Northeast Iowa Telephone Co. *and* Teamsters 421, affiliated with the International Brotherhood of Teamsters. Cases 18–CA–17200, 18–CA–17334, and 18–RC–17190

January 31, 2006

DECISION, ORDER, AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On October 6, 2004, Administrative Law Judge Keltner W. Locke issued the attached decision. The Respondent filed exceptions and a supporting brief and the Union filed a brief in opposition to the Respondent's exceptions.

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

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings,[1] and conclusions,[2] for the reasons set forth below, and to adopt the recommended Order.

I. BACKGROUND

On October 13, 2003, the Union filed a petition to represent an employerwide unit of the Respondent's technicians, office clerical employees, plant manager, and wireless manager. The Regional Director held a hearing on October 27 to address unit issues. At the hearing, the Respondent argued that the plant and wireless managers (collectively managers) were statutory supervisors. Based in part on the absence of General Manager Arlan Quandahl's testimony, the Regional Director found the evidence with respect to the managers' supervisory status to be inconclusive and allowed both to vote under challenge. The Respondent filed a request for review renewing its argument that the managers were statutory supervisors and requesting that the record be reopened to allow Quandahl to testify. The Board denied the request for review. *Northeast Iowa Telephone Co*., 341 NLRB 670 (2004). The election was held on December 3, 2003. In the relevant bargaining unit, of the eight eligible voters, four cast ballots in favor of the Union and two voted against representation with one challenged nondeterminative vote.

After the election, the Respondent filed timely objections, alleging, among other things, that the managers were supervisors and that their prounion conduct destroyed laboratory conditions requiring a new election. The judge recommended overruling the Respondent's objection, finding (1) that the managers were not statutory supervisors and (2) that even if they were supervisors, they did not engage in conduct which would compromise the laboratory conditions necessary for a free and fair election. For the reasons set forth below, we agree that assuming the managers are statutory supervisors, their conduct was not objectionable.[3]

II. THE MANAGERS' SUPERVISORY DUTIES AND PROUNION CONDUCT

Both Plant Manager Dennis Landt and Wireless Manager Thomas Hahn report directly to the Respondent's general manager, Arlan Quandahl. Since 2000, Dennis Landt has held the plant manager position after being promoted by the Respondent's board of directors. After his promotion, Landt was paid on a salary basis and was no longer eligible for overtime pay. Landt spends approximately 20 percent of his time on administrative tasks and 80 percent of his time performing work similar to that of the technicians, including ensuring that the technicians perform their installation work properly.

Landt oversees the work of two technicians located at the Respondent's Monona facility.[4] Landt arrives at the office half an hour before the technicians in order to review the trouble tickets received overnight. Upon the technicians' arrival, Landt discusses the tickets with the technicians to determine the assignment of tickets. The assignments are made, at least in part, on the geographic proximity of the jobs.[5]

Landt also participates in the technicians' annual evaluations. Landt fills out an evaluation form rating each employee on a 0-100 scale and drafts narrative

[1] 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 Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] With respect to the unfair labor practice allegations, we agree with the judge, for the reasons set forth in his decision, that the Respondent created the impression that its employees' union activities were under surveillance in violation of Sec. 8(a)(1).

No party excepted to the judge's decision to dismiss the remaining unfair labor practice allegations. Further, the Respondent has not excepted to the judge's recommendation to overrule Objections 1 and 3.

[3] As noted above, no party has excepted to the judge's recommendation to overrule Objections 1 and 3.

[4] The other two Monona technicians are overseen by the wireless manager, Thomas Hahn. Hahn did not testify at the hearing. However, it is undisputed that Hahn's supervisory authority is coextensive with Landt's. Therefore, the discussion of Landt's authority applies equally to Hahn.

[5] Throughout the day, trouble tickets are placed on a bulletin board. An office clerical may try to locate Landt to get a trouble ticket taken care of right away or a technician might simply take the ticket on his own initiative and address the problem without being assigned to the task by Landt.

comments. Landt presents drafts of his evaluations to Quandahl and includes a recommended wage increase. After Quandahl has reviewed the evaluation form, Landt meets with the technician to discuss performance. On some occasions, Quandahl has required Landt to make minor changes in the evaluations. For example, Quandahl required Landt to supplement a technician's evaluation regarding that employees' deficient participation in the sales process.[6] After Landt made the requested changes, Quandahl asked him to again revise the evaluation and emphasize the sales-related comments. Additionally, in at least three instances, Quandahl declined to follow Landt's recommendations regarding wage increases. On one occasion, Quandahl awarded the two technicians whom Landt evaluated a greater wage increase than indicated in Landt's evaluations. On another occasion, Quandahl gave one employee a lower wage increase than Landt recommended based on that employee's deficiencies in the sales area. However, Landt testified that the actual wage increases awarded in all these instances were based on his evaluations.

The managers also take part in the hiring process. The only two technicians to be hired during Landt's tenure as plant manager were recruited by Landt and hired on the strength of his recommendations. Landt spoke to both employees, encouraged them to apply, discussed each one's technical abilities and work ethic with Quandahl, and ultimately recommended that they be hired. Quandahl conducts his own interview of applicants after consulting with Landt about their technical qualifications. While interviewing job applicants, Quandahl focuses on personality and whether the applicant is a good fit for the Company.

Landt also testified that he has the authority to discipline technicians but indicated that he never had to do so.

During the organizing campaign, the managers manifested their support for the Union. The managers attended union meetings held at employees' homes and informally spoke at the meetings along with other employees sitting around the table. The managers also signed authorization cards while other employees were present. Landt told the technicians he supervised that "if they felt that's what they should do [vote for the Union] that's what they should do," that if the Union won it could help resolve issues concerning the "fairness of overtime and comp time," and that the Union would help protect against layoffs.[7] Although the judge found that the Respondent did not take a stand against the Union before the election, the Respondent admits in its exceptions that "Quandahl made clear his views on the union and that it was not necessary."[8]

[6] Quandahl relies exclusively on Landt's evaluation of the employee's technical skills. Quandahl operates the financial and growth ends of the business and relies on the managers for the technical aspects.

III. ANALYSIS

Respondent's Objection 2 alleges that the Petitioner's use of the managers, who the Respondent argues are statutory supervisors, "to actively obtain support for Petitioner in the December 3, 2003 election destroyed laboratory conditions necessary for a free and fair election." In agreeing with the judge that the Respondent's Objection 2 should be overruled, we find it unnecessary to rely on his finding that the managers are not statutory supervisors. Instead, assuming arguendo that the managers are statutory supervisors, we find that their prounion conduct did not interfere with employee free choice and did not materially affect the outcome of the election.

