CGLM, Inc. *and* Alan Kansas. Case 15–CA–17889

August 27, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS KIRSANOW AND WALSH

On August 28, 2006, Administrative Law Judge George Carson II issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed separate answering briefs.[1] On December 15, 2006, the 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 February 27, 2007, Judge Carson issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

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

The Board has considered the decisions and the record in light of the exceptions and the briefs and has decided to affirm the judge's rulings, findings, and conclusions[2] and to adopt the recommended Order.[3]

[1] The General Counsel also filed a motion to strike the Respondent's exceptions, which was denied in the Board's December 15, 2006 Order remanding the proceeding to the judge.

[2] In affirming the judge's conclusion that the Respondent failed to prove that Warehouse Manager Bobbie Marshall Jr., is an 2(11) supervisor based on his having the authority to "assign" or "responsibly direct" employees using "independent judgment," we adopt the judge's analysis set forth in the supplemental decision rather than the analysis set forth in the original decision.

In addition, in finding that the Respondent's discharge of employees Marshall Jr., Freddie Hughes, Derrick Thornton, Reginald Austin, and Bobbie Marshall III violated Sec. 8(a)(1) of the Act, we do not rely on the judge's analysis under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The *Wright Line* analysis is appropriately used in cases that turn on the employer's motive. As the judge himself noted, however, "the existence or lack of unlawful animus" is not material when "the very conduct for which employees are disciplined is itself protected concerted activity." *Burnup & Sims, Inc*., 256 NLRB 965, 976 (1981); accord: *Phoenix Transit System*, 337 NLRB 510, 510 (2002) (finding *Wright Line* inapplicable), enfd. mem. 63 Fed.Appx. 524 (D.C. Cir. 2003). Moreover, there is no contention here that any of the discharged employees lost the Act's protection. See *Phoenix Transit System*, supra; *Mast Advertising & Publishing*, 304 NLRB 819 (1991). Accordingly, because the Respondent dismissed the employees for their act of "going on strike," which constituted concerted protected activity, we find that their discharge violated Sec. 8(a)(1).

[3] We hereby adopt the judge's Order that issued with the judge's August 28, 2006 decision. This is consistent with the judge's February 27, 2007 supplemental decision, which ordered that the Respondent comply with the Order set out in the August 28, 2006 decision.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, CGLM, Inc., Jefferson, Louisiana, its officers, agents, successors, and assigns, shall take the actions set forth in the Order.

Charles R. Rogers, Esq., for the General Counsel.
Donald C. Douglas Jr., Esq., for the Respondent.
Alan Kansas, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE CARSON II, Administrative Law Judge. This case was tried in New Orleans, Louisiana, on June 26 and 27, 2006, pursuant to a complaint that issued on February 23, 2006.[1] The complaint alleges the discharge of five employees for engaging in protected concerted activity in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent's answer denies any violation of the Act and pleads that one of the discharged employees, Bobbie Marshall Jr., was a supervisor as defined in the Act. I find that Bobbie Marshall Jr., was not a supervisor and that the five employees were discharged for engaging in protected concerted activity as alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, CGLM, Inc. (the Company), is a Louisiana corporation with offices in Jefferson, Louisiana, where it is engaged in the sale and delivery of furniture. The Company, in conducting its business, annually purchases and receives at its facility goods and materials valued in excess of $50,000 directly from points located outside the State of Louisiana. The Respondent admits, and I find and conclude, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Company sells La-Z-Boy furniture. It has three showrooms in the New Orleans, Louisiana area, and a warehouse and office in Jefferson, Louisiana. President and part Owner Larry Marquez began selling La-Z-Boy furniture in 1989 at one showroom. Two of his first employees were Bobbie Marshall Jr. and Freddie Hughes. I shall, henceforth, refer to Bobbie Marshall Jr., as Marshall. The business expanded and, in 2005, consisted of the three showrooms and the warehouse at which shipments of furniture are received and from which deliveries are made to the showrooms and to customers. Marshall, whose title was warehouse manager, oversaw operations in the warehouse. Hughes, designated as the service technician, repaired furniture and went

[1] All dates are in 2005, unless otherwise indicated. The charge was filed on December 5.

to customers' homes to correct any problems that customers experienced with the furniture. Five other employees worked from the warehouse including William (Will) Norton, Lionel Robinson, and alleged discriminatees Derrick Thornton, Reginald (Reggie) Austin, and Bobbie Marshall III, who is the son of Warehouse Manager Marshall. All of the warehouse employees, except for Norton, are African-American.

Derrick Thornton recalled that Crystal Clouatre was hired as service manager in 2004. She worked in an office adjacent to the warehouse floor. Marquez worked out of a private office upstairs. Clouatre received calls from customers and the three showrooms regarding their needs. She prepared and presented delivery tickets to Marshall who passed them on to the drivers who had preassigned routes to fill the requests. Clouatre was assisted by employee Tiffany Meliet. The complaint alleges, the Respondent's answer admits, and documentary evidence establishes that Clouatre is a supervisor. Marquez, Clouatre, and Meliet are white.

The Company has three delivery trucks, but in the summer of 2005 only two were being operated. The drivers were Derrick Thornton, assisted by helper Bobbie Marshall III, and Lionel Richardson, assisted by Will Norton. Reggie Austin, who has a vision problem, worked in the warehouse throughout the day. If necessary, Warehouse Manager Marshall would drive.

The year 2004 was not profitable for the Company. Marquez typically informed employees in May of any increase in pay that they were to receive. In May 2005, he individually told each warehouse employee that there would be no pay increase. Employees Austin and Marshall III, were upset by the absence of a pay increase because both of them understood that a white warehouse employee identified as "Scott," who had begun working after them but was no longer employed, had been hired at $8 an hour. Austin had been hired at $6.50 an hour and Marshall III, had been hired at $6 an hour. Neither was being paid $8 an hour.

Austin was also upset with what he considered to be favoritism towards Norton who, he testified, would sit in the office talking to Clouatre while the African-American employees were working. On one occasion when he and Norton were sitting down, Clouatre came out with a service order, said nothing to Norton, and asked Austin why he was sitting down. Austin replied that he was taking a break and that Norton had just got to work. He asked Clouatre, "Why didn't you question him?" He reported the foregoing incident to Marquez who said, "Reg, are you sure you weren't seeing things?" Austin answered, "[I]t wasn't what I saw, [i]t was what I heard."

