RCC Fabricators, Inc. *and* Metropolitan Regional Council of Carpenters, Eastern Pennsylvania, State of Delaware and Eastern Shore of Maryland

RCC Fabricators, Inc. *and* Piledriver's Local 454 a/w Metropolitan Regional Council of Carpenters, Eastern Pennsylvania, State of Delaware and Eastern Shore of Maryland *and* Construction and General Laborers Union Local 172 of South Jersey. Cases 4–CA–31757, 4–RC–20569, and 4–RC–20572

June 9, 2008

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On October 23, 2003, Administrative Law Judge Paul Buxbaum issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answer, and the Respondent filed a reply. On September 20, 2006, the National Labor Relations Board remanded the case to the judge for further consideration in light of the Board's decisions in *Oakwood Healthcare, Inc.,* 348 NLRB 686 (2006), *Croft Metals, Inc.,* 348 NLRB 717 (2006), and *Golden Crest Healthcare Center,* 348 NLRB 727 (2006). On January 30, 2007, Judge Buxbaum issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision, the supplemental decision, and the record in light of the exceptions and briefs,[1] and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions as modified, to adopt the recommended Order as modified below, and to issue a certification of representative.[4]

We affirm the judge's finding that Foremen Ronald Earley and James Phillips were statutory supervisors based on the judge's finding that they exercised independent judgment when assigning, and effectively recommending the assignment of, employees to departments and significant overall tasks. In light of that finding, we do not pass on the judge's further finding that they possessed the power to discipline and effectively recommend discipline, and his alternative finding that foreman Phillips was the Respondent's agent. In addition, we affirm the judge's finding that Phillips unlawfully interrogated employees about a union meeting; however, we reverse the judge and dismiss the allegation that Phillips' questions about the union meeting created the impression of surveillance. Finally, because of their supervisory status, the challenges to Earley's and Phillips' ballots are sustained. Accordingly, we shall issue a certification of representation.

I. SUPERVISORY STATUS

The Respondent manufactures railroad equipment and structural steel components in a plant in Southampton, New Jersey. At all times relevant to these proceedings, Carl Baer was the shop manager. Under his supervision, James Phillips was foreman in charge of railroad construction operations, and Ronald Earley was foreman in charge of structural steel operations. We agree with the judge's finding that the foremen possessed and exercised supervisory authority to assign and recommend assignment of employees to departments and significant overall tasks as defined by the Board in *Oakwood Healthcare*, supra at 688. We thus affirm the judge's finding that the foremen were supervisors.[5]

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] In his initial decision, the judge dismissed the allegation that shop manager Carl Baer threatened to close the plant if the Union were elected, and the allegation that employee Pohubka was unlawfully discharged. In addition, the judge sustained challenges to Pohubka's ballot, because he was lawfully discharged, and to the ballots of two laid-off employees, finding that they had no reasonable expectation of recall. In the absence of exceptions, we affirm these findings

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 54 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] We shall modify the judge's Conclusions of Law and recommended Order to reflect our finding that the Respondent did not violate Sec. 8(a)(1) by creating an impression of surveillance. We shall substitute a new notice to conform to the Order as modified.

Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[5] The judge supported his finding that the foremen were supervisors by, among other things, drawing an adverse inference against the Respondent for its repeated failure to produce a written job description for the position of foreman, despite the Respondent's concession that such a job description existed. Indeed, as the judge noted in his supplemental decision, the Respondent excepted to the judge's adverse inference in the initial decision, yet it still refused to produce the document despite the opportunity to do so on remand. Under these circumstances,

II. THE 8(A)(1) ALLEGATIONS

On the evening of October 9, 2002, most of the Respondent's employees met with union representatives in a local pizza parlor. The following morning, as several employees, including Phillips and Earley, gathered in the breakroom before work, an employee asked Phillips why he was not at the meeting the night before. Phillips responded that he did not know about it and asked the other employees why he wasn't invited. As part of the discussion, he also asked who attended the meeting and what happened there. In addition, the evidence shows that, on separate occasions during that day, Phillips raised the issue of the union meeting individually with employees Pohubka and Iannaco and asked about the meeting, who was there, and what was said. We agree with the judge that Phillips unlawfully interrogated Pohubka and Iannaco in these individual conversations.[6]

The judge further found that Phillips' interrogation of Pohubka and Iannaco created an impression of surveillance. We disagree. The undisputed evidence shows that Phillips did not know about the meeting beforehand, but rather learned about it the next morning during a breakroom conversation with several employees, including Iannaco, before work. Phillips testified that the meeting was a topic of discussion around the plant during the day. Under these circumstances, we do not find that Phillips' questions to Pohubka or Iannaco would cause them to reasonably assume that their union activities had been placed under surveillance. *Park 'N Fly, Inc.*, 349 NLRB 132, 133 (2007). We therefore reverse the judge and dismiss this allegation.

AMENDED CONCLUSION OF LAW

We modify the judge's Conclusions of Law by deleting paragraph 4 and renumbering the subsequent paragraph.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, RCC Fabricators, Inc., Southampton, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(b) and reletter the subsequent paragraph.
2. Substitute the attached notice for that of the administrative law judge.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Piledrivers Local 454 a/w Metropolitan Regional Council of Carpenters, Eastern Pennsylvania, State of Delaware and Eastern Shore of Maryland, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit:

> All full time Layout Men, Machinists, Mechanics, Shop Laborers, Welders, and Welders/Fitters employed by the Employer at its 2035 State Highway 206 South, Southampton, New Jersey facility, but excluding all other employees, including clerical employees, guards, and supervisors as defined in the Act.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support and activities or the union support and activities of other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

RCC FABRICATORS, INC.

Henry R. Protas, Esq. and *Ann Marie Cummins, Esq.,* for the General Counsel.
John H. Widman, Esq. and *Amy Niedzalkoski, Esq.,* of King of Prussia, Pennsylvania, for the Respondent.
Richard C. McNeill Jr., Esq., of Philadelphia, Pennsylvania, for the Charging Party.

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we agree with the judge that an adverse inference was warranted and that such inference supports the judge's finding that the foremen were supervisors.

[6] We do not read the judge's decision as finding that Phillips' informal conversation with employees before work in the breakroom, during which an employee informed Phillips about the union meeting, constituted unlawful interrogation. To the extent that the judge made such a finding, we do not need to pass on it.

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on April 8 and 10 and May 15, 2003. The charge was filed on November 25, 2002, and an amended charge was filed on January 28, 2003. The complaint was issued on February 19, 2003.

On October 25, 2002, the Metropolitan Regional Council of Carpenters, Eastern Pennsylvania, State of Delaware and Eastern Shore of Maryland filed a petition for certification as collective-bargaining representative of certain employees of the Company.[1] Six days later, the Construction and General Laborers Union Local 172 of South Jersey filed a similar petition.[2] The Regional Director consolidated these petitions on October 31, 2002.

A representation election was held on November 21, 2002. Sixteen votes were cast. Six votes favored the Carpenters, five votes were against any union representation, and no votes were cast in favor of the Laborers. Five ballots were challenged, a potentially determinative number. On March 6, 2003, the Regional Director issued an order consolidating the ballot challenges and the unfair labor practice allegations and scheduling a hearing.

The General Counsel alleges that an admitted supervisor told an employee that the Company would close if the employees selected a union as their bargaining representative. It is also alleged that a foreman interrogated employees regarding their union activities and created an impression that union activities were under employer surveillance. That foreman is alleged to be a supervisor and agent of the Company. Finally, the General Counsel contends that the Company discharged an employee, Daniel Pohubka, because of his involvement in union activities. The Company filed an answer, denying the material allegations of the complaint, including the contention that the foreman was a supervisor and agent.

Regarding the representation election, the Board agent challenged three ballots since the names of the prospective voters were not contained on the *Excelsior* list of voters.[3] One of these prospective voters is Pohubka. His eligibility depends on a resolution of the unfair labor practice allegation that he was wrongfully terminated from employment due to his union activities. The remaining two prospective voters challenged by the Board agent were employees who were laid off prior to the election. The Union contends that these employees enjoyed a reasonable expectation of returning to work in the foreseeable future. The Company denies that such an expectation existed. Finally, the Union challenges the ballots of the two shop foremen, contending that they were supervisors within the meaning of the Act. The Company denies this assertion regarding their status.

As described in detail in the decision that follows, I conclude that the General Counsel has failed to prove that a supervisor threatened closure of the Company in the event the employees elected union representation. I further find that the foreman, a supervisor and agent of the Company, did unlawfully interrogate employees and create an impression that their union activities were under surveillance. I also conclude that, while the General Counsel met its initial burden regarding the discharge of Pohubka, the Company established that he would have been discharged regardless of his union sympathies and activities. It follows that Pohubka's ballot in the representation election was properly subject to challenge. By the same token, I find that the remaining four ballot challenges should be sustained since the evidence establishes that the laid-off employees did not have any reasonable expectancy of return within the foreseeable future and that the two shop foremen were supervisors within the meaning of the Act.

Before detailing my findings of fact, I must address preliminary matters regarding the state of the record. As is virtually inevitable, there are errors in the transcription of the testimony. Those significant errors involving testimony given on April 8 and 10, were corrected on the record during the second portion of the trial conducted in May. (Tr. 463–465.) Several errors relating to the testimony on May 15, require correction. The witness was actually asked if Pohubka often "didn't" punch in on time. (Tr. 543, l. 10.) The witness testifies that he observed Pohubka "wandering."[4] (Tr. 580, l. 14.) Three other errors can be seen in a more lighthearted vein. The Company's comptroller is reported to have testified that he was a "beam counter." (Tr. 609, l. 9–10.) This would be logical given the Company's involvement in the structural steel industry. Nevertheless, in referring to his duties as financial analyst, he actually said he was a "bean counter." (Tr. 670, l. 13.) Counsel for the Union characterizes the Company as asserting a "Great Wine Defense." While such a defense would certainly be interesting, counsel's reference was, of course, to a *Wright Line* defense. Finally, at the conclusion of the hearing, it is reported that I promised the parties that I would strive for a decision that was both just and "fear." (Tr. 677, l. 21.) Naturally, I expressed my hope that the eventual decision would be just and "fair."

On June 5, 2003, the Company filed a motion to reopen the record and admit newly discovered evidence. This evidence consists of a decision of the Appeal Tribunal of the State of New Jersey Department of Labor regarding the disposition of Pohubka's claim for unemployment compensation benefits. On June 11, 2003, counsel for the Union filed an opposition to this motion, contending that the decision did not constitute newly discovered evidence and was "at best . . . marginally relevant." The General Counsel takes a somewhat different view, conceding that the document is admissible, but asserting that it should be accorded no probative worth.

Counsel for the Union argues that the Department of Labor's decision cannot be deemed newly discovered evidence since the Company was aware of the pendency of the unemployment

[1] This is Case 4–RC–20569. As the Carpenters were the only labor organization that participated actively in this trial, I will refer to them where appropriate as the "Union."

[2] This is Case 4–RC–20572. The Laborers Union did not participate in this trial, either through counsel or otherwise.

[3] *Excelsior Underwear*, 156 NLRB 1236 (1966).

[4] This error, using the term "wondering" instead of "wandering," also occurs at Tr. 581, l. 10, Tr. 607, l. 24, Tr. 630, ll. 11, 12, 20, 24, and 25, and Tr. 648, l. 1.

compensation claim throughout the hearing in this matter and could have offered to introduce evidence regarding "the possibility of the issuance of a decision favorable to RCC" by the Appeals Tribunal. I find this argument to be unpersuasive. Counsel does not cite, and I am not aware of, any principle in the law of evidence that would authorize the submission into evidence of a "possibility" that a party may at some future date prevail in a pending lawsuit whose outcome could affect these proceedings. Evidence of such a contingency would fail the test for relevancy since it would not have

> [A]ny tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Federal Rules of Evidence, Rule 401. As a result, I attach no significance to the Company's failure to mention the pending unemployment case during the trial of this matter.

The Company has filed an affidavit from its comptroller, Frank Santos, indicating that he received the decision of the Appeals Tribunal upon returning to his office after attendance at the final day of trial in this case on May 15, 2003. The Appeals Tribunal decision states that it was mailed to the parties on May 13, 2003. This is entirely consistent with Santos' uncontroverted affidavit. By unfortunate coincidence, it appears that the Company received the document immediately after the trial concluded and the record was closed. From this it follows that the Appeals Tribunal decision was newly discovered evidence that could not reasonably have been produced during the trial in this matter.[5]

I must next address the question of whether the Appeals Tribunal decision is relevant to the issues under consideration. Both counsel for the Union and counsel for the General Counsel concede that the document is at least marginally relevant. More importantly, the Board had addressed this issue on several occasions. In *Western Publishing Co.,* 263 NLRB 1110 (1982), it observed that

> We have long held that [unemployment compensation decisions by state departments of labor], although not controlling as to the findings of fact or conclusions of law contained therein, have some probative value and are admissible into evidence.

Id. at fn. 1. The Third Circuit has described the Board's view as being that the decisions of state unemployment compensation agencies, although not controlling, "may be judicially noticed." *NLRB v. Duquesne Electric & Mfg. Co.,* 518 F.2d 701, 703 (3d Cir. 1989). Under the Board's longstanding policy authorizing admission of unemployment compensation decisions, I will reopen the record and admit the decision of the Appeals Tribunal into evidence. At the appropriate time, I will discuss the weight I have assigned to this document.

Finally, I note that, on June 19, 2003, the General Counsel filed an errata to counsel for the General Counsel's brief to the administrative law judge. This contains only technical corrections. No party has objected to this submission, and I grant leave to file this document.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company and the oral closing argument presented by counsel for the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, manufactures railroad equipment and structural steel components at its facility in Southampton, New Jersey, where it annually purchases and receives at the facility goods valued in excess of $50,000 directly from points outside the State of New Jersey. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[6]

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Factual Background

Alphonso Daloisio Jr. is the owner of RCC Fabricators, Inc. The firm's acronym is an abbreviation of "Railroad Construction Company." Daloisio's family has a long history in this field of endeavor. His grandfather started the original company in 1926, with exclusive focus on the railroad industry. Over time, the nature of the business expanded to include road, bridge, and site work, as well as, building construction. In 2000, the original company was divided into a number of separate entities. Historically, these companies have had work forces represented by a variety of unions. Daloisio testified that the family of companies currently has 27 agreements with unions, including the operators, teamsters, iron workers, laborers, dock builders, and carpenters.

Although RCC Fabricators, Inc. has a venerable corporate ancestry; the Company itself is quite new. Its immediate predecessor was a corporation known as RCC Materials and Equipment, located in North Carolina. Daloisio owned this company in conjunction with his brother, James. The company manufactured railroad equipment, but it was not a profitable enterprise. Daloisio testified that in the fall of 2001, it was decided to combine the North Carolina production with a steel fabrication operation intended to supply the building component of the RCC family of companies. It was further decided to locate this new company in New Jersey. As a result, Daloisio established the Company as a New Jersey corporation engaged in the manufacture of railroad equipment and structural steel components for the building industry.

A suitable facility for the Company was purchased. Located in Southampton, New Jersey, the property consists of 16 acres, including a 53,000 square foot manufacturing plant. Several veteran employees from the former North Carolina plant were

[5] In his affidavit, Santos also stated that the parties before the Appeals Tribunal were not given an indication of when its decision would issue. This is certainly consistent with the nature of the litigation process.

[6] The Company's position as to jurisdiction is set forth in its answer to the complaint, par. 2(b), as supplemented by counsel for the Company's stipulations at Tr. 6–7.

recruited for operations in Southampton. Among those who transferred to New Jersey for this purpose were two who figure prominently in this case, Carl Baer and James Phillips. Along with several other employees, they were housed in a residence located on the Company's property. Baer was hired as the shop superintendent. Daloisio testified that Phillips was initially hired to be a "jack of all trades" and did not have a formal title. (Tr. 42.) As the autumn of 2001 progressed, additional employees were hired, including principal management officers. Among them was Dave Puza, the Company's vice president. He testified that one of his initial impressions was a concern that the Company lacked formal disciplinary procedures for employees. He believed that the absence of such procedures was a cause of developing disciplinary problems. As a result, he directed that disciplinary forms be obtained from other components of the RCC family of companies.

In November 2001, operations began. Originally, these consisted of the cleaning and painting of the shop facility. At this time, Phillips was appointed as a foreman. He was told that he "would be working, as well." (Tr. 403.) The hiring process also continued. In December, Ronald Earley was hired as a welder and fitter. He had extensive prior experience, having risen from laborer to foreman in the defunct company that had been the prior occupant of the Southampton plant. Less than a year after he was hired, Earley was promoted to be the second shop foreman. At that point, the two foremen, Phillips and Earley, were each given responsibility for a facet of the Company's operations. Phillips dealt with the production of railroad equipment, while Earley was foreman of the structural steel operation. Both men reported to Baer.

By January 2002, the Company was fully operational and was manufacturing its products. The first billing was generated in that month. At the same time, the Company implemented use of the disciplinary form provided by the human resource manager of the RCC family of companies.

In the following month, Daniel Pohubka, another important participant in the events involved in this case, was hired. His job was as a laborer and the duties consisted of painting, sweeping, and, as he put it, "a little welding" and "whatever [else] I was told to do." (Tr. 169.)

At the approximate time that Pohubka began his employment with the Company, the question of union representation for the work force first arose. Daloisio testified that he serves as co-chair of Project Build, a cooperative union-management committee that resolves jurisdictional disputes among unions in New Jersey. His co-chair is Frank D'Antonio, the president of Laborers Union Local 172. On the occasion of a Project Build meeting in February 2002, Daloisio told D'Antonio that he had opened a new shop. Daloisio testified that D'Antonio responded by asking, "hey, do you want me to get a shop agreement, you know, for down there also?" (Tr. 43.) Daloisio reports that he told D'Antonio that he was uncertain about the Company's viability. As a result, he suggested,

> [W]hy don't you give us a year or two and we'll definitely, we'll talk about it, there's no question that if the co-workers[7] are interested[,] that we'd be interested.

(Tr. 44.) Daloisio indicated that subsequent to this conversation, D'Antonio would occasionally ask him about the status of the Company.

Pohubka testified that in March 2002, he began speaking to his fellow employees regarding the question of union representation. He reported that the idea for such representation came to him after employees of another RCC company took him to task, telling him that he was doing union work and should be getting paid union wages. Pohubka asserts that in the following month he asked Baer why there was no union at the plant and Baer responded by telling him that Daloisio would "shut down the shop" if a union came in. (Tr. 219.) Baer flatly denies any such conversation.

There is general agreement that Pohubka raised a peripheral issue regarding union representation during a meeting in April. Puza testified that during the meeting Pohubka asked why the employees were not being paid union wages when the material they were fabricating was being used on union contract jobs. Puza responded by noting that the contracts were prevailing wage contracts and that the Company was complying with this requirement. Puza opined that this response appeared to satisfy Pohubka, "because I was never asked about it again." (Tr. 640.)

On July 2, 2002, Pohubka became involved in an event that resulted in his first formal disciplinary sanction. Foreman Phillips discovered Pohubka and another employee, Shawn Mace, sleeping in the parts room 10 minutes after the conclusion of an employee breaktime. Phillips testified that he told both men that they owed the Company 10 minutes of work time. He told both men to make up the 10 minutes and then "forget about it." (Tr. 482.) Pohubka refused to make up the lost time and told Phillips he was being "anal" about the episode.[8] By contrast, Mace readily agreed to make up the time.

Phillips instructed Pohubka to return to the welding job that he had been performing. Pohubka testified that approximately 1 hour later, he became angry that he was being required to perform a welder's duties but was not being compensated at a welder's level of pay. He took this complaint to Phillips. Pohubka conceded that he behaved poorly, intentionally dropping a 30-pound piece of metal and cursing at Phillips.[9] Phillips ordered Pohubka to report to Baer's office. Pohubka was given formal notice that he was being suspended for 3 days. The suspension was memorialized and explained on a written "Corrective Action Notice" form. The nature of the misconduct was characterized as "insubordination" and "inadequate work per-

[7] In his testimony, Daloisio referred to the Company's employees as "coworkers."

[8] I do not find Pohubka to be a credible and reliable witness. As an example, in his testimony he initially conceded that he refused to make up the time spent sleeping. Later, he denied being asked to make up the time. Still later, he was again asked if Phillips directed him to make up the lost time. He responded, "[h]e might have, and he might have not. I really do not recall." (Tr. 226.) Compounding the confusion, later still in his examination, Pohubka agreed that the portion of the written disciplinary report about this incident describing the need to make up the time was accurate. That portion included the notation that Pohubka "was asked by [Phillips] to make-up the 10 mins. at end of shift. He thought it was funny." (GC Exh. 4, p. 24.)

[9] He testified that, in a loud voice, he told Phillips, "[d]on't f—kin' talk to me." (Tr. 224.)

formance." Pohubka was warned that he must improve both his attitude and his performance. (GC Exh. 4, p. 24.)

As mentioned, another employee, Mace, was discovered sleeping in the parts room at the same time as Pohubka. The corrective action notice issued to Mace is significantly different from Pohubka's. The level of discipline is listed as a verbal warning that Mace must be "more aware of scheduled break time." In addition, Baer added a comment that Mace deserved commendation for "the manner in which he handled this incident." (GC Exh. 4, p. 14.)

In his testimony regarding these events, Baer evinced a bit of difficulty in articulating his reasoning underlying Pohubka's suspension. At first, he contended that the suspension was imposed for the offense of sleeping on work time. Later, he testified that "[a]ttitude was the major reason" for the suspension. (Tr. 410.) Interestingly, Pohubka chose the same word to describe his conduct on this date, testifying that he gave his supervisors "attitude" and that he "yelled back at them." (Tr. 201.) I conclude that the best explanation for Pohubka's suspension is found in the reasons enumerated on the contemporaneously prepared corrective action notice, particularly the offense of insubordination. Emphasis on Pohubka's poor attitude as demonstrated by his insubordinate refusal to make up the lost time and his cursing at his foreman satisfactorily account for the difference in severity and tone between his discipline and that issued to Mace.[10]

In the following months, the new company continued to experience a variety of growing pains. Santos testified that among these was an increase in employees' tardiness. He described this problem as a spreading cancer. In mid-July, Santos drafted six identical corrective action notices addressing this tardiness. Among the six employees cited in these notices was Pohubka. Santos gave the draft notices to Baer for issuance to the employees. Baer did not issue them. In fact, he threw all of them away, including the one addressed to Pohubka.[11]

In early October 2002, the first concrete action was taken regarding union representation for the Company's employees. One of those employees, Brian VanNortwick, contacted the Carpenter's Union through his son's teacher's husband, a union member. VanNortwick discussed the issue of representation with his coworkers. Pohubka testified that he escalated his own similar discussions after VanNortwick made contact with the Union. He indicated that he spoke to all but two of his coworkers about the issue, albeit doing so "a little secretly." (Tr. 186.) Paradoxically, Pohubka also testified that at this time he had a similar conversation with Phillips and Baer in Baer's office. He asked them why they opposed a union, and suggested to them that a union would benefit them. Pohubka testified that Phillips made no response, but Baer told him that Daloisio would close the shop if the employees chose union representation. Baer denied the existence of any such conversation, testifying that he never discussed union issues with any employees.

VanNortwick took the next step by scheduling a meeting between interested employees and representatives of the Union.[12] Pohubka suggested that VanNortwick hold the meeting at a local pizzeria owned by Pohubka's friend. The meeting was scheduled for October 9 at the pizza shop. Approximately 13 employees attended the meeting. This represented the great majority of the Company's work force. All of those in attendance, including Pohubka and VanNortwick, signed cards authorizing the Union to act as their collective-bargaining representative.

There is no evidence to suggest that company officials had any advance notice that the Carpenters were meeting with employees. On the other hand, it is clear that immediately after the meeting the Company learned about it from a number of sources. Phillips testified that three employees told him about it either later that evening or the following day. Indeed, he reported that "lots of people" were discussing it. (Tr. 491.) Phillips also confirmed that he "probably" asked employees questions about the meeting, including why he was not invited to attend. (Tr. 491.) Counsel asked Phillips if he told employees "that the employer would go out of business with the Carpenters." (Tr. 164.) He responded that he may not have used those exact words, but "I'm sure I probably would've said something to that effect." (Tr. 164.) Pohubka testified that Phillips asked him "how the meeting went, what was said at the meeting." (Tr. 192.) In response, Pohubka indicated that he "just blew him [Phillips] off." (Tr. 192.) Another employee, Jesse Iannaco, also testified that Phillips inquired why he had not been invited to the meeting. He also asked who had attended the meeting.

Earley reported that he learned of the meeting through employee discussions on the following day. He confirmed the fact that he and Phillips asked employees why they had not been invited. He was informed that the employees did not invite the foremen because they were not considered to be "workers." (Tr. 532.) In addition to the foremen, Baer learned of the meeting on the next day. He testified that he thought Phillips told him about it. Santos also learned of the meeting on the following day. He gained his knowledge when an employee asked him if the shop would stay open. The question puzzled him, so he reported it to Baer. Baer then told him about the meeting at the pizzeria. Thus, it is apparent that the Company's officials had widespread knowledge of the meeting by the following day.

On the day after the meeting, the Union addressed a letter to the Company, informing it that the Union represented a majority of the workers and demanding recognition as exclusive bar-

[10] It follows from this that I further conclude that Pohubka's union sympathies and activities did not play a role in the differing disciplinary outcomes. Pohubka confirmed that his supervisors did not raise this as an issue and I find that it was not a factor. As both Baer and Pohubka noted, the problem was Pohubka's attitude toward his supervisors as manifested in his behavior on that day. This impression is reinforced by Phillips' testimony that he made his initial report regarding the incident due to Pohubka's "bad attitude" about it. (Tr. 484.)