In *Harborside Healthcare, Inc.*, 343 NLRB 906, 909 (2004), the Board clarified the standard to be applied in cases involving objections to an election based on supervisory prounion conduct. In such cases, the Board examines two factors. First, the Board examines whether the supervisor's prounion conduct reasonably tended to coerce or to interfere with employee free choice. To that end, the Board weighs the nature and degree of supervisory authority possessed by those engaged in the prounion activity and the nature, extent, and context of the conduct in question. Id. Second, the Board examines whether the conduct interfered with the employees' freedom of choice to the extent that it materially affected the outcome of the election. This inquiry requires consideration of the margin of victory, whether the conduct was widespread or isolated, the timing of the conduct, the dissemination of the conduct, and the lingering effect of the conduct. Id. Importantly, the Board noted that evidence of express threats or promises is not required in order for prounion supervisory conduct to be objectionable. Id., *Glen's Market*, 344 NLRB 294, 295 (2005). Further, the Board has decided to apply its *Harborside* decision retroactively to all pending cases. *SNE Enterprises, Inc.*, 344 NLRB 673 (2005).

Initially, based on the limited evidence of supervisory authority and the nature of the alleged supervisors' conduct, we find that the plant and wireless managers' prounion conduct did not reasonably tend to coerce or to interfere with employee free choice. While we assume

[7] There is no indication that Hahn spoke with employees regarding the Union apart from his participation in the meetings also attended by Landt.

[8] We interpret Quandahl's views as antiunion.

for purposes of our analysis that the plant and wireless managers are statutory supervisors, we note that they do not wield the full panoply of supervisory authority. Neither manager has ever disciplined a technician or been involved in a technician's termination or suspension.[9] Further, to the extent that either manager is responsible for scheduling technicians, the scheduling appears to be of a routine nature. The strongest evidence of supervisory authority is in the areas of effective recommendation to hire and to grant wage increases pursuant to the annual evaluation process.

With respect to the managers' prounion conduct, it is undisputed that the conduct was limited to attending union meetings, participating in discussions at those meetings, signing authorization cards in front of employees, and mentioning some of the issues that a union could help resolve, such as the fairness of scheduling, overtime, and layoffs. Such prounion activity markedly differs from that in *Harborside*.

In *Harborside*, 343 NLRB at 909, where the Board found objectionable supervisory prounion conduct, the supervisor in question initiated discipline, assigned schedules, gave principal input on evaluations, directly suspended employees, and effectively recommended suspension and termination. At least one employee testified in *Harborside* that the supervisor "could write you up and make you lose your job." Armed with such broad authority over the employees' day-to-day working conditions, the supervisor repeatedly told employees during the election campaign that they could lose their jobs if the union lost the election, initiated loud and intimidating confrontations with employees to cajole them to support the union, and engaged groups of employees in discussions during which the supervisor made numerous references to the lack of job security. The supervisor also told employees that she was counting on them to vote for the union. Additionally, the supervisor solicited authorization cards from employees, pressured an employee to wear a union pin, solicited employee signatures on a union petition, and required at least one employee to attend union meetings.

Here, conversely, the conduct of the managers does not approach the extensive and intimidating prounion conduct engaged in by the high-level supervisor in *Harborside*. To the extent that the managers possess supervisory authority, the employee technicians are affected by it in two limited circumstances—at their initial hiring and during the annual evaluation process. Further the managers' prounion conduct was limited at best. The managers attended meetings held in employees' homes, spoke at those meetings along with the other attendees, signed authorization cards in front of other employees, and mentioned some of the potential issues that a union could help resolve. The Respondent does not allege that the managers solicited authorization cards from other employees. Accordingly, the managers' prounion conduct coupled with their limited supervisory authority did not reasonably tend to coerce or to interfere with employee free choice.

Even assuming that the managers' conduct was objectionable, we find that it did not materially affect the outcome of the election. While the Union's two-vote margin of victory might support such a finding that the managers' conduct could have materially affected the outcome of the election, other relevant factors lead us to the opposite conclusion. First, the managers' conduct appears to have been isolated. Concededly, the managers attended a number of union meetings, engaged in limited discussions with employees about the campaign, and signed authorization cards in front of other employees. However, there is no evidence that the managers signed their cards in front of employees under their supervision. The only prounion conduct directed by the managers to the technicians under their supervision was Plant Manager Landt's statements (1) that if the employees felt that they should vote for the Union then they should vote for the Union and (2) that if the Union won it could help resolve issues regarding overtime, compensatory time, and layoffs. The first statement is not itself an endorsement of the Union and the second is merely a statement of the potential benefits of collective bargaining. Further, this is not a case in which employer representatives were prounion during the organizing campaign such that the prounion sentiments of a supervisor might be attributed to the employer and their effect on the election compounded. Instead, the Respondent admitted that Quandahl made clear to the employees during the campaign that the Union was not necessary. Accordingly, to the extent that Landt's statements could be viewed as prounion they are less likely to be attributed to the Respondent. Further, the Respondent's admitted antiunion stance would have served to mitigate the supervisor's conduct in this case given the limited nature of their conduct and of their authority. Based on these facts, we conclude that the managers' prounion conduct, even if it

[9] While there was testimony that the managers have the authority to discipline employees, there was no evidence that such discipline has ever occurred or if it were to occur what form and effect it would have. Chairman Battista does not rely upon the absence of evidence of exercise of authority. In this regard, he notes that Sec. 2(11) speaks of possession of authority. And, in Chairman Battista's view, the possession of supervisory authority, if accompanied by *Harborside*-type prounion conduct, can be sufficient to intimidate an employee into supporting the union.

were objectionable, did not materially affect the outcome of the election, despite the small margin of victory.

Lastly, we take issue with our concurring colleague's accusation that we have imposed some preset view of the "natural state" of labor relations in reaching our decision. We do not assume that employers are prounion or antiunion, and we firmly believe that Section 8(c) gives employers the right to espouse either view. Similarly, the fact that an employer is prounion or antiunion will not itself render an election invalid. We simply say that *if* an employer expresses an antiunion view, that may mitigate a supervisor's prounion coercive conduct. However, the fundamental issue remains the same. That issue is whether a supervisor's prounion actions have interfered with employees' exercise of their Section 7 right to choose whether or not to be represented. When supervisors inject themselves in the debate in a coercive manner, employee free choice may well be inhibited.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Northeast Iowa Telephone Company, Decorah, Iowa, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Teamsters 421, affiliated with the International Brotherhood of Teamsters, and that it is the exclusive collective-bargaining representative of the employees in the unit found appropriate.

MEMBER LIEBMAN, concurring.