In the spring of 2005, Marquez informed service technician Hughes that, henceforth, Service Manager Clouatre would order the parts that he used to repair the furniture. Hughes did not protest, testifying that "he's the boss," but pointed out the difficulty caused by the change because Clouatre "didn't know . . . the parts."

Thornton was upset with the fact that, before first speaking with the driver regarding customer complaints, Clouatre "would go straight to Larry [Marquez] and that when Marquez "thought the warehouse employees were doing something wrong he was ready to punish us . . . [but] [a]s soon as he found out it was Crystal [Clouatre], everything was fine and dandy."

On July 26, Clouatre directed Marshall to throw out a chair that had been repaired but for which the customer had not called. Marshall initially objected, but thereafter compiled. Shortly thereafter, Marshall came looking for the chair because the customer had called for it. Marshall explained that Clouatre had directed that it be thrown out. Marquez said that he did not believe that, and, as he was leaving, stated that if he found out that "any one of you guys threw that chair away, you all are going to pay for it." Only Marshall and Austin were present. Later that day, Marquez told Marshall that Clouatre admitted that she told him to throw out the chair.

Marshall's description of the foregoing encounter avoided any racial implications. Employee Reggie Austin, who witnessed the foregoing conversations, testified that he was concerned that when Marquez thought that an African-American employee was responsible for the throwing out of the chair, Marquez intended to hold him financially responsible but after Service Manager Clouatre admitted her responsibility, Marquez said nothing about anyone having to pay.

The next day, July 27, Tiffany Meliet called Marshall regarding a "pouch" that contained orders from one of the showrooms. Marshall testified that he checked the trucks but did not find the pouch, and reported his effort to Meliet and Clouatre. Austin recalled that he and Marshall were putting up furniture and that Marshall told Clouatre that he could not help look for the pouch, that it was her responsibility. Regardless of whether Marshall did or did not attempt to locate the pouch, Marquez heard Marshall and Clouatre arguing and came to see about the problem. I credit Austin's recollection of the ensuing conversation that began with Marquez asking Marshall what was "going on with your attitude." Marshall replied that he was trying to put up furniture. More words were exchanged. Marshall stated that it "looks like this Company is becoming one-sided." Austin muttered, "Yes, Bobbie, you're right," and Clouatre said, "Reggie, you shut up." Marquez asked Marshall what he meant, and Marshall referred to the incident the previous day, stating that when Marquez "thought it was one of us that threw the chair away, you were ready to make one of us pay for it, [but] [w]hen you found out it was Crystal [Clouatre], you immediately covered up for her . . . [and] you weren't man enough to apologize."

Marshall confirmed that he made the "one-sided" comment and recalled that Marquez then stated, "[W]e've got to work together, but you need to start listening to them," referring to Clouatre and Meliet. Marshall mentioned a prior conversation in which his seniority had been noted and argued that Marquez was "telling me that I've go t to listen to them now." More words were exchanged, and Marshall stated that he was just going to do what he had to do. Marquez asked, "What do you have to do?" Marshall answered, "That's my business."

Marquez does not dispute the substance of the foregoing conversation. He recalls telling Marquez, "We got to work this thing out," and that Marshall replied that there was no working it out. He stated that the Company could not have two managers that were not going to talk to each other, and Marshall replied that he knew "how to handle this." He asked what Marshall meant, and he replied, "Well, you'll see." He did not deny that Marshall accused the Company of becoming "one-sided."

The events critical to this proceeding occurred the following day, July 28.

B. Supervisory Status

Before addressing the events of July 28, it is necessary to determine the supervisory status of Warehouse Manager Marshall. Marshall's supervisory title and status as a salaried employee, even though he continued to punch a timeclock, "are merely secondary indicia of supervisory status." *John N. Hansen, Co.*, 293 NLRB 63, 64 (1989). As found in that case, "such evidence is insufficient to prove that he exercises independent judgment in performing any of the functions set forth in Section 2(11) of the Act." Marshal's oversight of warehouse operations involved assuring that furniture received at the warehouse was properly stored and that the furniture items from inventory were loaded onto the delivery trucks that carried them to customers or showrooms. The delivery slips were prepared by Service Manager Clouatre. Marshall physically moved furniture and, when necessary, would drive a delivery truck.

Section 2(11) of the Act provides that a supervisor is "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 routine or clerical nature, but requires the use of independent judgment." The burden of establishing that an individual is a supervisor is upon the party asserting the supervisory status of the individual in question.

There is no evidence that Marshall possessed or exercised any authority to transfer, suspend, lay off, recall, promote, reward, or adjust the grievances of the warehouse employees. Marquez determined all issues relating to employee compensation. As already noted, he individually informed the employees in May that they would not be receiving a raise.

Despite Marshall's absence of authority relating to compensation, Marquez testified that Marshall had the authority to hire. He produced no documentation in support of that testimony, and he named no employee purportedly hired by Marshall. I do not credit that testimony. Although Marshall provided some applicants with applications, the record establishes that all hiring decisions were made by Marquez. Driver Derrick Thornton, after receiving an application and speaking with Marshal, was interviewed by Marquez who told him to start working as a driver helper. When a driver was terminated for stealing fuel, Marquez informed Thornton that he would become a driver. Driver helper Will Norton was hired by Marquez. Reginald Austin sought work at one of the showrooms and was referred directly to Marquez, who interviewed and hired him. I do not credit the bare assertion of former employee Pierre Jones that Marshall hired him. His assertion was unaccompanied by any details, and he did not state who informed him of his pay rate. Bobbie Marshall III, was interviewed and hired by Marquez at $6 per hour. Thereafter, Marshall III, learned that the employee identified as Scott was making $8 an hour. When questioned as to whether he approached Marquez about the disparity, Marshall III, explained that he did not because Marquez "told us to not let anybody know how much you were making, to keep it to yourself. So I didn't want to go in and get him [Scott] in trouble." Marquez did not deny the foregoing testimony which confirms that, in addition to the hiring decision, Marquez set individual pay rates that differed among the employees.

Although Marquez asserted that Marshall had the authority to discharge employees, his testimony in that regard was unconvincing, and he admitted that Marshall had never done so.

With regard to discipline, the Respondent introduced into evidence two documents reflecting discipline issued to two employees that contain Marshall's name. A typed memorandum to employee Charles Felton, dated March 21, 2003, although stating that it is from Marshall, is written in the third person, stating that, on March 20, 2003, Felton was absent and did not call or leave a message for "Bobbie or Larry that you were not going to be here." The typed memorandum to employee Pierre Jones regarding tardiness on September 20, 2003, purporting to be from "Bobbie Marshall, Warehouse Manager and Larry Marquez, Owner," bears a handwritten correction in which the last name of "Bobbie" has been stricken and the name "Marshall" has been written in.