[11] This is a good illustration of one of the sources of conflict and inconsistency among the Company's management officials. It is evident that those managers with prior experience in New Jersey favored a tougher, more confrontational approach to employee discipline. Supervisors whose prior experience was gained in the North Carolina operation were more inclined to a conciliatory approach to employee relations.

[12] Pohubka testified that he did not speak with any union representatives prior to this meeting. VanNortwick handled all the contacts and arrangements.

gaining agent. (R. Exh. 1.) Daloisio testified that he received this letter within the next couple of days. He then consulted with counsel.

The culminating event referred to in the General Counsel's complaint of unfair labor practices took place on October 11. Baer testified that on this day Pohubka arrived at work a few minutes late. He got a cup of coffee and paused to speak to at least two coworkers. Baer confronted him about his failure to begin performing work. Pohubka angrily responded that he was unable to begin working because he could not find Phillips in order to ascertain his next assignment. Baer responded that this could not be true, since Pohubka had a clear view of Phillips. Bear instructed Pohubka to report to Phillips, whereupon he entered his office. He testified that, 10 minutes later, Pohubka and Phillips arrived at his office. Phillips informed him that Pohubka had called Baer a f—king asshole. Pohubka did not deny making the comment, but grew angry and loud, complaining that he was being treated unfairly. Baer testified that, at this point, he told Pohubka that he was fired. He directed Pohubka to leave the plant.

Phillips testified that Pohubka had arrived late. Upon punching in, Pohubka "went right by me, and cut down the first aisle." (Tr. 486.) At that time, Phillips was engaged in assigning tasks to other employees. Within 5 to 10 minutes, Phillips observed Baer and Pohubka talking. Afterwards, Pohubka approached Phillips and told him that Baer was a f—king asshole. He accused Phillips of getting him into trouble. Phillips described Pohubka's attitude and his own opinion by noting that:

> [H]e felt like being as I didn't just grab him by the shoulder and bring him over there, and say "hey, do this, this, and this," then it was part my fault. And then, you know, that's bull crap because he should have stopped over and seen me instead of walking around.

(Tr. 496.) Phillips testified that Pohubka kept getting louder and louder. When he refused to calm down, Phillips took him to Baer's office. Pohubka and Baer "got into it again" and Baer fired him. (Tr. 488.)

Pohubka testified that he arrived at work a minute late due to ongoing car troubles. He proceeded to get a cup of coffee. He then walked to the back of the shop in order to find Phillips. He asked a couple of coworkers about Phillips' whereabouts. He encountered Earley and asked him if he had any work. Earley responded negatively and told Pohubka to find Phillips.[13] He then saw Baer and asked him what to do. Baer asked him why he wasn't working and Pohubka replied that it was due to his inability to locate Phillips. Pohubka testified that Baer became angry and told him that he was sick of his not working. Pohubka reports that within 30 seconds thereafter he located Phillips who was entering the building. He told Phillips that Baer was in a bad mood. Pohubka testified that Phillips responded by telling him that he was "sick of my attitude" and sent him to Baer's office. (Tr. 198.) Baer told him he was fired.

[13] Earley does not corroborate this testimony. He indicated that he observed Pohubka walk past Phillips. He further testified that Pohubka also walked past him.

Although Pohubka's discharge is the ultimate allegation in the complaint, it is necessary to consider subsequent events. It will be recalled that Daloisio testified that, as of approximately October 12, he received the Carpenters Union's demand for recognition. Thereafter, Daloisio informed D'Antonio of the Carpenters' involvement at the shop. D'Antonio requested an opportunity to talk with the Company's employees and Daloisio agreed.

On October 18, the Company arranged for a representative of the Laborers Union to address the work force at the shop during work hours. One hour before this meeting, Daloisio addressed the employees. As described by Iannaco, Daloisio told them that he had contracts with both unions in other parts of the family of companies. According to Iannaco, he went on to say, "You vote what you feel is best. And he said he actually couldn't afford the Carpenters Union in there." (Tr. 284.) Daloisio testified that he told the employees that he had relationships with both unions, but added that, "I had a long term relationship with shop agreements with the Laborers. We did not have a shop agreement with the Carpenters." (Tr. 50.)

Daloisio also testified that during the meeting an employee asked him about the odds that the shop would stay open in the event of union representation. He told the employee that this would not be a problem "as long as we came to an agreement that was reasonable" but an unreasonable package from a union "would not be a long term viable operation for us." (Tr. 52–53.) He also testified that employees said that the Carpenters Union had promised them pay of $50 per hour. He responded by informing them that under his shop agreements with the Laborers, pay ranges from $14 to $17 per hour.

Shortly thereafter, a meeting with Derrick Weber of the Laborers Union was convened. Phillips testified that the workers were assembled along with himself, Earley, and Santos. Puza asked Phillips, Earley, and Santos to leave "so that the guys could talk to the Laborer guy." (Tr. 492.) A few minutes later, Phillips and Earley were told that they could attend the meeting. Santos was not given a similar invitation.

Santos confirmed that he did not stay for the substance of the meeting. However, he introduced Weber to the employees, telling them that Weber was there to "speak with the shop employees about, you know, an alternative union if the guys were interested." (Tr. 598.) After making this introduction, Santos left the room. During the meeting, authorization cards for the Laborers Union were passed to the attendees. Three days later, a second meeting with the Laborers Union was held at the shop on worktime.

On October 23, 25, and 30, a carpenter's union representative left voice mail messages for Daloisio, telling him "who I was with and what we were about." (Tr. 372.) Having received no response, on October 25, the Union filed a petition seeking certification as collective-bargaining representative. (GC Exh. 1(a).) On the same date, the Acting Regional Director mailed notice of this petition to the Company. (GC Exh. 1(c).)

The Company continued to provide the Laborers Union with access to its employees at the plant during working hours. On October 31, the Laborers filed a petition seeking representation of the Company's employees. (GC Exh. 1(d).) The Regional Director consolidated the two representation proceedings and

issued an appropriate notice. (GC Exh. 1(f).) At approximately the same time, Daloisio again addressed the employees. According to VanNortwick, Daloisio stated that he was leaving it up to the employees as to whom they chose to represent them. However, he added that the Carpenters Union was "more—a little more expensive, in terms of their overall package, than the Laborers Union."[14] (Tr. 355.) Shortly thereafter, another meeting with a Laborers Union representative was held. Among those attending were Phillips and Earley. Authorization cards were passed out.

On November 4, a hearing was convened at the Regional Office regarding the representation petitions. All parties reached consensus as to a stipulated election agreement. In particular, two issues were addressed and resolved. The Laborers' petition had included "working foremen" within the proposed collective-bargaining unit. The Carpenters' petition did not. The parties agreed that the Carpenters reserved the right to challenge the ballots of the foremen if they voted in the election. The Carpenters also raised the issue of the provision of access to representatives of the Laborers Union on the Company's premises during working hours. It was agreed that the Carpenters would be given an opportunity to meet with the employees at the shop on worktime. The election was scheduled for later in the month.

VanNortwick testified that during this period leading up to the election, Earley discussed the union issue on an almost daily basis. He warned that the shop would close if the employees selected the Carpenters Union. As VanNortwick put it, Earley told them that, "Al would close, 'cause Al did not want a union in here." (Tr. 358.)

Puza testified that in accordance with the parties' election agreement, arrangements were made for the Carpenters to address the employees at the plant. The meeting never took place since the Carpenters' representatives got lost on their way to the facility and arrived after closing time. Puza indicated that VanNortwick then asked the Company to reschedule the meeting. The record does not reflect precisely what occurred, but it is uncontroverted that the Carpenters did not meet with the employees at the plant on company time. They did hold another meeting with employees at an employee's home.

The election was held on November 21.[15] Sixteen ballots were cast. There were 6 votes for the Carpenters, 5 votes against union representation, no votes for the Laborers, and 5 challenged ballots. Three days later, the Union filed an unfair labor practice charge arising from Pohubka's dismissal. This was supplemented by an amended charge filed on January 29, 2003.

[14] This is quite consistent with Daloisio's testimony that "[o]verall for our construction activities, generally the Carpenter's benefits are significantly higher than the Laborer's benefits." (Tr. 62.) He also reported that the Carpenter's wages were higher, but that this gap was closing.

[15] There is some confusion in the record regarding the date of the election. I will adopt the date set forth by the Regional Director in her notice of hearing on challenged ballots. (GC Exh. 1(o).)

B. Legal Analysis

1. Baer's alleged threat of plant closure

The General Counsel alleges that Baer warned an employee that the Company "would close the shop if the employees selected a union as their bargaining representative." (Complaint, par. 5, GC Exh. 1(m).) The approximate date of this conversation is alleged to have been during the first week of October 2002. As is customary, the complaint does not name the employee. At trial, counsel for the General Counsel confirmed that the employee alleged to have received this threat of plant closure was Pohubka. (Tr. 665–666.) It is contended that Baer's alleged statement violated Section 8(a)(1) of the Act.

In the course of 3 days of trial testimony, very little was elicited regarding this allegation. Counsel for the General Counsel asked Pohubka if he ever talked about union representation with a supervisor. Pohubka testified that he had such a conversation with Baer and Phillips in their office. He indicated that this happened in late September or early October. He described the conversation as follows.

> POHUBKA: . . . I asked Bud [Phillips] and Gene [Baer] why they're not for the Union because it would actually benefit them more if they went for the Union?
> COUNSEL: How did Gene respond to this?
> POHUBKA: He told me that Al [Daloisio] would close down the shop if the Union got into RCC.
> COUNSEL: Did he say anything else?
> POHUBKA: No.
> COUNSEL: Did Bud have, did he make a comment?
> POHUBKA: No.

(Tr. 187.) Although Baer was not asked directly about this asserted conversation, he addressed it in general terms. Counsel for the Company directed Baer to Pohubka's allegation that Baer threatened plant closure during a conversation in April. Baer denied make such a statement at that time. Counsel then asked him,

> COUNSEL: Did you ever tell any employee in the shop at RCC Fabricators that Al [Daloisio] would close the shop if they brought a Union in?
> BAER: No I didn't.
> COUNSEL: Did you ever say anything like that to the employees?
> BAER: No.

(Tr. 406.) Nobody asked Phillips if he had any recollection of a conversation among Pohubka, Baer, and himself during the time period under consideration.[16]

[16] In certain circumstances, it is appropriate to draw an adverse inference from the failure to question a witness who was present during a disputed event. See *Daikichi Sushi,* 335 NLRB 622 (2001). However, such an inference is only applicable in circumstances showing that the witness "may reasonably be presumed to be favorably disposed to any party." *Queen of Valley Hospital,* 316 NLRB 721 fn. 1 (1995). Phillips testified that he was demoted immediately prior to his testimony in April and left the Company's employ under disputed circumstances immediately prior to his testimony in May. The evidence does not support a presumption that his testimony would be favorable to either side. Indeed, review of his entire testimony shows that it sometimes

It is evident from this sparse record that resolution of this unfair labor practice charge hinges entirely on assessment of credibility. Because I do not find Pohubka's uncorroborated claim to be credible or reliable, I cannot conclude that the General Counsel has met its burden of proving this charge by a preponderance of the evidence. Pohubka's account is implausible on its face and is further undermined by my general assessment of his credibility.

Pohubka claims that during the week immediately preceding the employees' first meeting with the Carpenters, he boldly interrogated his foreman and his foreman's supervisor regarding their opinions on the issue of union representation. He not only demanded to know their reasons for opposing the union, but also attempted to persuade them of the error of their views. One may give credence to such a conversation in circumstances where an employee and his supervisors share cordial and friendly relations. Indeed, the annals of labor law are replete with cases involving allegations of improper interrogation when a supervisor quizzes a subordinate who is also a friend.[17] I have no difficulty accepting the notion that a prounion employee would feel free to raise similar issues with supervisors with whom he or she shares a warm personal relationship. The difficulty here is that Pohubka's relationship with Phillips and Baer was adversarial, not friendly.

It will be recalled that several months earlier Baer had suspended Pohubka based on Phillips' report regarding his sleeping on company time and his insubordination when told to make up the lost time. Both Phillips and Baer testified credibly regarding their assessment of Pohubka. Phillips reported that, "more often than not" he would "spend half the day hunting" Pohubka in order to get him to perform his work. (Tr. 483, 485.) Baer testified to a variety of problems with Pohubka. He had a disrespectful attitude toward the foremen. He was late for work on a "[f]airly regular basis." (Tr. 412.) Baer warned him about this behavior continually. He would spend time talking to other employees at the beginning of his shift instead of getting to the tasks at hand. Again, Baer reported that he discussed this with Pohubka on a frequent basis. Finally, Baer reported that Pohubka would not stay on task. He observed that "it was just a matter of continually chasing him down, getting him back on the job." (Tr. 411.)

Whatever the accuracy of Phillips and Baer's criticisms of Pohubka's work attitude and performance, they certainly put Pohubka on notice that he was not highly regarded by these superiors. Interestingly, Pohubka was examined about his view of their attitude toward him. His testimony underscores my findings that his assertion about a threat of plant closure is implausible and his general credibility is suspect. Counsel for the Company asked Pohubka about his relationship with Baer during the summer of 2002. He estimated that the relationship was cordial. Even after his suspension, he continued to believe that the relationship remained cordial. However, he testified that, in late September, he concluded that the relationship "got a little weird." (Tr. 235.) He opined that this did not stem from any specific conversation, but arose after Pohubka began discussing the Union with coworkers. Upon additional questioning, he retreated somewhat from this position, stating he was having difficulty recalling and that it was "a possibility" that Baer's attitude "got weird." (Tr. 236.)

Pohubka's description of his relationship with Baer heightens my sense of the implausibility of the asserted conversation leading to the alleged threat of plant closure. It certainly appears that, as of the end of September, Pohubka had doubts about his standing with Baer. This is also supported by his testimony that when he discussed the Union with coworkers in late September, he did so "a little secretly." (Tr. 186.) Nevertheless, he contends that immediately thereafter he addressed both superiors in their office, questioning them about the reasons for their opposition to the Union and explaining the error of their views. Given the objective circumstances demonstrating that Pohubka's attitude and work performance were viewed unfavorably by these supervisors, and the subjective assessment that caused Pohubka to conduct his conversations with coworkers more covertly, I cannot credit his testimony that he interrogated and lectured his superiors about the benefits of the Union and received a threat of plant closure in return. I find this story to be unlikely and contrary to common perceptions of human behavior.

My conclusion that Pohubka's tale regarding this alleged threat of plant closure is implausible is further supported by overall doubts regarding his veracity when recounting events related to his discharge from employment. His demeanor as a witness conveyed a distinct impression that his testimony was clearly colored by his perception of self-interest. On key points, he was unable to present a coherent and consistent account. Thus, his testimony vacillated regarding whether he was an overt union activist or a covert union supporter. He was unable to clearly articulate whether he was viewed as being in good stead with his supervisors or was the subject of their unfavorable scrutiny. I have already related his inability to set forth a consistent account of his behavior on the day he was suspended for sleeping on the job. I cannot credit his testimony, except in circumstances where it is corroborated by independent evidence. Because of his unreliability as a witness and the inherent implausibility of his uncorroborated account, I do not find that Baer told him that the plant would close if the employees selected the Union as their representative.

2. Interrogation of employees by Phillips

On October 9, at a pizza restaurant, the Company's employees met with representatives of the Carpenters Union for the first time. The General Counsel alleges that, in the days following this meeting, Phillips interrogated employees regarding the reasons why he was not invited to attend the union meeting. He is also alleged to have interrogated employees regarding their union activities and sympathies and the union activities of their fellow workers. Phillips' behavior is asserted to have violated Section 8(a)(1) of the Act.

advanced the Company's cause and sometimes directly undermined it. I do not draw any inference from the failure of any counsel to question Phillips regarding Baer's alleged threat of plant closure.

[17] For example, in *Acme Bus Corp.,* 320 NLRB 458 (1995), enfd. 198 F.3d 233 (2d Cir. 1999), the Board held that a supervisor's friendship with employees increased the likelihood that his solicitation of information about the union from them would be coercive.

There is little, if any, dispute among the witnesses regarding these events. Pohubka testified that Phillips asked him "how the meeting went, what was said in the meeting."[18] (Tr. 192.) Another employee, Iannaco, testified that Phillips asked him why he wasn't invited to the meeting. He also "wanted to know who was there." (Tr. 278.) Phillips confirmed that he "probably" asked questions about the pizza party, including an inquiry about why he was not invited. (Tr. 491.) In addition, Earley confirmed that both he and Phillips asked, "how come we weren't invited." (Tr. 532.) Significantly, Earley testified that he asked this question because it was "my future I'm looking at." (Tr. 532.) He told the employees about the reason for his concern, noting that, "I really don't like Unions that much, because I had a few bad experiences with them, you know. And, I, I says I can't afford to be out of work." (Tr. 534.) Thus, two employees reported that Phillips questioned them about the meeting with the Carpenters Union, seeking to learn who attended and what was discussed. Both of the foremen confirmed this questioning, and Earley placed it in context by noting that he had articulated his concerns about the negative impact of union representation.

In its leading case on this subject, the Board observed that it would be unrealistic to contend that any instance of casual questioning about union sympathies would violate the Act. Noting that, "there are myriad situations in which interrogations may arise," it articulated a totality of circumstances standard for assessment of alleged illegal interrogations. *Rossmore House,* 269 NLRB 1176 fn. 20 (1984), affd. 760 F.2d 1006 (9th Cir. 1985). Among the key circumstances to be considered are the background to the questioning, the nature of the information sought, the identity of the questioner, and the place and method of the questioning. *Rossmore House*, supra, citing *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964). The fundamental issue to be addressed by application of the totality of circumstances test is whether the questioning "would reasonably have a tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights." *Multi-Ad Services,* 331 NLRB 1126, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). This is an objective standard, and it does not turn on whether the "employee in question was actually intimidated." *Multi-Ad Services,* supra at 1228.

Considering the totality of circumstances, the Company argues that Phillips' conduct was not unlawful. There is evidence that supports the Company's position. Phillips was a foreman, not a higher management official. His questions were asked in casual conversation, not in the more formal setting of an office interview. There is no evidence that the questions were posed in a hostile manner. While these factors are in the Company's favor, I conclude that they are outweighed by other relevant factors that direct a finding of reasonable tendency to interfere with, restrain, or coerce the employees.

I find that the background to the questioning is highly significant. The questions were posed immediately after the employees' first organizational meeting with the Carpenters Union. Thus, they came at a particularly delicate moment in the life of this workplace. Regarding the background, I have also considered whether the subjects of the questioning were open union supporters. As to Pohubka, the evidence is conflicting, in large measure due to credibility concerns regarding his own testimony. It is undisputed that he had questioned management about union pay rates for work being performed by the Company. He also contends that he openly discussed the union issue itself with management officials. This is disputed, and it is further undercut by his testimony that he had attempted to organize his coworkers secretly. It is simply unclear whether he was known to be a union supporter at the time Phillips questioned him. By contrast, there is no evidence whatsoever to suggest that Iannaco was an open union supporter.[19] It is also clear that there were other employees present when Phillips and Earley asked their questions.[20] There is nothing to show that such other employees had openly expressed any union sympathies. I conclude that the background circumstances show that the questions were posed immediately after the first organizational meeting and were addressed to employees, at least some of whom were not known to be active and open union supporters.

I also conclude that the nature of the questions posed strongly supports a finding of reasonable tendency to interfere with, restrain, or coerce the employees. The Board has recently underscored the importance of some of the employee rights directly implicated in Phillips' questions, including his questions about who attended the meeting. In *Guess?, Inc.,* 339 NLRB 432 (2003), the Board found a violation of the Act where an attorney for an employer who was deposing an employee asked for the names of persons who had attended a union meeting. The Board noted that,

> It is well settled that Section 7 of the Act gives employees the right to keep confidential their union activities, including their attendance at union meetings. . . . This right to confidentiality is a substantial one, because the willingness of employees to attend union meetings would be severely compromised if an employer could, with relative ease, obtain the identities of those employees.

Id. at 434. The Board went on to observe that this confidentiality interest would be even greater in the case of a union meeting held during an organizational campaign. Phillips' questions about what took place during the organizational meeting implicate these grave concerns. The answers to this question could have readily revealed information regarding the union sympathies of specific employees. As a result, I find that the nature of the information sought strongly supports a finding of interference with Section 7 rights.

[18] In this instance, I credit Pohubka's account. It is corroborated by the testimony of a coworker. Significantly, it is also corroborated by the testimony of both foremen. In this connection, the Board has endorsed the observation that "nothing is more common in all kinds of judicial decisions than to believe some and not all" of a witness' testimony. *Daikichi Corp*., 335 NLRB 622, 622 (2001), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950). Such is the case here

[19] Counsel for the Company concedes as much. See R. Br. at 49.

[20] Pohubka specifically mentioned an employee he knew as "Charlie H." (Tr. 192.) Earley also testified that the relevant conversations involved other employees.

Finally, I conclude that the context of the interrogation by Phillips was not innocuous, but rather was directly linked to the Company's opposition to the Carpenters' Union. I base this conclusion on Earley's testimony that during the conversation involving himself, Phillips, and the employees, he directly informed those employees that he viewed his own future as being at stake.[21] He elucidated this concept by describing his own negative experiences and opinions about unions. This placed a clear and pointed meaning on Phillips' inquiries that would reasonably tend to convey a message that the questioners were interested in the information about union sympathies and activities out of concern that the organizational campaign was harmful to their interests.

Based on the totality of circumstances, with particular emphasis on the nature of the questioning, as well as, the background, context, and timing of that questioning, I conclude that Phillips' questions reasonably tended to interfere with, restrain, and coerce the employees in their exercise of the rights granted them by Section 7 of the Act.

3. Phillips' status as supervisor and agent of the Company

A major component of the Company's defense to the allegation of unlawful interrogation of employees by Phillips is its contention that he was not a supervisor within the meaning of the Act. Section 2(11) of the Act defines the term "supervisor" as including an individual who has "the authority to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees." Possession of any one of these powers is sufficient to qualify the person as a supervisor. However, in order to so qualify, the authority must involve more than simply routine or clerical duties. The statute requires that the authority be exercised through the application of independent judgment. The Act does not require that the individual exercise such authority on a regular or routine basis; it is the possession of this type of authority that mandates a finding of supervisory status. Finally, the burden of proving supervisory status is upon those who assert it.[22] In this case, that places the burden on the General Counsel and the Union.

In analyzing this issue, it is necessary to consider several general observations stemming from the Company's brief history. The evidence established that the lines of authority in this new enterprise have not yet crystallized. Managerial and supervisory employees continue to jostle for position and authority. This reality is reflected in the relative lack of probative weight that can be given to job titles within the Company.[23] The owner, Daloisio, testified that he was "not big with titles." (Tr. 42.) Indeed, his own business card does not contain any title denoting his position in the Company. The ongoing fluidity of the situation was illustrated by Baer's testimony at trial. As late as the trial date, he indicated that he was "not real clear" as to Santos' position within the Company. (Tr. 408.) Thus, even within the ranks of the undisputed managers, the lines were blurry. Hence, it was no surprise that when the counsel for the General Counsel asked Phillips what his job title was, he responded that he was, "Leadman, foreman, you know, I mean you could call it leadman, foreman, supervisor, whatever you wanted to call it." (Tr. 139.) Despite this amorphous corporate structure, I note that there exists one type of documentary evidence that could shed considerable light on the issue of Phillips' supervisory status.

Phillips testified that he was told that he was a "working foreman," but at the same time he noted that he "had a resume that they [the Company] had done for me that said leadman supervisor on it." (Tr. 140.) Santos confirmed the existence of this document, but attempted to minimize its significance. He reported that it was prepared for submission to potential customers. He asserted that the Company simply took a resume prepared by Phillips and reformatted it for this use. He further contended that the document merely described Phillips' prior work experience before joining the Company. Despite these claims that the document would have limited probative value in assessing Phillips' responsibilities, the Company did not offer it into evidence so as to conclusively establish its contents. This is particularly striking since the Company did introduce a document describing Baer's job as shop superintendent. (R. Exh. 3.) Interestingly, that document is very specific in laying out the nature and quality of Baer's authority. Among other things, it empowers him to "[s]upervise shop operations" and be responsible for employees' "adherence to company policy and procedures." (R. Exh. 3, pars. 3 and 7.) Furthermore, contrary to the point Santos was trying to make, Puza, the Company's vice president, testified that "job descriptions" for the foremen did exist. (Tr. 651.) His testimony on this point is authoritative since he noted that he wrote the job descriptions himself.

The Board has long held that a party's failure to present evidence within its possession that may reasonably be assumed to be favorable to it raises an adverse inference regarding the factual issue that the evidence could have addressed. Thus, for example, the Board approvingly cited language from a treatise setting forth the rule that:

> [W]here relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him. [Citation omitted.]

[21] As will be discussed later in this decision, I have concluded that both Phillips and Earley were statutory supervisors. Earley's supervisory status lent great weight to his words in opposition to the Union. While Earley's statements are not the subject of any unfair labor practice charge, they form part of the vital context of Phillip's interrogation of the employees. The Board permits consideration of such evidence even in the absence of a formal charge when the evidence sheds light on the "underlying character of other conduct that is alleged to violate the Act." *American Packaging Corp*., 311 NLRB 482 fn. 1 (1993).

[22] This summary of the Board's standards for adjudication of the issue of supervisory status is adapted from the Board's recent discussion in *Arlington Masonry Supply, Inc.,* 339 NLRB 817, 818 (2003).

[23] In any event, the Board has observed that it is "well settled" that supervisory status depends on an individual's duties, not his or her title. *Dole Fresh Vegetables,* 339 NLRB 785, 785 (2003).