The majority decides that under the Board's *Harborside* decision, in which I dissented, the conduct at issue here was not objectionable. Although I agree with that conclusion,[1] I write separately to disavow any suggestion that the natural state of affairs is for an employer to be antiunion, that the law is premised on this adversarial stance, and that if an employer is in fact prounion, it is both unnatural and somehow unlawful (or at least grounds for overturning a union election victory). The majority implicitly assumes that employees will be able to exercise free choice in an antiunion atmosphere, but will somehow be inhibited in a prounion atmosphere. Its approach, even if premised on assumptions that more closely resemble the prevalent state of affairs, is short sighted and unfortunate. It is also wrong as a matter of legal analysis.

[1] *Harborside Healthcare, Inc.,* 343 NLRB 906 (2004). Like Member Schaumber, I do not join Chairman Battista's position expressed in fn. 9 of the majority's decision.

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Alan I. Model, Esq. (Grotta, Glassman & Hoffman, P.C.), of Roseland, New Jersey, for the Respondent.
Andrea F. Hoeschen, Esq. (Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C.), of Milwaukee, Wisconsin, for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on September 13 and 14, 2004, in Decorah, Iowa. After the parties rested, I heard oral argument, and on September 16, 2004, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[1]

Further Discussion Concerning Case 18–RC–17190

On December 3, 2003, the Board conducted an election in Case 18–RC–17190. The Union received a majority of the valid votes and challenges were not sufficient in number to affect the outcome. The Employer timely filed three objections.

In the bench decision, I concluded that the Board already had considered Respondent's first and third objections and had rejected them in a published order. *Northeast Iowa Telephone Co.,* 341 NLRB 670 (2004). Because these objections were not before me, I did not consider them further. However, I did consider Respondent's second objection, which stated as follows:

> Petitioner's use of said statutory supervisors to actively obtain support for Petitioner in the December 3, 2003 election destroyed the laboratory conditions necessary for a free and fair election.

The words "said statutory supervisors" refer to Dennis Landt and Tom Hahn, whose job titles were plant manager and wireless manager, respectively. Landt testified during the hearing but Hahn did not.

In the bench decision, I concluded that Respondent had failed to carry its burden of proving that the putative supervisors met the definition of "supervisor" set forth in Section 2(11) of the Act. Therefore, I recommended that Respondent's second objection be overruled. The following discussion explains in greater detail my conclusion that neither Landt nor Hahn was a statutory supervisor.

The evidence established that sometime around the year 2000, Landt's job title changed to "plant manager." Before that time, Landt received an hourly wage rate and could earn overtime pay for overtime work. When Landt's title changed to plant manager, he began receiving a salary and no longer drew overtime pay.

[1] The bench decision appears in uncorrected form at pages 387 through 414 of the transcript. The final version, after correction of oral and transcriptional errors, is attached as appendix A to this certification.

The evidence established that Landt oversaw the work of two technicians, Stan Dull and Scott Chase. Unlike Landt, Dull, and Chase are paid by the hour and receive overtime pay.

Landt testified that he spends 80 percent of his worktime doing the same type of technical duties which Dull and Chase perform. The remaining 20 percent of his worktime, Landt performs administrative tasks.

Landt does not have a private office but works out of a downstairs conference room which he shares with a number of other individuals. Each weekday morning, Landt arrives at work before Dull and Chase and reviews the work orders and trouble tickets which he has received from office employees. Landt then tells Dull and Chase about the work orders when they arrive. The record does not establish that Landt uses independent judgment to make work assignments, as contrasted to discussing the available work with the two men and then collectively deciding who should do which job.

Landt testified that he "probably" had authority to require an employee to work overtime. However, the record falls short of establishing that Landt uses independent judgment in the assignment of overtime. Similarly, Landt has authority to grant employees' vacation requests or, presumably, to deny them. However, Landt has never denied a vacation request.

Landt prepares annual performance appraisals for Dull and Chase, but shows these draft appraisals to General Manager Quandahl before giving them to the employees. On occasion, Quandahl instructs Landt to change the performance evaluations in some way.

Landt can make a recommendation that management grant a wage increase to Dull and Chase, but the record fails to establish that such recommendations are effective. To the contrary, when Landt most recently recommended wage increases for these employees, management did not follow those recommendations.

Landt does not have access to the employees' personnel files. He may possess authority to issue an employee an oral warning but the record does not indicate that he has ever used this authority.

Landt has recommended that management hire certain individuals who were, in fact, hired. However, General Manager Quandahl participated in the interview process.

The Act defines "supervisor" to mean "any individual having 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." See 29 U.S.C. § 152(11).

Thus, to warrant a conclusion that a particular person meets the statutory definition of supervisor, the evidence must establish three elements: (1) That the individual had authority to perform one of the functions listed in the statute; (2) that the individual exercised this authority in the interest of the Employer, and (3) that the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

The burden of proving supervisory status rests with the party asserting such status. *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999); *Alois Box Co.,* 326 NLRB 1177 (1998). In this case, that party is the Employer, Northeast Iowa Telephone Company.

The evidence, summarized above, indicates that Landt had some authority to direct, assign, reward, and discipline employees in the interest of the Employer. However, the record does not establish that Landt's exercise of such authority went beyond the routine or required the use of independent judgment.

Landt's authority to reward employees consisted of filling out annual performance appraisals and recommending wage increases. As noted above, the general manager sometimes tells Landt to modify the performance appraisal before giving it to the employee and does not always follow the recommendations. Therefore, I conclude that Landt's authority to reward employees falls short of that required to establish supervisory status under Section 2(11).

Landt's authority to impose discipline also is limited. Although Landt believed he had authority to give an oral warning, the record does not indicate that such a warning would be an "official" action within a disciplinary system rather than merely cautionary remarks offered by one employee to another. Moreover, in practice, Landt did not give such warnings.

It is true that the Employer paid Landt a salary rather than an hourly wage. However, the form of compensation is not one of the indicia listed in Section 2(11). Such a "secondary indication" is not dispositive. *General Security Services Corp.,* 326 NLRB 312 (1998). Similarly, it is not dispositive that Landt sometimes attended management meetings.

Landt was also a shareholder in Respondent but that fact does not confer supervisory status. Employees at many companies own stock in their employers, and sometimes buy those shares through payroll deductions under an employee stock purchase plan. Needless to say, this ownership interest does not turn the employees into statutory supervisors.

In sum, I conclude that Landt's "supervisory" duties did not require the exercise of independent judgment but instead were the routine actions typical of a leadman. *Byers Engineering Corp.,* 324 NLRB 740 (1997); *S.D.I. Operating Partners, L.P.*, 321 NLRB 111 (1996). Therefore, I also conclude that Landt was not a supervisor within the meaning of Section 2(11) of the Act.

