GCX 36). However, Supervisor Buckingham accepted Braggs claim about Evans without question and issued the written warning to Evans without undertaking any investigation to determine whether Braggs' report was correct. (Tr. 755, 759-60). Respondent's discriminatory motive can be inferred from its failure to conduct an adequate investigation into this incident. *New Orleans Cold Storage & Warehouse Co.*, 326 NLRB 1471 (1998).

Beyond this clear evidence of animus, Respondent cannot show that it would have issued Evans the written warning in the absence of his union and protected concerted activities. Prior to Evans' written warning, no employee had ever been disciplined in any form for allegedly being in the break room prior to the start of breaks. (GCX 38).¹⁰ As testified to by General Counsel witnesses, and admitted by Team Lead Braggs and Manager Bush, employees stopped work and went to the break room early nearly every day both prior to March 22, 2016 and after that date. (Tr. 163, 1046, 1100-1). In addition, no employee has been disciplined solely for being in the break room prior to the start of breaks since March 22, 2016. (GCX 38, 40). Finally, as admitted by Respondent, other employees were actually in the break room with Evans prior to the start of lunch on March 22, 2016 and none of them were disciplined. (Tr. 281; GCX 36). Thus, the

¹⁰ Braggs testified that he reported one other employee, Tavares King, for being in the break room outside of break time, among other alleged violations of the rules of conduct, in an email to supervisor Ayikwei on March 4, 2016. (RX 3). Braggs did not know, and no evidence was presented to show, whether King was actually disciplined for any of these alleged violations. (Tr. 847-9). General Counsel would note that Braggs report about King occurred within a week after King filed a grievance accusing Braggs and Ayikwei of retaliatory conduct and creating a hostile work environment for King. (RX 1, p.13 – King grievance dated February 24, 2016).

evidence reflects that Buckingham and Braggs harbored animus toward Evans and Evans was subjected to disparate treatment in that he was disciplined for conduct which was common among employees and for which no other employee had ever been disciplined. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 27, 30 (May 31, 2018); *Yellow Enterprise Systems, Inc.*, 342 NLRB 804, 806 (2004). Thus Respondent violated the Act which it issued the March 23, 2016 written warning to Evans.

C. Respondent Suspended Evans on May 3, 2016 in Violation of Section 8(a)(1) and (3) of the Act

In performing a *Wright Line* analysis of this allegation, General Counsel would note the evidence cited above of Evans' union and protected concerted activities. Respondent's animus toward Evans' protected activities was so pervasive in the plant that it was not only present on the plant floor (as evidenced by Team Lead Braggs' and Supervisor Buckingham's comments about Evans' complaints), but also manifested in the front office. For example, HR Manager Leslie Thompson conveyed an unsolicited observation regarding Evans' protected activities in an email to Labor Relations Manager Youngdale regarding the April 21, 2016 accident where windshields being lifted by Evans tipped over. (GCX 66). In her email, Manager Thompson states, "[Evans'] continued behaviors are posting (*sic*) a lot of disruption on the 3rd [shift]..." (GCX 66).¹¹ While Thompson's email does not specifically mention which behaviors of Evans caused the disruption on the third shift, it is reasonable to infer that Thomas was referring to protected activities Evans engaged in close to the time the discipline was issued. For example, in the weeks prior April 26, 2016, Evans challenged the issuance of the March 23, 2016 written warning in a meeting with Manager Bush and prepared two separate letters dated March 31,

¹¹ General Counsel would note that the document containing Thompson's April 26, 2016 email to Youngdale was provided to General Counsel only three days prior to the September 13, 2018 resumption of the hearing (as can be seen by the email delivery date at the top of page 1 of General Counsel Exhibit 66) and General Counsel was thus limited in its ability to question or present witnesses concerning the email.

2016 and April 12, 2016 to Bush (with the April 12, 2016 letter copied to HR Director Thomas) which detailed, at length, Respondent's hostility toward him because of his union and protected concerted activity and his assertion that he was the subject of retaliation because of these activities. (GCX 14; RX 1). Thus, Thompson's statement to Youngdale about Evans' "continued behaviors" disrupting the third shift reflect continued hostility toward Evans because of his union and protected concerted activities.