Martin Luther King Sr., Nursing Center, 231 NLRB 15 fn. 1 (1997).[24] The document that Phillips' called his "resume" was uniquely within the possession of the Company, the organization that admittedly prepared it for use in its business operations. The nature of the document, coupled with the highly relevant contents of the similar document regarding Baer, leads me to infer that the Company failed to produce it because its contents would tend to support the existence of Phillips' supervisory status. As the Supreme Court has put it, "[t]he production of weak evidence [Santos' testimony about the document] when strong is available [the document itself] can lead only to the conclusion that the strong would have been adverse." *Interstate Circuit v. U.S.,* 306 U.S. 208, 226 (1939).

While on the subject of the Company's job descriptions for employees, it is instructive to note that Baer's written statement of duties and responsibilities indirectly addresses the duties and responsibilities of Phillips and his counterpart, Earley. Among Baer's duties is the requirement that he, "[s]upervise shop operations and provide direction to the two shop foreman [sic] in charge of equipment and steel fabrication." (R. Exh. 3, par. 3.) This supports the undisputed testimony that Earley and Phillips, the foremen, reported to Baer. It also supports the assertion that, by being "in charge of" the Company's two production processes, the foremen were vested with the sort of authority consistent with the exercise of independent judgment and supervisory responsibility.[25] Therefore, to the extent that the Company maintained any written policy regarding the nature and extent of Phillips' supervisory authority, I find that such written guidance supports the General Counsel and Union's position that Phillips was a statutory supervisor.

Turning now to the analysis of job duties required in order to assess supervisory status, I note that the parties have narrowed the issue. In their brief, counsel for the General Counsel assert that Phillips possessed two of the specific attributes of supervisory status enumerated in the Act, the powers to assign and discipline employees. It is further contended that these powers were sufficiently broad so as to require that Phillips exercise independent judgment in their application. The Company disputes these assertions.

In evaluating the Company's position, it is necessary to employ caution. The evidence demonstrates that management has been well aware of the legal issues involved and the tactical advantages of describing Phillips and Earley as nonsupervisory employees. For example, on October 18, the representative of the Laborers Union addressed the employees at the shop. Santos, Phillips, and Earley were present with the employees as the meeting commenced. Phillips testified that they were instructed to leave the meeting "so that the guys could talk to the Laborer guy." (Tr. 492.) A few minutes later, Phillips and Earley were told to return to the meeting. Santos was not invited to rejoin the meeting. It is apparent that the shift in management's position as to the foremen's status as possible bargaining unit members reflected a perception of advantage in having them participate. Similarly, the Company manipulated its position regarding Phillips in another respect. The evidence shows that Phillips was exempted from the requirement that production employees punch a timeclock. He testified that this changed, noting that "[w]hen all this stuff came about," he was ordered to punch the clock. (Tr. 141.) This was basically confirmed by Santos who testified that he complained about Phillips' exemption from this requirement. As a result, by December 2002 or January 2003, Puza directed that Phillips punch the clock. Once again, I conclude that management made decisions to alter the appearance of Phillips' status for tactical advantage.

With these considerations in mind, I will assess and resolve the conflicts in the evidence regarding Phillips' role. Phillips' immediate superior, Baer, testified regarding Phillips' ability to assign work to employees. When asked if Phillips assigned "people working on one job to another job," he first responded that he "wouldn't say that." (Tr. 94.) Shortly thereafter, he retreated from this position, noting that, as "a spontaneous thing," the foreman may assign a worker on his own authority rather than attempting to "track me down." (Tr. 94.) Under examination by counsel for the Union, Baer agreed that Phillips and Earley "directed the groups that worked with them."[26] (Tr. 116.) Baer also testified that he would hold informal meetings with Phillips and Earley to decide which employees would work on each of the current jobs. After these meetings, the foremen would inform the employees of their assignments.

Phillips and the employees presented a different picture of the foremen's authority to assign work. Phillips reported that he would make the decisions to assign employees from one completed task to another job that needed to be done. Typically, this would occur twice daily. The employees who testified supported his description of the nature and extent of his authority. Pohubka, Iannaco, and Duane Ashcraft all reported that Phillips made their work assignments, often on a daily basis. VanNortwick put it this way:

> Once we finished a project, we would either find Bud [Phillips] or Butch [Earley] to see what needed to be done next; and then they would assign you to the next task.

(Tr. 338.) Indeed, the actual operation of this management practice is well illustrated by the events immediately preceding Pohubka's termination. On that day, Baer confronted Pohubka because he was angry that Pohubka had walked past Phillips. Phillips was in the process of assigning employees to their tasks. Baer admonished Pohubka and directed him to report to Phillips for job assignment. All of this is consistent with the practices outlined by Phillips and the employees in their testimony. I find that Phillips played a key role in making job assignments to employees on a regular basis.

I also find that Phillips employed independent judgment in making job assignments. As noted, the preponderance of the credible evidence establishes that Phillips' role was far more than merely making ad hoc transfers of employees from one

[24] The Board recently reaffirmed these observations, including reference to the *Martin Luther King Sr., Nursing Center* case, in *Daikichi Sushi,* supra at 622 fn. 4.

[25] In addition, the document also sheds light on the precise job title possessed by Phillips and Earley. In testimony, they were identified with various titles, most commonly that of "working foremen." However, it appears that their actual formal title was that of "shop foremen."

[26] Baer also confirmed that the foremen "worked along with" other employees. (Tr. 116.)

simple task to another when Baer was unavailable. Rather, Phillips was a primary participant in the daily process of determining which employees would undertake the necessary tasks involved in the entire production process for railroad components. Even the picture presented by management witnesses confirms this arrangement. Baer conceded that he had regular meetings with the foremen to work out the assignments. Puza agreed that the foremen could select workers for tasks, but added that this was "[o]nly after discussion with Gene [Baer]." (Tr. 651.) At a minimum, the evidence establishes that Baer, Phillips, and Early formed a troika responsible for the assignment of all job tasks in the production process. This troika made complex and sophisticated judgments. I conclude that Phillips possessed the authority to assign employees and that the breadth and complexity of his authority encompassed the power and duty to make independent judgments as to those assignments.

In reaching the conclusion that Phillips possessed the supervisory authority to assign work contemplated in the language of the Act, I have considered the precedents cited by counsel for the General Counsel and for the Company, as well as, other cases addressing supervisory status. It is clear that the cases turn on their unique facts. To the extent that any precedent is helpful, I find that *Richardson Bros. Co.,* 228 NLRB 314 (1977), bears considerable resemblance to the circumstances involved here. In *Richardson,* the issue was whether an employee characterized as a "leadman" or "assistant foreman" was a statutory supervisor. As part of his job, he "reassigns the department's 22 employees among the various jobs to meet workflow demands." 228 NLRB at 314. The Board found that he possessed supervisory status, observing that

> [I]n carrying out his duties in connection with monitoring and reassigning the work in a department as large as the finishing department, [he] must of necessity make judgments which are more than routine in nature.

228 NLRB at 314. The same is true of Phillips.

The General Counsel contends that Phillips also possessed the power to impose discipline. Puza testified that the foremen were not empowered to impose discipline, not even the issuance of a written warning. Baer made the same assertion. Nevertheless, on examination by counsel for the Union, he conceded that it was "very possible" that a foreman could sign a corrective action notice on the line indicated for supervisors. (Tr. 125.) Once again, the employees testified that the foremen were more powerful figures than described by the management witnesses. Iannaco agreed with counsel's contention that they had the "authority and power to discipline." (Tr. 288.) VanNortwick was of the same opinion.

I find that the conflicting testimony is best resolved by consideration of the documentary evidence, the corrective action notices themselves. A substantial number of these notices were signed by Baer, Phillips, and Earley together. (GC Exh. 4, pp. 1, 9, 13, 14, 25, 29, 30, 40, 42, and 43.) Baer contended that he liked to have Phillips and Earley join him in signing these forms because they could serve as witnesses to the discipline being meted out. The first difficulty with this contention is that the forms do not show them to be signing as witnesses. In fact, when Earley did sign one such form as a mere witness, he was careful to annotate the form to this effect. (GC Exh. 4, p. 28.) Furthermore, there was no evidence of any Company requirement that such forms be witnessed. In fact, Baer issued corrective action notices that contained only his own signature. (GC Exh. 4, pp. 8, 22, 24, and 33.) Other management officials also issued corrective action notices or other disciplinary letters containing only their own signatures. (GC Exh. 4, pp. 16, 38.) Some disciplinary notices were even signed by one manager acting on behalf of another manager who did not sign the form. (GC Exh. 4, pp. 7, 21, 39.)

Events involved in the issuance of one particular disciplinary form emphatically undercut Baer's contention that Phillips and Earley were simply witnesses. On November 13, 2002, Iannaco was issued a corrective action notice for using abusive language. Baer signed the notice on November 13. Phillips and Earley signed the same notice on the following day. As a result, they could hardly be signing as witnesses. Indeed, when questioned about this document, Baer testified that he could not recall why they had signed it. He went on to report that "when I talked to Mr. Iannaco about this particular offense, that it was in the presence of Mr. Dave Puza." (Tr. 127.) Yet, although he was a bona fide witness, Puza did not sign the form. I do not credit Baer's testimony that Phillips and Earley signed corrective action notices as mere witnesses.[27]

If Phillips and Earley did not sign these disciplinary forms as witnesses, in what capacity did they sign the forms? To answer this question, it is helpful to recall that the evidence has already established that Baer, Phillips, and Earley often acted as a troika in making work assignments. I find that this pattern is repeated as to the issuance of discipline. The three men often acted together and used their signatures on the corrective action notices to demonstrate their consensus to the offending employee. In drawing this conclusion, I place great weight upon Phillips' testimony as to this precise issue. When asked about the meaning of his signature on the corrective action forms, he responded that:

> Sometimes I did them, you know, I signed them myself. And sometimes I signed them as a witness . . . I mean, what it was it was me, Butch [Earley] and Gene [Baer] would agree on, you know, we all showed, signed it, showing that we agreed with whatever was happening. If it was, you know, this corrective action notice or another corrective action notice, then you know, so we were all in agreeance [sic].

(Tr. 489.) Phillips' explanation that the presence of the three signatures on corrective action notices represented confirmation to the employee that the three persons in charge of plant operations had reached agreement as to the imposition of the disciplinary action is consistent with the evidence regarding their pattern of exercise of joint authority in running those operations. In addition, I have generally found Phillips to be a reliable witness regarding the events involved in this matter. His

[27] By the same token, I do not credit Earley's testimony in support of Baer on this point. His testimony is fatally undermined by the fact that he carefully noted that he was signing as a witness when that was actually his role. (GC Exh. 4, p. 28.)

general reliability is reinforced on this point since he provided this testimony in May, after he had left the Company's employ. By then, he had no apparent reason to curry favor with any party to this litigation.

Although my conclusion that Phillips possessed supervisory authority within the meaning of the Act is grounded upon the evidence regarding his exercise of independent judgment while assigning work and disciplining employees, I have also considered the secondary indicia of supervisory status to the extent mandated by the Board.[28] Phillips' possession of significant secondary indicia lends additional support to a finding of supervisory status. Puza testified that when considering whom to lay off due to decline in work, top management asked Phillips and Earley for "a characterization of all the people" in order to ascertain "who were good workers, who were marginal workers." (Tr. 648.) Phillips and Earley were also regular participants in the weekly production meetings. These were attended by Tanzola, Puza, Santos, and Baer. The purpose of the meetings was to assess each ongoing work order, including schedules, targets, delivery goals, assignment of workers, and authorization of overtime. The foremen not only attended the meetings, they were active participants. Indeed, Baer testified that during the meetings, they would frequently "know where they stood on a particular project better than I did." (Tr. 452.) In addition, Phillips shared use of Baer's office and had his own desk in that office.[29] He used this for sophisticated work tasks that included drawing schematics and ordering thousands of parts for the production process. He had the authority to order such parts based on his own judgment and initiative. He also possessed the power to sign timecards for employees when their duties prevented them from punching in personally. He testified that the other persons who possessed this power were Santos, Tanzola, Baer, and perhaps Earley. In addition to signing corrective action notices, Phillips and Earley joined Baer in signing a notice informing an employee that he was being laid off. (R. Exh. 2.) Phillips was issued a Company credit card that he used for purchases on the Company's behalf.

Contrary to the Company's assertions, the evidence shows that Phillips possessed key primary and secondary indicia of supervisory status.[30] The General Counsel also contends that, apart from the issue of supervisory status, Phillips was an agent of the employer within the meaning of the Act. The Board applies common law principles of agency in making this determination. An employer is responsible for the conduct of an employee if that employee acted with apparent authority with respect to the conduct. Apparent authority results from a manifestation by the employer that creates a reasonable basis for the employee to believe that the employer has authorized the alleged agent to perform the acts at issue. A key aspect of the analysis is whether the employer has used the employee in question as a conduit for transmitting information from management to other employees.[31]

Phillips testified that in addition to attending the weekly production meetings, he would convey decisions made at those meetings to the employees. This is quite significant. In *Ready Mix, Inc.,* 337 NLRB 1189 (2002), the Board noted that it has held that employees were conduits from management

> [W]here they attended daily production meetings with top management, from which they returned to communicate management's production priorities and were the "link" between employees and upper management.

Id., citing *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 428 (1998). Such was the case regarding these foremen.

Phillips also asked Iannaco if he would consent to a voluntary layoff. Both foremen asked the employees if they were available to work overtime. Indeed, counsel for the Company concedes that by asking about overtime, the foremen were "relaying messages from management to the employees." (R. Br. at 23.) Although Earley attempted to minimize his role as a supervisor in his trial testimony, he emphasized his role as a conduit of information. As he put it,

> I work and help keep the guys busy, whatever Mr. Baer gave me to do. I told the guys, I relayed the message. I'm just like a messenger boy. I relay the message, but I also did my job.

(Tr. 501.)[32] I find that, at a minimum, the foremen were regularly used by the Company to serve as conduits of important employment information to the production employees. They passed out work assignments, signed disciplinary notices, inspected employees' work, conveyed management decisions made during the production meetings, and asked employees about their willingness to work overtime or accept temporary layoff. From all this, I conclude that the General Counsel has met its burden of establishing that the foremen, including Phillips, possessed actual and apparent authority to speak on behalf of management regarding work-related questions. See *Mid-South Drywall Co.,* 339 NLRB 480 (2003).

4. The impression of surveillance charge

The General Counsel contends that the Company created an impression that it was engaging in surveillance of the employees' union activities. Specifically, it is asserted that Phillips'

[28] The Board holds that secondary factors should only be considered if primary indicia of supervisory status enumerated in Sec. 2(11) have been found to exist. Compare: *J.C. Brock Corp.,* 314 NLRB 157, 159 (1994), with *McClatchy Newspapers, Inc.*, 307 NLRB 773 (1992).

[29] Earley was offered a similar arrangement, but declined. He testified that he was "not a desk person" and disliked even going into offices. (Tr. 505.)

[30] By not inviting the foremen to their organizational meeting at the pizza restaurant, the employees demonstrated their view that the men were supervisors. In his testimony, one employee, VanNortwick, summarized his reasons for drawing this conclusion by noting that the foremen issued discipline, attended production meetings, and assigned work. The factors he identified are all deemed probative by the Board.

[31] This summary of the Board's standard for analysis of the issue is paraphrased from the recent decision in *D&F Industries,* 339 NLRB 618, 619 (2003).

[32] On the witness stand, Earley conveyed a clear impression that he was (understandably) profoundly grateful to the Company for hiring him and promoting him after the closure of his prior long-term employer who had occupied the same factory complex. His gratitude colored the accuracy of his testimony. Even so, at the same time that he described himself as a mere "messenger boy," he conceded that, as the foreman, he "run[s] the shop for RCC." (Tr. 501.)

discussions with Pohubka and Iannaco about the organizational meeting at the pizza restaurant created this impression of surveillance. (GC Br. at 33.) Having found that Phillips was a supervisor and agent of the Company, it is necessary to evaluate the impact of his conversations regarding the pizza meeting.

The Board has recently described the standard involved in this evaluation, observing that

> In order to establish an impression of surveillance violation, the General Counsel bears the burden of proving that the employees would reasonably assume from the statement in question that their union activities had been placed under surveillance.

Heartshare Human Services of New York, 339 NLRB 842, 844 (2003). The concept underlying the prohibition of this type of employer conduct is that Section 8(a)(1) of the Act protects employees from fear that "members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Fred'k Wallace & Son,* 331 NLRB 914 (2000).

In his conversations with Pohubka and Iannaco on the day after the organizational meeting, Phillips clearly indicated to these employees that he was aware of the meeting. I conclude that his comments would reasonably cause those employees to assume that their union activities had been placed under surveillance. In reaching this conclusion, I note that the Board has not required employees to keep their activities secret before an employer can be found to have created an improper impression of surveillance. *United Charter Service, Inc.,* 306 NLRB 150, 151 (1992). Thus, the fact that other employees may have told Phillips about the meeting does not serve to excuse his statements to Pohubka and Iannaco that suggested surveillance of their attendance at the pizza meeting. In *United Charter Service,* the Board also noted that it was significant that the employees chose to conduct their union business at an off-site restaurant. Id. at 151.

Finally, of decisive importance in these circumstances, I note that Phillips' comments creating an impression of surveillance were made at the same time that he engaged in questioning of the employees regarding the events that transpired at the meeting and the names of other employees who attended. The Board has observed that the context of comments alleged to have created an impression of surveillance is highly probative. In *Flexsteel Industries,* 311 NLRB 257, 258 (1993), it held that comments suggestive of surveillance made in the context of an unlawful interrogation would lead an employee to conclude that his behavior was under observation and would tend to discourage his participation in protected activity. The circumstances presented here are quite similar to those in *Newlonbro, LLC (Connecticut's Own),* 332 NLRB 1559 (2000), where the Board affirmed an administrative law judge's conclusion that an employer had created an impression of surveillance when a manager told an employee that he "understood" that the employee had attended a union meeting. Id. at 1571. In reaching his conclusion that the statement was unlawful, the judge noted that it was coupled with other comments found to constitute an improper interrogation.

Phillips' comments to Pohubka and Iannaco indicating that he knew they had attended the organizational meeting, made during the same conversations in which he asked improper questions about that meeting, created an unlawful impression of surveillance. As a result, the Company violated Section 8(a)(1) of the Act.

5. The discharge of Pohubka

The General Counsel's final unfair labor practice charge embodies the contention that the Company discharged Pohubka because he "supported and assisted the Union." (GC Exh. 1(m).) This is alleged to have violated Section 8(a)(1) and (3) of the Act. In order to evaluate this charge, I must apply the Board's analytical framework set forth in *Wright Line*.[33] This requires that the General Counsel show that Pohubka was engaged in protected activity, that the Company was aware of his activity, and that the activity was a substantial or motivating factor for the decision to terminate him. If the General Counsel fulfills these requirements, the burden shifts to the Company to demonstrate that it would have terminated Pohubka even in the absence of his protected conduct. I will address each factor in turn.

While there is some disagreement about the precise nature and extent of Pohubka's union activity, there is no doubt that he did engage in some forms of protected conduct.[34] Pohubka testified that he began speaking to coworkers about union representation within approximately 1 month after being hired by the Company.[35] It is undisputed that, at a company meeting in April 2002, he raised the issue of union level compensation. Finally, in late September 2002, he testified that in response to VanNortwick's steps to obtain representation by the Union, he escalated his efforts to urge such representation.[36] He reported that he spoke to virtually all of his coworkers in support of this idea. In addition, he attended the meeting at the pizza restaurant and signed an authorization card at that time. I readily conclude that Pohubka engaged in concerted activity of the type that is protected by the Act.

I also find that the Company's management officials were aware that Pohubka supported and was participating in the campaign to secure representation of the employees by the Carpenters Union. Puza, the Company's vice president, confirmed that during a meeting in April 2002, Pohubka raised the issue of union pay for the work being performed at the facility. Thus, shortly after Pohubka was hired, he chose to address management regarding an issue that touched on union representation. It is true that Pohubka indicated that his efforts to per-

[33] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S 393 (1983).

[34] The Company concedes that "Pohubka was engaged in protected activity under the Act." (R. Br. at 32.)

[35] During the same period, Pohubka also claimed to have spoken to Baer, Phillips, and Earley about his interest in the Union. This claim is disputed, and I do not credit it.

[36] Coupled with this testimony, Pohubka again asserted that he also discussed the benefits of union representation with his superiors. They denied such conversations and I have found that their denials are credible.

suade coworkers to support the Carpenters Union were done "a little secretly." (Tr. 186.) On the other hand, Pohubka attended the pizza meeting and was interrogated by his foreman regarding the meeting on the following day. The foreman testified that he was aware that Pohubka had attended this meeting, noting that "lots of people" were talking about the meeting. (Tr. 491.) A probative illustration of the extent of upper management's knowledge about this meeting was given by Santos. He testified that on the day after the pizza meeting an employee asked him if the Company would remain in business. He was perplexed by the question and reported it to Baer. Baer then told him about the Carpenters Union's organizational meeting. Based on the evidence, I conclude that officials at all levels of management were aware of Pohubka's union sympathies and activities, including his attendance at the organizational meeting held by the Carpenters Union.[37]

Having found that Pohubka engaged in protected activities and that his involvement was known by management, I must address the issue of the Company's motivation in reaching the decision to discharge him. In my view, this presents a close question. On balance, I conclude that the General Counsel has shown that Pohubka's support for the Carpenters Union constituted one of several factors in the decision to discharge him.

In his testimony, the Company's owner, Daloisio, went to considerable lengths to demonstrate that he does not harbor antiunion animus. He noted that the family of companies associated with RCC Fabricators has 27 union agreements. He has served as trustee and representative for a variety of union-management organizations. Furthermore, he discussed the issue of union representation with a representative of the Laborers Union very shortly after the Company commenced its operations.

While all of Daloisio's assertions may be accurate, they miss the point. The General Counsel contends, and I find, that Daloisio harbored specific animus against the Carpenters Union's effort to organize this workplace. This is reflected in his vigorous attempts to deflect the employees from this option by presenting the alternative of the Laborers Union. In this connection, he testified that he went so far as to tell the employees that "the Carpenters were more—a little more expensive, in terms of their overall package, than the Laborers Union." (Tr. 355.) Indeed, he noted that the employees told him that the Carpenters were promising wages of $50 per hour. He responded by informing them that the Laborers had shop agreements with some components of the RCC family of companies and generally received between $14 and $17 per hour. He coupled this with the pointed admonition that union representation would not be a problem so long as any resulting agreement was "economically advantageous to keep the company going." (Tr. 50.) His explicit preference for the Laborers was further reinforced by the powerful implicit message conveyed by his direction that the employees be authorized to attend meetings with the Laborers on work premises during working hours.[38] I further infer that Daloisio's strong preference for the Laborers Union was conveyed to his managers in at least as clear a fashion as it was conveyed to the rank and file employees. As a result, it is realistic to find that the desire to thwart the Carpenters' organizational effort formed a factor in the determination to discharge Pohubka, an employee who was active in that organizational effort.[39] I, therefore, conclude that the General Counsel has carried its initial burdens and the focus of the inquiry must shift to assessment of the Company's defense.

In evaluating the Company's defense to this unfair labor practice charge, I have been mindful of the overall context, including the labor-relations history just discussed. By the same token, I have also considered the general background of Pohubka's employment history with the Company as this also provides essential context for assessment of the crucial events regarding his termination. The record strongly demonstrates that he was far from an exemplary employee. There was overwhelming evidence that he was generally seen as an unmotivated worker who was difficult to supervise effectively. For example, Baer testified that Pohubka was not attentive to work tasks and "it was a matter of continually chasing him down, getting him back on the job." (Tr. 411.) In addition, Baer reported that he had "a disrespectful attitude towards the Foremen." (Tr. 411.) Earley testified that Pohubka was "[n]ot a very good worker," that he spent too much time "getting coffee, walking around talking to people," and engaging in loud, cursing speech "[a] couple of times a week at least."[40] (Tr. 522, 526.) Phillips also reported that "sometimes I would spend half a day hunting him." (Tr. 483.) Santos colorfully characterized Pohubka's pattern of lack of attentiveness to his work as being similar to that of "a very slow moving pinball, going side to side in the shop." (Tr. 580.)

I found it noteworthy that the managers' unfavorable overall impression of Pohubka's work attitudes and behavior was echoed by those coworkers who were called upon to comment. For example, Ashcraft testified that he requested not to have to work with Pohubka because,

> He would, you know, walk away and be talking or he would [be] too hard to keep track of. There was like I had to work, you know, I had to do the job of two people then.

(Tr. 623.) Iannaco reported similar behavior by Pohubka. His testimony was impressive since it was obvious that he was uncomfortable in reporting his observations about a coworker.

[37] In this regard, I agree with counsel for the General Counsel's argument that the quantum of evidence showing management's general knowledge about the organizational meeting supports an inference that it knew of Pohubka's specific involvement. See *Montgomery Ward & Co.,* 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996).

[38] While Daloisio eventually agreed to permit a similar meeting with the Carpenters, this was only done as part of a negotiated agreement to facilitate the representation election.

[39] On the other hand, I do not accept the General Counsel's reliance on the timing of Pohubka's discharge as evidence of illegal motivation. Although Pohubka was discharged only 2 days after the pizza meeting, for reasons shortly to be discussed, I agree with counsel for the Company's assertion that "the timing of Pohubka's discharge was dictated by Pohubka and not the Company." (R. Br. at 33.)

[40] Earley's opinion was particularly significant because he gave me the impression that he was a rather mild-mannered individual who was inclined to give others the benefit of the doubt. As a foreman, he was far from being a stickler for perfection.