Marshall denied seeing either of the foregoing documents until they were presented by the Company in the investigation of this case, and he denied that he issued the foregoing discipline. Marshall's signature does not appear upon either document whereas other documents in the record reflecting discipline bear the signature of the individual who issued it. I credit Marshall's denial, but I do not question the authenticity of the documents. Thus, it appears that the Company, in 2003, purported to issue discipline in Marshall's name although Marshall was unaware of that fact and did not issue the discipline.

Marquez did not address the absence of Marshall's signature upon the two foregoing documents. With regard to discipline, he reported that Marshall informed him that he had spoken to employee Austin about spending too much time on the telephone. Documentary discipline to Austin for spending too much time on a telephone is dated June 21 and was issued by Service Manager Clouatre. No discipline since 2003 has been issued in Marshall's name.

Pierre Jones did not testify regarding the discipline reflected upon the document dated September 20, 2003, that was purportedly issued by Marshall. Jones claimed that Marshall sent him home and recounted an incident in 2004 upon which Marshall had directed him to sweep up in the warehouse prior to leaving on his route. Jones protested that doing so would cause him to run late. An argument ensued. Although Jones initially testified that Marshall sent him home, on cross examination he admitted, "I chose to go home." There is no evidence that Jones was disciplined for his failure to sweep or his leaving.

Employee Will Norton testified to an occasion upon which Marshall purportedly sent him home early; however, his testimony establishes that, on the occasion in question, Marshall simply assigned Norton to work in the warehouse and that he went home when his work was completed. The record does not establish whether the driver who Norton regularly assisted had any deliveries to make that day or whether the deliveries required an assistant. The only discipline reflected in the record relating to Norton is a warning on June 28 for being tardy. That discipline

was issued by Service Manager Crystal Clouatre, not by Marshall.

There is no evidence that Marshall ever issued any discipline and there is no evidence that discipline was issued in his name after 2003. Clouatre, who issued discipline to warehouse employees Austin and Norton in 2005, did not testify.

There is no credible evidence that Marshall possessed or exercised the authority to hire, fire, or discipline employees.

Regarding the assignment and direction of employees, Marquez described Marshall's duties as supervising "the warehouse in getting merchandise in, getting it racked, getting it pulled for the delivery trucks, getting the delivery trucks routed." There is no probative evidence that Marshall exercised independent judgment in carrying out those duties. The routes of the delivery trucks were prescribed by geographic area. As Marshall explained, "all the drivers know that you start from wherever is closest to the warehouse . . . and just keep on going." Pierre Jones testified that Marshall would inform the drivers whether they would be "off the next day or that you're working the next day, depending upon the amount of deliveries." He confirmed that the routing was routine, that "we" would "refrain from sending two trucks in the same area" unless "we had no choice but to run two trucks" because of the volume of deliveries. "Proof of independent judgment in the assignment of employees entails the submission of concrete evidence showing how assignment decisions are made. The assignment of tasks in accordance with an Employer's set practice, pattern or parameters, or based on such obvious factors as whether an employee's workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition." *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002), citing *Express Messenger Systems*, 301 NLRB 651, 654 (1991), and *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985).

When Marquez was questioned regarding Marshall's responsibility for routing, the only example he cited was his assisting an inexperienced driver "by spreading out the sheets, getting the zip codes," and explaining that "this Metairie goes along with this Metairie, and this Kenner goes behind this Metairie." Marshall would "put them in order because he had been doing it for so long" based upon his "[g]eographic knowledge and time frames," how long it would take to get from point A to point B based upon "17 years of experience." The direction thus provided falls short of the independent judgment contemplated by the Act. See *Express Messenger Systems*, supra. The Supreme Court, in *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706 (2000). recognized that "[m]any nominally supervisory functions may be performed without the "exercis[e of] such a degree of . . . judgment or discretion . . . as would warrant a finding" of supervisory status under the Act. *Weyerhaeuser Timber Co.*, 85 1170, 1173 (1949), and, citing *Providence Hospital*, 320 717, 729 (1996), that "supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position." Id. at 713, 714–715 fn. 1. As pointed out in *Unifirst Corp.*, 335 NLRB 706, 713 (2001), "If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car. *NLRB v. Security Guard Service*, 384 F.2d 143, 151 (5th Cir. 1967)."

I reject any argument that Marshall possessed genuine supervisory authority. The fact that Marquez stated his intention to hold this purported supervisor monetarily liable for the throwing out a chair until he learned that the action had been directed by Service Manager Clouatre further confirms that Marshall was not vested with supervisory authority and did not exercise independent judgment on behalf of the Company.

Marquez testified that Marshall had the authority to set the starting time of warehouse employees. That assertion is belied by his discharging Marshall as well as the other warehouse employees who did not report on the morning of July 28 without ever speaking with Marshall to determine whether he had changed the starting time. Marshall had no more authority to set reporting times without the approval of Marquez than he did to throw out a chair without being held financially responsible. I find and conclude the Respondent failed to prove that Marshall was a supervisor as defined in the Act.

C. Facts

On the evening of July 27, following the encounter in which Marshall informed Marquez that he was going "to do what I've got to do," Marshall contacted the warehouse employees and requested that they meet with him behind the warehouse the following morning. All of the employees did so. Although there is conflicting testimony regarding Thursday reporting times, documentary evidence establishes that all warehouse employees except for Freddie Hughes had been reporting about 7:30 a.m. on Thursdays for several weeks preceding July 28.

All of the warehouse employees met behind the warehouse on the morning of July 28. Although the employees do not totally agree regarding when each arrived or whether a particular employee arrived before or after another employee, there are no significant inconsistencies. More significantly, there is no question that Marquez was informed that "all of the employees" were present "behind the warehouse" and "were going on strike." Marquez testified that he terminated all of the employees because they did not call in and failed to report to work, the reasons stated on the termination slips. I do not credit that testimony.