The evidence further establishes Respondent cannot show that Evans would have been suspended for 30 days for the April 21, 2016 accident absent his union and protected concerted activities. Respondent's disciplinary records show that, prior to April 21, 2016, no employee other than Evans had ever been disciplined for an incident where product fell off the forks of a reach truck or order picker. (GCX 39). These disciplinary records further show that, since April 21, 2016, no employee has been disciplined for an incident where product tipped off of the forks of a reach truck or order picker without an investigation showing a documented safety violation by the disciplined employee. (GCX 39). In this instance, Respondent admits that there is no investigative report from supervisor Ayikwei which reflects that Evans engaged in any unsafe practice or committed any safety violation in lifting the pallets of windshields. (Tr. 1069-75; GCX 65). Manager Bush admitted that Labor Relations Manager Youngdale informed him that Respondent agreed to rescind the May 3, 2016 suspension of Evans for the April 21, 2016 accident because the accident investigation was not properly done. (Tr. 1116-7). Thus, according to Bush, Respondent should never have disciplined Evans for the April 21, 2016 incident in any form. General Counsel submits that this evidence establishes Respondent subjected Evans to disparate treatment and would not have sought to suspend Evans on May 3, 2016 absent his union and protected concerted activities.

D. Respondent Discharged Evans on May 11, 2016 in Violation of Section 8(a)(1) and (3) of the Act and Evans Did Not Engage in Conduct Which Would Cause Him to Lose the Protection of the Act

As established in the two prior sections of this brief, Respondent had been retaliating against Evans because of his union and protected concerted activities, including unlawfully issuing him a written warning on March 23, 2016 and informing Evans on May 3, 2016 that he was being suspended for 30 days even though there was no evidence to provide a basis for the suspension. Evans and Simpson testified, and Manager Bush admitted, that the May 3, 2016 suspension meeting was short and Bush refused to entertain any arguments from Simpson or Evans concerning the decision to suspend Evans for 30 days. (Tr. 47-8, 335-9). Evans' conduct after the conclusion of the May 3, 2016 meeting must be examined in light of Respondent's continued unlawful actions toward him.

Respondent's stated reason for discharging Evans was that he used abusive language toward Manager Bush and threatened Bush by his statements and conduct. (GCX 19). Regarding the incident, Evans testified that he walked past Bush on his way out of the meeting and said, "You have no integrity." Evans then claims that as he walked away from Bush he said, "The reason things around here are all fucked up is because of people like you," and "If you think you can get away with shit like this, I'll see you in court." (Tr. 339-40). These statements were largely confirmed by the testimony of Simpson and Bush. (Tr. 54-5, 1025; GCX 48). Only head of security Candid Patino ever asserted that Evans said, "I'm going to get your ass," or any other statement which could plausibly be considered to be threatening in any form (and Patino had no independent recollection of the events of May 3, 2016). (JTX 3). Evans testified he made the statements to Bush because he was upset about Respondent's continued unlawful actions toward him. (Tr. 338).

In making the statements to Manager Bush following the May 3, 2016 meeting, Evans was engaged in protected concerted activity and his discharge should first be examined under the Board's test in *Atlantic Steel Co.*, 245 NLRB 814 (1979). According to that case, in order to determine whether an employee who is otherwise engaged in protected activity loses the protection of the Act due to opprobrious conduct, the Board considers the following factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. *Id.* At 816.

In this case, the first *Atlantic Steel* factor weighs in favor of protecting Evans' conduct because the discussion took place in the office area at the warehouse, away from the warehouse floor, and outside of the presence of any unit employees. (Tr. 56, 345). As such, his conduct did not undermine managerial authority in front of other employees or disrupt work processes. The subject matter of the discussion concerned the unlawful 30 day suspension Respondent issued – a factor that militates in favor of finding Evans' conduct was protected.

The nature of Evans' outburst does not warrant a finding that his conduct lost the protection of the Act. The Board has long recognized that “disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses.” *Consumers Power Co.*, 282 NLRB 130, 132 (1986). In assessing whether an employee's protected, concerted activity loses the protection of the Act, the Board has found that a line “is drawn between cases where employees engaged in concerted activities that exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such a

character as to render the employee unfit for further service.” *Prescott Industrial Products Co.*, 205 NLRB 51, 51-52 (1973).