The Employer also asserts that Wireless Manager Tom Hahn is a statutory supervisor. However, Hahn did not testify and the record otherwise does not establish that he possessed any more authority than Landt, whom I have concluded is not a supervisor. Similarly, the evidence fails to demonstrate that Hahn's "supervisory" duties were any less routine, or required any greater exercise of independent judgment, than Landt's. Accordingly, I conclude that the Employer has not met its burden of proving either Landt or Hahn to be a statutory supervisor.

Because Landt and Hahn are not supervisors, even if they had engaged in union activities, it would not provide a basis for setting aside the election. Therefore, I recommended that the Employer's second objection be overruled.

Even should the Board disagree with my conclusion that Landt and Hahn are not supervisors, I would still recommend

that the Employer's objection be overruled because the record does not establish that either Landt or Hahn engaged in any conduct which would compromise the laboratory conditions necessary for a free and fair election.

My observations of the witnesses lead me to conclude that the testimony of Dennis Landt is reliable and I credit it. Based on that testimony, I find that Landt signed a union authorization card which he obtained from Union Business Agent John Rosenthal. However, Landt never solicited any employee to sign an authorization card.

Landt attended union meetings, where he expressed his opinions during informal group discussions, but he did not speak more than others attending the meeting and never delivered a formal speech. Landt never told employees that they had to come to union meetings. The Employer has not asserted that Hahn, who did not testify, possessed or exercised a greater amount of supervisory authority than Landt, and the record would not support such a conclusion. I find that Hahn's authority to perform the supervisory functions listed in Section 2(11) does not exceed that of Landt. Likewise, the record does not establish that Hahn engaged in union activities to any greater extent than Landt, and I conclude that he did not.

A supervisor's union activities do not invariably disturb the laboratory conditions necessary for a free and fair election, and do not necessarily require that an election be set aside. However, the Board will sustain an objection based upon a supervisor's prounion conduct in either of two situations: (1) When the employer takes no stand contrary to the supervisors' prounion conduct, thus leading the employees to believe that the employer favors the union, or (2) when the supervisors' prounion conduct coerces employees into supporting the union out of fear of retaliation by, or expectation of rewards from the supervisors. *Sutter Roseville Medical Center*, 324 NLRB 218 (1997).

The record does not establish that the Employer had taken a stand contrary to the Union before the December 3, 2003 election. It is true that General Manager Quandahl made a violative statement which reasonably would convey to an employee the impression that her telephone calls to the Union were under surveillance. However, Quandahl made this statement in late May 2004, almost 6 months after the December 3, 2003 election. Credited evidence does not demonstrate that, before the election, management made statements which took a stand against the Union.

In these circumstances, if a supervisor engaged in certain prounion conduct before the election, the conduct could constitute a basis for overturning the election. Nonetheless, I do not conclude that Landt's prounion conduct was sufficient to disturb the necessary laboratory convictions. Likewise, the record does not establish that Hahn engaged in any prounion conduct which would warrant setting the election aside.

Landt did not solicit any employee to sign a union authorization card. There is no evidence that he expressed prounion views in the workplace. Even when he attended a union meeting at a private home, Landt did not take any leadership role but simply expressed his views as part of a group discussion. There is no evidence either that employees regarded Landt as speaking for the Employer or that they reasonably would consider him to be expressing the viewpoint of management.

In sum, the Employer has not established that either Landt or Hahn made prounion statements in the workplace or otherwise expressed their views in a manner which reasonably would convey to employees that they were voicing the Employer's position. Therefore, notwithstanding the lack of evidence that the Employer had taken any stand against the Union, I conclude that the conduct of Landt and Hahn does not warrant setting the election aside.

In *Sutter Roseville Medical Center*, above, the Board also noted that an election would be set aside when a supervisor's prounion conduct coerced employees into supporting the union out of fear of retaliation by, or expectation of rewards from the supervisor. The record does not establish that either Landt or Hahn engaged in such coercive conduct and I find that they did not.

Therefore, even if the evidence had established that Landt and Hahn were supervisors, I would still recommend that the Board overrule the Employer's second objection.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to post the notice to employees attached hereto as Appendix B.

Further, I recommend that the Board overrule the Employer's objection in Case *18–RC–17190*, severe this case from the unfair labor practice cases, and remand it to the Regional Director for the appropriate certification.

CONCLUSIONS OF LAW

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

2. The Charging Party, Teamsters 421, affiliated with the International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by threatening an employee that management was monitoring that employee's cellular telephone calls to the Charging Party.

4. The aforesaid unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent did not engage in any unfair labor practices not specifically found herein.

On the findings of fact and conclusions of law, and on the entire record in this case, I issue the following recommended[2]

ORDER

The Respondent, Northeast Iowa Telephone Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression that it has placed its employees' union activities under surveillance by monitoring their cellular telephone calls.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend 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.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

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 Monona, Iowa, copies of the attached notice marked "Appendix B."[3] Copies of the notice, on forms provided by the Regional Director for Region 18, 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 May 27, 2004.

(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 Regional Director attesting to the steps that the Respondent has taken to comply.

APPENDIX A

This decision is issued pursuant to Section 102.35(a)(10) and Section 102.45 of the Board's Rules and Regulations. I conclude that Respondent's general manager violated Section 8(a)(1) by making one unlawful statement, but I recommend that the Board dismiss the other allegations raised by the Complaint. Additionally, I conclude that the Board already has rejected two of Respondent's objections in the representation case and recommend that the Board overrule the third.

Procedural History

On October 10, 2003, the Union, Teamsters 421, affiliated with the International Brotherhood of Teamsters, filed a petition with the National Labor Relations Board in Case 18–RC–17190. The Union sought to represent certain employees of the Respondent, Northeast Iowa Telephone Company.

On December 3, 2003, pursuant to a Decision and Direction of Election dated November 7, 2003, the Board conducted a secret ballot election in which two units of Respondent's employees had the opportunity to vote. One of these units consisted of office clerical employees and is not at issue in this proceeding. The other unit consisted of the following employees:

> All full-time and regular part-time technicians employed by the Employer at its Monona and Decorah, Iowa facilities; excluding office clerical employees, and guards and supervisors as defined in the National Labor Relations Act, as amended.

After the election, the Board impounded the ballots because of a pending request for review of the Decision and Direction of Election.

On February 25, 2004, the Union filed an unfair labor practice charge against Respondent in Case 18–RC–17200.

In an April 30, 2004 Order, the Board denied Respondent's Request for Review of the Decision and Direction of Election in the representation case. This action resulted in the ballots being counted on May 5, 2004. The tally of ballots showed that in the technicians unit, there were approximately 8 eligible voters, no void ballots, 4 votes cast for the Union, 2 votes cast against the Union, and 1 challenged ballot.

On May 11, 2004, Respondent filed timely objections to conduct affecting the results of the election.

On June 14, 2004, the Union amended the unfair labor practice charge it had filed in Case 14–CA–17200. On June 18, 2004, the Union filed another unfair labor practice charge against Respondent, which was docketed as Case 18–CA–17334.