Although Marshall recalls asking the employees to meet at 7:30 a.m., employee Will Norton, who contends that he reported to work on time, testified that Marshall requested he come at 7 a.m. Norton recalled that, when he arrived, only Marshall, Freddie Hughes, and Reggie Austin were present. He asked Marshall what was going on, and Marshall replied, "We're going on strike." Norton stated that the employees were crazy, and Marshall stated that they were "fed up with all this." Hughes concurred. Norton made no further inquiry, repeated that the employees were crazy, stated that he had bills to pay, and left. As he was leaving, Norton says that he asked Marshall whether he should tell Marquez where the employees were and that Marshall replied, "No, don't let him know anything."

Marshall recalls telling Norton, "[T]hat's really up to you. It's not a problem." Employee Derrick Thornton testified that he was present when Norton was present and that Norton left to report to

work at 7:50 or 8 a.m. The discrepancy regarding time is immaterial.

Norton denies having any conversation with Marquez regarding the employees until after Service Manager Clouatre, who had left the warehouse on an errand, spoke with Marquez.

After Norton left, Clouatre drove up and parked where she could observe the employees. She called driver Derrick Thornton, who carried a two-way radio, and asked what he was doing. Thornton replied that "we were sitting back here waiting to talk to Larry."

Marquez admits that, between 8:30 and 8:45 a.m., he received a call from Clouatre in which she informed him that "the warehouse employees . . . [were] behind the warehouse sitting in the back of Bobbie's [Marshall's] truck." Upon receiving that call, Marquez told Norton what Clouatre had said, and Norton reported that Marshall had called him the previous evening about attending a meeting, that he had been at the meeting and "they were all going on strike." Norton stated that he wasn't going on strike, that "they were going on strike, but he wasn't doing it."

Norton confirms that he informed Marquez that the "guys had called me into a meeting" and told him that they were "going on strike and tried to get me to go on with them." Marquez asked if Norton knew why and, without waiting for a response, answered his own question, stating that "it was probably about the fight that Bobbie and Crystal had gotten into."

Marquez testified that, notwithstanding his receipt of the foregoing information at between 8:30 and 8:45 a.m., he continued loading trucks for up to an hour. He was vague about the time, estimating, "Could have been 30, 40, 50, 60 minutes." He made no attempt to contact purported supervisor Marshall, who had a telephone so that he could be contacted at any time. About 9:45 a.m., "[s]omewhere around that time," Marquez went to his office and wrote out termination slips for all of the warehouse employees except Norton.

Service Manager Crystal Clouatre did not testify.

Each termination slip, including the termination slip of purported Supervisor Marshall, states: "Did not call or show up for work on 7–28–05." The company employee handbook requires employees to notify their supervisor by telephone at least one hour before reporting time and that if an employee does not "report as required for three (3) consecutive days" the employee will be deemed to have resigned and "your employment will be terminated." The handbook also provides for immediate discharge for "[f]ailure to return to work for over three (3) working days without notifying the Company (considered as a resignation)." Employees are subject to a progressive disciplinary system that provides for a verbal counseling, written warning, and suspension or termination. Employees had, prior to July 28, received discipline for tardiness and unexcused absences without calling in. Prior to July 28, no employee had ever been terminated for a single instance of failure to call in or a single unexcused absence.

Service technician Freddie Hughes, who had been employed for 17 years, credibly testified that he reported to work depending upon the number of service calls that he had to make. Thus, he had no set reporting time. He testified that on July 28, he was to report at noon to perform afternoon service calls. Documentary evidence establishes that, on the four Thursdays in May, Hughes had reported to work after 10 a.m. twice, that on the five Thursdays in June he had been on vacation on one of the Thursdays and reported after 10 a.m. on two of the remaining four Thursdays. Marquez, who prepared the termination slips about 9:45 a.m., admitted that he did not check with anyone to determine when Hughes was "supposed to be in" on July 28 prior to discharging him because he "[d]id not call or show up."

After Clouatre spoke to Thornton, she returned to the warehouse. The employees continued to discuss their concerns and Marshall sought to get them organized so that when they talked to Marquez, "we'd know what to say, not to get hostile or anything like that." He sought to assure that the employees would present themselves correctly in order to "go in there and talk . . . because basically some of them were really kind of teed off about it."

Employee Lionel Richardson, who was rehired, left the meeting at some point after 10 a.m., and went to the warehouse office. He spoke with Marquez who informed him that he was giving him a pink slip and that the remaining warehouse employees had also been terminated. Richardson returned to the group and informed them that they had been terminated. Marshall and the remaining employees came to the warehouse office and retrieved their termination notices. Employees Derrick Thornton and Bobbie Marshall III, sought to speak with Marquez, but were denied entry to his upstairs office by his secretary. Whether Marquez was present and refused to meet or had left to make deliveries is not established. It is undisputed that Marquez terminated the warehouse employees without first speaking with any of them.

Employee Reginald Austin came to the warehouse to obtain his final check and spoke with Marquez regarding the correctness of the hours shown. Austin was, of course, not paid for any time on July 28. As he and Marquez reviewed his time, Marquez referred to July 28 as the "day you all pulled that stunt." Austin replied, "Mr. Larry, you know that wasn't a stunt. You knew we were back there waiting to talk to you." Marquez replied, "[W]ell, that's all irrelevant right now." Marquez did not deny the foregoing conversation.

D. Contentions of the Parties

The General Counsel argues that the Respondent was aware of the employees' activity based upon the reports of Clouatre and Norton, that the testimony of the employees establishes that their discussion, which included perceived favoritism, racism, and wages, related to working conditions and was protected and concerted, and that the absence of a formal demand did not cause them to lose the protection of the Act.

The Respondent, in its brief, argues that the predicate for the failure of the employees to report to work on July 28 was Marquez's denial of a request by Marshall for a loan. The Respondent's answer pleads that Marshall "[i]n calling the meeting . . . was improperly attempting to retaliate against Marquez" for refusing Marshall's request for a loan. Marshall admits requesting and being denied a loan in late June. I do not credit the testimony of Marquez that the request was on Monday, July 25. Regardless of the date, there is no evidence whatsoever that the meeting of the employees related in any way to denial of a loan.

The Respondent argues that the activity in which the employees engaged was not protected in that the "overwhelming complaint voiced by the charging parties was their dislike of Crystal

Clouatre," and there were no immediate safety, environmental, or other such issues.