Here, the credible evidence shows that Evans, who was understandably upset about Respondent’s imposition of what he considered to be unlawful discipline, reacted by making the observation that Manager Bush lacked integrity, blaming Bush for the dysfunction that existed at the facility, and indicating he would challenge his suspension through legal means. (Tr. 54-5, 339-40). Evans’ comments were brief, spontaneous, made in the heat of the moment, and attributable to his frustration at Respondent’s unlawful conduct. Nothing in the remarks testified to by Manager Bush, Evans or Simpson regarding what occurred after the disciplinary meeting indicate that Evans conveyed an actual threat to physically harm Bush. Thus, Evans’ statements were not so opprobrious as to warrant removal of statutory protection. See *Plaza Auto Center, Inc.*, 355 NLRB No. 85 (2010) (finding protected, employee’s act of cursing and informing supervisor that he would regret it if supervisor fired him); *Kiewit Power*, 355 NLRB No. 150 (2010) (finding Act’s protection not lost when employee, following issuance of discipline, told supervisor that “things could get ugly” and supervisor had “better bring [his] boxing gloves.”). Respondent will likely contend that Evans lost the Act’s protection based on the content of Patino’s handwritten statement wherein she claims Evans told Bush “I’m going to get your ass” and “we’ll handle it” in 30 days. However, Patino’s statement is highly incredible and unworthy of belief because it not only wildly deviates from the credible accounts presented by Evans and Simpson but, most significantly, varies tremendously from the account offered by Manager Bush – the person to whom the remarks were made – and was fully rebutted by Sammie Dance, the IT employee who was present during the meeting and notified Respondent that Evans never made the remarks Patino claims he made. (Tr. 1083-4; GCX 50). The fact that Patino’s handwritten

statement is highly unreliable is further illustrated by her lack of credibility as a witness at the hearing.

Finally, as established in the prior section, Evans' statements were directly provoked by Respondent's decision to unlawfully suspend him for 30 days. Based on an examination of these factors, Evans did not engage in any conduct which could plausibly cause him to lose the protection of the Act.

To the extent the discharge should be examined pursuant to a *Wright Line* analysis, General Counsel argues that doing so also establishes Evans was discharged in violation of the Act. As noted previously, Respondent's managers and supervisors harbored animus toward Evans because of his union and protected concerted activities. The evidence further establishes that Respondent would not have discharged Evans for his conduct absent his union or protected concerted activities as there is no evidence that any employee had been disciplined in any form for allegedly using abusive language or threatening another employee prior to Evans' discharge. (GCX 42). In addition, no employee has been disciplined since May 2016 for using harsh language to a supervisor or manager during or following a disciplinary meeting outside the presence of unit employees. (GCX 42). General Counsel submits that, absent Respondent's animus and continued unlawful conduct toward Evans, Respondent would not have discharged Evans and, thus, the discharge violates the Act.

E. Respondent Discharged Evans on March 20, 2017 in Violation of Section 8(a)(1), (3), and (4) of the Act

In evaluating this discharge under *Wright Line*, General Counsel would note Respondent's animus toward Evans because of his union and protected concerted activities has been established by its prior unlawful conduct toward Evans. As established at the hearing, after Evans returned to work in August 2016 pursuant a grievance settlement, he resumed his union

and protected concerted activities by having pro-Union t-shirts made to distribute to employees, distributing union literature regularly to employees during non-work time at the warehouse, and being involved in the grievance process. (Tr. 365-71; GCX 27, 28).

As to the question whether Respondent would have discharged Evans on May 20, 2017 for backing out of an aisle absent Evans' union and protected concerted activities, the analysis should begin with the fact that the disciplinary process against Evans began with Manager Bush (to whom Evans no longer reported to) spotting and reporting Evans for allegedly committing a safety violation. (Tr. 1035-6). As noted previously, Bush was a participant in the prior unfair labor practices committed against Evans and was the target of Evans' enmity when Evans was informed he was being unlawfully suspended for 30 days on May 3, 2016. Following the events of May 3, 2016, Bush unreasonably asserted that he felt threatened by Evans' harsh language about his management performance and unlawful actions and recommended Evans be discharged immediately.