On June 28, 2004, the Regional Director for Region 18 of the Board issued a Complaint and Notice of Hearing in Case 18–CA–17200.

On July 1, 2004, the Regional Director issued a Report on Objections, Order Directing Hearing, Order Consolidating Cases and Notice of Hearing. This document consolidated the representation case with the unfair labor practice case then pending hearing.

On July 23, 2004, the Regional Director issued an Order Further Consolidating Cases, Amended Consolidated Complaint and Notice of Rescheduled Hearing. This document consolidated the second unfair labor practice charge, in Case 18–CA–17334 with the first, Case 18–CA–17200, and both unfair labor practice charges with the objections in Case 18–RC–17190. For brevity, I will refer to it simply as the "Complaint."

On September 13, 2004, a hearing opened before me in Decorah, Iowa. At the beginning of the hearing, I granted the General Counsel's motion to correct some apparent typographical errors in the Complaint. This decision will quote the Complaint as it has been corrected by the amendment.

On September 13 and 14, the parties presented evidence. On September 14, 2004, after all sides had rested, counsel presented oral argument concerning both the unfair labor practice and representation issues.

Today, September 16, 2004, I am issuing this bench decision, which first will address the unfair labor practice issues.

Cases 18–CA–17200 and 18–CA–17334

Undisputed Matters

In its Answer to the Complaint, Respondent admitted a number of allegations. Based on those admissions, I find that the General Counsel has proven that the Union filed and served the unfair labor practice charges as alleged in Complaint paragraphs 1(a), (b), and (c).

[3] 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."

Additionally, based on Respondent's admissions, I find that it is an Iowa corporation with places of business located in Monona and Decorah, Iowa, and that at all material times, it has been engaged in providing telephone services and products, cable television service, internet service, and wireless service to various communities in northeast Iowa.

Respondent also has admitted facts establishing that it meets both the Board's statutory and discretionary standards for the assertion of jurisdiction. I so find. Further, I conclude that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent admits, and I find, that at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

Additionally, based on the admissions in Respondent's Answer, I find that at all material times, General Manager Arlan Quandahl and Office Manager Julie Hemmersbach have been supervisors of Respondent within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act.

Disputed Matters

Respondent has denied other allegations, which I will discuss in the order they appear in the Complaint.

Complaint Paragraphs 5(a) through 5(g)

Complaint paragraphs 5(a) through 5(g) allege that Respondent's general manager, Arlan Quandahl, made a number of unlawful statements during a meeting which took place on February 17, 2004. It is appropriate to begin the discussion of these allegations with an overview of the meeting and an assessment of the credibility of the persons who testified about it.

Office Manager Julie Hemmersbach supervised employees Ann Marie Kirkestrue, whose title was administrative assistant, and Audrey Tschirgi, whose title was customer service administrator. Notwithstanding the word "administrator" in Tschirgi's title, no party asserts that either Kirkestrue or Tschirgi was a supervisor and the record would not support such a finding.

The working relationships between Hemmersbach and Kirkestrue and between Hemmersbach and Tschirgi had deteriorated. It appears that these employees and their supervisor were still on speaking terms but hostility had become manifest. According to General Manager Quandahl, the tension could be discerned by someone who walked into the office. "It was an adversarial place out there," he said.

The lack of communication took its toll on the work. Because of inconsistencies and inaccuracies, Quandahl began to doubt the accuracy of the data in the status reports the office staff produced.

It appears that the communication problems also slowed the speed of production. After the office staff had been working on a report for 2 to 3 weeks, Quandahl called a meeting to discuss the matter with Office Manager Hemmersbach and her two employees, Kirkestrue and Tschirgi. Complaint paragraphs 5(a) through 5(g) allege that Quandahl made unlawful statements at this February 27, 2004 meeting.

Complaint Paragraph 5(a)

Complaint paragraph 5(a) alleges that on or about February 17, 2004, Respondent threatened employees that job duties of one employee had been taken away due to the employee's support of the Union. Respondent denies this allegation.

No witness testified that Quandahl made the statement attributed to him in Complaint paragraph 5(a). However, to the extent that the testimony of Kirkestrue and Tschirgi contradicts that of Quandahl and Hemmersbach, my observations of the witnesses lead me to credit Quandahl and Hemmersbach.

Moreover, other evidence is consistent with the conclusions I draw from the demeanor of the witnesses. The record suggests that both Kirkestrue and Tschirgi harbored some ill feelings which may have colored their testimony.

On cross-examination, Kirkestrue admitted that during the February 17 meeting, she either called Hemmersbach a "bitch" or said that Hemmersbach was acting like one in her dealings with employees. Further, Kirkestrue sometimes testified in a somewhat halting manner which raised a question concerning how much her words mirrored something she had rehearsed rather than her original memories of the meeting.

Tschirgi admitted that her relationship with Hemmersbach was strained and that had always been the case. Moreover, Tschirgi admitted that a conflict involving her husband and Quandahl's wife (who worked together for a county department) had created tensions.

This animosity did not help Kirkestrue and Tschirgi to be dispassionate and disinterested witnesses. But nonetheless, neither Kirkestrue's testimony nor Tschirgi's testimony about the February 17 meeting quoted Quandahl as saying that any employee's job duties had been taken away because of that employee's support for the Union.

No other evidence supports this allegation. Finding that Quandahl did not make the statement attributed to him in Complaint paragraph 5(a), I recommend that the Board dismiss this allegation.

Complaint Paragraph 5(b)

Complaint paragraph 5(b) alleges that during this same February 17, 2004 conversation, General Manager Quandahl "threatened employees that he would sell Respondent or move it if employees did not support Respondent." Read literally, these words do not allege a violation of the Act. Therefore, I recommend that the Board dismiss this allegation.

Possibly, the drafter of the language in Complaint paragraph 5(b) intended it to say "if employees did not support Respondent against the Union." However, no credited evidence establishes that Quandahl made any statement of this kind during the February 17, 2004 meeting.

Moreover, even *discredited* testimony does not support a finding that Quandahl threatened to sell or move Respondent because employees supported, or continued to support, the Union. Kirkestrue did testify that Quandahl made a comment about moving the company, but her testimony does not link moving the company to any employee's union sympathies or activities.

Kirkestrue's testimony clearly indicates that Quandahl's comments focused on the communication problem in the front

office. Quandahl wanted Kirkestrue and Tschirgi to begin their work days by writing down what work they intended to do and then to close their work days by writing down what they had accomplished. Quandahl directed them to give these notes to their supervisor so that she would be aware of the work and its progress.