Contrary to the foregoing argument, the issue was not dislike of Clouatre, it was inequitable treatment of the African-American warehouse employees. As explained by Thornton, when Marquez "thought the warehouse employees were doing something wrong he was ready to punish us . . . [but] [a]s soon as he found out it was Crystal [Clouatre], everything was fine and dandy." Similarly, when Austin complained that Clouatre was exhibiting favoritism towards Norton, Marquez asked if he was not "seeing things," and Austin replied, "[I]t wasn't what I saw, [i]t was what I heard." On July 27, Marshall accused the Company of becoming "one-sided," citing the threat of Marquez to have the responsible warehouse employee pay for the chair, but not mentioning payment when he learned that Clouatre had been responsible.

The Respondent's brief does not cite or discuss case authority that establishes that activity related to perceived favoritism or racial discrimination is directly related to working conditions and is protected activity. See *Titanium Metals Corp.*, 340 NLRB 766, 773 (2003) and *Dearborn Big Boy No. 3, Inc.*, 328 NLRB 705, 710 (1999).

The Respondent asserts that there is not "a scintilla of the necessary evidence that the employer was aware of any protected activity." I disagree. Although the Respondent's brief acknowledges that Marquez was informed that the warehouse employees were "behind the building," it does not recite Norton's report that "they were all going on strike." At no point does the brief acknowledge that Marquez admitted being told that the employee were on strike.

E. Analysis and Concluding Findings

The complaint alleges that, on July 28, the employees met for their mutual aid and protection to discuss the absence of a wage increase, perceived favoritism and racial prejudices, treatment by supervision and other working conditions; that they ceased work concertedly and engaged in a strike; that the Respondent believed that they had ceased work concertedly and engaged in a strike; and that it terminated them for that reason.

Employee activity is concerted when it is "engaged in with or on the authority of other employees," and a respondent violates Section 8(a)(1) of the Act if, having knowledge of an employee's concerted activity, it takes adverse employment action that is "motivated by the employee's protected concerted activity." *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984). All of the warehouse employees met Marshall behind the warehouse on the morning of July 28. Norton left. The remaining employees discussed their various complaints regarding perceived favoritism and discrimination and other working conditions and were counseled by Marshall to present those complaints in a manner that was not hostile.

Marquez admits that Norton informed him that the employees "were going on strike, but he wasn't doing it." When Marquez asked Norton whether he knew why, he answered his own question stating that "it was probably about the fight that Bobbie and Crystal had gotten into." That argument concluded with the confrontational exchange in which Marshall accused the Company of becoming "one-sided," an assessment with which Austin agreed only to be told by Clouatre to "shut up." Marshall then cited the chair incident, telling Marquez that, when he thought a warehouse employee was responsible for throwing away the chair, "you were ready to make one of us pay for it, [but] [w]hen you found out it was Crystal [Clouatre], you immediately covered up for her . . . [and] you weren't man enough to apologize." The foregoing clearly expressed perceived inequity in the treatment by management of the African-American warehouse employees.

A respondent's belief that protected activity has occurred is controlling. *Henning and Cheadle*, 212 NLRB 776, 777 (1974). Marquez believed that the employees were on strike, as reported by Norton. He informed Norton that he believed that the strike related to the argument between Marshall and Clouatre the previous day that concluded with Marshall's statements expressing disgruntlement relating to the treatment of warehouse employees. Although Marquez did not admit that Clouatre informed him that employee Thornton had stated that the employees were waiting to speak to him, he did not deny, as stated to him by employee Austin, that he "knew we were back there waiting to talk to you." As counsel for the General Counsel correctly points out, "Respondent cannot blind itself to the surrounding action and claim that it did not know the walkout was based upon a protected activity." *Virginia Mfg. Co.*, 310 NLRB 1261 (1993), citing *Eaton Warehousing Co.*, 297 NLRB 958, 961-962 (1990), enfd. mem. 919 F.2d 141 (6th Cir. 1990).

The concerns of the employees differed. Austin and Marshall III, were concerned about pay. Austin was also concerned with what he regarded as favoritism toward Norton, a concern he had expressed to Marquez. Hughes was upset with the removal of his responsibility for ordering the parts necessary for him to perform his job. Thornton was concerned that Clouatre would take a white person's word over an African-American's word. Marshall was seeking to assure a presentation of the various grievances that would not be hostile, which included his concern that the Company was becoming "one-sided." "The Act is concerned with concerted activity, not concerted thought. Any contention that a failure of all participants in a group activity to entertain identical reasons for engaging in that activity renders the activity individual rather than concerted is plainly without merit." *Advance Cleaning Service*, 274 NLRB 942, 945 (1985).

The Respondent argues that Marquez expressed no animus and discharged the employees because of their failure to report to work and not calling in. As explained in *Burnup & Sims, Inc.*, 256 NLRB 965 (1981), "the existence of or lack of unlawful animus" is not material when "the very conduct for which employees are disciplined is itself protected concerted activity." Id. at 975. "Calling a strike . . . an absence from work justifying discharge is to write Section 13 out of the Act." *Anderson Cabinets*, 241 NLRB 513, 518, 519 (1979).

Section 13 of the Act provides that "[n]othing in this Act . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike. . . ."

The fact that the employees gave no advance notice of their intention is immaterial. The failure of the employees to report to work was "a concerted action for mutual aid and protection." *Lisanti Foods Inc.*, 227 NLRB 898, 902 (1977). See also *Iowa Packing Co.*, 338 NLRB 1140, 1144 (2003).

The Respondent argues that it had no knowledge of the reason that the employees did not report to work. Marquez knew the

employees were behind the warehouse, and he had been told that they were going on strike. "[T]he employees' failure to make any specific demand or to notify the Respondent of their reasons for their cessation of work does not render their conduct unprotected." *Eaton Warehousing Co.*, supra at fn. 1. In this case, Marquez "knew we [the employees] were back there waiting to talk to you." He correctly believed that the employees' action related to the argument the previous day. Marquez had intervened in that argument and been told by Marshall that he was concerned that the Company was "one-sided." The fact that the employees never made a demand in support of their concerted action is immaterial. As stated in *South Central Timber Development, Inc.*, 230 NLRB 468, 472 (1977):

It is well settled that a walkoff to protest working conditions is a protected concerted activity. *NLRB. v. Washington Aluminum Co.*, 370 U.S. 9 (1962). It is protected even if the employer was unaware of its purpose, for as the Court said at 14: "We cannot agree that employees necessarily lose their right to engage in concerted activities under §7 merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of §7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made." Thus, it is clear that, even if the purpose of the walkoff is not clearly communicated to the employer at the time, if from surrounding circumstances the employer should reasonably see that improvement of working conditions is behind the walkoff, it may not penalize the employees involved without running afoul of Section 8(a)(1).