The evidence suggests that if Evans had been any other employee backing out of the aisle on March 17, 2017, his alleged transgression would have gone overlooked by Bush given the fact that employees were routinely allowed to engage in this conduct without incident. In that regard, witnesses Simpson, Dobson, and Gray all testified that employees back into and out of aisles on a daily basis without their actions resulting in discipline. (Tr. 64-5, 438-42, 653-5). Gray also testified that Team Lead Ahmad Rafee informed him just a few weeks prior to the hearing that backing into or out of aisles was appropriate in order to meet the Employer's productivity goals so long as Gray was careful in doing so. (Tr. 438-42).¹²

¹² Andrew Gray testified as a current employee of Respondent and explained that he is currently working under a last chance agreement whereby he could be discharged immediately for violations of certain rules of conduct. (Tr. 444-5). Nonetheless, Gray admitted that a supervisor and agent of Respondent had instructed him to engage in what Respondent claims is a serious safety violation.

Despite the evidence that employees engage in this practice on a daily basis and have done so for as long as the warehouse has been in operation, Respondent's disciplinary records show that no employee had ever been disciplined in any form for backing into or out of an aisle prior to Evans' discharge on March 20, 2017. (GCX 41). Thus, the evidence reflects that Respondent had never enforced this rule prior to Evans' alleged violation of the rule on March 17, 2017 and cannot show that Evans was treated in a similar manner to other employees who committed similar violations. General Counsel argues that, based on this evidence of disparate treatment toward Evans and Respondent's established animus toward Evans, Evans' discharge on March 20, 2017 violates the Act.

Respondent's discharge of Evans on March 20, 2017 also violates Section 8(a)(4) of the Act as the evidence demonstrates that this personnel action was taken to retaliate against Evans for his prior participation in the Board's processes. The Board had scheduled an unfair labor practice hearing for the charges filed by Evans in Cases 15-CA-179071 and 15-CA-184912 to commence on March 27, 2017, a week after Evans' discharge. (GCX 1(j)). HR Manager Otto testified he and Respondent's other management personnel were fully aware of Evans' upcoming unfair labor practice hearing when it initiated Evans' discharge. (Tr. 958). As noted by Otto, there had not been any complaints or concerns about Evans' work performance or claims that Evans had violated any rules of conduct in the more than six months after Evans returned to work on August 1, 2016. However, about one week prior to the unfair labor practice hearing, Manager Bush initiated disciplinary proceedings against Evans which resulted in his discharge. General Counsel submits that, based on the timing of Respondent's decision in relation to discharge Evans and its prior animus toward Evans, the evidence supports a finding that Evans'

discharge violates Section 8(a)(4) of the Act. *Airgas USA, LLC*, 366 NLRB No. 104, slip op. at 2-3 (2018); See *S. Freedman & Sons, Inc.*, 364 NLRB No. 82, slip op. at 4 (2016).

F. Deferral to the July 2016 Grievance Settlement and December 2017 Arbitration Award is Not Appropriate Pursuant to Board Law

Respondent contends that the Board should defer to the grievance settlement covering Evans' May 3, 2016 suspension and May 11, 2016 discharge and the arbitration decision concerning Evans' March 20, 2017 discharge. However, deferral to either the grievance settlement or arbitration decision is inappropriate under current Board law. The Board's deferral standard that applies to this case is set forth in *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, 1140 (2014). Even though the collective-bargaining agreement between the Union and Respondent was executed prior to December 15, 2014, the grievance settlement and arbitration took place after that date and the bargaining agreement authorized an arbitrator to decide the statutory unfair labor practice issues. Specifically, the parties' contract prohibits "discrimination, coercion, interference or restraint by the [Employer] or the Union . . . against any employee because of his membership or nonmembership in the Union." See, e.g., *Radio Officers' Union v. NLRB*, 347 U.S. 17, 39-40 (1954) (Section 8(a)(3)'s prohibition of discrimination based on union "membership" includes discrimination based on participation in union activities). In light of this language, the contract clearly authorizes an arbitrator to decide the unfair labor practice issues of whether Respondent had discriminatorily suspended or discharged Evans.