The overall impression of Pohubka's work history was of an employee whose behavior was characterized by inattentiveness to his duties and a pattern of disrespect for his supervisors, sometimes expressed in a loud and profane manner. Thus, this case does not present the picture of an otherwise exemplary (or even merely satisfactory) employee who is suddenly discharged on the basis of a single alleged infraction. To the contrary, the evidence established that prior to the events immediately preceding his discharge, Pohubka already stood out as a problem employee.[41]

Turning now to the events of October 11, 2002, the day began with Pohubka's late arrival at work. It is undisputed that, although he arrived late, he stopped to get a cup of coffee. I credit the testimony that he then resumed his pattern of wandering in the shop instead of proceeding to obtain a work assignment from his foreman. Baer observed this misbehavior. Rather than imposing any formal discipline, Baer merely expressed his displeasure at Pohubka's conduct and directed him to report to the foreman for assignment of duties. Upon reporting to Phillips, Pohubka elected to revert to his pattern of loud and profane insubordination. He told Phillips that Baer was a fucking asshole.[42] Phillips described what occurred next:

> I said no, Dan, calm down, you know, just stay calm. And, we would, you know, we would go on to work.
>
> Well, he just kept on getting louder and louder and louder and louder and louder. . . . And, he just kept on. And finally, I said "That's it, go to the office." (Tr. 487.)

Upon reporting to Baer, Pohubka continued his insubordinate behavior. In response, Baer terminated his employment.

Counsel for the General Counsel argue that the Company's decision to terminate Pohubka was unlawful since management had acquiesced in Pohubka's pattern of poor performance and behavior until the Carpenters Union's organizational campaign came to a head. The record does not support this conclusion. It will be recalled that VanNortwick first contacted a representative of the Carpenters Union in late September 2002. Almost 3 months before the initiation of such contact, management disciplined Pohubka for conduct and attitude problems that were virtually identical to those displayed on October 11. On that occasion, Pohubka and Mace were discovered to be sleeping on work time. They were simply instructed to make up the lost time at the end of their workday. Mace readily complied and was issued only a warning. An additional notation further softened this warning, noting that he deserved commendation for his compliant response to the discipline. (GC Exh. 4, p. 15.) Unlike Mace, Pohubka responded to the discipline by growing angry, dropping a heavy piece of metal, and resorting to expletives. He was issued a corrective action notice for "[m]isconduct/insubordination" and "[i]adequate work performance." (GC Exh. 4, p. 24.) I find that the supervisors cited inadequate work performance because of his conduct in sleeping on the job. I further find that they cited insubordination due to his refusal to comply with the directive that he make up the lost time and because of his loud and abusive conduct directed at his supervisors.

The corrective action notice issued to Pohubka on July 2, 2002, clearly informed him of the precise nature of the discipline being imposed. The form lists three types of disciplinary sanctions: warning, suspension, and termination. He was informed that the discipline imposed at that time consisted of both a warning and a suspension. It was apparent from the manner in which the form was completed that the only remaining sanction was termination. Despite this, less than 4 months later, Pohubka committed essentially identical disciplinary infractions. As in July, he was observed to be avoiding work during his scheduled work time. When the shop superintendent attempted to impose the mildest of discipline, simply ordering him to obtain a work assignment, Pohubka responded by engaging in loud and profane disparagement of the manager. It was a clear repetition of the same types of misconduct for which he had been sanctioned by all steps short of termination in July. Therefore, I find it logical, consistent, and reasonable that the resulting sanction in October consisted of his termination. In other words, I conclude that the Company would have terminated Pohubka for this recidivist pattern of severe misconduct regardless of his participation in the Carpenters Union's organizational campaign.[43]

To summarize, I find that the General Counsel established that Pohubka engaged in protected, concerted activity and that his participation in such activity was known to management officials. Additionally, I infer that Pohubka's involvement in the Carpenters Union's organizational effort formed one of the factors in his discharge. Finally, I determine that the Company has proven by preponderance of the credible evidence that Pohubka's poor work performance, including his loud and profane insubordination, would have resulted in a decision to terminate

[41] For this reason, counsel for the General Counsel's reliance on *Naomi Knitting Plant,* 328 NLRB 1279, 1283 (1999), is inapposite. The Board described the discharged employee in that case as having a "good employment record" and no history of prior discipline. As a result, the context in which the events occurred was quite different.

[42] The Board has recently sustained the discharge of an employee for engaging in workplace profanity of this type. In *Aluminum Co. of America*, 338 NLRB 20 (2002), the employee engaged in a "tirade" during which he referred to "chicken s– bosses" and supervisors who were "mother f—kers." Id. at 21. The Board found that such profane speech was not protected within the meaning of the Act, and that application of the analysis required by *Wright Line* was unnecessary. The parties have not suggested that *American Aluminum* should govern the result in this case. Given that the events here took place during an organizing campaign, I have applied the *Wright Line* analysis with its requirement that employer motivation be assessed. Nevertheless, I certainly recognize that in *American Aluminum*, the Board has condemned the sort of profane workplace speech indulged in by Pohubka.

[43] In this regard, my ultimate conclusion mirrors that of the Appeals Examiner for the New Jersey Department of Labor who concluded that Pohubka's "actions in shouting and acting in an insubordinate manner . . . were the cause of [his] discharge." (Appeals Tribunal Decision, p. 2.) I recognize that the Department of Labor's decision may not reflect knowledge of the larger context. However, while the labor-relations portion of that context raises concern regarding management's motivations, the full history of Pohubka's employment by the Company provides compelling support for the conclusion that he was terminated for insubordinate behavior. Overall, the context reinforces the accuracy of the Appeals Examiner's characterization of what occurred.

his employment regardless of his union sympathies and activities. As a result, the Company did not commit any violation of the Act in terminating his employment.

III. THE CHALLENGED BALLOTS

On November 21, 2002, a representation election was held. Sixteen ballots were cast. Six bargaining unit members voted for the Carpenters Union as their representative. Five voted against any union representation. Nobody voted for representation by the Laborers Union. Three ballots were challenged administratively since those voters' names did not appear on the list of eligible voters. In addition, the Carpenters Union challenged the ballots of two voters, contending that they were not proper members of the bargaining unit. As is apparent, the disposition of these ballot challenges could be determinative of the election result.

The five challenged ballots fall into three categories. One ballot was challenged because the individual did not appear on the list of eligible voters since he had previously been terminated from employment. The eligibility of two voters is challenged due to the contention that, as shop foremen, they are statutory supervisors. Two ballots are challenged because the voters did not appear on the list of eligible employees since they had been laid off. I will address each of these issues in turn.

A. The Discharged Employee's Ballot

Daniel Pohubka cast one of the challenged ballots. If, as the General Counsel contended, Pohubka's discharge had been unlawful under the Act, then he would have retained the status of an eligible member of the bargaining unit. For reasons already discussed, I have concluded that Pohubka's discharge was lawful. As a result, he was no longer employed by the Company and was ineligible to vote in the election. I will recommend that the challenge to his ballot be sustained.

B. The Ballots Cast by the Foremen

The Company's two shop foremen, Phillips and Earley, cast ballots in the election. The Union challenged their ballots on the basis that they are supervisors within the meaning of the Act and are not properly included in the bargaining unit.[44] I have already engaged in extensive analysis of the issue of Phillips' supervisory status since resolution of this question was required in order to adjudicate alleged unfair labor practices. Having found that Phillips possessed the power to assign and discipline employees and was required to exercise independent judgment while doing so, I have concluded that he was a supervisor within the meaning of the Section 2(11) of the Act. As a consequence, I will recommend that the challenge to his ballot be sustained.

The issue of Earley's status has not yet been resolved. In grappling with this question, I note at the outset that there was general agreement that Phillips and Earley had the same job. Phillips was the shop foreman for the railroad component portion of the facility and Earley was the shop foreman for the structural steel side of the operation. As Earley put it in his testimony, he and Phillips were "even," meaning that, "I would be a foreman as much as he was a foreman." (Tr. 541.) Both Puza and Santos confirmed that the two foremen possessed the same responsibilities. Bargaining unit members who were asked to comment expressed the same conclusion. Therefore, the record fully supports counsel for the Company's characterization as follows:

> Earley performed the majority of his work on the structural steel side of the RCC Fabricators facility. Phillips performed the majority of his work on the railroad side. However, at all relevant times, they performed the same work and had the same functions and responsibilities. [Citations to the transcript are omitted.]

(R. Br. at 12.) For this reason, I have considered the material portions of the record pertaining to Phillips' status in evaluating Earley's eligibility to vote.[45]

I have earlier noted when evaluating Phillips' status that Puza testified that he had written job descriptions for Phillips and Earley. Despite this testimony, the Company failed to introduce these documents. As with Phillips, I draw the inference that this failure to present documentary evidence uniquely within the possession of the Company means that Earley's job description would tend to show that he possessed the type of authority contemplated by the definition of supervisory status contained in the Act. This conclusion is reinforced by consideration of the job description prepared for Baer. That document noted that the shop foremen were "in charge of" the Company's two production processes. (R. Exh. 3.) Such language is also suggestive of the possession of the degree of authority required by the Act. I have also noted that the Company's assertions regarding the foremen's status must be viewed with reservations since management officials attempted to manipulate the evidence in support of their position. Such manipulation directly involved Earley's status. It will be recalled that Earley was initially excluded from attending the organizing meeting conducted by the Laborers Union. This position was abruptly reversed and management authorized Earley to attend the meeting. I conclude that this was done because it was perceived that his participation in the bargaining unit would convey a tactical advantage even though it was initially clear to the higher managers that he was a supervisory employee. Thus, circumstantial evidence and the associated inferences support a conclusion that the Company's position is not credible and that the foremen were, in fact, statutory supervisors.

Turning to the direct evidence, I have found that, as a shop foreman, Phillips possessed the power to assign and discipline employees. He exercised independent judgment while performing these functions. The same is true of Earley. Employees testified that Earley made job assignments related to the structural steel manufacturing process. For example, Iannaco testified that Earley gave out such assignments a couple of times

[44] Although the shop foremen had been included in the description of the bargaining unit written before the election, the parties agreed that the Carpenters Union remained entitled to challenge the inclusion of the foremen. (Tr. 393–395, 463–464.)

[45] It also follows that, where appropriate, I have considered the evidence regarding Earley in determining that Phillips was a supervisor within the meaning of the Act.

each day. VanNortwick reported that Earley gave out assignments and monitored his work. He also solicited overtime from VanNortwick. VanNortwick summarized his view of Earley's power to assign work by observing that, "Once we finished a project, we would either find Bud [Phillips] or Butch [Earley] to see what needed to be done next, and then they would assign you to the next task." (Tr. 338.) Baer also confirmed that Earley formed a part of the troika that met regularly to determine job assignments. He also attended and was an active participant in the weekly production meetings where important decisions were reached. I conclude that Earley had the authority to assign work.

As to the issue of exercise of independent judgment in making work assignments, I find that the evidence of the exercise of such discretion is even better established than in the case of Phillips. This is so because Earley ran the structural steel operation. He testified that this was the more difficult of the two operations and involved more potential hazard to employees due to the dangers involved in moving heavy pieces of steel. As a result, it is evident that the assignment process required exercise of a highly significant degree of independent judgment in order to assure safe and efficient operations.

Like his counterpart Phillips, Earley also possessed the power to discipline employees. In reaching this conclusion, I note that the evidence is virtually identical to that discussed with reference to Phillips. In particular, consideration of the documentary evidence shows that Earley signed substantial numbers of corrective action notices and, for reasons discussed earlier in this decision, I have concluded that he signed those notices as a participant in the tripartite disciplinary decision-making process.[46]

One further matter requires comment. I have already noted that I credit Phillips' expansive view of the nature of his duties and authority. In large measure, this is due to his independent status after having left the Company's employ. He does not appear to have any remaining interest in maintaining a relationship with the employer or employees.[47] By contrast, since Phillips' departure, Earley has assumed the status of sole foreman in charge of both sides of the Company's production processes. In addition, his testimony clearly demonstrated that his loss of prior long-term employment and rescue through employment by this employer has inspired deep feelings of loyalty and gratitude. I conclude that these emotions have affected his objectivity in describing his role as foreman. As a result, I do not credit his testimony that his duties were limited to those of a mere "messenger boy." (Tr. 501.) Nor do I credit his other attempts to support his employer's position in this litigation by minimizing his duties and authority as shop foreman. Indeed, the reliability of his assessment is directly undercut by his own recognition that, as foreman, he "run[s] the shop for RCC." (Tr. 501.) For these reasons, I place greater reliance on Phillips description of the foreman position that he shared with Earley.

Because Earley's duties as shop foreman included the authority to assign and discipline employees and required the exercise of independent judgment in so doing, I find that he is a supervisor within the meaning of the Act. As a result, he is not properly included in the bargaining unit and I shall recommend that the challenge to his ballot be sustained.

C. The Ballots Cast by Laid-Off Employees

In September 2002, the Company hired two brothers, Maurice and George Lopez.[48] These men were laid off on October 22. The men cast ballots in the November 21 election. Their ballots are challenged administratively since their names did not appear on the list of eligible voters. (Jt. Exh. 1.) The Union asserts that their ballots should be counted because the layoff was temporary and the men possessed a reasonable expectation that they would be recalled to work in the foreseeable future. The Company disputes this, arguing that the men were terminated from employment and had no such reasonable expectation of regaining employment in the foreseeable future.

The legal standard for assessment of this issue is clear. As the Board has put it,

> The voting eligibility of laid-off employees depends on whether objective factors support a reasonable expectancy of recall in the near future, which establishes the temporary nature of the layoff. The Board examines several factors in determining voter eligibility, including the employer's past experience and future plans, the circumstances surrounding the layoff, and what the employees were told about the likelihood of recall.

Apex Paper Box Co., 302 NLRB 67, 68 (1991).[49] I will now address these factors.

As RCC Fabricators is in its corporate infancy, the Company has had no prior layoffs. As a result, there can be no evidence regarding the employer's past experience with such events. In *Sol-Jack Co.,* 286 NLRB 1173, 1174 (1987), the Board made a passing reference to the absence of a prior history of layoffs as constituting an objective factor arguing against a reasonable expectancy of recall. Absent a clearer exposition of this less than self-evident concept, it would appear to me that the Company's lack of history or policy regarding layoffs is simply a neutral factor.[50]

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[46] There is one exception, the corrective action notice that Earley annotated by noting that he was merely signing as a witness. (GC Exh. 4, p. 28.) The old adage that an exception sometimes proves the rule applies to this document.

[47] It will be recalled that Phillips came to New Jersey from his home in North Carolina in order to work for the Company. Having severed this tie, he has no evident connection to any of the persons associated with this case.

[48] For clarity, I will sometimes refer to the two men by their first names.

[49] These standards have been reiterated very recently in *MJM Studios of New York, Inc.,* 338 NLRB 980 (2003), and *Laneco Construction Systems,* 339 NLRB 1048 (2003). In *MJM Studios,* it was also noted that the determination of eligibility is based on the circumstances as of the payroll eligibility date and the date of the election, with the burden of proof placed on the party seeking to exclude the challenged individuals. Id. at 980.

[50] As the Sixth Circuit has observed in the case of a company with no prior history of layoffs, "Of course, the absence of a prior policy of recalling laid-off employees does not prove that they did not have a reasonable expectancy of recall. Thus, we must focus our attention on other factors." *NLRB v. Seawin, Inc.,* 248 F.3d 551, 555 (6th Cir. 2001).

I will now address the evidence regarding the circumstances of the layoff. Baer testified that the Lopez brothers were hired in order to meet increased staffing needs for a job involving the production of rail cars for the Port Authority. Although this contract had been awarded to the Company, the Port Authority subsequently "pulled it" due to lack of funds. (Tr. 421.) Baer continued by noting that the Company kept the brothers on the payroll for a week by giving them duties such as sweeping the shop floor. This was done because the Company was "trying to hold on as long as we could." (Tr. 117.) After a week, it was apparent that there was no work for the men and "we had to lay them off." (Tr. 117.) There is no evidence to suggest that the men were laid off for any reason other than an unanticipated loss of business. The Board treats this factor as evidence cutting against a reasonable expectancy of recall. See *Heatcraft,* 250 NLRB 58 (1980), and *Osram Sylvania, Inc.,* 325 NLRB 758 (1998). Indeed, relying on these Board decisions, the Sixth Circuit observed that evidence of a downturn in orders and loss of customers "compellingly" indicates that laid-off employees lacked a reasonable expectancy of recall. *NLRB v. Seawin, Inc.,* 248 F.3d 551, 555–556 (6th Cir. 2001). I find that the reason for the layoff, the unexpected loss of the contract that had justified the workers' hiring, supports a conclusion that there was no reasonable expectancy of recall.

The remaining factors to be considered involve the evidence of the employer's future plans and what the employees were told about the likelihood of recall. The evidence regarding these factors is intertwined and it is appropriate to address the factors together. Baer testified that on October 22, he intended to personally inform both men of the layoff. Unfortunately, George was not at work, having been required to attend to a matter in court. As a consequence, Baer met with Maurice alone. He testified that he told Maurice that both men had been satisfactory employees. Maurice confirmed that Baer indicated that the layoff was solely due to work being "slow." (Tr. 314.) Both men agree that Baer also made some statements indicative of a desire to hire the men in the future. Baer reported that he probably said that "I hoped things did pick up, and if they did we'd consider using them again." (Tr. 118.) Later in his testimony he amplified this, indicating that he told Maurice that "if, or when work picked up, you know, I'd see what we could do about calling them back." (Tr. 424–425.) Maurice described Baer's remarks as indicating that the layoff "was just going to be temporary; I wasn't going to be fired; and that, you know, just call him up to see if there was any job available." (Tr. 314.) Later in his account, Maurice seemingly contradicted this description. At that point, he testified that Baer told him that "as soon as he gets more jobs, he was going to call me." (Tr. 319, 321.)

There is one additional item of evidence that sheds light on what transpired during the conversation between Baer and Maurice Lopez. Both men agree that Baer asked Maurice to sign a form documenting the layoff.[51] The form noted that the presenting problem was that Maurice's "[s]ervices are no longer required due to lack of work." This explanation was handwritten on the form. Using a checklist, the form went on to advise him that it was to be considered as notice of "[t]ermination." (R. Exh. 2.) Maurice Lopez, Baer, Phillips, and Earley signed the form. In his testimony, Maurice disputed that the checklist designation for termination had been marked when he signed the form. However, he conceded that he did recall the language regarding lack of work being written on the form. I find that both of these items were on the form as tendered to him. It is natural that his attention would be directed to the handwritten notation on the form rather than to the checkbox at the bottom of the document. There is nothing to suggest that the Company's officials have altered the appearance of the form after it was signed.

After this meeting, Maurice told George that they had been laid off. George testified that Maurice told him the reason for the layoff was that "there was no more work for us." (Tr. 308.) Several days later, George telephone Baer who told him he was sorry about the layoff. This was the extent of their conversation. Maurice testified that for approximately 2 months he continued to call the Company regarding return to employment. During these conversations, he was never given any indication that he would be called back to work. After 2 months, he found new work and stopped calling.

In resolving the disputes regarding this matter, I generally credit the Company's version. Baer's account is supported by the documentary evidence showing that Maurice Lopez was given a written explanation that he was being terminated from employment due to lack of available work. There is no doubt that Baer expressed a desire to consider the brothers for future employment. The Board has realistically noted that such expressions are common in this type of unfortunate situation and reflect a desire on the part of the bearer of ill tidings to soften the blow. Thus, the Board has held that a supervisor's "equivocal statement" of this sort "expresses a possibility more likely expressed to lend hope to the laid-off employee than to give a realistic assessment of his being recalled to work." *Sol-Jack Co.*, supra at 1174. As a result, such statements do not provide an adequate basis for a finding of reasonable expectancy of recall. Such is the situation here. Even if Baer made the statements in the precise manner attributed to him by Maurice Lopez, they were merely expressions of vague hopefulness and cannot be seen as constituting any indication of a return to employment in the foreseeable future.

Considering the factors outlined by the Board, I conclude that the Company has carried its burden of establishing that the circumstances of the layoff, the evidence regarding the Company's future plans, and the statements made to the laid-off employees failed to create any reasonable expectancy of recall. As the Board said in its leading case,

> In the absence of evidence of past practice regarding layoffs, where an employee is given no estimate as to the duration of the layoff or any specific indication as to when, if at all, the employee will be recalled, the Board has found that no reasonable expectation of recall exists.

Apex Paper Box Co., supra at 69. That is the situation here. Accordingly, I find that George and Maurice Lopez could not

[51] The form employed was the corrective action notice. Although not really appropriate to the situation, the form was used since the Company lacked a layoff form.

have had a reasonable expectation of recall to employment in the foreseeable future. As a result, I must recommend that the challenges to their ballots be sustained.

CONCLUSIONS OF LAW

1. By interrogating employees regarding their protected, concerted activities and the protected concerted activities of other employees, the Company violated Section 8(a)(1) of the Act.

2. By creating an impression that employees' protected, concerted activities were under surveillance, the Company violated Section 8(a)(1) of the Act.

3. The Company did not violate the Act in any other manner alleged in the complaint.

4. Having been lawfully discharged from employment, Daniel Pohubka was not eligible to vote in the representation election held on November 21, 2002. The challenge to his ballot should be sustained.

5. Having been laid off without reasonable expectation of recall in the foreseeable future, George and Maurice Lopez were not eligible to vote in the representation election held on November 21, 2002. The challenges to their ballots should be sustained.

6. James Phillips and Ronald Earley were supervisors within the meaning of Section 2(11) of the Act. As a result, they were not eligible to vote in the representation election held on November 21, 2002. The challenges to their ballots should be sustained.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I conclude that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that the Company be ordered to post notices in the usual manner.

Having found that none of the challenged ballots should be counted, I recommend that an appropriate Certification of Results of Election be issued.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[52]

CERTIFICATION OF REPRESENTATIVE

It is certified that a majority of the valid ballots have been cast for Piledrivers Local 454 a/w Metropolitan Regional Council of Carpenters, Eastern Pennsylvania, State of Delaware and Eastern Shore of Maryland, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit:

> All full time Layout Men, Machinists, Mechanics, Shop Laborers, Welders, and Welders/Fitters employed by the Employer at its 2035 State Highway 206 South, Southampton, New Jersey facility, but excluding all other employees, including clerical employees, guards, and supervisors as defined in the Act.

ORDER

IT IS ORDERED that the Respondent, RCC Fabricators, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees regarding their union sympathies or their participation in protected concerted activities or regarding the union sympathies or participation in protected, concerted activities of other employees.

(b) Creating an impression that its employees protected concerted activities are under surveillance.

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

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

(a) Within 14 days after service by the Region, post at its facility in Southampton, New Jersey, copies of the attached notice marked "Appendix."[53] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 10, 2002.

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

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

APPENDIX

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

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

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support and activities or the union support and activities of other employees.

WE WILL NOT create an impression that your union activities are being placed under surveillance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

RCC FABRICATORS, INC.

Henry R. Protas, Esq. and *Ann Marie Cummins, Esq.,* for the General Counsel.

John H. Widman, Esq. and *Amy Niedzalkoski, Esq.,* of King of Prussia, Pennsylvania, for the Respondent.

Stephen J. Holroyd, Esq. and *Richard C. McNeill, Jr., Esq.,* of Philadelphia, Pennsylvania, for the Charging Party.[1]

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on April 8 and 10 and May 15, 2003. An unfair labor practice charge had been filed on November 25, 2002, and an amended charge was filed on January 28, 2003. The complaint was issued on February 19, 2003.

In addition to the unfair labor practice allegations, this case involves issues arising from representation proceedings. On October 25, 2002, the Metropolitan Regional Council of Carpenters, Eastern Pennsylvania, State of Delaware and Eastern Shore of Maryland filed a petition for certification as collective-bargaining representative of certain employees of the Company.[2] Six days later, the Construction and General Laborers Union Local 172 of South Jersey filed a similar petition.[3] The Regional Director consolidated these petitions on October 31, 2002.

A representation election was held on November 21, 2002. Sixteen votes were cast. Six votes favored the Carpenters, five votes were against any union representation, and no votes were cast in favor of the Laborers. Five ballots were challenged, a potentially determinative number. On March 6, 2003, the Regional Director issued an order consolidating the ballot challenges and the unfair labor practice allegations and scheduling the hearing. After that hearing, on October 23, 2003, I issued a decision setting forth my resolution of each of the issues arising in the unfair labor practice and representation portions of the proceedings. *RCC Fabricators, Inc.,* 348 NLRB 56 (2006).

As to the unfair labor practice portion of the case, the General Counsel alleged that an admitted supervisor told an employee that the Company would close if the employees selected a union as their bargaining representative. It was also alleged that a foreman, James Phillips, interrogated employees regarding their union activities and created an impression that union activities were under employer surveillance. That foreman was asserted to be a supervisor and agent of the Company. Finally, the General Counsel contended that the Company discharged an employee, Daniel Pohubka, because of his involvement in union activities. The Company filed an answer, denying the material allegations of the complaint, including the contention that the foreman was a supervisor and agent.

In my decision, I concluded that the General Counsel had failed to prove that a supervisor threatened closure of the Company if employees selected union representation. I recommended dismissal of that charge. Similarly, I recommended dismissal of the charge that the Company's firing of employee Pohubka was unlawful. Specifically, while I found that Pohubka's involvement in union activities was a factor in the decision to terminate his employment, his poor work performance and insubordination would have caused the Company to discharge him regardless of his involvement in those union activities. No exceptions to these recommendations for dismissal were filed.

The General Counsel alleged that Phillips was a supervisor and agent of the Company and that he had unlawfully interrogated certain employees and created an impression that union activities were under surveillance by the Company's officials. I determined that Phillips was both a supervisor within the meaning of the Act and an agent of the Employer. I further found that his conduct constituted unlawful interrogation and the creation of an improper impression of surveillance. The Company filed exceptions to these findings and conclusions.