In this case, the Respondent gave no opportunity to the employees to present a demand. Employee Richardson went to the office and discovered that he and the others had already been discharged. When Marshall and the other employees arrived, Marquez either had already left or informed his secretary not to let in the employees.

Marquez terminated Marshall and Hughes, as well as the other three warehouse employees and Richardson, purportedly because they "[d]id not call in or show up." Marquez, although claiming that Marshall had the authority to set the starting time for employees, did not seek to confirm with him whether he had given the employees permission to report later than 7:30 a.m. Hughes had no regular starting time and was to have reported at noon. He committed no offense. Marquez discharged him without checking with anyone to determine when Hughes was "supposed to be in." The Respondent's brief does not address the discharge of Hughes.

The General Counsel established that the protected concerted activity in which the warehouse employees were engaged was the motivating reason for their discharges. Any claim to the contrary is refuted by the discharge of Hughes who committed no offense but participated in the concerted activity and was discharged in the same manner as the other participants.

The General Counsel presented a prima facie case. Pursuant to *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), the burden of going forward shifts to the Respondent to demonstrate that it would have taken the same action in the absence of the employees' protected conduct. The Respondent has not sustained that burden. The Respondent disregarded its Employee Handbook, which provides for progressive discipline and termination upon three consecutive unexcused absences. Prior to July 28, discipline had been meted out in accord with the Handbook. Prior to July 28, no employee had ever been terminated for a single failure to call in or a single unexcused absence. The Respondent has not established that it would have taken the same action against these employees in the absence of their protected concerted activity.

I find that the Respondent discharged these employees because it believed that they were engaged in a strike, which is protected concerted activity. I find it particularly disheartening that Marquez, having worked with Marshall and Hughes for over 17 years, terminated purported supervisor Marshall and service technician Hughes, who was not late for work, without speaking with either of them. Marquez' termination of Marshall, who had a telephone upon which he could be contacted 24 hours a day, confirms that he was not vested with any genuine supervisory authority and that Marquez did not consider him to be a supervisor. The inclusion of these two employees in the Respondent's unprecedented terminations upon a first offense of failure to call in or report to work constitutes irrefutable evidence that the employees were terminated for "going on strike." The Respondent retaliated against these employees because they engaged in protected concerted activity, and the Respondent has presented no credible evidence that it would have taken the same action in the absence of the protected concerted activity in which the employees engaged. I find the discharges of the employees violated Section 8(a)(1) of the Act as alleged in the complaint.

CONCLUSION OF LAW

By discharging Bobbie Marshall Jr., Freddie Hughes, Derrick Thornton, Reginald Austin, and Bobbie Marshall III, because they engaged in protected concerted activities, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

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 take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Bobbie Marshall Jr., Freddie Hughes, Derrick Thornton, Reginald Austin, and Bobbie Marshall III, it must offer them reinstatement and must make them whole for any loss of earnings and other benefits, and to make each employee whole for any loss of earnings and other benefits. *Abilities & Goodwill, Inc.*, 241 NLRB 27 (1979), enf. denied on other grounds 612 F.2d 6 (1st Cir. 1979). Backpay shall be computed on a quarterly basis from July 28, 2005, to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent will also be ordered to post an appropriate notice.

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

ORDER

The Respondent, CGLM, Inc., Jefferson, Louisiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Discharging employees for engaging in protected concerted activities.

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

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

(a) Within 14 days from the date of this Order, offer Bobbie Marshall Jr., Freddie Hughes, Derrick Thornton, Reginald Austin, and Bobbie Marshall III, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Bobbie Marshall Jr., Freddie Hughes, Derrick Thornton, Reginald Austin, and Bobbie Marshall III, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Bobbie Marshall Jr., Freddie Hughes, Derrick Thornton, Reginald Austin, and Bobbie Marshall III, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Jefferson, Louisiana, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 15, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. 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 July 28, 2005.

(f) 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.

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 had 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 discharge any of you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer Bobbie Marshall Jr., Freddie Hughes, Derrick Thornton, Reginald Austin, and Bobbie Marshall III, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Bobbie Marshall Jr., Freddie Hughes, Derrick Thornton, Reginald Austin, and Bobbie Marshall III, whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and within 3 days thereafter notify Bobbie Marshall Jr., Freddie Hughes, Derrick Thornton, Reginald Austin, and Bobbie Marshall III, in writing that this has been done and that the discharges will not be used against them in any way.

CGLM, INC.

[2] 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.

[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."

Charles R. Rogers, Esq., for the General Counsel.
Donald C. Douglas Jr., Esq., for the Respondent.
Alan Kansas, Esq., for the Charging Party.

SUPPLEMENTAL DECISION

GEORGE CARSON II, Administrative Law Judge. I issued my Decision in this case on August 28, 2006, finding, inter alia, that Warehouse Manager Bobbie Marshall Jr., was not a supervisor as defined in the Act. On December 15, 2006, the Board, in an unpublished Order citing its 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), remanded this case to me "for further consideration in light of . . . [those decisions] including allowing the parties to file briefs on the issue and, if warranted, reopening the record to obtain evidence relevant to deciding the case under . . . [those decisions]." On December 22, 2006, I conducted a conference call with all parties. All parties agreed that the record need not be reopened, but that they did desire to file briefs. I have reviewed the record. Reopening the record is not warranted.

On the entire record, the above cited Board decisions, and after considering the briefs filed by all parties, I reaffirm my decision that Warehouse Manager Bobbie Marshall Jr., was not a supervisor as defined in the Act.[1]

I. THE BOARD'S DECISIONS

In *Croft Metals, Inc*., supra, the Board stated that, in *Oakwood Healthcare, Inc*., supra, it had "refined the analysis to be applied in assessing supervisory status" and, with citation to the applicable portions of the *Oakwood Healthcare, Inc*. decision, summarized the definitions for the terms "assign," "responsibly to direct," and "independent judgment" as follows:

> The authority to "assign" refers 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 over-all duties, i.e., tasks, to an employee . . . . In sum, to 'assign' for purposes of Section 2(11) refers to the . . . . designation of significant overall duties to an employee, not to the . . . ad hoc instruction that the employee perform a discrete task." Id. slip op. at 4.
>
> The authority "responsibly to direct" is "not limited to department heads," but instead arises "[i]f a person on the shop floor has 'men under him,' and if that person decides 'what job shall be undertaken next or who shall do it . . . 'provided that the direction is both 'responsible' . . . and carried out with independent judgment." Id. slip op. at 6. "[F]or direction to be 'responsible,' the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed are not performed properly." Id. slip op. at 7. "Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." Id. slip op. at 7.
>
> "[T]o exercise 'independent judgment,' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Id. at 8. "[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." Id. slip op. at 8. "On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices." Id. slip op. at 8 (citations omitted). Explaining the definition of independent judgment in relation to the authority to assign, the Board stated that "[t]he authority to effect an assignment . . . must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" Id. slip op. at 8 (citations omitted).