Regarding the July 2016 grievance settlement, the Board will defer to a grievance settlement only if the parties intended to settle the unfair labor practice issues, the unfair labor practice issues were addressed in the settlement agreement, and Board law reasonably permits the settlement under the requirements of *Independent Stave*, 287 NLRB 740, 743 (1987). See *Babcock*, 361 NLRB at 1139. In this case, the July 2016 grievance settlement fails to satisfy any

of the three preceding requirements. (GCX 37). Initially, there is no evidence that Respondent and the Union, who did not file the pending unfair labor practice charges, intended to settle the unfair labor practices at issue. At the third step grievance meeting on June 30, 2016, the Employer and Union did not discuss the pending unfair labor practice charges at any time. (GCX 36). Rather, Respondent and the Union appear to have processed the May 2016 suspension and discharge grievances solely on the contractual “just cause” requirement for discipline. Second, the grievance settlement does not explicitly or implicitly address the Section 8(a)(1) and (3) charge allegations that the Employer discriminatorily suspended and discharged Evans in retaliation for his union and protected concerted activities, including filing grievances, raising complaints about violations of the contract, and making safety complaints. The settlement does not mention the unfair labor practice charges or Evans’ allegations of retaliation. The settlement also does not provide any indication that Respondent would comply with the contract clause prohibiting anti-Union discrimination or cease and desist from retaliating against employees for their union and protected concerted activities. The terms of the settlement do nothing to inform unit employees that they are free to file grievances, raise claims of contract violations or pursue workplace safety complaints without fear of retaliation by Respondent. Finally, under an *Independent Stave* analysis of the grievance settlement, it would not effectuate the purposes and policies of the Act to give the settlement the effect of resolving the unfair labor practice charges considering that Respondent’s discriminatory discharge of Evans was merely converted into a 30 day suspension which left Evans without pay for that month and at peril of discharge for any additional alleged violation of Respondent’s rules of conduct.

Regarding the December 2017 arbitration award, the Board will defer to such an award in Section 8(a)(1) and (3) cases only where the arbitration procedures appear to be fair and regular,

the parties agreed to be bound, and the party urging deferral demonstrates that: (i) the arbitrator was explicitly authorized to decide the unfair labor practice issue; (ii) the arbitrator was presented with and considered the statutory issue, or was prevented from doing so by the party opposing deferral; and (iii) Board law “reasonably permits” the arbitral award. See *Babcock*, 361 NLRB at 1131. In this case, Respondent is the party urging deferral but cannot make the required showing to support deferral. Specifically, although the Employer requested that the arbitrator also decide if it had discharged Evans in March 2017 because of his Section 7 activities, the arbitrator explicitly stated that he did not address or decide the statutory unfair labor practice issues because there was no relevant evidence in the record before him. (JTX 4, p.15). Although the Union had objected to the Employer’s request that the arbitrator decide the unfair labor practice issues, it did nothing further to prevent the Employer from presenting evidence or briefing the issues to the arbitrator. Respondent chose to do neither. Thus, because the arbitrator did not consider the alleged unfair labor practices, the arbitration award does not satisfy the deferral standard in *Babcock*. Additionally, because the Complaint in this case alleges Respondent discharged Evans in violation of Section 8(a)(4) of the Act, that allegation is not appropriate for deferral because it involves the issue of access to the Board’s processes. See, e.g., *International Harvester Co.*, 271 NLRB 647, 647 (1984) (“The Board has consistently held that allegations of an employer’s violation of Section 8(a)(4) will not be deferred to arbitration.”) Because the Complaint allegations that Respondent discharged Evans on March 20, 2017 in violation of Section 8(a)(1) and (3) of the Act are “closely intertwined” with the 8(a)(4) allegation, deferral of those statutory issues is also inappropriate. *Id.*; See also *Hoffman Air & Filter Systems*, 312 NLRB 349, 353 fn. 19 (1993).

G. Respondent Unilaterally Changed its Enforcement of the Buzzer System Rules Without Prior Notice to and Bargaining with the Union

The unrebutted evidence in this case shows that Respondent unilaterally changed the enforcement of its buzzer system rules. Multiple witnesses testified, without contradiction, that Respondent never enforced the rules regarding the buzzer system against employees prior to March 16, 2017, despite the fact that employees would routinely stop work prior to the first buzzer or leave the warehouse area prior to the second buzzer in contravention of the rule. (Tr. 163, 431-2, 643-8, 1045-6). On March 16, without ever providing the Union with notice and an opportunity to bargain, Respondent met with unit employees and announced that they could no longer violate the buzzer system rules and that Respondent would begin strictly enforcing the rules. (GCX 63; Tr. 1100-1). After the announcement, Respondent disciplined at least four employees for violating the unilaterally changed buzzer system rules. (GCX 40).