The representation issues involved in this case concerned challenges to five ballots, any one of which could be determinative of the outcome of the election. The Board agent challenged 3 ballots because those voters' names were not found on the Excelsior list.[4] One of these prospective voters was Pohubka. His eligibility to vote depended on the outcome of my resolution of the unfair labor practice allegation that he was wrongfully terminated from employment due to his union activities. Since I found that he had been lawfully discharged, I sustained the challenge to his ballot. The remaining two prospective voters challenged by the Board agent were employees who were laid off prior to the election. The Union contended that these employees enjoyed a reasonable expectation of returning to work in the foreseeable future. The Company denied that such an expectation existed. Because I agreed with the Company's assertion that the evidence established that there was no reasonable expectation of such a return to employment, I sustained the challenge to these ballots. No exceptions were

[1] Listed are the attorneys who participated in the original trial and in this remand proceeding.

[2] This is Case 4–RC–20569. As the Carpenters were the only labor organization that participated actively in this case, I will refer to them where appropriate as the "Union."

[3] This is Case 4–RC–20572. The Laborers Union did not participate in this case, either through counsel or otherwise.

[4] *Excelsior Underwear,* 156 NLRB 1236 (1966).

filed to my determinations regarding the 3 ballots challenged by the Board Agent.

The remaining issue forms the heart of the matters that must be resolved in this supplemental decision. The Union challenged the ballots of the two shop foremen, James Phillips and Ronald Earley, contending that they were supervisors within the meaning of the Act. The Company disputed this characterization of their status. Having concluded that the foremen were statutory supervisors, I recommended that the challenges to their ballots be sustained. The Company filed exceptions to these recommendations.

On September 30, 2006, the Board issued an Order remanding the matter to me for further analysis. RCC Fabricators, Inc., supra. As explained in the Board's Order, the remand is designed to permit an assessment of the impact of the Board's recent trilogy of decisions addressing a number of issues arising from the Act's exclusion of supervisors from the scope of its coverage. Specifically, I was directed to engage in, "further consideration in light of Oakwood Healthcare, Croft Metals, and Golden Crest."[5]

As part of the remand order, the Board required that I evaluate the need for any reopening of the evidentiary record and that I afford the parties an opportunity to file briefs. I solicited the views of all counsel regarding both of these matters. Their written responses indicated that they each wished to file briefs.[6] Counsel for the Company sought to submit one additional item of documentary evidence. This was identified as Joint Exhibit 2 and was accompanied by a written stipulation signed by all counsel. By order dated November 22, 2006, I received it into evidence. As indicated in their respective letters, no counsel sought to reopen the record for the production of any other evidence or testimony. Having considered the existing record and the parties' arguments, I similarly conclude that it is not necessary to reopen the record to obtain any further evidence. Finally, I granted the parties time to file briefs, and those briefs have now been received.[7]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following supplemental[8]

FINDINGS OF FACT

I. THE PERTINENT BACKGROUND

In my original decision, I described events relevant to all of the issues presented in both the unfair labor practice and representation proceedings. Given the considerably narrower focus of inquiry on remand, it is useful to provide a revised factual narrative directed specifically toward the issues concerning the status of the two foremen.[9] In so doing, I found it interesting to note that when attention is directed to this particular question of the foremen's status, certain facts assume a greater significance than appeared to be the case originally. For example, in my prior decision, I tended to scrutinize the circumstances of Pohubka's discharge from the primary viewpoint of whether the Employer had acted lawfully in terminating his employment. With this question now resolved, it has been useful to reexamine the events involving Pohubka to determine what they demonstrate regarding the powers and duties of the foremen. Similarly, the previous focus regarding the layoff of Maurice Lopez was on the reasonableness of his expectation of a return to employment. Now, I have examined these events with an eye toward what may be revealed regarding the supervisory powers of the foremen. Like a ray of the sun seen through a prism, certain facts that were previously viewed in one light may now be reexamined from another angle to provide a clearer vision of the proper resolution of the questions presented on remand of this case.

At the outset, it is useful to note that at the time of these events, the Company, RCC Fabricators, Inc., was a new offspring of a set of venerable corporate ancestors. The Company's owner, Alphonso Daloisio, Jr., testified that the firm's acronym is an abbreviation for "Railroad Construction Company." The original company with that name was founded by Daloisio's grandfather in 1926. Although the initial nature of the business was confined to the railroad industry, over time the extent of the business activities grew to include road, bridge, and site work, as well as, building construction. As the scope of activities developed, the operations expanded into what is now termed the RCC Family of Companies.

Among the entities included in the RCC Family of Companies was a firm known as RCC Materials and Equipment, located in Lexington, North Carolina. That company was owned by Daloisio and his brother, James. It manufactured railroad equipment. Among its employees was James Phillips. It is undisputed that Phillips' job title while employed at RCC Mate-

[5] *RCC Fabricators, Inc.,* supra, slip op. at 1, citing *Oakwood Healthcare*, 348 NLRB 686 (2006); *Croft Metals,* 348 NLRB 717 (2006); and *Golden Crest Healthcare Center,* 348 NLRB 727 (2006).

[6] By letter dated December 26, 2006, counsel for the Union joined in most aspects of the General Counsel's brief. I will discuss the one aspect of the case about which the Union parts company with the General Counsel's position at the appropriate point in this decision.

[7] Due to the procedural posture of this case, the General Counsel and the Company have each filed a number of briefs. When citing from some of those briefs, I have abbreviated their titles as set forth parenthetically: Counsel for the General Counsel's Brief [to the Administrative Law Judge] (GC Br. ALJ); Answering Brief of Counsel for the General Counsel to Respondent's Exceptions (GC Ans. Br.); Counsel for the General Counsel's Supplemental Brief [on Remand] (GC Br. Rem.); Posthearing Brief of RCC Fabricators, Inc. (R. Br. ALJ); Respondent RCC Fabricators, Inc.'s Brief in Support of its Exceptions to the Decision of the Administrative Law Judge (R. Br. Ex.); and Brief on Remand of RCC Fabricators, Inc. (R. Br. Rem.).

[8] I have not addressed those issues resolved in my original decision that were not the subject of any exceptions.

[9] I do not mean to suggest that I have altered my conclusions regarding the facts of this case. My review of the evidentiary record, including the additional items submitted by counsel for the Company, persuades me that the factual narrative in my original decision was accurate. The revisions that I am referring to concern the desirability of restating only those facts that bear on the remand topics and presenting them in a manner more highly focused on resolution of those more limited issues.

rials and Equipment was "Team Leader/Supervisor."[10] (Jt. Exh. 2, pp. 1 and 2.)

Daloisio reported that by the fall of 2001, it became apparent that RCC Materials and Equipment was not proving to be a profitable enterprise. In consequence, it was decided to close the North Carolina facility and combine its production work with a steel fabrication operation that was intended to supply the building component of the RCC Family of Companies. It was decided to locate this new entity in New Jersey. A facility suitable for the manufacture of both railroad equipment and structural steel components for the building industry was obtained in Southampton and RCC Fabricators, Inc., was launched.

In order to meet some of the new company's staffing needs, certain veteran employees of the North Carolina facility were recruited for operations in New Jersey. Among these persons were two who figure prominently in this narrative, Phillips, and Carl Baer. Baer became the shop manager for the Company. Daloisio testified that Phillips was initially hired during the period when the Company organized itself and took the steps needed to become ready to begin production. Although he was not given a formal title at that time, Daloisio testified that he came to New Jersey to take the "same position that he had" in North Carolina. (Tr. 42.) Daloisio went on to explain why Phillips was valuable and also why he was not initially given any sort of formal job title, noting that,

> his expertise was mainly in handling a lot of the equipment, the wiring, the mechanics. He was an excellent mechanic. He could weld. He basically was a jack of all trades, and, you know, came up with the other gentlemen [from North Carolina]. I honestly don't think there was a [job] title associated that I can think of, that was associated with any one of the three of them, to be perfectly honest. I don't have any title on my business card. I'm not big with titles.
>
> (Tr. 42.)

In November 2001, the new company began production. Baer reported that at that time Phillips was formally appointed as shop foreman. He further testified that this was, "basically the same position that he was given in North Carolina." (Tr. 404.) During the following month, the Company hired Ronald Earley as a welder and fitter. He had extensive prior experience, having risen from laborer to foreman in the defunct company that had been the prior occupant of the Southampton plant. Less than a year after he was hired, Earley was promoted to be the second shop foreman.[11] At the time of his promotion, the respective areas of responsibility for the two foremen were established. Phillips would be the foreman for the department of the shop that produced railroad equipment and Earley would hold the same position for the structural steel operation. In turn, both men reported to Baer.

It is undisputed that the two shop foremen were co-equals. As Earley put it, he was told by the Company's vice president, Dave Puza, that, "me and Bud [Phillips] would be even. I would be a foreman as much as he was a foreman."[12] (Tr. 541.) This was confirmed by Santos, who indicated that both men had the same job, "just [in] two different areas of the manufacturing process." (Tr. 560.)

It is now appropriate to examine the record in order to develop an understanding of the powers, duties, and functions of the shop foremen. There are two types of evidence that bear on this subject, the testimony of management officials, employees, and the foremen themselves, and the documentary evidence created and maintained by the Company.[13]

Turning first to the rather basic question of job title, the record is more complicated than one might expect. This most likely stems from Daloisio's admitted aversion to such structural formalities as job titles. The result was perfectly illustrated by Phillips' response to counsel for the General Counsel's inquiry as to his job title:

> Leadman, foreman, you know, I mean you could call it leadman, foreman, supervisor, whatever you wanted to call it.

[10] Examination of the newly-submitted exhibits provided by the Company confirms that Phillips' job title at RCC Materials and Equipment is undisputed. Frank Santos, the Respondent's lead controller, testified that Phillips prepared a resume which his wife submitted to Santos. (Jt. Exh. 2, p. 1.) In this document, Phillips listed his job title as "Team Leader/Supervisor." (Jt. Exh. 2, p. 1.) Santos testified that he made certain revisions as shown in the second version. (Jt. Exh. 2, p. 2.) The Company then used the revised edition when preparing "prequalification statements" for job proposals. (Tr. 601.) In Santos' revised version, Phillips continues to be shown as "Team Leader/Supervisor." (Jt. Exh. 2, p. 2.) From this, it is evident that his possession of the job title of "Team Leader/Supervisor" is not in dispute.

[11] At this point, it is worthwhile to note that both foremen were often referred to by their nicknames. Phillips was known as "Bud," and Early was called "Butch."

[12] Puza's testimony supported Earley's account. He characterized the responsibilities of Phillips and Earley as being the "same." (Tr. 651.)

[13] In his brief in support of exceptions to my original decision, counsel for the Company contends that it was error for me to accord significant probative weight to the documentary evidence. (R. Br. Ex., pp. 14–15.) He correctly notes that the Board has always cautioned against mechanical reliance on job descriptions or titles. Thus, the Board recently reaffirmed its position that it is error to give such documents "controlling weight." *Avante at Wilson, Inc.,* 348 NLRB 1056, 1057 (2006), and *Golden Crest Healthcare Center,* 348 NLRB 727, 731 (2006). It is important to note that the context for these admonitions is one where the employer asserts that supervisory status exists based on job descriptions but fails to adduce evidence showing actual possession of such supervisory authority. See *Golden Crest*, supra at 731 ("Board insists on evidence supporting a finding of actual as opposed to mere paper authority.") Nothing in this line of cases suggests that company-issued job descriptions or titles are irrelevant. It is obvious that such documentary evidence easily meets the test of "having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Indeed, the Board quoted extensively from the "Employer's written job bid descriptions" in assessing supervisory status in *Croft. Croft Metals,* supra at 717, 719. Furthermore, it is perhaps ironic to observe that counsel for the Company quoted the Board's citation to that job description from *Croft* when making an argument in his brief on this remand. (R. Br. Rem., p. 9.) To the extent that it is corroborated by other evidence of actual conduct and behavior, I have accorded significant value to the Company's own documentation regarding job descriptions and job titles.

(Tr. 139.) What is interesting about this rather diffuse formulation is that it mirrors the language employed by Santos in the Company's own version of Phillips' resume utilized to impress prospective customers with the qualifications of its foreman. In that document, Phillips is referred to as a "Team Leader/ Supervisor" for the "RCC Family of Companies."[14] (Jt. Exh. 2, p. 2.) The common thread here is the use of the term "supervisor" to characterize his role.

Another indication of the scope of the foremen's role in operating the facility is found in the written job description of their immediate supervisor, Baer. Among Baer's enumerated duties was the requirement that he, "[s]upervise shop operations and provide direction to the two Shop Foremen in charge of equipment and steel fabrication."[15] (Tr. 419.) As with the use of the term "supervisor," the choice of the phrase "in charge of," while not dispositive, is certainly suggestive of the Company's expansive view of the scope of the foremen's responsibilities.

There is a third item of documentary evidence; one that poses quite a conundrum in this case. Puza, the Company's vice president, clearly testified that he "wrote the job descriptions" for the foreman positions occupied by Phillips and Earley. (Tr. 651.) The existence of such a document or documents is supported by Baer's testimony regarding the existence of a job description for his own position as superintendent. Furthermore, counsel for the Company conceded that "Puza wrote the working foreman job description." (R. Br. ALJ, p. 12.) It is difficult to imagine the existence of a piece of documentary evidence that would be more probative on the issue of supervisory status than the Company's own written description of the duties and responsibilities of the foremen. Nevertheless, the document was never offered into evidence during the trial.

In my original decision, I drew adverse inferences against the Company based on its failures to produce Phillips' resume prepared by Santos and the foremen's job description prepared by Puza. I noted that the Board has long held that the failure to produce evidence in the possession of a party that may reasonably be assumed to be favorable to its position raises an adverse inference. I cited Board decisions to this effect, including the Board's reliance on language from a treatise noting that

> where relevant evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may draw an inference that such evidence would have been unfavorable to him.

Martin Luther King Sr. Nursing Center, 231 NLRB 15 fn. 1 (1977).

In its brief in support of exceptions to my decision, the Company mounted a vigorous attack on my use of this principle of legal analysis.[16] I will not further discuss the role of this analytical tool with regard to Phillips' resume. The Company has now provided the documents in question and there is no need to make any inferential assumptions regarding their content.[17]

On the other hand, the eventual, albeit belated, submission of the resume stands in harsh and illuminative contrast to the Company's continuing decision not to similarly introduce the job description for the foremen's position. On direct examination by counsel for the Company, Puza testified that he was particularly familiar with the nature of the foremen's authority because he wrote their job description. Counsel asked him to describe that authority and Puza proceeded to outline a rather constrained version of their role. And yet, the Company has now twice failed to admit the job description into evidence. This is particularly notable with regard to these remand proceedings, given the Board's authorization for the admission of new evidence to supplement the record and my subsequent invitation to all parties in this regard.

As another administrative law judge has noted, the Board has established the preconditions for application of an adverse inference. They are that

> (1) the party against whom the rule is invoked must have control of certain evidence; (2) the evidence in question must be relevant evidence which would properly be part of a case; (3) this party's interest would naturally be to produce the evidence; and (4) it did not offer a satisfactory explanation for failing to produce the evidence. [Internal quotation marks omitted.]

[14] While this document shows Phillips' job location as being in North Carolina, it was prepared by Santos on behalf of the New Jersey operation. Furthermore, the Company's owner testified that Phillips held the "same position" in both locales. (Tr. 42.)

[15] In his brief in support of the Company's exceptions to my decision, counsel correctly observes that I mistakenly referred to Baer's job description as being part of the record. While it was identified as R. Ex. 3, it was never introduced. The reporter inadvertently included it in the binder containing the exhibits admitted on behalf of the Company. Nevertheless, my error was not material since Baer was shown the document during his testimony and was asked if the quoted language was an "accurate description of your job." (Tr. 419.) He unhesitatingly answered in the affirmative. I credit that testimony.

[16] For example, the Company contended that I impermissibly shifted the burden of proof by drawing the adverse inference. Apart from the fact that I repeatedly acknowledged that the General Counsel and the Union had the burden of proof on the issue, this argument conflates two unrelated legal concepts. This is illustrated by reference to one of the cases I cited on the adverse inference principle, *Martin Luther King Sr. Nursing Center,* supra. In that unfair labor practice case, the Board affirmed the administrative law judge's decision to apply an adverse inference against the respondent for failing to call any witnesses. It is clear that the Board did not see the result as involving any shifting of the burden of proof. In a case involving the drawing of a negative inference from the failure of a defendant to produce a required timber license, the Supreme Court long ago warned of the error of becoming "confounded" by confusing this sort of inferential analysis with the ultimate burden of proof in the proceeding, a burden that continued to reside with the plaintiff. *U.S. v. Denver & RGR Co.,* 191 U.S. 84, 92 (1903).

[17] I do note, however, that their actual content supports the rationale underlying the adverse inference that I drew. In particular, the resume prepared by the Company for use in bidding for contracts described Phillips as "Team Leader/Supervisor" for the "RCC Family of Companies." (Jt. Exh. 2, p. 2.) The Company's choice of these descriptors tends to undercut its claim in this proceeding that the foremen were mere straw bosses of the type excluded from statutory supervisory status.

Forsyth Electric Co., 332 NLRB 801, 818 (2000), vacated 69 Fed. Appx. 164 (4th Cir. 2003).

In this case, it is undisputed that the Company created and possessed the job description. That description was directly relevant to the central issue in the representation proceeding; indeed it may reasonably be assumed to have delineated the Company's view of the precise issues of authority under scrutiny in this proceeding. The Company's interest would ordinarily be to produce the document it had created that most directly addressed the powers and authority of its own foremen. Finally, the Company offered no explanation for the failure to produce the job description, despite having now been afforded multiple opportunities to produce the document and having observed the impact of its failure to produce it on my earlier decision-making process. As the prerequisites for the drawing of an adverse inference are all met, I do not hesitate to apply this traditional principle of evidentiary analysis.

Many years ago, the Supreme Court observed that, "[t]he production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse." *Interstate Circuit, Inc. v. U.S.*, 306 U.S. 208, 226 (1939). Here, counsel for the Company chose to rely on Puza's testimony about the issue under scrutiny while withholding the document that Puza had written for this employer that formed much of the basis for that testimony and that would have possessed compelling probative value on the issue since it was written for purposes unrelated to this litigation and could have shed great light on the parties' dispute. The ongoing choice not to produce the one document that purports to set forth a comprehensive description of the Company's own conception of the nature and duties of the foremen's job continues to lead me to the conclusion that the job description contains a description of that job that is adverse to the Company's position in this litigation.[18]

One additional matter regarding the documentary evidence needs to be addressed. In his brief in support of exceptions, counsel for the Company contends that my application of the adverse inference doctrine was incorrect because the record revealed that counsel for the General Counsel possessed a copy of the foremen's job description. He cites transcript pages 99-100, which consist of portions of a discussion among counsel and me, as well as, testimony by Baer. There are several difficulties with this argument. At the outset, it is important to note that counsel does not suggest that the attorney for the Union had been furnished with a copy of the document. It will be recalled that the foremost importance of the supervisory status issue in this case is the potential determinative impact on the outcome of the representation election. The General Counsel has no position on this issue and his attorneys did not and do not represent the Union's position on the matter.

Beyond this, careful study of the transcript relied on by counsel for the Company does not support his interpretation. The discussion in question actually begins at page 97 of the transcript, during the testimony of Baer. Counsel for the General Counsel indicates that he wishes to introduce documents that were provided to him by the Company pursuant to a subpoena. He seeks a stipulation in this regard, indicating that the documents are job descriptions. I ask counsel for the Company whether these are "authentic company documents." (Tr. 99.) Counsel for the Company sidesteps the question, stating in part that, "[e]xactly what they are, what timeframe they apply to, I don't know." (Tr. 99.) He offers to confer with his client. After some further inconclusive discussion among the lawyers, counsel for the General Counsel asked Baer if the documents in question were the Company's "written job descriptions for jobs in the facility in Southampton." (Tr. 100.) Baer responds, "[i]t appears to be, but to be perfectly honest with you, I don't ever remember this." (Tr. 100.) At that point, counsel for the Company sought a recess and I granted the request. After the recess, counsel for the General Counsel advised that, "after consulting with the Respondent, I've decided that I am not going to offer [the materials] into evidence." (Tr. 100.) The examination of Baer then moved on to other matters.

It is apparent from a close reading of the entire discussion that counsel for the Company never established that counsel for the General Counsel possessed the job description for the foremen's position.[19] In fact, when shown the documents in counsel for the General Counsel's possession, Baer was unable to identify them at all. The record fails to establish that counsel for the General Counsel possessed the document at issue.

Finally, I note that the thrust of counsel for the Company's argument seems to be that it would be error to draw an adverse inference if the document in question was also in the possession of the General Counsel. In my view, this confuses the nature of the analytical principle I employed with the imposition of sanctions for failure to produce evidence that had been subpoenaed. If a party fails to comply with a subpoena, the trier of fact may impose an adverse inference as a sanction for the noncompliance. *McAllister Towing & Transportation Co*., 341 NLRB 394, 396 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005). In that event, the fact that the party actually had complied with the subpoena would certainly be a complete defense. In this case, nobody has sought imposition of any sanction for noncompliance with a subpoena and I have not imposed any such relief. Instead, I have examined the entirety of the evidence and drawn the appropriate inferences from what was presented and what was not presented. The simple and inescapable fact remains that, despite having multiple opportunities to provide the trier of fact with the document that may best represent the Company's non-litigation based view of the status and responsibilities of the foremen, the Company has chosen not to provide the document and has also chosen not to present any explanation in support of that decision. From this, applying longstanding and wise principles of jurisprudential analysis, I infer that the document contained a vision of the scope and nature of the

[18] However, as in my original decision, I continue to base my ultimate findings and conclusions on a mosaic of evidence as described in this decision. The adverse inference is simply one significant piece of that mosaic.

[19] I do not mean to suggest that this represented a failure on the part of counsel. There was no reason at this early stage of the trial to think that this would assume the importance that counsel now ascribes to it.

foremen's job that is adverse to the constricted picture of that job painted in the Company's trial testimony.[20]

Having examined the documentary evidence,[21] it is now important to turn to the testimony, particularly the testimony that reveals the manner in which the foremen actually functioned at the Southampton facility. I will begin this analysis with a description of the foremen's working conditions and daily routines. Then, I will address the key areas of assignment of work and imposition of discipline.

To start with some basics, it is interesting to note that the foremen were provided with their own desks in Baer's office. Earley testified that, "I'm not a desk person." (Tr. 505.) As a result, he did not use his desk. By contrast, Phillips spent a great deal of time at his desk, usually while ordering the many parts needed for the manufacturing process. As Pohubka described it, "Like I was done with a job, I'd have to go find [Phillips] for another job. If I have to go up to his office, you know, usually he's on the phone ordering parts." (Tr. 174.)

As with the provision of desks, both foremen were also issued company credit cards. Perhaps more significantly, these cards were not merely for their own use on company business. Both foremen provided uncontroverted testimony that they also issued the cards to other employees whom they were assigning to tasks involving purchase of supplies or equipment for the facility.

With regard to timeclocks, it appears that the foremen were not treated alike.[22] Earley always punched a timeclock. According to Puza, Phillips was not required to punch the clock for a period of "close to a year."[23] (Tr. 654.) Interestingly, Phillips confirmed that he was not required to punch in until, "[w]hen all this stuff came about." (Tr. 141.) Asked to be more precise about the timing, he testified that he began to be required to punch the clock, "[p]robably right at the same time" as the Union's first organizational meeting occurred. (Tr. 142.) This meeting was held on October 9, 2002.[24]

Although there were disparities regarding documentation of the foremen's own time and attendance, both foremen were actively involved in the supervision and documentation of other employees' time and attendance. Phillips testified without contradiction that he possessed the authority to certify the start time of an employee who had not punched in. Earley provided clear testimony regarding his colleague's role in supervising time and attendance:

> Every morning he [Phillips] would check the cards to make sure everybody was here. Because he checks to make sure they punched in, make sure they were here. That was like a common thing.

(Tr. 560.) Additionally, an employee, Brian Van Nordwick, testified that, for some period during the time at issue, employees would fill out a weekly timesheet to show what tasks they had performed and for how long they had performed them. These were submitted to Baer and Phillips, who would log in the hours. Baer confirmed this arrangement, testifying that, Phillips and Earley would verify the employee timesheets on a daily basis, "because they knew what each man worked on." (Tr. 435.)

The Company maintained a practice of holding production meetings on a weekly basis. Baer testified that these were attended by himself, along with Plant Manager Tanzola, Vice President Puza, Controller Santos, Quality Assurance Manager Thomashefsky, and the two foremen. Baer reported that the foremen were active participants in the meetings, going so far as to observe that, "[a] lot of times, they would know where they stood on a particular project better than I did." (Tr. 452.) Puza's testimony also shed light on the nature of the foremen's role at these meetings. He noted that one topic for discussion would be the addition of more employees to handle a given project. In such cases, the foremen were asked, "who would you guys like to have in there?" (Tr. 658.)

In addition to the top-level production meetings, the foremen frequently met with Baer to discuss plant operations. Indeed, the content and frequency of these discussions was so striking that, in my original decision, I chose to refer to the communal decision-making process involving these three men as constituting a "troika." Counsel for the General Counsel asked Baer if,

[20] For a good example of the difference between the drawing of an adverse inference for failure to comply with a subpoena versus an adverse inference from the failure to produce evidence that one would expect to have been produced at trial, see the administrative law judge's decision in *Commercial Cabinets,* Case 7–CA–45023, 2002 WL 31758368, at p. 4 (2002), enfd. 89 Fed Appx. 511 (6th Cir. 2004) (judge rejected the General Counsel's request for adverse inference for failure to produce documents sought by subpoena, but drew adverse inference from the respondent's failure to offer those same documents into evidence to shed light on a significant issue in the case).