Reading "between the lines" of Kirkestrue's testimony, I infer that she and Tschirgi vigorously opposed this instruction. Kirkestrue claimed that the supervisor already knew what Kirkestrue was doing because the supervisor's desk was nearby. Tschirgi admitted the she did not respect the supervisor.

Both Kirkestrue and Tschirgi testified that this meeting lasted several hours, which would seem to be a long time to discuss the communication problem, at least if the employees agreed there was, in fact, a problem. But extended argument about whether the problem existed, and if so, who bore responsibility for it, could well prolong the meeting and frustrate Manager Quandahl as well.

Cutting through the colloquy, Quandahl instituted a remedy which appeared to be both simple and effective: At the start of each workday, the employees would write down what they were going to do and give the notes to the supervisor; at the end of the day, they would follow up with notes summarizing what they actually had accomplished.

It isn't surprising that Kirkestrue and Tschirgi would resent this instruction. At this same meeting, Kirkestrue had told Quandahl that the supervisor was a "bitch" (or acting like one), and, as previously noted, Tschirgi admitted in her testimony that she did not respect the supervisor. Logically, employees with such attitudes about their supervisor would not be enthusiastic about this supervisor exercising greater oversight.

However, Quandahl insisted that they follow the instruction for two weeks and, according to Kirkestrue, threatened disciplinary action if they did not. Kirkestrue testified that during this February 17, 2003 meeting, Quandahl said "that if we weren't going to be team players for the company, that he would sell the company, be better off located in Houston, Minnesota."

For the reasons discussed above, I do not credit this testimony. However, even if I had credited it, the testimony does not constitute a threat to move the company *in retaliation for Union activity*.

The government would read the phrase "team player" to be synonymous with "antiunion." In context, however, Quandahl clearly was not using the words "team player" as a veiled or coded reference to union or antiunion sentiments. Kirkestrue's own testimony establishes that Quandahl had called the February 17, 2003 meeting to find out why the office staff was not working as a team: "He wanted to know why we were not communicating and being team players."

Kirkestrue's further testimony does attribute to Quandahl a reference to the Union but even this testimony, which I specifically discredit, fails to provide a basis for equating the phrase "team player" with "antiunion." After testifying that Quandahl wanted to know why they were not communicating and being team players, Kirkestrue continued as follows:

> I told Arlan Quandahl that Julie was not communicating to us also. He also stated that we needed to be team players and to work together, that no matter how much money it took, he was not going to let the Union come in. He also stated that we needed to report to Julie Hemmersbach morning and evening on what we did during the day. That he had known what I was doing since a lot of my job responsibilities were taken away since my involvement with the Union. And he was giving us two weeks and if we didn't comply to this we would be reprimanded if we didn't report to Julie morning and evening that our jobs would be terminated.

The words Kirkestrue attributes to Quandahl–"that no matter how much money it took, he was not going to let the Union come in"–seems unrelated to what came before and to what came afterwards. They come from "out of the blue." I suspect that they are an interpolation added by Kirkestrue as she rehearsed her testimony.

Kirkestrue's other reference to the Union in the testimony quoted above also sounds uncomfortably out of place. According to Kirkestrue, Quandahl said "that he had known what I was doing since a lot of my job responsibilities were taken away since my involvement with the Union."

Quandahl had no reason to interject that he knew what work Kirkestrue was doing. Indeed, his major point was that the supervisor, Hemmersbach, did not know what Kirkestrue or Tschirgi was doing. Quandahl would have undermined this point if he had said that he knew what the employees were doing (even though the supervisor did not).

Moreover, Quandahl had no particular reason to bring up the Union at all during this meeting. The Board had conducted the representation election on December 3, 2003, more than 2 months earlier, and Respondent's request for review remained pending.

For these reasons, I discredit Kirkestrue's testimony. But even assuming for the sake of argument that Quandahl had, in fact, spoken the words attributed to him by Kirkestrue, these words do not constitute a threat to close or move the facility in retaliation for Union activity.

In sum, I find that the government has failed to prove the allegations raised in Complaint paragraph 5(b). Therefore, I recommend that the Board dismiss them.

Complaint Paragraph 5(c)

Complaint paragraph 5(c) alleges that during this same conversation, Quandahl "prohibited employees from socializing with other employees and managers because of their activities on behalf of the Union." Respondent denies this allegation.

In response to the question, "What, if anything, do you recall about socializing," Kirkestrue testified as follows:

> We were not to socialize, Audrey Tschirgi and myself were not to socialize with Tracy Smith 'cause he would fill our head with nonsense about joining the Union would be the best thing that we could do.

Quandahl denied, clearly and unequivocally, that he told employees that they should not socialize with other employees because they supported the Union.

Quandahl testified that he did not remember saying anything at all about not socializing with Tracy Smith, but he specifically denied instructing employees that they should not associate with Smith because of the Union.

For the reasons already discussed, I do not credit Kirkestrue's testimony. Therefore, I find that Quandahl did not make the statement she attributed to him, quoted above. Accordingly, I recommend that the Board dismiss the allegations in Complaint paragraph 5(c).

Complaint Paragraph 5(d)

Complaint paragraph 5(d) alleges that during this same February 17, 2004 conversation, Quandahl accused employees of not being team players because they supported the Union. During the hearing, I granted Respondent's motion to dismiss these allegations. However, some further discussion of my conclusions may be helpful.

Because of Section 8(c) of the Act, I have serious reservations that such a statement, even if proven, would violate Section 8(a)(1) of the Act.

Section 8(c) of the Act provides that "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Arguably, in some circumstances, accusing someone of not being a "team player" might convey a threat of reprisal. However, I need not explore that issue because the credited evidence in this case does not establish that Quandahl accused employees of not being team players because they supported the Union.

To the extent that Quandahl stated, or even implied, that Kirkestrue and Tschirgi were not team players, he associated that conclusion with their failure to communicate effectively with their supervisor about their work. No credited evidence indicates that Quandahl told Kirkestrue and Tschirgi that they were not team players because of their Union sympathies or activities.

Therefore, I recommend that the Board dismiss the allegations raised by Complaint paragraph 5(d).

Complaint Paragraph 5(e)

Complaint paragraph 5(e) alleges that during this same February 17, 2004 conversation, Quandahl "threatened to fire employees because of their support for the Union, and that employees had two weeks to get their act together." Respondent denies this allegation.

No credited evidence establishes that Quandahl made such a threat, and I find that he did not. To the contrary, Quandahl told Kirkestrue and Tschirgi that they must keep their supervisor informed about their work by writing daily notes, and had to do so for two weeks or else face disciplinary action.

Such a statement has nothing to do with employees' union activities. Therefore, I recommend that the Board dismiss the allegations raised by Complaint paragraph 5(e).