II. FACTS AND ANALYSIS

My initial decision addresses the evidence relative to the definition of supervisory authority set out in Section 2(11) of the Act. I found that there is no evidence that Marshall possessed or exercised any authority to transfer, suspend, lay off, recall, promote, reward or adjust the grievances of the warehouse employees. I found that the probative evidence failed to establish that Marshall possessed or exercised the authority to hire, discharge, or discipline employees.[2] In addressing the authority to assign or responsibly to direct, I found no probative evidence that Marshall exercised independent judgment in carrying out those duties.

With regard to the authority to assign as set out in *Oakwood Healthcare, Inc.,* supra, there is no evidence that Marshall, other than in the context of an ad hoc assignment, designated an employee to a place, appointed an employee to a time such as a shift

[1] Donald C. Douglas Jr., Esq., filed the brief herein and represents the Respondent. He is now associated with a different law firm. My Order dated January 26, 2007, granting a motion to substitute counsel of record is hereby vacated. Attorney Douglas remains counsel of record.

[2] Notwithstanding the scope of the Order of the Board remanding this case, the brief of the Respondent seeks to revisit my determination that Marshall did not have the authority to hire or discipline. I did not credit the testimony of either President Larry Marquez or employee Pierre Jones in that regard. Although Marquez testified that Marshall had the authority to hire, "[h]e produced no documentation in support of that testimony, and he named no employee purportedly hired by Marshall." Nor did I credit "the bare assertion of employee Pierre Jones that Marshall hired him. His assertion was unaccompanied by any details, and he did not state who informed him of his pay rate." Although the Respondent revisits the issue of discipline, there is no evidence that Marshal ever issued any discipline. As stated in my decision, although the Respondent "purported to issue discipline in Marshall's name . . . Marshall was unaware of that fact and did not issue the discipline." All discipline since 2003 was issued under the signature of Service Manager Crystal Clouatre. "No discipline since 2003 has been issued in Marshall's name."

or overtime period, or gave significant overall duties. As the General Counsel points out, the only assignment to different overall duties established in the record is the assignment, actually a promotion, of employee Derrick Thornton from the position of driver helper to driver. President Larry Marquez, not Marshall, made that assignment. There is no evidence that Marshall assigned overtime. Drivers were required to finish their routes. If overtime was thereby incurred, it was incurred by the requirement, not by assignment. As noted in my initial decision, Marshall would fill in as necessary. He would direct that one employee assist another if assistance was necessary. As the Charging Party points out in its brief, the factual context in which these assignments occurred, dictated by circumstances, are "almost identical" to those discussed in *Croft Metals, Inc*., supra, in which such actions were found not to constitute assignments under the criteria of *Oakwood Healthcare, Inc*.

The Respondent, in its brief, argues that Marshall "set the schedule" of the employees. The evidence does not support that argument. The only schedule change established in the record is a period during which all deliveries on Thursday were made in the afternoon. Insofar as it was immaterial to my decision, I simply noted that there was conflicting testimony regarding when that schedule change occurred. Regardless of when that change occurred and for how long it lasted, Marquez admitted that he made the change and employee Will Norton testified that Marquez announced it at a meeting.

The Respondent cites the testimony of Marquez that Marshall could tell an employee not to come in without his approval. I give that assertion no more credence that I do to the claim of Marquez that Marshall had the authority to set starting times. As found in my initial decision, Marshall did not have the authority to set starting times. If Marshall had that authority, Marquez would have spoken with him on July 28, 2005, prior to discharging Marshall and the other warehouse employees who did not report to work. The foregoing rationale applies equally to the incredible contention that Marshall could tell an employee not to come in without his approval.

The Respondent, citing the testimony of employee Pierre Jones that Marshall would tell him whether he was "off the next day or working the next day, depending on the amount of deliveries, but it was always . . . [Marshall's] call," argues that Marshall "decided when the other employees would and would not work."[3] Jones was in no position to know whether it was Marshall's "call" or whether he was simply relaying instructions. Driver helper Bobbie Marshall III, noted that, when work was slow, it was Marquez who would tell him whether to come in. Marquez testified that the oversight of the delivery of furniture was the responsibility of Service Manager Crystal Clouatre, that her job duties included "all aspects of customer service." Asked whether that included "the delivery of furniture," Marquez answered, "Yes, sir." The foregoing is confirmed by driver Derrick Thornton who was upset with Clouatre for going directly to Marquez with customer complaints regarding drivers. As noted in my initial decision, Clouatre would prepare the delivery tickets, and Marshall would simply pass them on to the drivers who had preassigned routes, "[e]verybody has a certain area."

Even if I were to have found that the decision as to whether an employee was not needed on a particular day was made by Marshall rather than Marquez or Clouatre, who did not testify and who was responsible for all areas of customer service including "the delivery of furniture," that decision, predicated upon the "amount of deliveries," was not shown to have involved independent judgment. The Respondent adduced "no evidence regarding the factors weighed or balanced" in making the decision. *Croft Metals, Inc*., supra slip op. at 6. It is incumbent upon the party with the burden of proof to adduce "concrete evidence showing how assignment decisions are made." *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002).

The Respondent, in its brief, revisits two incidents in which Marshall purportedly sent employees home early. I addressed both of these in my initial decision. The one time assignment in 2004 of driver Pierre Jones to sweep up, "do the trash," in the warehouse before leaving on his route was an ad hoc assignment. After performing it, Jones was to have left on his route. Marshall did not send him home. On cross examination Jones admitted, "I chose to go home." Jones was not disciplined for not performing the job, and Marshall was not held accountable. The incident regarding employee Will Norton related to one occasion when Norton did not serve as a driver helper. As found in my initial decision, the testimony of Norton establishes that, on that occasion, Marshall simply assigned him to work in the warehouse, and Norton went home when his work was completed. The Respondent presented no evidence regarding the circumstances surrounding this ad hoc assignment. As noted in my initial decision, the record does not establish whether the driver whom Norton regularly assisted had any deliveries to make that day or whether the deliveries required an assistant. As the Board held in *Croft Metals, Inc*., sporadic temporary assignments dictated by circumstances "are insufficient to confer supervisory status." Id. slip op. at 6. There is no probative evidence that Marshall assigned employees.