[21] There is one additional piece of documentary evidence that sheds a bit of light on the foremen's job title and scope of authority. After the trial in this case, the Company filed a Motion to Reopen the Record to admit the decision of the New Jersey Appeals Tribunal regarding Pohubka's denial of unemployment benefits. Over objection, I granted this motion. In that decision, which followed a telephonic hearing during which Baer, Santos, and Pohubka testified, the appeals examiner made factual findings regarding the events of Pohubka's discharge. Based on the evidence presented to her, she characterized Baer as the "shop supervisor" and Phillips as Pohubka's "immediate supervisor." This is simply another example of the use of the term "supervisor" to describe the Company's foremen.

[22] It may well be that the disparity reflected Phillips' long history with the RCC Family of Companies. By contrast, Earley was only hired after the Southampton facility was already in production.

[23] Santos indicated that this subject was controversial. He noted that he asked Baer about it, and Baer told him Phillips, "doesn't have to punch a time clock." (Tr. 589.)

[24] As I observed in my original decision, this illustrates the caution that must be employed when examining the Company's evidence on the issue presented in this remand. There are instances where it appears that the Company took certain actions designed to make the foremen appear to possess less stature than they had actually been accorded. It is reasonable to infer that the decision to begin requiring Phillips to punch the clock and the timing of that action represented a response to the Union's organizational effort. Another such example concerns the question of whether the foremen should be allowed to participate in meetings with the representative of the competing union. As discussed in my original decision, management initially ordered the foremen, along with other managers, to refrain from attending such meetings. Subsequently, for reasons never explained, the foremen were instructed to attend the meetings.

"generally each morning you asked the foremen who is working on what project." (Tr. 93–94.) Baer agreed that this was his practice. Employee Van Nordwick provided further insight into this process, testifying that

> Gene [Baer] would go around the shop mostly observing what's going on in the shop, conferring with Bud [Phillips] and Butch [Earley] about jobs that need to be worked on; what would have to be worked on first to meet a required deadline.

(Tr. 337.)

It is undisputed that both foremen worked alongside the production employees. However, their responsibilities included far more. Thus, when counsel for the Union asked Baer if the foremen "directed groups that worked with them," Baer responded, "[y]es, sir." (Tr. 116.) Part of that process involved the inspection of the work performed by the employees. For example, Pohubka testified that Phillips inspected his completed work approximately 80 per cent of the time. Similarly, he reported that when he worked on the structural steel side of the facility doing such tasks as "cutting steel," Earley would inspect his work. (Tr. 176.) In addition to the inspection function, employees provided testimony that the foremen would respond to their questions about the work process and would train the employees.

Because of the nature of their job responsibilities, the foremen spent a great deal of time directing, inspecting, and instructing the employees. As Phillips put it

> I usually go around and make rounds, see who's working and if they need something or, you know, to inform them what to do, you know, if they run out of something to do.

(Tr. 481.) Pohubka described the nature of the foremen's role in similar terms, reporting of Phillips, that

> [s]ometime's he'd work, sometimes he was just like overseeing everything . . . . Just walk around and make sure everybody was working, seeing like if they were doing their job right.

(Tr. 171.) Indeed, Phillips noted the magnitude of this aspect of his position as it related to Pohubka himself, commenting, perhaps hyperbolically, that "sometimes I would spend half the day hunting him." (Tr. 483.)

Not surprisingly given their involvement in daily oversight and evaluation of the employees' work, the foremen were also asked to rate their employees. Vice President Puza testified that, in September 2002, a meeting was convened. As he described it:

> We had Butch and Bud there. And we had told them that we were going to start letting people go. And, we wanted input from them as to who were the performers, who were not the performers.

(Tr. 646.) Puza noted that the purpose was to "just basically get a characterization of all the people" from Phillips and Earley. (Tr. 648.)

In addition to regular oversight of the production employees, the foremen provided important information from management to those employees. Such information would include the decisions taken at the production meetings. It also included the solicitation of both overtime and consent to voluntary layoff. Van Nordwick noted that it was a "common occurrence" for Baer, Phillips, and Earley to asked him if he wanted to work overtime. (Tr. 340.) Baer confirmed that both Phillips and Earley were involved in this activity, noting that Earley did so "[f]airly regularly." (Tr. 430.) He also reported that the requests were always voluntary since it was unclear whether the Company maintained any requirement for mandatory overtime on the part of its employees.

Insight into Phillips' role in these matters was also provided in the testimony of Maurice Lopez, an employee whose layoff status was an issue in the original proceeding. Lopez testified that Baer and Phillips came to him to inform him of his layoff. Tellingly, Lopez went on to report that he would later telephone the Company to inquire about the chances of a recall to duty. When he spoke to the controller, Santos "just passed me through [to] Bud [Phillips]." (Tr. 323.)

With this broad context as explanatory background, it is now necessary to assess the foremen's role in the two most important areas of supervision involved in this remand, the power to assign and the power to discipline employees. Turning first to the power to make assignments, it is undisputed that the foremen possessed this authority to some degree. As counsel for the Company noted in his brief in support of exceptions, "Earley and Phillips also had some responsibility for giving assignments or telling employees what they should be working on." (R. Br. Exh., p. 14.) The contest here concerns the scope of this admitted job function.

In their testimony, Baer and Earley attempted to downplay the nature of the foremen's role in this regard. Thus, Baer contended that the foremen's assignments were "more of a spontaneous thing" that occurred when they "didn't track me down" to seek permission. (Tr. 94.) Baer gave the example of a need to unload a truck. In such a case, the foremen would select, "whoever was closest, probably." (Tr. 94.) Earley was even more emphatic, reporting that

> I work and help keep the guys busy, whatever Mr. Baer gave me to do. I told the guys, I relayed the message. I'm just like a messenger boy.

(Tr. 501.)

I do not credit these narrow depictions of the foremen's role in assigning work. They are contradicted by much other testimony, including additional testimony provided by both Baer and Earley themselves.[25] For example, Baer made a major retreat from his just-cited testimony that had been provided on the first day of the trial. When he was recalled as a witness much later in the case, he noted that both foremen played a

[25] Furthermore, as I noted in my original decision, Earley's testimony must be viewed with caution as it was very much influenced by his understandable gratitude toward his employer. As he made clear on the witness stand, he felt that the Company had saved his career by hiring and promoting him after his previous long-term employment had ended when that employer went out of business. It was evident that Earley's feelings were sincere and heartfelt, but they also caused him to shade his testimony in order to express his gratitude.

major role in the assignment process. When speaking of his discussions with Earley, he testified that

> we would determine that if one—if one employee was more suited to drilling, and another employee was more suited to doing layout work . . . and we would make the determination who should do what.

(Tr. 428.) He observed that he followed the same procedure with Phillips.

Baer's view of the respective roles of the superintendent and foremen was crystallized in his testimony that the three men operated by "consensus," and that, if the foremen "had assigned people to do certain jobs, I wouldn't come behind them and say, 'No, don't do that; do something else.'" (Tr. 428.) Examining Baer's testimony as a whole, I conclude that, as with so much else in his relationship with his foremen, he viewed the decision-making process as a troika.[26] Many assignment decisions were made by mutual agreement. Significantly, however, Baer conceded that if a foreman made a unilateral assignment, he would not intervene to alter that decision.

Similarly, while Earley provided a highly self-effacing description of his role as that of a mere messenger boy, he also gave other testimony that showed it in quite a different light. For example, he noted that, with regard to the steel operation, "I run the shop for RCC, sir." (Tr. 501.) And, in a rather extensive bit of testimony, he described how he would pick who worked on his structural steel crew. Taking obvious pride in the importance and difficulty of his work with structural steel, he noted that the selection of his crew involved critical issues of competence and safety. He made his assignments based on such factors as the particular worker's familiarity with the use of cranes and knowledge of blueprints. (See, Tr., at pp. 506–508.)[27]

As one would expect, Earley's colleague also provided detailed and illuminating testimony about the foremen's role in assigning work.[28] He reported that he discussed work assignments with Baer, but did not always consult before making such assignments. As he explained

> [i]f they're working with me and they're done with that task and I know what task that needs to be done next and everything, then I'll move them to another task so that we can keep the production of the equipment going. Where if I had to run and find [Baer] every time that I needed to move somebody, then I'd be running to find him all day instead of doing anything.

(Tr. 153.) For this reason, Phillips testified that he made his own assignment decisions "a couple times a day, probably." (Tr. 153.) Indeed, when asked if making a job assignment on his own authority would be something likely to get him "in trouble," Phillips unhesitatingly answered in the negative. (Tr. 160.)

While I recognize that testimony from the production employees is necessarily based on their subjective perceptions regarding the foremen's power to assign, I was nevertheless impressed by the uniformity of their opinions regarding the power to assign. Thus, Jesse Iannaco reported that Earley gave him assignments a couple of times each day. Another employee, Duane Ashcraft, was asked who gave him his work assignments on a "day-to-day basis." (Tr. 622.) He responded that the assignments were made by Phillips, except on the rarer occasions when he was working on the steel side of the operation. In that case, his assignments came from Earley.

Van Nordwick summed up the assignment process in the following terms:

> Once we finished a project, we would either find Bud or Butch to see what needed to be done next; and then they would assign you to the next task.

(Tr. 338.) Indeed, Van Nordwick was asked why he concluded that the foremen were part of management, and he posed this pithy rhetorical question in response:

> If they weren't part of—my understanding—if they weren't part of management, why would they be handing out these work assignments?

(Tr. 353.)

Considering the entire body of testimony on the issue of job assignment, I conclude that both foremen regularly made individual decisions to assign work to employees. They did this over and above their practice of consulting with Baer to make other such decisions by consensus. Furthermore, the assignments they made on their own authority and initiative ran the gamut from the simple (such as sweeping the floor) to the complex (such as operating a crane in the dangerous process of moving heavy pieces of steel). Regarding frequency, I conclude that both men assigned work to employees on a daily basis, often more than once each workday.

Finally, it is necessary to closely examine the power and authority of the foremen in the area of discipline. The credible evidence demonstrates that the two men did possess such authority, both in taking action on their own individual initiative and in functioning as part of the cooperative management team with Baer that I have previously characterized as the "troika."

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[26] Interestingly, the foremen also had a similarly cooperative decision-making pattern of behavior between themselves. Thus, Earley testified that, "if [Phillips] needed somebody, he could have it. Or, if I needed somebody, or if I needed help, he would help me." (Tr. 542.)

[27] At the end of this detailed description of his assignment duties, Earley backtracked a bit, noting that Baer "usually" gave him the employees who were "always" on the job on the structural steel side. (Tr. 508.) I discount this testimony as being both inconsistent with the immediately preceding description and reflective of Earley's previously described desire to support his employer's position. Furthermore, even if credited in full, the testimony reveals that Baer did not always participate in the assignment process with Earley, he simply did so "usually."

[28] As I explained in my original decision, I give Phillips' testimony greater weight than that of Earley. Aside from Earley's bias, I noted that, at the time he testified, Phillips was no longer employed by the RCC Family of Companies. As counsel for the Company observed, Phillips' employment had been terminated, "due to a 'mutual agreement' between himself and the Company." (R. Br. ALJ, p. 12.) He had no apparent interest in shading his testimony to support one side or the other. This was reflected in the fact that his testimony did support one side on some issues and the other side as to other matters in controversy.

To begin, I note that the Company's management witnesses testified that the foremen did not possess disciplinary authority. Baer asserted that, "[t]he only discipline that was administered came through me." (Tr. 427.) Puza contended that the foremen had no authorization to administer discipline. Rather, their role was to tell Baer about their "displeasure with an employee's performance," and leave it to Baer to "have to handle it." (Tr. 654.)

The great weight of the evidence does not support this depiction of the foremen's lack of disciplinary authority. The contrary evidence is particularly compelling. It begins with the testimony of employees who reported that the foremen did, in fact, have the authority to discipline them. Thus, Baer and Puza's testimony was matched by Van Nordwick and Iannaco's directly contrary claims. For example, Iannaco was asked who had the power to impose discipline. He responded, "[j]ust Gene, Bud, or Butch." (Tr. 288.)

Given this conflicting testimony, it is fortunate that the record is enhanced by two particularly probative types of evidence. First, as will shortly be described, Baer and Puza's description is contradicted by the actual behavior of the parties in a number of specific instances. The general claims of Baer and Puza cannot withstand comparison with these particular examples of contrary practices. Second, the evidence as to disciplinary authority does not consist simply of conflicting testimony presented by the parties. Instead, key insight is provided by reference to an extensive set of documentary records. I am referring to the numerous corrective action notices issued by the Company to errant employees, as well as, other disciplinary records maintained by the Company.[29] Many of these documents were created by the Company at a time when this litigation was not on the horizon and they were all issued for important corporate purposes other than those under consideration in this case. As such, they represent the best unfiltered, unbiased, and reliable view of the Company's disciplinary system in operation.

Turning first to the specific instances illustrating the possession of disciplinary authority by the foremen, three examples stand out. On September 11, 2002, Phillips issued a corrective action notice to Matthew Rettberg. (GC Exh. 4, p. 28.) This was signed by Phillips on the line for the "Supervisor's Signature." It was also signed by Rettberg and Earley. Earley added the notation that he was signing as a "witness." The incident arose when Rettberg objected to a job assignment he had been given by Phillips. In voicing his complaint, he made a comment suggestive of ethnic bias. Phillips testified about his thought process in confronting this problem, noting that the Company had a zero tolerance position with respect to discrimination and that

> we hire all types of people, doesn't matter what color they are or anything else because, you know, we're all people and we just work together to try to get the job done.

(Tr. 158.) As a result, he decided to issue a corrective action notice to Rettberg.

Phillips testified that he then telephoned Baer who was away from the facility. He described the phone call, reporting that

> I explained to him what was going on and everything, and told him that, you know, that we'd already went through the zero tolerance thing because it was our stand, the company's stand, and I was going to take and do this, write this corrective thing up and everything, and I just wanted to check with him first and make sure that that's the way he wanted it handled and everything. And then I did it and signed it and turned it in.

(Tr. 158.) When Baer was questioned about this incident, he agreed with counsel that, "[o]n that particular date, at least, Mr. Phillips has authorization to take corrective action of a disciplinary nature against Mr. Rettberg." (Tr. 132.)

While not entirely free from ambiguity, these events certainly tend to demonstrate that Phillips had the authority to take disciplinary action on his own initiative. While the misconduct was serious, there was no emergency presented. If Phillips lacked disciplinary authority, he could have simply written a memorandum for Baer's further consideration. Alternatively, he could have immediately taken the matter to higher management officials present at the facility. Instead, he chose to write and issue the disciplinary action himself. I recognize that he elected to phone Baer and explain what he was doing. In my view, this does not demonstrate any lack of authority. Instead, it represents the common human desire to seek validation of an important decision from someone whom one trusts and respects. Had the phone call been evidence of a lack of authority, one would have expected that Baer would have given Phillips a directive to seek assistance from other members of management, delay action until his return, or sign the form on Baer's behalf.[30] Instead, Baer did not express any doubts about either Phillips' wisdom or his authority to act on behalf of the Company.

Two related incidents shed even more light on Phillips' role in the Company's disciplinary processes. These both involved Pohubka.[31] On July 2, 2002, Phillips discovered Pohubka and another employee sleeping on the job. He ordered them to return to work. About an hour later, Pohubka confronted Phillips in an angry manner, complaining about his assignment to a welding project, dropping a heavy piece of metal, and cursing. Phillips told Pohubka to report to Baer's office. Pohubka testified regarding what transpired next, relating that Phillips told Baer that he was "sick of my attitude." (Tr. 183.) Without directing any questions to either Pohubka or Phillips, Baer in-

[29] These forms are located at GC Exh. 4. The parties stipulated that these constitute all of such forms issued to employees from October 1, 2001 through March 31, 2003. In addition, R. Exh. 2 is another corrective action form that was issued to Maurice Lopez in place of a nonexistent layoff notification form.

[30] The Company had no policy preventing one official from signing a disciplinary action on behalf of another. Tanzola signed three such forms in that manner, twice on behalf of Puza, and once for Santos. (GC Exh. 4, pp. 7, 21, & 39.)

[31] As will shortly be described, I generally credit Pohubka's largely uncontroverted description of the procedural history of his suspension and discharge. While I found him to be an unreliable witness regarding his workplace misconduct and the reasons for his discipline, his account of how the discipline was meted out to him is credible.

structed the men to report to the front office. The three men met with Plant Manager Tanzola. Tanzola did not ask Pohubka any questions. Baer remained silent. Phillips told Tanzola that he was sick of Pohubka's attitude. Pohubka testified that, upon hearing Phillips' complaint, "[t]hat's when Dave Tanzola said if he had a problem with me, he should write me up." (Tr. 184.) At that point, Pohubka was directed to return to work. He further testified that, 10 minutes later, he met with Phillips and Baer in their office. He was issued a corrective action notice for a 3-day suspension. (GC Exh. 4, p. 24.) While this was signed by Baer, tellingly, it was handed to Pohubka by Phillips. (Tr. 252.)

Just as Phillips had been the primary initiator of Pohubka's suspension, he had a similar role in Pohubka's discharge from employment on October 11, 2002. Events began with a confrontation between Baer and Pohubka over Pohubka's poor work habits. Shortly thereafter, Pohubka had an exchange with Phillips. Pohubka testified about what transpired next.

> POHUBKA: That's when Bud said he's sick of my attitude and he sent me up to Gene's office.
>
> COUNSEL: How did you respond?
>
> POHUBKA: I walked up to Gene's office. I didn't even say anything.
>
> COUNSEL: Did Bud go with you?
>
> POHUBKA: Yes.
>
> COUNSEL: What happened once you were in Gene's office?
>
> POHUBKA: He told Gene that he's sick of my attitude, and then Gene looked at me and said they no longer needed my services.

(Tr. 197–198.) Pohubka's discharge was memorialized on a 2-page corrective action notice that was signed at the bottom of each page by Baer, Phillips, and Earley. (GC Exh. 4, pp. 26–27.)

Turning now to the records, I have examined the disciplinary reports in an effort to discern patterns of authority. Plant Manager Tanzola signed one disciplinary form on his own account. (GC Exh. 4, p. 16.) He signed two such forms on behalf of Vice President Puza and another one on behalf of Controller Santos. (GC Exh. 4, pp. 7, 21 and 39.) Baer was the sole signatory on five forms. (GC Exh. 4, pp. 9, 15, 22, 24, and 33.) Phillips signed one form as the supervisory official with Earley's signature as a witness. (GC Exh. 4, p. 28.) One form was signed by both an indecipherable writer and Phillips. (GC Exh. 4, p. 41.) The remaining 10 forms were each signed by Baer, Phillips, and Earley. (GC Exh. 4, pp. 1, 10, 13, 14, 26, 29, 30, 40, and 42; R. Exh. 2.)

Review of this documentary record shows that the most common single form of discipline issued to employees was a joint corrective action notice signed by the members of what I have denominated as the troika: Baer, Phillips, and Earley. This is consistent with the general pattern of evidence confirming Baer's testimony that he preferred to act by consensus among himself and his foremen. Furthermore, this understanding of the meaning of the joint signatures was explicitly confirmed by Phillips. When asked in what capacity he had been signing these notices, he answered

> I mean, what it was, it was me, Butch and Gene would agree on, you know, we all showed, signed it, showing that we agreed with whatever was happening. If it was, you know, this corrective action notice or another corrective action notice, then you know, so we were all in agreeance.

(Tr. 489.)

Examination of individual notices lends further support to this explanation. For example, the troika signed a corrective action notice for a 5-day suspension and final warning issued to Van Nordwick. (GC Exh. 4, p. 43.) There are several reasons why this particular document is illuminating. Van Nordwick's misconduct did not directly involve any of the troika members. Rather, he engaged in insubordinate and disrespectful conduct toward the Company's quality assurance manager, Pat Thomashefsky. She filed a written account. (GC Exh. 4, p. 44.) In that account, she described the events and noted that she informed Baer and Tanzola of what had happened. Nevertheless, the disciplinary form was not signed by either Thomashefsky or Tanzola. Instead, it was signed by Baer, Phillips, and Earley.

Additionally, it is interesting that Baer signed the notice on November 13, 2002, but Phillips and Earley did not add their signatures until the following day, a fact that is inconsistent with any attempt to characterize their role as simply serving as witnesses. All of this provides impressive support to corroborate the practices of management reflected on the corrective action notices as described in Phillips' testimony recounted above. The Company took pains to obtain the concurrence of both foremen in the disciplinary decision involving an employee's misconduct that had not occurred in their presence and did not involve them in any direct way. The manner in which the Company proceeded to suspend Van Nordwick is strongly indicative of the possession of meaningful and powerful disciplinary authority by both foremen.

Another explicit example of the troika in action is contained in a corrective action notice issued to Shawn Mace on October 14, 2002. (GC 4, Exh. 14.) The offense involves absenteeism and tardiness. Baer, Phillips, and Earley each signed the form. The sanction was merely a verbal warning.[32] In explanation, the three signatories noted that they "understood there is a problem w/his family vehicle being wrecked and we will excuse for this week." (GC Exh. 4, p. 14.) (Boldface added.) This constitutes an open and obvious example of the troika in operation.

I recognize that the Company has attempted to provide an alternate explanation for the presence of the three signatures on a plurality of its corrective action notices. Thus, for example, Baer testified that Phillips and Earley signed the layoff notice for Lopez because, "I normally like to have witnesses." (Tr. 423.) Earley tried to make the same point, claiming that his signature kept appearing on these documents because, "I would witness that the guy did sign it, and this is what was said in a meeting." (Tr. 508.)

[32] This is an illustration of a perplexing and recurring phenomenon in the life of a labor law judge. All sorts of employers maintain an Orwellian practice of issuing so-called "verbal" warnings that are memorialized in writing.

There are a number of reasons why I decline to accept this explanation. First, Earley could not be signing merely as a witness to what was said at the disciplinary meetings. He admitted that he was not present at the meeting at which Pohubka was discharged. Yet, he signed both pages of that corrective action notice. Lopez testified that he was laid off by Baer and Phillips. Although Earley was not there, he signed the layoff notice anyway. And, I have already noted that he signed Van Nordwick's suspension notice on the day after Baer signed it. Perhaps most tellingly, Baer, Phillips, and Earley signed a corrective action notice issued to Iannaco. (GC Exh. 4, p. 10.) Baer signed it on November 13, but the two foremen signed it the following day. Baer testified that he could not recall why they signed that notice. Beyond this, he testified that, "when I talked to Mr. Iannaco about this particular offense, that it was in the presence of Mr. Dave Puza." (Tr. 127.) Yet, Puza, the actual witness, did not sign the form. Furthermore, there is simply no evidence that the Company required the signature of witnesses. Baer signed five corrective action notices without any cosigners. Tanzola signed one form by himself as well. Indeed, there is not even a requirement that the issuing official sign the form. It will be recalled that Tanzola signed forms on behalf on both Puza and Santos. The signatures of those officials were never added to the forms at any subsequent time.

Finally, I note that on one occasion the evidence is clear that Earley did sign as a mere witness. The evidence is clear because Earley wrote the word, "witness," next to his signature. As I opined in my original decision, this constituted an excellent example of the old adage that the exception can sometimes prove the rule.[33] When Earley was desirous of limiting the purpose of his signature he was clearly capable of doing so.[34]

In sum, the credible evidence shows that Phillips and Earley imposed discipline on employees, both by direct individual action and through consensus decision making with Baer. It is also evident that the nature of the disciplinary decisions was far more than minor correction of workplace mistakes. Both foremen were active participants in decisions to suspend, discharge, and lay off employees.

II. SCOPE AND CONTEXT OF THE LEGAL ANALYSIS ON REMAND

It is now necessary to apply the Board's principles of legal analysis to the facts and circumstances outlined above regarding the status of the two foremen. While the Board's remand order makes specific mention of the need to consider its recent decisions in *Oakwood Healthcare*, 348 NLRB 686 (2006); *Croft Metals*, 348 NLRB 717 (2006); and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006), it is appropriate to begin with some mention of the overall context in which these matters arose.

As the Board has observed, "[s]upervisory status is one of the most common issues" in labor law, and its decisions are "replete with findings of supervisory and nonsupervisory status." McCullough Environmental Services, 306 NLRB 565 (1992), enfd. denied 5 F.3d 923 (5th Cir. 1993). The issue arises because Section 2(3) of the Act excludes "supervisors" from the statute's coverage. Section 2(11) contains a detailed definition, providing that a supervisor is

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

The situation is made difficult by the recognition that the correct outcome when applying this definition "has not always been readily discernible by either the Board or reviewing courts." *Oakwood*, supra at 687. In particular, there has been considerable tension between the Board's views of the statutory requirements for supervisory status and those of the Supreme Court. The Court has rejected the Board's interpretations of the provisions of the Act regarding aspects of the definition in a number of cases, *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); *NLRB v. Healthcare & Retirement Corp. of America*, 511 U.S. 571 (1994); and *NLRB v. Kentucky River Community Care,* 532 U.S. 706 (2001). As the Board has observed, the common theme of these decisions was the Court's conclusion that the Board had "reached too far" by imposing an "overly narrow construction" of the Act's definition of a supervisor. *Oakwood*, supra at 687. In other words, in each of those cases, the Board had erred by failing to include the affected employees within the statutory exclusion. It was this persistent problem that the Board chose to address in a comprehensive fashion through its decisions in *Oakwood*, *Croft,* and *Golden Crest*. As a result, the overall context mandates application of appropriate caution to avoid applying the statutory definition of supervisory status in a manner that is overly restrictive. In other words, the objective of the analysis must be to effectuate the Congressional intent to exclude from the Act's coverage "such individuals whose fundamental alignment is with management" since this purpose "is at the heart of Section 2(11)." *Oakwood*, supra at 690.