The Board has held that a change to more strict enforcement of pre-existing rules constitutes a change in employees' terms and conditions of employment over which an employer has an obligation to bargain. *Hyatt Regency Memphis*, 296 NLRB 259, 263-4 (1989); see also *Vanguard Fire & Supply Co., Inc.*, 345 NLRB 1016, 1017 (2005). Here, the evidence in this case clearly establishes that Respondent unilaterally shifted from a prolonged phase of non-enforcement of the buzzer system rules to a phase of strict enforcement that was ushered in on March 16 without providing the Union with the legally requisite notice and an opportunity to bargain. Respondent then fulfilled its promise to target violators of the now strictly enforced rule by issuing discipline to several employees following its unilateral action. Consequently, Respondent violated Section 8(a)(1) and (5) of the Act by its unlawful conduct.

IV. CONCLUSION

For the reasons discussed above, General Counsel requests the administrative law judge find that Respondent violated Section 8(a)(1) and (3) of the Act by issuing a written warning to Evans on March 23, 2016; suspending Evans for 30 days on May 3, 2016; discharging Evans on May 11, 2016 and discharging Evans on March 20, 2017. General Counsel further requests the administrative law judge find that Respondent violated Section 8(a)(4) of the Act by discharging Evans on March 20, 2017 and violated Section 8(a)(5) of the Act by unilaterally changing its enforcement of the buzzer system rules without prior notice to or bargaining with the Union. General Counsel seeks an order requiring Respondent to: (1) cease and desist from engaging in such conduct; (2) make Evans whole for his loss of employment with Respondent; (3) expunge the written warning, suspension and discharge notices from Evans' personnel and disciplinary files; (4) rescind upon the Union's request, the unlawful unilateral changes to unit employee terms and conditions of employment; and (5) post a notice containing provisions such as those set forth in the attached proposed notice.

Dated: November 9, 2018

Respectfully submitted,

/s/ William T. Hearne_____

William T. Hearne
Counsel for the General Counsel
National Labor Relations Board
Subregion 26
80 Monroe Avenue, Suite 350
Memphis, TN 38103

PROPOSED NOTICE

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative 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 do anything to prevent you from exercising the above rights.

WE WILL NOT discipline, suspend or fire because of their union membership or support.

WE WILL NOT fire employees because they have filed charges with or given an affidavit or testified in a Board proceeding.

WE WILL NOT refuse to bargain collectively with the United Steelworkers Union as the exclusive representative of employees in the following appropriate unit:

All full-time and regular part-time production and maintenance employees, including all warehouse employees but excluding all office clerical, temporary employees, salesmen, guards, professional employees, confidential employees, and supervisors as defined by the Act.

WE WILL NOT refuse to meet and discuss in good faith with your Union any proposed changes in wages, hours and working conditions before putting such changes into effect.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer Walter Evans his job back along with his seniority or all other rights and privileges previously enjoyed.

WE WILL pay Walter Evans for the wages and other benefits he lost because we suspended and fired him.

WE WILL compensate Walter Evans for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL remove from our files all references to the written warning, suspension and discharge of Walter Evans and **WE WILL** notify him in writing that this has been done and that the written warning, suspension and discharge will not be used against him in any way.

WE WILL, if requested by the Union, rescind any or all changes to our buzzer alert system that we made without bargaining with the Union.

VOLVO PARTS NORTH AMERICA, LLC

(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlr.gov.

Telephone:
Hours of Operation:

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

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2018, a copy of the Post-Hearing Brief of Counsel for the General Counsel to the Administrative Law Judge was electronically filed via NLRB E-Filing system with the Division of Judges.

Honorable Sharon Steckler
Administrative Law Judge
Division of Judges
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

I further certify that on November 9, 2018, a copy of the Post-Hearing Brief of Counsel for the General Counsel to the Administrative Law Judge was served on the following:

Charles P. Roberts, III Esq.
Constangy, Brooks, Smith and Prophete, LLP
100 N. Cherry Street, Suite 300
Winston-Salem, NC 27101

Via Email: croberts@constangy.com

Walter Evans
875 West Poplar Avenue #115
Collierville, TN 38017

Via Email: evanswalt@aol.com

/s/ William T. Hearne _____
William T. Hearne
Counsel for the General Counsel