Complaint Paragraph 5(f)

Complaint paragraph 5(f) alleges that during this same February 17, 2004 conversation, Quandahl "threatened to spend whatever was needed to fight the Union organizing campaign." Respondent denies this allegation.

Respondent contends that this Complaint paragraph does not allege violative conduct because the alleged statement falls within the protection of Section 8(c). I need not address this argument because I conclude that no credited evidence establishes that Quandahl made such a statement.

Kirkestrue did testify that Quandahl "stated that we needed to be team players and to work together, that no matter how much money it took, he was not going to let the Union come in." Quandahl denied making this statement and I credit his denial.

Because I conclude that the government has not proven the allegations in Complaint paragraph 5(f), I recommend that the Board dismiss these allegations.

Complaint Paragraph 5(g)

Complaint paragraph 5(g) alleges that during this same February 17, 2004 conversation, Quandahl threatened employees that they should find other jobs because they supported the Union. Respondent denies this allegation.

No credited evidence establishes that Quandahl made such a statement. Therefore, I recommend that the Board dismiss the allegations raised in Complaint paragraph 5(g).

Complaint Paragraph 5(h)

Complaint paragraph 5(h) alleges that during the same February 17, 2004 meeting, Quandahl "threatened an employee that the employee has not been a team player because the employee supported the Union." At hearing, I granted Respondent's motion to dismiss this allegation.

No credited evidence establishes that Quandahl made such a statement. Rather, for reasons already discussed, I conclude that Quandahl implied that Kirkestrue and Tschirgi needed to become better team players because of their problems communicating with their supervisor.

I recommend that the Board dismiss the allegations raised by Complaint paragraph 5(h).

Complaint Paragraph 5(i)

Complaint paragraph 5(i) alleges that on about May 27, 2004, Respondent, by General Manager Quandahl, created the impression of surveillance by threatening an employee that he (Quandahl) was monitoring that employee's cellular telephone calls to the Union. Respondent denies this allegation.

For reasons already discussed, to the extent that the testimony of Kirkestrue and Tschirgi conflicts with that of other witnesses, I do not credit it. Instead, I credit Quandahl's testimony concerning this matter.

Respondent provides certain of its employees, including Kirkestrue, with cell phones that they can use for personal matters as well as business. Up to a certain monthly limit, Respondent pays the charges for these cell phones. Respondent's staff reviews the employee's monthly statement to determine whether cellphone use has exceeded the specified amount. Such monthly statements include a list showing the telephone numbers called from that phone.

Quandahl testified that he routinely reviews such cellphone bills, in part as a way of controlling expenses: "When I see a

pattern of numbers that I don't relate to business activities it's not uncommon for us that we do a reverse directory check on those numbers and see where they come from."

Quandahl further testified that he "happened to do that" on a particular bill for the cellphone provided to Kirkestrue, "and, frankly, made a decision to go and say something to Marie [Kirkestrue] that I had checked it . . . I was just doing normal business and I wanted to let Marie know that 'Hey, look, I just want you to know that I saw this. You have the right to make the calls. It's an employee perk, I don't have an issue with that."

Quandahl is not the only manager who examines employee cell phone bills. Sometimes, the office manager and the controller also reviews such bills. Quandahl explained that he did not want Kirkestrue to hear from one of these individuals, "or at the water cooler, that I had looked at her phone bill and saw this call to the Union. I wanted her to hear it from me because I had indeed looked at her phone bill and identified several calls that having been made to the Union."

Crediting Quandahl's testimony, I find that he did tell Kirkestrue that he had examined her cellphone bill and found that she had made several calls to the Union. Further, I find that he told her that she had the right to make the calls, which was an employee "perk."

Ordinarily, in determining whether a particular statement interferes with the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act, the Board does not take into account the speaker's motivation. Rather, the Board, applying an objective standard, considers what effect the statement reasonably would have on an employee's exercise of such rights.

Based on the present facts, I conclude that Quandahl's statement to Kirkestrue reasonably would create the impression that her Union activities were under surveillance by Respondent. Therefore, I recommend that the Board find that this statement violated Section 8(a)(1) of the Act.

The Section 8(a)(3) Allegations

Complaint Paragraph 6(a)

Complaint paragraph 6(a) alleges that on or about November 7, 2003, Respondent took away job duties assigned to employee Ann Marie Kirkestrue. Respondent's Answer denies this allegation. However, uncontradicted testimony establishes that Respondent did modify Kirkestrue's job duties on about that date.

On November 7, 2003, Quandahl memorialized the change in an email message to Kirkestrue. That message stated as follows:

> In confirmation of our discussions today, you have been advised the [sic] effective immediately, you will not be allowed access to our UNIX accounts payable files. The AP section of our systems contains confidential and critical financial information that is accessible for management only. As you are aware, you have been relieved of all administrative responsibilities regarding corporate and board files and you have not had access to the General Manager's office, files, information, mail or other such information that may be of a confidential nature.
>
> Your supervisor, Julie Hemmersbach, will provide additional direction to provide you with work on a daily basis.

Uncontradicted evidence establishes that in making this change, Quandahl took into consideration the ongoing Union authorization drive. "I didn't know who was active in the Union," he testified, "and didn't know what was being said or done."

Additionally, someone had broken into Quandahl's office several weeks earlier, and this fact may also have influenced his decision.

The evidence is undisputed that Kirkestrue did not suffer any loss of pay, reduction in hours, or change of employment location because she no longer performed certain duties. Instead, the office manager arranged for her to perform other duties. The record does not indicate that these new duties were unpleasant, demeaning, or otherwise less desirable than the duties Kirkestrue no longer performed.

In evaluating whether this action violated Section 8(a)(3) of the Act, I will follow the framework the Board established in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line,* the General Counsel must establish four elements by a preponderance of the evidence. First, the government must show the existence of activity protected by the Act. Second, the government must prove that Respondent was aware that the employees had engaged in such activity. Third, the General Counsel must show that the alleged discriminatees suffered an adverse employment action. Fourth, the government must establish a link, or nexus, between the employees' protected activity and the adverse employment action.

In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. *Wright Line*, 251 NLRB 1083, at 1089. See also *Manno Electric, Inc.,* 321 NLRB 278, 280 fn. 12 (1996).

The General Counsel clearly has established the existence of protected activity. Kirkestrue participated in the Union organizing campaign and signed an authorization card.

Additionally, the record establishes that Respondent was aware of the Union organizing campaign. In fact, it had received the Union's petition about one month before the change in Kirkestrue's duties.

Third, the government must establish that Kirkestrue suffered an adverse employment action. Deciding that issue should begin with a definition of the term.

The dictionary defines "adverse" as "acting against" or "in a contrary direction." The discharge of an employee is certainly contrary to employment and clearly constitutes an adverse employment action. A disciplinary warning may affect an employee's tenure with a company and therefore is adverse to the employee's interest in continued employment.