Before venturing further, it is necessary to make one additional comment on the Supreme Court precedents. In his brief in support of exceptions, counsel for the Company argued that it was error for me to find that Phillips and Earley exercised independent judgment when making job assignments "based on experience, skill, and the known abilities of others." (R. Br. Ex., p. 21.) He cited a number of Board decisions, the most recent of which was *Hausner Hard-Chrome of KY, Inc.,* 326 NLRB 426, 427 (1998) (leadman's assignments based on "employee's skills and experience with respect to particular tasks" are merely routine and do not demonstrate independent judgment). This was the Board's position. However, that position

[33] I cannot be certain as to why Earley chose to sign that form as a witness. In his testimony, he was never really asked to explain this. It may be that he disagreed with Phillips' choice of discipline in that instance.

[34] Counsel's attempt to explain this away borders on the fatuous. He suggests that Earley's decision to write the word "witness" on Rettberg's form, "was not a conscious one." (R. Br. Ex., p. 26.) Does counsel mean to suggest that Earley was in a coma when he made this notation?

was squarely rejected by the Supreme Court in *Kentucky River*, supra. As Justice Scalia hypothesized for the majority:

> What supervisory judgment worth exercising, one must wonder, does not rest on "professional or technical skill or experience"? If the Board applied this aspect of its test to every exercise of a supervisory function, it would virtually eliminate "supervisors" from the Act. [Citation omitted.]

Kentucky River, supra at 715. In light of the Court's conclusions, I will continue to assess the statutory element of independent judgment regardless of whether that judgment "is informed by professional or technical training or experience." *Kentucky River*, supra at 708.

As a further preliminary consideration, I note that other aspects of the law regarding the issues in this remand proceeding have also evolved since I issued my original decision. In particular, there have been significant developments in the Board's articulation of the meaning of the statutory language concerning a supervisor's power to "effectively recommend" any of the enumerated functions listed in Section 2(11). There has also been some development in the Board's explanation of its views of the common law concepts of agency and apparent authority. I find it necessary and appropriate to consider the evolution of these concepts in the intervening period because, "[t]he Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'"[35] *SNE Enterprises, Inc.*, 344 NLRB 673 (2005). [Citations omitted.] As a result, these concepts will be addressed below.

Finally, I have already noted that when I issued my original decision, the status of the foremen was simply one piece of a much larger legal puzzle. I simplified the focus of my decision making, finding that the foremen possessed the primary supervisory indicia of power to assign and authority to discipline employees. As a result, I did not address the possible existence of other primary indicia of supervisory status. It is important to note, however, that both the Union and the General Counsel argued that additional indicia of such status were present. Thus, in his opening statement, counsel for the Union contended that Phillips and Earley possessed the power "to hire, fire, recommend hiring, recommend firing, impose discipline, [and] recommend discipline." (Tr. 14.) Similarly, in his brief to the Board, counsel for the General Counsel contended that Phillips, "assigned and directed employees and disciplined employees, including effectively recommending discipline and layoff of employees." (GC Ans. Br., p. 24.) Thus, this remand provides the opportunity to examine additional elements of supervisory status that were litigated by the parties.

In *Oakwood*, the Board provided the labor law community with a complete formulation of the legal standard, holding that

> individuals are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 supervisory functions (e.g., "assign" and "responsibly to direct") listed in Section 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) their authority is held in the interest of the employer. Supervisory status may be shown if the putative supervisor has the authority either to perform a supervisory function or to effectively recommend the same. The burden to prove supervisory authority is on the party asserting it.

Oakwood, supra at 686–687. [Footnotes and some internal quotation marks omitted.]

I will now examine the components of this analytical framework that are pertinent to the issues presented in this case.

III. THE FOREMEN'S POWER TO ASSIGN AND EFFECTIVELY RECOMMEND ASSIGNMENTS

As another administrative judge observed in what was perhaps the first post-*Oakwood* judicial decision, the Board in Oakwood took the opportunity of "restating certain principles and clarifying others." *South Jersey Healthcare*, Case 4–RC–21179 (November 1, 2006), at p. 20. Among the most significant of these clarifications was the Board's analysis of the power to assign. It held:

> [W]e construe the term "assign" to refer to the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee. . . . It follows that the decision or effective recommendation to affect one of these—place, time, or overall tasks—can be a supervisory function.

Oakwood, supra at 688. The Board also provided a useful illustration of the concept of appointment to significant overall tasks. It noted that such an assignment would include, for example, a directive to an employee to restock shelves. However, it did not encompass lesser instructions within this broad category, such as telling an employee to restock one type of commodity before another one. In further explication of the power to assign, the Board noted that a key consideration was whether the nature of the assignments imposed a significant effect on the employee's terms and conditions of employment. Once again, it provided a useful illustration, noting that some workplaces contain "plum assignments" and "bum assignments." *Oakwood*, supra at 689. The power to order an employee to perform such tasks is an example of the power to impose a significant effect on a worker's job conditions.

Turning now to Phillips and Earley, I conclude that they did not possess the power to appoint an employee to a shift or worktime. The Company only operated one shift. The foremen routinely solicited employees for overtime work, but the uncontroverted testimony established that this was always voluntary. There is no evidence that any manager possessed the authority to order mandatory overtime. In Golden Crest, supra at 728, the Board clearly held that "the authority merely to request that employees work overtime does not constitute the power to assign within the meaning of the Act." [Italics in the original.]

[35] The Board makes an exception for situations that would lead to manifest injustice. *Pattern Makers (Michigan Model Mfrs.),* 310 NLRB 929, 931 (1993). The points discussed in the recent cases that I will apply do not involve any significant departure from preexisting law, but simply represent the evolving process of development of precedent through case adjudication. There is no unfairness in applying these teachings to the facts of this case.

The situation is different with regard to the designation of an employee to a particular place within the facility. It will be recalled that the Company's operations were divided into two departments, the manufacture of railroad equipment and the work with structural steel components. These production processes took place on different sides of the facility in what were described as separate "long bays." (Tr. 153.) The evidence demonstrated that Phillips and Earley possessed the power to assign employees to either wing of the facility and also possessed the authority to effectively recommend such assignments. This is perhaps best illustrated by the undisputed testimony that the foremen would consult with each other and trade employees between the railroad and steel operations as the need arose. As Earley put it, "if [Phillips] needed somebody, he could have it. Or, if I needed somebody, or if I needed help, he would help me."[36] (Tr. 542.)

At this workplace, the power to assign to a location is interwoven with the power to assign to overall tasks. As a result, I will now turn to an assessment of this component of the power to assign. It will be recalled that much of the management authority in the operation of the railroad and steel production processes was exercised by what I have chosen to call the troika. As Baer explained, he liked to function through "consensus" with his foremen. (Tr. 428.) He explained the operation of this management style in the area of job assignments as follows:

> [W]e would determine that if one—if one employee was more suited to drilling, and another employee was more suited to doing layout work . . . and we would make the determination who should do what.

(Tr. 428.) This is clearly either the power to assign employees to significant overall tasks or its close cousin, the power to effectively recommend such assignment.

However one chooses to characterize the operation of the troika, it is also evident that each foreman had the power to assign significant overall tasks independent of the consensus style of management. As Baer explained, in cases where a foreman "had assigned people to do certain jobs, I wouldn't come behind them and say, 'No, don't do that; do something else.'" (Tr. 428.)

It is also noteworthy that the overall task assignments did not merely consist of choices from among a number of routine, repetitive chores. Instead, they ran the gamut from simple to complex, and even dangerous, duties. In other words, these were just the sort of plum and bum assignments mentioned by the Board in Oakwood. This was well illustrated in the incident involving Phillips' issuance of a corrective action notice to Rettburg. It will be recalled that this disciplinary measure was imposed after Phillips had ordered Rettburg to sweep the shop and Rettburg complained that other employees with less seniority should be performing this distasteful task. Unfortunately, Rettburg choose to sully his complaint by linking it to the ethnicity of the less senior employees. The vehement nature of his ill-chosen protest vividly illustrates both the existence of bum assignments and Phillips' ability to affect employees' quality of work life through exercise of the assignment power. Similarly, it was Pohubka's equally inappropriately vehement response to his assignment by Phillips to a welding project that played a role in leading to his suspension. The controversies arising from some of Phillips' decisions in this area vividly illustrate his possession of the power to impose a dramatic impact on the work life of the production employees through his exercise of the assignment power.

In *Oakwood*, the Board emphasized that the analysis of the power to assign remains fact specific. In making that assessment here, I have found it useful to compare the facts with those described in *Oakwood* and those outlined in *Croft.* In *Oakwood*, a key indicator of the quality of the assignments being made by the charge nurses involved the matching of the needs of the workplace with the "skills and special training" of the employees. *Oakwood*, supra at 689. Thus, the fact that a charge nurse was required to match a patient's needs with the particular expertise of the available nursing staff was deemed a critical aspect of the analysis. By contrast, in *Croft*, while the lead persons made some shifting of jobs on the production line in order to finish projects or meet goals, there was no evidence regarding the "factors, if any, taken into account by leads in reallocating work." *Croft,* supra at 721. Furthermore, the jobs in *Croft* involved repetitive tasks "requir[ing] minimal guidance." Infra at 721. As a result, in contrast to the charge nurses' duties, the nature of the assignment role for the lead persons in *Croft* did not rise to the level of a primary indicator of supervisory status.

The evidence in this case establishes that the quality of the assignment process involved in the foremen's job duties was much closer to that of the charge nurses in Oakwood than the lead persons in Croft. As Earley definitively described it for his part of the shop

> structural steel is kind of a, you know, touchy job. You've got to have somebody who knows how to use squares, you know, and has to have a little bit of knowledge what they're doing with stuff . . . . And, you're using cranes on it. I don't want to see anybody get hurt, so you've got to watch who you're using and why. And when you've got 20-ton cranes in the shop, somebody goes to flip a beam, and they flip it off on the floor on somebody, you know, I, it's very, it's kind of a delicate thing.

(Tr. 506–507.) Earley goes on to provide an example of his reasoning in making assignments, describing that he made assignments to an employee named Jesus based on his extensive job experience and knowledge of blueprints. It is evident that this type of exercise of the power to assign employees involves careful evaluation of the skills and abilities of the available staff and the demands of the particular work to be performed. Applying the Board's test, I find that Phillips and Earley possessed a power to assign that required "the degree of discretion" that rose above "the routine or clerical." *Croft*, supra at 721. (Footnote omitted.)

[36] This contrasts with the lack of similar authority of the lead persons in *Croft.* The Board noted that, "[t]he lead person's supervisor, not the lead person, decides whether to borrow or temporarily transfer an employee from another part of the plant." *Croft,* supra at 718.

Because of the nature of the assignment process employed by the foremen, I further conclude that it involved the application of independent judgment within the meaning of the Act. Returning to the comparison with the charge nurses in I, I note that the Board relied on the fact that each charge nurse, "weighs the individualized condition and needs of a patient against the skills or special training of available nursing personnel," in finding that the assignment power involved the application of independent judgment. *Oakwood,* supra at 692. Phillips and Earley engaged in the identical analytical process, albeit in the very different context of a specialized manufacturing facility. Their assignments were based on these important considerations, not on instructions from higher authority, detailed company procedures, or application of existing policies, rules, or contractual provisions.

At this juncture, it is appropriate to discuss the current position of the General Counsel on the question of whether Phillips' power to assign work required the exercise of independent judgment. In his answering brief to the Board, the General Counsel asserted that, "[c]learly, Phillips exercised independent judgment when he assigned work." (GC Ans. Br., p. 24.) However, in his brief on remand, the General Counsel now advises that, "we no longer allege" that Phillips used independent judgment when making assignments.[37] (GC Br. Rem., p. 13.)

The change in the General Counsel's position is based on his view of the impact of the *Oakwood* trilogy. I have given this careful thought. Respectfully, I must disagree with this reading of the *Oakwood* cases. To begin with, I have already noted the significance of the context in which the *Oakwood* cases arose. In his remand brief, the General Counsel correctly states that the *Oakwood* cases were decided "in light of the Supreme Court's decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001)." (GC Br. Rem., p. 2.) It will be recalled that, in *Kentucky River*, the Court was harshly critical of the Board's prior restrictive interpretation of the scope of the independent judgment language contained in the statutory definition of supervisory status. Indeed, the Court opined that the Board's narrow reading of that language was "directly contrary to the text of the statute." *Kentucky River*, supra at 715. It is apparent that the *Oakwood* trilogy was the Board's effort to ensure that its interpretation of the independent judgment requirement was no longer "unduly circumscribed." *Oakwood,* supra, slip op. at p. 3. As a result, it would be counter-intuitive to conclude that a finding of independent judgment that was legally correct under the Board's pre-*Oakwood* standards would somehow no longer be justified in light of the *Oakwood* cases.

While the General Counsel's contention is counter-intuitive, it is, nevertheless, still possible. The General Counsel bases his conclusion that such is the case on a belief that the record fails to explain the nature of Phillips' decision-making process when making assignments. For two reasons, I cannot agree. First, the record regarding Phillips is sufficiently developed to permit the drawing of informed conclusions regarding the considerations involved in Phillips' assignment decisions. Second, the record regarding Phillips cannot be viewed in isolation, but must be considered along with the comprehensive evidence developed that demonstrated that Phillips' colleague and coequal as foreman employed the precise type of independent judgment regarding assignments outlined by the Board in *Oakwood.*

Turning first to Phillips, it will be recalled that his department of the Company was engaged in the manufacture of sophisticated equipment for the railroad industry. As Baer described it, "we build and market railroad maintenance equipment and it can be a variety of applications. But I mean anything from tie exchangers . . . to specialized equipment."[38] (Tr. 91.) Daloisio testified that Phillips was brought to New Jersey because of his wide-ranging knowledge of all aspects of this manufacturing process. The Company's edition of Phillips' resume described in detail the breadth and extent of Phillips' technical knowledge in this area, including many aspects of the "[f]abrication and design of machinery." (Jt. Exh. 2, p. 2.) It will be recalled that this was written in the context of describing for potential customers Phillips' role as "Team Leader/Supervisor." Finally, I note that Baer delineated the precise nature of the assignment decision-making process. He testified that he and Earley

> would determine that if one—if one employee was more suited to drilling, and another employee was more suited to doing layout work, you know; we would just talk it out with the people we had available, and we would make the determination who should do what.

(Tr. 428.) Of crucial importance, several minutes later, Baer was asked additional questions regarding this testimony as follows:

> COUNSEL: Did you have—did Mr. Phillips meet with you to assign work?
> BAER: Yes.
> COUNSEL: Were those meetings similar in nature to the meetings you've described with Mr. Earley?
> BAER: Yes.

(Tr. 432.) In fact, counsel for the Company correctly summarized the evidence on this issue of the nature of the assignment-related decisional process, noting that "the record shows that Phillips and Earley discussed with Baer which employees should be assigned to which tasks in a routine manner based on their skill, experience, and knowledge of other employees' abilities."[39] (R. Br. Ex., p. 19.)

Any lingering doubt as to the nature of the decision-making process is dispelled when one examines the evidence regarding

[37] In his letter submitted in lieu of a brief, counsel for the Union states that the Union continues to believe that "the record in this case is sufficient to establish that Phillips exercised 'independent judgment.'" (In this letter, counsel for the Union mistakenly assumes that the General Counsel no longer contends that Phillips was a statutory supervisor. In fact, the General Counsel continues to assert that Phillips possessed statutory supervisory status due to his possession of authority to discipline employees through the exercise of independent judgment. See, GC Br. Rem., pp. 13-15.)

[38] Van Nordwick testified that a tie exchanger is a machine that is designed to travel along the track removing and replacing railroad ties.

[39] The "routine manner" referenced by counsel refers to the frequency of the meetings of the troika, not to the nature of the decisions being made in those meetings.

the other foreman whose status is equally at issue in this case.[40] I have already recounted how Earley described in detail the factors involved in making these assignment decisions, including the employees' abilities to operate equipment such as cranes, read blueprints, and perform dangerous tasks safely. It is important to recall that there is no dispute as to the fact that Phillips and Earley held the same position with the same duties and responsibilities. This point was made particularly clearly in counsel for the Company's posthearing brief, where it was noted concerning Phillips and Earley that, "at all relevant times, they performed the same work and had the same functions and responsibilities." (R. Br. ALJ, p. 12.)

Ultimately, I have compared the assignment process employed by Phillips and Earley with the assignment decision-making processes described by the Board in *Oakwood* and *Croft*. In *Oakwood*, the charge nurses made discriminating judgments about the abilities of the available nursing staff and the specific needs of the patients on the hospital ward. In *Croft*, the lead persons sporadically shifted employees among a range of "repetitive tasks." *Croft*, supra at 721. Based on the full evidentiary picture presented by the General Counsel and the Union, I conclude that Phillips and Earley engaged in a mental process far closer to that of the *Oakwood* charge nurses than that of the *Croft* lead persons. Because both Phillips and Earley employed independent judgment when assigning and effectively recommending assignments, I find that the General Counsel and the Union have met their burden of establishing that the foremen utilized a process involving independent judgment when exercising their power to assign within the meaning of the Act.

Upon consideration of the credible evidence, I find that Phillips and Earley regularly assigned employees to significant overall tasks and departments within the facility. The nature of those assignments imposed a material effect on the employees' terms and conditions of employment. In making these choices, the foremen applied a sophisticated analytical process to match skills and abilities with work tasks and safety considerations.[41] That independent analytical process was not significantly constrained by any instructions from higher officials or by company rules or procedures. As a result, the foremen possessed primary indicators of supervisory authority within the meaning of the Act: the power to assign and to effectively recommend assignments.

[40] Indeed, I suspect that the General Counsel's belief as to the quantum of evidence produced on this point stems from the limited nature of his role in this case. Because he, quite properly, takes no position as to Earley's possession of supervisory status, it is possible that he has failed to take into consideration the evidence regarding Earley's specific description of the foremen's decision-making process for assigning employees to overall tasks.

[41] Safety considerations weigh heavily in the Board's assessment of the quality of the assignment power. For example, see *American River Transportation Co.,* 347 NLRB 925, 925 (2006) (towboat pilots' responsibility for "safe transport of the vessels, cargo, and the crew" is an important factor in establishing supervisory status).

IV. THE FOREMEN'S POWER TO DISCIPLINE AND EFFECTIVELY RECOMMEND DISCIPLINE

The record in this case shows that the foremen possessed two variant forms of the disciplinary power.[42] First, there are specific instances that involved the unilateral imposition of disciplinary measures by a foreman. In addition, there is an impressive quantum of testimony and documentary evidence establishing that the foremen had a very substantial role in the disciplinary functions of the collective form of leadership that I refer to as the troika. I will discuss each of these elements of the disciplinary power in turn.

A clear demonstration of the foremen's unilateral authority to impose disciplinary action is the Rettberg incident. It will be recalled that Phillips chose to issue a formal corrective action notice to Rettberg resulting from certain discriminatory comments made by Rettberg when protesting a job assignment. I have already noted that this situation did not represent an emergency and that Phillips could have simply chosen to report the incident to Baer or to have sought the intervention of other higher ranking company officials. Although he did telephone Baer to discuss the matter, he acted unilaterally in issuing the notice. That action was never questioned by his superiors. Indeed, Baer clearly affirmed counsel's observation that Phillips had been authorized "to take corrective action of a disciplinary nature against Mr. Rettberg." (Tr. 132.)

There is additional persuasive evidence that the foremen possessed the unilateral authority to impose discipline. That evidence stems from actions taken at the highest level of management. In particular, Pohubka provided testimony about the procedural circumstances of his disciplinary suspension. He reported that Phillips informed Plant Manager Tanzola about his misconduct. Tanzola, while in Pohubka's presence, responded by instructing Phillips that, "if he had a problem with me, he should write me up." (Tr. 184.) Although the ensuing suspension notice was signed by Baer, it was issued to Pohubka by Phillips himself.

I recognize that the evidence does not show that Phillips utilized his unilateral authority to impose discipline on any sort of regular basis. In addition, the record does not demonstrate that Earley ever imposed unilateral discipline. This is not decisive. As the Board noted in citing a Sixth Circuit decision with approval:

> the employee is [not] required to regularly and routinely exercise the powers set forth in the statute. It is the existence of the power which determines whether or not an employee is a supervisor.

Arlington Masonry Supply, 339 NLRB 817, 818 (2003), citing *NLRB v. Roselon Southern, Inc*., 382 F.2d 245, 247 (6th Cir. 1967). See also *West Penn Power Co. v. NLRB*, 337 F.2d 993,

[42] Sec. 2(11) lists a number of different aspects of the disciplinary power, including the authority to suspend, lay off, discharge, or discipline employees. As I will discuss, Phillips and Earley possessed authority to perform or effectively recommend each of these functions. For the sake of simplicity, I will refer to the general power to discipline as including each of these particular aspects of that authority as outlined in the Act.

996 (3d Cir. 1964). Perhaps an ultimate illustration of this precept was recently provided by the Board in *Mountaineer Park, Inc.*, 343 NLRB 1473 (2004), a case that I will discuss in detail later in this decision. Suffice it to say at this point that the Board found that an employee possessed supervisory status based on the power to effectively recommend discipline despite the fact that the employee had never actually made any disciplinary recommendations. I conclude that the evidence establishes that Phillips and Earley possessed the authority to impose discipline on a unilateral basis as illustrated by the incidents involving Rettberg and Pohubka.

I will now address the legal significance of the disciplinary procedures employed by the management troika consisting of Baer, Phillips, and Earley. The record contains the entire corpus of documentation of the Company's disciplinary actions during the period under consideration. It is striking that the single largest category of such documents consists of notices signed jointly by the three troika members. The nature of these disciplinary actions ranges from so-called verbal warnings through suspensions, a layoff, and, ultimately, the discharges of four employees. Furthermore, I have credited Phillips' explanation of the significance of the three signatures on each form. As he described it, the three signed the forms to demonstrate that "we agreed with whatever was happening." (Tr. 489.) This is entirely consistent with Baer's description of his preference for management by "consensus." (Tr. 428.) It is also consistent with an analysis of the content of the forms as detailed earlier in this decision. I readily find that the foremen were full, regular, and active participants in the tripartite process of decision making regarding the entire range of employee discipline.

I have given consideration to the question of how to categorize the tripartite operation in terms of the Board's standards for assessment of supervisory status. Does the foremen's role in the troika constitute the power to discipline, or is it a variant of the power to effectively recommend discipline? While I conclude that the best answer is that it constitutes the power to discipline, I will also discuss the alternative construction.

At the outset, I note that the Board does not require that the power to discipline must be held unilaterally to constitute a primary indicator of supervisory status. For example, in *Florida Southern College*, 196 NLRB 888, 889 (1972), the Board found that a college's dean of students was a statutory supervisor because he was a member of a committee of four whose function was to "make [effective] recommendations regarding the hiring or firing of faculty members." Because the committee as a whole possessed supervisory powers, the dean was deemed to be a supervisor. Further reflection on this subject demonstrates the wisdom of this conclusion. For example, while a member of the House of Representatives has only one vote out of 435, it can hardly be contended that he or she is not a legislator. Of course, an example closer to home would be the recognition that a member of an appellate administrative tribunal or court is no less an adjudicator because he or she may cast only one of the votes necessary to affirm or reverse a prior judgment. Finally, an examination of the purpose underlying the existence of the statutory exclusion of supervisors reveals the propriety of classifying a member of such a troika as a possessor of supervisory authority. As the Board reiterated in *Oakwood,* supra at 692, the "heart" of the statutory provision is the desire to exclude from a collective-bargaining unit those employees "whose fundamental alignment is with management." Employees who regularly vote on the fate of others accused of misconduct are so aligned. It would undermine the goals of the collective-bargaining process to hold otherwise.

Although I have concluded that the participation of Phillips and Earley in the disciplinary decisions made by the troika constituted possession of the power to discipline, I will also examine the related power to effectively recommend discipline. In the period since my original decision, the Board has provided additional guidance concerning the concept of the effective recommendation of discipline.

Initially, I note that the Supreme Court has observed that the power to make effective recommendations is given equal weight in the statute with the unilateral possession of any of the primary indicators of supervisory status. As the Court explained:

> The statutory definition of "supervisor" expressly contemplates that those employees who "effectively . . . recommend" the enumerated actions are to be excluded as supervisory. 29 U.S.C. § 152(11). Consistent with the concern for divided loyalty, the relevant consideration is effective recommendation or control rather than final authority.

NLRB v. Yeshiva University, 444 U.S. 672, 684 at fn. 17 (1980).

In two cases decided after my original decision, the Board has provided pertinent illustrations of the operation of this concept of effective recommendation of discipline. The issue in *Progressive Transportation Services*, 340 NLRB 1044 (2003), was whether a deck lead supervisor named Yozzo fell within the statutory exclusion. Yozzo was clearly a working "supervisor," performing all of the duties of the other dispatchers. However, she also issued 33 disciplinary notices to those other dispatchers. These consisted mostly of warnings, but did include two suspensions. The credited evidence showed that Yozzo did not prepare the notices by herself. Rather, she brought the disciplinary issues to the attention of her own superior, "who then [told] Yozzo what level of discipline to impose and how to draft the notices."[43] 340 NLRB at 1044. Based in large measure on the fact that Yozzo's superior did not conduct any independent investigation once Yozzo proposed discipline, the Board found that Yozzo possessed the power to effectively recommend discipline.