With regard to the authority responsibly to direct, the Board requires both direction and accountability. In *Golden Crest Healthcare Center*, supra at fn. 11, the Board pointed out that a finding of responsible direction requires both evidence of direction and accountability: "[W]hen there is no showing of 'direction,' the Board need not reach the issue of 'accountability,' just as when there is no showing of 'accountability' the Board need not reach the issue of 'direction.'"

Direction requires that "it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary." Direction is established by showing that the putative supervisor determines "what job shall be undertaken next or who shall do it." The authority to take corrective action obviously falls below the threshold of formal discipline, since the authority to discipline, assuming independent judgment in that regard, would, standing alone, establish supervisory authority. The decision in *Croft Metals, Inc*., supra at fn. 13, suggest that "corrective action" would be established by evidence of verbal warnings or by the lead person taking a recalcitrant employee to the personnel

[3] In my initial decision, I incorrectly identify Jones as a former employee. Jones was a former employee when the alleged discriminatees were discharged. Thereafter, he was rehired. He is a current employee and was called as a witness by the Respondent.

office or to an acknowledged supervisor, actions that fall below the threshold of formal discipline.

Marshall worked with the warehouse employees and oversaw the storage of items in the warehouse and the loading of delivery trucks. Like the lead persons in *Croft Metals, Inc*., he would "fill in to pick up the slack," which could involve driving a delivery truck if a driver was absent. If there were more deliveries than normal in a specific area, Marshall would alter the route of a driver or send two trucks. Although the Board includes the authority to take corrective action in its consideration of authority to direct, there is no probative evidence on this record that Marshall possessed the authority to take corrective action. Nevertheless, insofar as Marshall oversaw the work and who would do it, I find that the record establishes the initial aspect of direction.

With regard to accountability, the second requirement that is essential to a finding of responsible direction, there is no evidence that Marshall was held accountable for the actions of the employees that he purportedly supervised. No discipline was ever issued to Marshall either for the actions of the employees that he purportedly supervised or for any other reason. Owner Marquez intended to hold both purported supervisor Marshall and employee Reggie Austin monetarily liable for throwing away a chair, stating that if he found out that "any one of you guys threw that chair away, you all are going to pay for it." Only Marshall and Austin were present. Marquez was addressing Marshall in the same manner as he addressed Austin, as an employee, not as a supervisor. After Service Manager Clouatre went directly to Marquez regarding a customer complaint concerning driver Thornton, Thornton was questioned by Marquez, not Marshall, regarding the complaint. Thus, as was the case in *Golden Crest Healthcare Center*, there is no evidence that Marshall, the purported supervisor, "experienced any material consequences to . . . [his] terms and conditions of employment, either positive or negative, as a result of . . . [his] performance in directing . . . [employees]." Id. slip op. at 5.

With regard to independent judgment, even if I were to have found that Marshall responsibly directed warehouse employees and drivers, he did not exercise independent judgment when doing so. As set out in my initial decision, the routes of the delivery trucks were prescribed by geographic area. As Marshall explained, "all the drivers know that you start from wherever is closest to the warehouse . . . and just keep on going." As already discussed, even if I were to have found that Marshall decided whether an employee was not needed on a particular day, the predicate for the determination, stated by driver Pierre Jones, was the "amount of deliveries." The further testimony of Jones that "we" would "refrain from sending two trucks in the same area" unless "we had no choice but to run two trucks" confirms that these were routine practices known to the drivers, practices based upon the objective factor of delivery volume. The Respondent presented no evidence to the contrary. Thus, the undisputed record evidence establishes that independent judgment was not required and was not exercised with regard to these decisions. Similarly, Marshall's showing an inexperienced driver how his route should be set up was dependent upon the factors of time and distance which Marshall knew from experience. The assignment of tasks in accordance with an Employer's set practice, pattern or parameters, or based on such obvious factors as whether an employee's workload is light, does not require a sufficient exercise of independent judgment to satisfy the statutory definition." *Franklin Home Health Agency*, supra at 830, citing *Express Messenger Systems*, 301 NLRB 651, 654 (1991), and *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1075 (1985).

In *Oakwood Healthcare*, *Inc*., supra, the Board noted that "for an individual 'responsibly to direct' . . . with 'independent judgment,' that individual would need to exercise 'significant discretion and judgment in directing' others." Id. at fn. 38. The burden is upon the party alleging supervisory status to establish that the putative supervisor exercises independent judgment by submitting "concrete evidence showing how . . . decisions are made." *Franklin Home Health Agency*, supra at 830.

The evidence in this case does not establish that Marshall exercised independent judgment. Marshall would set up routes based upon his "[g]eographic knowledge and time frames," how long it would take to get from point A to point B. Loading trucks was performed in a set pattern, with the last deliveries loaded first and the first deliveries loaded last. As found in *Croft Metals Inc*., supra, slip op at 6, any directions given in that regard would not rise above the routine or clerical that the Act specifically states do not confer supervisory status. As recognized by the Supreme Court in *NLRB v. Kentucky River Community Care, Inc*., 532 U.S. 706, 713 (2000). "[m]any nominally supervisory functions may be performed without the 'exercis[e of] such a degree of . . . judgment or discretion . . . as would warrant a finding' of supervisory status under the Act. *Weyerhaeuser Timber Co*., 85 NLR.B 1170, 1173 (1949)."

The burden of establishing supervisory status is upon the party asserting that status. The Respondent has not met that burden. The evidence in this case does not establish that Warehouse Manager Marshall assigned, responsibly directed, or exercised independent judgment.

CONCLUSION OF LAW

Having considered the record in view of the "refined . . . analysis to be applied in assessing supervisory status" prescribed in *Oakwood Healthcare, Inc.,* and the briefs filed by all parties, I reaffirm my decision that the Respondent has failed to prove that Warehouse Manager Bobbie Marshall Jr., was a supervisor as defined in the Act. Accordingly, I issue the following recommended.[4]

ORDER

The Respondent, CGLM, Inc., Jefferson, Louisiana, its officers, agents, successors, and assigns, shall comply with the recommended Order set out in the decision issued on August 28, 2006.

[4] 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.