Certain other employment actions are "adverse" because they change the terms and conditions of employment in an unfavorable way and thus make the job less desirable. A reduction in pay certainly constitutes a change for the worse. Trans-

ferring an employee from an air-conditioned office to a loading dock in Death Valley likewise constitutes an adverse change in working conditions.

To meet its burden of proving that an adverse employment action has taken place, the government must establish by a preponderance of the evidence that the individual's prospects for employment or continued employment have been diminished or that some legally cognizable term or condition of employment has changed for the worse.

In the present case, Kirkestrue suffered no change in hours of employment, no change in pay, and no change in location of employment. Additionally, the government has not demonstrated that Kirkestrue's job duties changed in any way which reasonably would make the work less desirable to her. Indeed, Kirkestrue did not testify that the job had become any less pleasant or any more onerous.

It is difficult for me to understand how Kirkestrue's terms and conditions have worsened when her pay hasn't changed, her benefits haven't changed, her hours of employment haven't changed, her work environment hasn't changed, and she has not claimed that her work has become more difficult or less rewarding in any way.

Kirkestrue has not asserted that she took some kind of pleasure in reading the Respondent's confidential financial reports. Even if she had made such a strange claim, I would hesitate to find that an employee's secret reading of confidential financial reports constitutes a term or condition of employment which the law should protect. Indeed, Kirkestrue could derive no benefit from her access to these documents that would be consistent with her duty to guard their confidentiality.

Therefore, I conclude that, for purposes of *Wright Line* analysis, Kirkestrue suffered no adverse employment action. Because the government has failed to establish all four *Wright Line* elements, it has not proven that the change in Kirkestrue's job duties violated Section 8(a)(3) of the Act.

As the Union's attorney pointed out during oral argument, even if such a change did not violate Section 8(a)(3), it might still interfere with the exercise of employee rights in violation of Section 8(a)(1) of the Act. In the present case, however, I conclude that there has been no such interference.

Kirkestrue's job did not get worse in any appreciable way. Such a benign change would have little potential to chill the exercise of protected rights.

Therefore, I recommend that the Board find that the actions alleged in Complaint paragraph 6(a) do not violate either Section 8(a)(3) or (1) of the Act.

Complaint Paragraph 6(b)

Complaint paragraph 6(b) alleges that on about February 17, 2004, Respondent required employees Ann Marie Kirkestrue and Audrey Tschirgi to write down all jobs they expected to do each day at the beginning of each day and to give those written reports to Office Manager Julie Hammersbach, and then to write down what they had done at the end of each day and to give those written reports to Office Manager Julie Hammersbach. For reasons already discussed, I conclude that credited evidence establishes that Respondent did require Kirkestrue and Tschirgi to take these actions.

Complaint paragraph 6(c) alleges that Respondent engaged in this action because the employees formed, joined or assisted the Union, and engaged in concerted activities, and to discourage employees from engaging in these activities. The evidence fails to support this allegation.

Following the *Wright Line* framework, I conclude that the government has established both the existence of protected activity and Respondent's knowledge of it.

However, the General Counsel has not proven the third necessary element, that of an adverse employment action.

Kirkestrue and Tschirgi complied with Respondent's requirement by writing a few sentences on a sheet of a "mini" sized legal pad, one about half the size of a standard 8-1/2 by 11 inch sheet of paper. They testified that this activity took between 5 and 10 minutes a day. That amount of time seems implausibly long for the completion of such a simple and limited task, but even assuming that the employees did take 10 minutes in the morning and 10 minutes in the afternoon to do this duty, it did not affect their employment adversely.

This action did not change their pay, hours of employment, benefits, or working conditions. It reasonably would not make their work less pleasant in any appreciable way.

In oral argument, the General Counsel contended that requiring the employees to write these notes constituted an onerous requirement. Because the notes only entailed a few sentences, I asked whether it would be onerous to require the employees to write a note consisting of only one sentence. The General Counsel replied that "it is onerous precisely because it is not a big deal."

However, that argument strikes me as pernicious. Should the same argument be raised in a case of constructive discharge, it would point to the conclusion that an employer could make an employee's work intolerable simply by imposing a requirement which is "no big deal." That is a kind of "homeopathic" reasoning which would turn the law on its head.

I conclude that the government has not satisfied the third *Wright Line* requirement. Additionally, the record does not establish the fourth criterion, a nexus between the action and the protected activity. Clearly, the record establishes that Respondent imposed this requirement not in retaliation for Union activities but to remedy the problem of poor communications between the employees and their supervisor.

Therefore, I recommend that the Board dismiss the allegations raised by Complaint paragraph 6(b).

The Objections

The Employer has raised three objections to the conduct of the election. The first objection is as follows:

> Petitioner's inclusion of statutory supervisors, Plant Manager Dennis Landt and Wireless Manager Tom Hahn, in the petitioned-for unit destroyed the laboratory conditions necessary for a free and fair election.

The Employer's third objection is as follows:

> By failing to render a determination as to the supervisory status of Plant Manager Dennis Landt and Wireless Manager Tom Hahn and directing that such individuals "vote under challenge," Region 18 of the Board, by and through its au-

> thorized agents and representatives, engaged in conduct which destroyed the laboratory conditions necessary for a free and fair election.

I conclude that the Board's April 30, 2004 order, reported at 341 NLRB 670, addresses and rejects these objections. In accordance with the Board's Order, I also reject them.

Respondent's second objection states as follows:

> Petitioner's use of said statutory supervisors to actively obtain support for Petitioner in the December 3, 2003 election destroyed the laboratory conditions necessary for a free and fair election.

Respondent has failed to carry its burden of proving that the alleged supervisors are actually supervisors within the meaning of Section 2(11) of the Act. That section defines "supervisor" to mean "any individual having 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." See 29 U.S.C. § 152(11).

However, the evidence fails to establish that the individuals in question exercise any authority that is not of a merely routine nature. Additionally, the evidence fails to establish that the asserted supervisors have the authority to effectively recommend any of the employment-related actions enumerated in Section 2(11).

Therefore, I recommend that this objection be overruled.

When the transcript of this proceeding has been prepared, I will issue a Certification which attaches as an appendix the portion of the transcript reporting this bench decision. This Certification also will include provisions relating to the Findings of Fact, Conclusions of Law, Remedy, Order and Notice. When that Certification is served upon the parties, the time period for filing an appeal will begin to run.

Throughout this proceeding, all counsel have displayed the highest standards of civility and professionalism, which I truly appreciate. The hearing is closed.

APPENDIX B

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 the 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 create the impression that we have placed our employees' union activities under surveillance by monitoring their cellular telephone calls.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the National Labor Relations Act

NORTHEAST IOWA TELEPHONE COMPANY