One year later, in *Mountaineer Park, Inc*., 343 NLRB 1473 (2004), the Board addressed the supervisory status of two assistant housekeeping supervisors, Fullerton and Guzzo. These employees spent half of their workday performing housekeeping work and the remainder engaged in supervisory duties. Their superior testified that he had received between three to five recommendations for employee discipline from Fullerton. All of these recommendations were approved. He had never received any such recommendations from Guzzo. Relying on the holding

[43] The evidence showed that Yozzo did issue discipline to one employee without first consulting her own superior. Her superior subsequently rescinded that discipline. This stands in illuminating contrast to Phillips' independent issuance of discipline to Rettburg.

in *Progressive Transportation Services*, supra, the Board found that both Fullerton and Guzzo possessed the power to effectively recommend discipline. The Board's primary rationale was that both were authorized to initiate the disciplinary process and their superior did not conduct any independent investigation once it was so initiated. While that superior did review each recommendation and added "his own judgment and insight," he placed weighty reliance on the recommendations. 343 NLRB at 1476.

If Yozzo and Guzzo possessed supervisory status based on their significant roles in the effective recommendation of discipline, there can be little doubt that Phillips and Earley fall within the same legal category. If one characterizes the operation of the troika as consisting of Baer's imposition of discipline upon the recommendation of Phillips and Earley, the case falls squarely within the Board's recent precedents just described. In addition, the record demonstrates that the foremen possessed the power to make such effective recommendations of disciplinary action apart from their activities in the troika. The most obvious example concerns the firing of Pohubka. Pohubka testified that, on the day of his discharge, Phillips told him that he was sick of his attitude. The men reported to Baer's office. Once in the office, "[Phillips] told Gene [Baer] that he's sick of my attitude, and then Gene looked at me and said they no longer needed my services." (Tr. 198.) That was the end of Pohubka's employment with the Company. There can be no more powerful illustration that the foremen's recommendations were effective—they were implemented without any additional investigation by higher levels of management. I find that the foremen possessed the power to effectively recommend discipline both through their participation in the troika and by their own unilateral action in reporting instances of misconduct to higher levels of management.

One additional matter related to the issue of disciplinary authority remains to be addressed. In his brief in support of the Company's exceptions, counsel for the Company cited my failure to explicitly discuss whether the foremen's authority to recommend and impose discipline included the element of independent judgment. In particular, he contends that the foremen's participation in the troika demonstrated the lack of such judgment since "only individuals who can act independently with respect to discipline have the power to discipline." (R. Br. Ex., p. 25.)

In my view, this formulation confuses the power to act with the requirement of exercising a particular degree of judgment in deciding what action to take. It is not the action which must be independent, it is the judgment that sets the action in motion that must have certain characteristics of independence. This is most obviously illustrated by the specific enumeration of the power to effectively recommend the various supervisory functions described in the Act. It is inherent in such a formulation that the person possessing such power to effectively recommend is not an independent actor. Nevertheless, if that person applies independent judgment to the process of making the recommendation, supervisory status is achieved. As the Board explained in *Mountaineer Park*, supra, at 1476, "Section 2(11) requires only that an individual have the authority to 'effectively recommend' discipline—not that he or she have the final authority to impose it."

In *Oakwood*, the Board provided further guidance to the labor law community regarding the meaning of independent judgment. It held that the elements of such a degree of decision-making include the power to act or recommend action "free from the control of others," by forming an opinion through the process of "discerning and comparing data." *Oakwood*, supra at 693. Beyond this, to constitute independent judgment, the decision-making must rise above the level of the routine or clerical and must not be "dictated or controlled by detailed instructions," whether such instructions come from higher officials, company policies, or the provisions of a collective-bargaining agreement.[44] *Oakwood,* supra.

With these guidelines in mind, it is evident that the authority possessed by Phillips and Earley involved the application of independent judgment. During the relevant period, the Company simply did not possess any handbook or formal disciplinary rules. In an affidavit, Baer reported that the Company also did not have any progressive disciplinary policy. Instead, "[w]e determine on a case-by-case basis what type of discipline to issue." (R. Motion for Partial Summary Judgment, Ex. C, p. 4.) Both Baer and Santos testified that written disciplinary procedures were not effectuated until approximately 1 or 2 months before the trial of this case. Similarly, counsel for the Company noted that there were no instructions about how to use the corrective action forms. (R. Br. Ex., p. 6, fn. 2.) This is not a case where disciplinary decisions were constrained by detailed rules and procedures or by the terms of a progressive disciplinary process. Deciding whether to impose discipline and what form of discipline to impose was essentially an unrestrained exercise of discretion on the part of the decision makers. It represents the classic case of decision making application of independent judgment.

The nature of the judgments being made is constant regardless of whether the decisionmaker is acting unilaterally or as part of the troika. In either case, no company policy, rule, or procedure of any type was available for consultation. Thus, when any member of the troika came to a conclusion as to which position to take with regard to the imposition of discipline, he did so by the exercise of independent judgment. Once again, it is important not to be misled by the fact that the troika member possessed only one vote among three. As with my hypothetical appellate judges, the point is not that it takes more than one vote. Instead, the key factor is that the voter engages in an independent mental exercise in deciding which way to cast that vote. In making difficult choices with far-reaching consequences up to and including termination of employment, Phillips and Earley employed exactly the sort of decision-making process intended by Congress to fall within the statutory exclusion for supervisors.

In sum, I find that the General Counsel and the Union have fulfilled their burden of demonstrating that Phillips and Earley possessed the power to discipline and effectively recommend discipline both through unilateral action and by their participation as decisionmakers in the management troika that imposed the plurality of disciplinary actions on behalf of this Employer. In exercising those powers, the foremen acted on their employer's behalf and operated by utilizing independent judgment. As a

[44] This does not represent any major departure from prior precedent. For example, in *Wackenhut Corp.,* 345 NLRB 850, 854 (2005), the Board found a lack of independent judgment when the discipline imposed was mandated by "detailed orders or regulations issued by the employer."

result, they possessed these primary indicia of supervisory status within the meaning of the Act.

V. THE FOREMEN'S POWER TO RESPONSIBLY DIRECT EMPLOYEES

In its remand of this case, the Board instructed me to consider whether the foremen possessed the power to responsibly direct the members of the workforce as defined in *Oakwood*, supra at 691–692. Under that definition, if the foremen have employees serving under them whom they instruct as to which tasks shall be undertaken next and who shall perform them, they may meet the requirements for this primary indicator of supervisory status. In that event, it is also necessary to determine whether the foremen are accountable for the performance of the subordinate employees such that there is the possibility of adverse consequences to the foremen for any failure of performance by those subordinates. If so, the foremen possess the power to responsibly direct employees. If they exercise that power in the interests of their employer and through the application of independent judgment, they are supervisors within the meaning of the Act.

It is clear that Phillips and Earley possessed the first of these prerequisites. They routinely determined which jobs should be undertaken next and who should undertake them. As Van Nordwick put it

> Once we finished a project, we would either find Bud or Butch to see what needed to be done next; and then they would assign you to the next task.

(Tr. 338.) Furthermore, for the same reasons I have discussed in detail regarding the foremen's power to assign, the directions they gave their subordinates involved the application of independent judgment, including the matching of work tasks with known skills and aptitudes of the workers and the assessment of issues of efficiency and safety.

Although the foremen's position involves many of the required aspects of responsible direction, I cannot conclude that this indicator of supervisory status is present. The record is barren of evidence showing that Phillips and Earley were held accountable for the success or failure of their subordinate employees. Nothing in the evidence establishes whether "there is a prospect of adverse consequences for the putative supervisor" if there is deficient performance. *Oakwood*, supra at 692. I recognize that one reason for this dearth of evidence is the newness of the Company and the lack of such items as a handbook or written disciplinary procedures. Where such things have never existed, their absence from the record cannot be troubling.

In this connection, I note that the single item of existing documentation most likely to contain such evidence is the job description of the foreman position that had been written by the Company's vice president, Puza. The Company has repeatedly foregone the opportunity to introduce this document into evidence. I have drawn an adverse inference from this behavior. This inference has been a decisional factor as to other aspects of this case, issues where there is significant other evidence that is consistent with the adverse inference. Here, however, the adverse inference stands alone. I decline to find that the inference, by itself, constitutes sufficient evidence to demonstrate the element of accountability. As a result, I conclude that the General Counsel and the Union have failed to meet their burden of presenting evidence sufficient to support a finding that the foremen possess the power to responsibly direct or effectively recommend such responsible direction.

VI. REMAINING ISSUES

In my original decision, I concluded that Phillips was an agent of the Company when he engaged in certain unlawful conduct consisting of the interrogation of employees and the creation of an impression that their organizing activities were under surveillance by the Employer. I based this conclusion on my finding that the Company had clothed Phillips with apparent authority to act on its behalf, particularly by making him a conduit of information from management to the work force. In his brief in support of the Company's exceptions, counsel for the Company asserts that I erred in two respects. First, he contends that, although Phillips may have been used as a conduit and so may have possessed apparent authority, there was no finding that this authority covered the behavior at issue here.[45] Second, he opines that the lack of such authority should be evident from the fact that Phillips' communications were at variance with the Company's policy toward the organizing campaign as articulated to the work force by its owner, Daloisio.

I will provide additional clarification of my reasoning as to both of these aspects of the agency issue. In addition, I will consider the issue of agency status in light of a decision issued by the Board in the period since I made my original decision.

While counsel for the Company does not seriously contest my finding that Phillips was a conduit of information between management and staff, he argues that this role was narrowly limited to job assignment information. As he put it, "the only type of decision Phillips occasionally relayed to employees related to work assignments to be completed." (R. Br. Ex., p. 30.) I cannot agree. The evidence actually shows that Phillips served as a conduit of information on a very wide array of topics.

One of the significant work functions of the foremen was the transmission of information to the workers regarding production decisions, scheduling of work, and job assignments. Vice President Puza testified that one of the primary purposes of having the foremen attend the production meetings was so that

> in that way, our foremen were informed as to being to talk to the people and say listen, we're going to be working so many hours, you know, notify the loved ones that you're not going to be home for an extra two hours a day; or you're going to have to work six days a week.

(Tr. 658.) In addition to conveying information about production decisions, work schedules, and the need for overtime, Phillips conveyed information about layoffs. For instance, Lopez testified that it was Phillips who informed him of his layoff. Beyond this, when Lopez telephoned Santos to ask about the possibility of a recall to work, Santos "just passed me through [t]o Bud" for information about this hiring issue. (Tr. 323.)

[45] In my original decision, I characterized the subject matter of Phillips' grant of apparent authority as the "authority to speak on behalf of management regarding work-related questions." *RCC Fabricators, Inc.,* supra at 932.

Phillips also served as a conduit for the Company's disciplinary decisions, for example, handing Pohubka his suspension notice.

An overall appraisal of the evidence leads to the conclusion that the foremen were employed as conduits of information about the full range of topics of concern to management and workers. Two broad statements about this practice perfectly illustrate the point. It will be recalled that, in a bit of self-deprecation, Earley characterized the foreman's role as that of a mere "messenger boy." (Tr. 501.) While the foremen were far more than that, there is no doubt that the relay of messages was an integral part of their role for the Company. This was clearly articulated by Vice President Puza, who observed

> We like to keep our, our employees totally informed. And we do that through all our companies, and with our foremen.

(Tr. 658.) Thus, the evidence establishes that the foremen, including Phillips, were regularly utilized by management as conduits of information to the workers. More specifically, they were employed as conduits of information about the entire range of issues regarding the terms and conditions of their employment.

The legal effect of the Company's use of Phillips as a conduit of information about a wide scope of topics related to the employment of their workers was that the Company clothed him in apparent authority. The principle is well illustrated in the case of *Zimmerman Plumbing & Heating Co*., 325 NLRB 106 (1997), enfd. in pertinent part 188 F.3d 508 (6th Cir. 1999), where the Board noted that, as a general proposition

> [i]t is well established that apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for that party to believe that the principal has authorized the alleged agent to perform the acts in question. Thus, in determining whether statements made by individuals to employees are attributable to the employer, the test is whether under all the circumstances, the employees would reasonably believe that the employee in question [alleged agent] was reflecting company policy and speaking and acting for management. [Internal quotation marks and citations omitted.]

325 NLRB at 106.

In *Zimmerman,* the Board found that foremen attended management meetings and were privy to the employer's policies and objectives. They "acted as the conduits for relaying and enforcing the Respondent's decisions, directions, policies and views." As a result, "given the position in which the Respondent had placed them, it was reasonable for the rank-and-file employees to believe that these foremen were reflecting company policy and acting for management when they engaged in the conduct found to be unlawful." 325 NLRB at 106. By the same token, having clothed Phillips with the identical broad apparent authority to speak as to the wide range of employment issues, the Company became responsible for his conduct in interrogating employees and creating an impression of surveillance among them. Similarly, in *Speed Mail Service*, 251 NLRB 476 (1980), the employer was held responsible for the coercive statements made by someone who was utilized by the employer as a conduit for information "with respect to such important matters as job assignments and layoffs."

The second aspect of the Company's argument on the issue of agency is the contention that Phillips cannot be considered an agent of the Company since the conduct at issue was merely personal behavior and was at odds with the Employer's actual position regarding the Carpenters Union's organizing campaign. As to the personal aspects of the behavior under scrutiny, the Board has taken a more realistic approach than simply deferring to the personal nature of the words used. For example, in *Mid-South Drywall Co*., 339 NLRB 480, 481 (2003), Campbell, a leadman who was found to be an agent of the employer, told two employees that, with regard to union activities, "if he owned the business he would close it." The Board rejected the same argument made here, holding that

> Although Campbell phrased his statement in terms of what he would do if it was his company, given Campbell's role as spokesman for management and the degree to which employees viewed Campbell as being "in charge" of the job, we find that the employees would reasonably view Campbell's statement as authorized by the Respondent or at least reflecting a shared management view.

339 NLRB at 481. Thus, Phillips' questions and statements concerning the organizing meeting held at the pizza parlor may have contained an element of personal content. Nevertheless, they could also reasonably be viewed by the employees as being either directly authorized by management or as conveying management's opinions and concerns.

This leads to discussion of counsel's remaining point, that management's views actually differed from the antiunion message implicit in Phillips remarks. In his brief in support of exceptions, counsel for the Company contends that Daloisio told the employees that "the Company would stand by any choice that they made with respect to union representation." Furthermore, "[i]t is also undisputed that the Company attempted to make arrangements for both unions to meet with the employees on company premises." As a consequence, "[g]iven this official[ly] neutral Company policy with respect to union representation, no reasonable employee would have viewed Phillips' questions as representing a negative view held by RCC management with respect to unions." (R. Br. Ex., p. 35.)

This is a disingenuous depiction of the Company's position regarding the Carpenters Union's organizing effort. The fact is that a reasonable employee could readily conclude that, far from being "neutral," the Company was opposed to the Carpenters Union becoming the representative of its work force. At a meeting convened by management, Daloisio conveyed his actual views quite clearly. As I described it in my original decision, Daloisio testified that

> he went so far as to tell the employees that "the Carpenters were more—a little more expensive, in terms of their overall package, than the Laborers Union." (Tr. 355.) Indeed, he noted that the employees told him that the Carpenters were promising wages of $50 per hour. He responded by informing them that the Laborers had shop agreements with some components of the RCC family of companies and generally received between $14 and $17 per hour. He coupled this

> with the pointed admonition that union representation would not be a problem so long as any resulting agreement was "economically advantageous to keep the company going." (Tr. 50.)

RCC Fabricators, Inc., 348 NLRB 920, 934 (2006). Beyond this, the Company's position was further underscored by the fact that, only after the Carpenters began their organizing effort, did it extend repeated invitations to the Laborers to come into the facility to discuss representation with the employees. In addition, while it is "undisputed" that the Company offered the Carpenters Union an opportunity to come into the facility to address the employees, this was only done "as part of a negotiated agreement to facilitate the representation election." 348 NLRB 920 fn. 38. As counsel for the General Counsel has described it, "[b]y allowing the Laborers to have continued access to employees, the Respondent implicitly supported the Laborers, which flies in the face of Daloisio's claim that Respondent maintained a neutral position during the union campaign." (GC Br. ALJ, fn. 18.)

Phillips' statements were not inconsistent with the Company's viewpoint. Instead, a reasonable employee could readily discern that the foreman's statements were congruent with the opinions of Daloisio and reflected a shared management view of the Carpenters' campaign. For example, Phillips was asked if he told employees that "the employer would go out of business with the Carpenters." (Tr. 164.) He responded that this was "probably" accurate. (Tr. 164.) It is instructive to compare this with Iannaco's testimony that, during a meeting, Daloisio told the assembled employees that "he actually couldn't afford the Carpenters Union in there." (Tr. 284.) The confluence between Phillips' assertions and the Company's expressed position on the Carpenters Union reinforces the reasonableness of the conclusion that Phillips was an agent of the Company when discussing the representation issue.

As with the issue of supervisory status, the Board's views concerning apparent authority have continued to evolve through the adjudicatory process in the time since my original decision. In particular, in *Facchina Construction Co*., 343 NLRB 886 (2004), enfd. 180 Fed. Appx. 178 (D.C. Cir. 2006), the Board addressed the agency status of a foreman who had made coercive antiunion statements.[46] As the Board's reasoning applies directly to the circumstances of this case, I will quote it at some length:

> Here, the evidence demonstrates that the foremen serve as conduits between employees and management, i.e., that management routinely communicates with employees through its foremen and receives information about employees from its foremen. Employees receive their daily assignments and work instructions from the foremen. Foremen are responsible for overseeing employees' work and instructing them to redo work if it is done incorrectly. When the discriminatees were discharged by the Respondent, it was [the foreman] who informed them of their discharge. If employees need to leave work early, or need some time off, they inform the foremen. Foremen regularly report to [the] superintendent about personnel issues and other problems that arise during the course of the day. In these circumstances, we conclude that employees would have reasonably believed that [the foreman] was speaking on behalf of management when he engaged in the conduct at issue.
>
> The Respondent argues that the judge's finding of agency is precluded because there is no evidence that [the foreman] was instructed by [the superintendent] to engage in the above-mentioned conduct. We reject this argument. A finding of apparent authority here does not turn on whether [the foreman] was acting pursuant to specific instructions by the Respondent; rather, it turns on whether the Respondent placed [the foreman] in a position in which employees could reasonably believe he was speaking on behalf of management. [Footnote and citation omitted.]

343 NLRB at 887.

Finding no meaningful distinction between the facts described above and the situation I must address in this case, I readily conclude that Phillips was clothed in the apparent authority to speak regarding the wide range of employee concerns relating to the terms and conditions of their employment. When he engaged in interrogations and the creation of an impression of surveillance, reasonable employees were entitled to conclude that his views were either "authorized by Respondent or at least reflecting a shared management view." *Mid-South Drywall Co*., supra, at 481.

Because of his status as supervisor and agent, I determined that the Company was responsible for certain statements made to employees by Phillips on the day following the Union's organizational meeting at the pizza parlor. In particular, Phillips informed employees that he was aware of the meeting and asked detailed questions regarding the identity of persons attending the meeting and about the nature of the discussions at that event. I found that this behavior, when considered in its full context, constituted the unlawful creation of an impression of employer surveillance of protected activity and unlawful interrogation of employees in violation of Section 8(a)(1) of the Act. In the period since my decision, the Board has continued to apply the same lodestar principles in analyzing such allegations. For example, regarding interrogations, compare *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB 347 (2006) (unlawful interrogation found where, on the day after an organizational meeting, company official asked employee who had attended that meeting) with *Amcast Automotive of Indiana*, 348 NLRB 836 (2006) (questioning found lawful where it did not attempt to uncover the union sympathies and activities of any employee). As to the impression of surveillance, see *Spartech Corp*., 344 NLRB 576 (2005) (employer's agent's statement that company knew who had attended organizational meeting held a day or two earlier constituted creation of unlawful impression of surveillance); and *Dallas & Mavis Specialized Carrier Co.,* 346 NLRB

[46] Interestingly, given the great similarity in the facts as will be apparent upon reading the portion of the case about to be quoted, the administrative law judge found that the foreman was not only an agent, but also a statutory supervisor. Because of the more limited nature of the issue in that case, the Board held that it was unnecessary to pass on the judge's finding of such supervisory status. See, 343 NLRB at 889, fn. 4.

253 (2006) (employer's manager created improper impression of surveillance when, 2 days after an offsite organizational meeting, he told an employee that he was aware of the union's organizing effort). Given the continuity of the Board's approach to these issues, I continue to conclude that Phillips' statements were unlawful.

VII. SUMMARY

Applying the Board's analytical standards for determination of supervisory and agency status, including the clarifications enunciated in *Oakwood*, *Croft*, and *Golden Crest*, supra, I conclude that the General Counsel and the Union have met the burden of establishing that Phillips and Earley possessed primary indicia of supervisory status, including the powers to assign, effectively recommend assignment, discipline (including suspend, layoff, and discharge), and effectively recommend such discipline. They exercised these powers on behalf of their employer and did so through application of independent judgment.[47] In addition, by regularly using him as a conduit of information, the Company vested Phillips with apparent authority to speak on its behalf as to matters related to the employees' terms and conditions of employment. When Phillips made certain statements that constituted unlawful interrogations of employees and the improper creation of an impression that the employees' protected activities were under employer surveillance, he acted as a supervisor and agent of the Company.

Before letting this matter rest, I believe it is appropriate to step back from the necessary, but sometimes tedious, discussion of the minutiae involving the issue of supervisory status and reflect on the purpose underlying the statutory exclusion. As the Board noted, the exclusion from a collective-bargaining unit of those employees "whose fundamental alignment is with management," is at the "heart" of the statutory provision involved in this case.[48] *Oakwood*, supra at 692. The evidence establishes that Phillips and Earley are so aligned, particularly in the critical areas analyzed in this decision. If one were to imagine that the Company's production employees were participating in a collective-bargaining unit that included their foremen, the issues in this remand are brought into sharp focus. At such a hypothetical union meeting, the rank-and-file employees would certainly wish to discuss those terms and conditions of their employment that should be subject to future contract negotiations with their employer. It is clear from the record that controversy surrounds the Company's current practices in the areas of assignment and discipline. Would a line employee feel at liberty to raise the suggestion that onerous chores such as sweeping the shop should be assigned by seniority? Would that same employee be comfortable in raising the suggestion that disciplinary procedures should include uniformly applied predetermined progressive steps? It is difficult to conceive that the presence of the persons who currently wield such unrestrained power in these areas would not have a chilling effect.[49] The community of interest essential to the success of collective bargaining would be absent. The foremen's fundamental alignment with management would preclude effective participation of the work force in the labor relations scheme created by Congress through passage of the Act.

CONCLUSIONS OF LAW

1. The General Counsel and the Union have met their burden of proving that, at all relevant times, the Company's shop foremen, James Phillips and Ronald Earley, were supervisors within the meaning of Section 2(11) of the Act.
2. The General Counsel has met his burden of proving that, at all relevant times, James Phillips was an agent of the Company with apparent authority to speak on behalf of the Company regarding matters related to the terms and conditions of employment of the Company's work force.
3. By interrogating employees regarding their protected, concerted activities and the protected, concerted activities of other employees, the Company, through its supervisor and agent, James Phillips, violated Section 8(a)(1) of the Act.
4. By creating an impression that employees' protected, concerted activities were under surveillance by their employer, the Company, through its supervisor and agent, James Phillips, violated Section 8(a)(1) of the Act.
5. Because James Phillips and Ronald Earley were supervisors within the meaning of Section 2(11) of the Act, they were not eligible to vote in the representation election held on November 21, 2002. The challenges to their ballots should be sustained.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I conclude that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that the Company be ordered to post notices in the usual manner.

Having found that none of the challenged ballots should be counted, I recommend that an appropriate Certification of Results of Election be issued.

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[47] Although not central to my post-*Oakwood* analysis, I note that the foremen possessed numerous secondary indicia of supervisory status, including the title of "supervisor;" the provision of office space for their use; their attendance and participation in production meetings; their prominent role in rating the performance of the production employees; their authority with regard to documentation of time and attendance; the issuance of company credit cards for their own use and for provision to other employees assigned to tasks outside the facility; and the subjective opinions of production employees that the foremen were their supervisors. See *Palagonia Bakery Co.,* 339 NLRB 515 (2003) (application of secondary indicia, including the opinions of other employees); *McClatchy Newspapers, Inc.,* 307 NLRB 773 (1992) (use of secondary indicia, including attendance at management meetings and access to supervisory office space); and *NLRB v. Chicago Metallic Corp.,* 794 F.2d 527 (9th Cir. 1986) (propriety of consideration of secondary indicia, including perception of other employees).

[48] Of course, this exclusion is designed to protect the interests of both labor and management. As the Supreme Court noted, in part, the exclusion reflects Congressional concern about creating "divided loyalty" among supervisory employees. *NLRB v. Yeshiva University,* 444 U.S. 672, at fn. 17 (1980).

[49] I do not mean to cast any aspersions against Phillips or Earley. They both seemed like decent people. Even the most well-intentioned boss can be influenced, consciously or otherwise, by opinions and criticisms voiced by subordinates.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[50] order and certification of representative.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Piledrivers Local 454 a/w Metropolitan Regional Council of Carpenters, Eastern Pennsylvania, State of Delaware and Eastern Shore of Maryland, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate bargaining unit:

> All full time Layout Men, Machinists, Mechanics, Shop Laborers, Welders, and Welders/Fitters employed by the Employer at its 2035 State Highway 206 South, Southampton, New Jersey facility, but excluding all other employees, including clerical employees, guards, and supervisors as defined in the Act.

ORDER

IT IS ORDERED that the Respondent, RCC Fabricators, Inc., Southampton, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees regarding their union sympathies or their participation in protected, concerted activities or regarding the union sympathies or participation in protected, concerted activities of other employees.

(b) Creating an impression that its employees' protected, concerted activities are under surveillance by their employer.

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

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

(a) Within 14 days after service by the Region, post at its facility in Southampton, New Jersey, copies of the attached notice marked "Appendix."[51] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 10, 2002.

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

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

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