Tracy Auto, L.P. d/b/a Tracy Toyota *and* Machinists and Mechanics Lodge No. 2182, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL–CIO. Cases 32–CA–260614, 32–CA–262291, and 32–RC–260453

July 6, 2023

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS KAPLAN AND WILCOX

On September 27, 2021, Administrative Law Judge Mara-Louise Anzalone issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed answering briefs, and the Respondent filed reply briefs. The General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief. The Union filed cross-exceptions and a supporting brief, and the Respondent 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 decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

We affirm the judge's finding, for the reasons she stated, that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by failing to recall strikers to fill the vacancies created by replacement technician Edgar Sanchez' failure to report for duty and the departure of replacement foreman Josh Spier.[3] Further, as discussed below, we adopt the judge's finding that the Respondent violated Section 8(a)(3) and (1) by failing to recall strikers to fill two vacancies that existed immediately following the strikers' May 21, 2020 unconditional offer to return to work. We also affirm the judge's finding that foremen Kevin Humeston and Tyrome Jackson are not supervisors within the meaning of Section 2(11) of the Act[4] and her recommendation to overrule the Respondent's election objections.[5] We therefore certify Machinists and Mechanics Lodge No. 2182, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive collective-bargaining representative of the unit employees.[6]

For the reasons set forth below, we find, contrary to the judge, that the Respondent coercively interrogated foremen Humeston and Jackson in violation of Section 8(a)(1)

[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 Dry Wall 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 the findings.

[2] We have amended the judge's conclusions of law consistent with our findings herein. We have also amended the remedy and modified the judge's recommended Order consistent with our legal conclusions herein, to conform to the Board's standard remedial language, and in accordance with our decisions in *Thryv, Inc.*, 372 NLRB No. 22 (2022), and *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022). We shall substitute a new notice to conform to the Order as modified.

We note that the Charging Party excepts to the judge's failure to order additional notice posting, distribution, and reading remedies here. We find, however, that the remedies ordered by the judge are sufficient to effectuate the policies of the Act in this matter.

[3] Spier quit working for the Respondent in early June, but subsequently reconsidered his decision, and the Respondent rehired him.

[4] In finding that the Respondent failed to prove that foremen Humeston and Jackson are statutory supervisors, the judge declined to give weight to warnings issued by former foreman Jorge Santiago and replacement foreman Spier, reasoning that a "party claiming an individual with the title 'foreman' is a supervisor may not simply point to supervisory traits exhibited by others with the same job title." But Santiago and Spier did not merely have the same title as Humeston and Jackson; rather, they held the same *positions*. Evidence of Santiago's and Spier's supervisory authority is therefore relevant to whether Humeston and Jackson are supervisors. Nevertheless, we find that the Respondent's evidence that its foremen issue written warnings fails to establish that foremen discipline employees within the meaning of Sec. 2(11), as there is no evidence that the Respondent uses a progressive discipline system or that the warnings otherwise affect job status. See, e.g., *Passavant Health Center*, 284 NLRB 887, 889 (1987) ("[T]he mere factual reporting of oral reprimands and the issuance of written warnings that do not alone affect job status or tenure do not constitute supervisory authority.").

The judge also declined to give weight to evidence that the Respondent demoted replacement foreman Rene Cabrera for inefficiency in assigning repair orders. The Respondent claims that that demotion shows that the Respondent's foremen have authority to responsibly direct other employees within the meaning of the Act. It does not. Instead, evidence of Cabrera's demotion merely shows that the Respondent's foremen "are accountable for their *own* performance or lack thereof, not the performance of *others*, and consequently is insufficient to establish responsible direction." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 695 (2006) (emphasis in original).

[5] Because we affirm the judge's finding that Humeston and Jackson are not statutory supervisors, we find it unnecessary to pass on whether they would have engaged in objectionable pro-union conduct that would warrant setting aside the election if they had been statutory supervisors.

[6] On May 15, the Union filed a representation petition. Pursuant to a stipulated election agreement, a mail-ballot election was conducted between July 17 and August 5. The Regional Director issued a Tally of Ballots on August 7, showing 17 ballots in favor of the Union and 8 against, with 3 nondeterminative challenged ballots. Under Sec. 102.69 of the Board's Rules and Regulations, the Board itself has the authority to issue a certification. Because the Union prevailed in the election, we shall certify it as the unit employees' exclusive collective-bargaining representative. See *Talmadge Park*, 351 NLRB 1241, 1241 fn. 4 (2007).

of the Act when it served them with subpoenas requiring production of all communications between them and Counsel for the General Counsel.

I. THE FAILURE TO RECALL STRIKERS AFTER THEIR UNCONDITIONAL OFFER TO RETURN TO WORK

A. Background

The Union began organizing technicians in the Respondent's service department in May 2020.[7] On May 15, the technicians went to the general manager's office to demand that the Respondent recognize the Union as their collective-bargaining agent, saying that they would not return to work until the Respondent did so. None of the technicians resumed work that day or reported to work the following day. On Monday, May 18, the employees decided to begin picketing the Respondent, which commenced on May 19. The striking employees unconditionally offered to return to work on May 21. But by that point, the Respondent had hired permanent replacements for some of the strikers. At issue here is whether the Respondent violated the Act by failing to recall strikers to fill vacancies that existed when the strike ended. Specifically, whether two of the claimed replacements—foreman Josh Spier and technician Steve Lopez—were strike replacements, and therefore occupied vacancies created by the strike, or were pre-strike hires, and instead occupied newly created positions. Relevant to this issue is a determination of whether Spier and Lopez were hired before or after the strike began. As discussed below, we find, in agreement with the judge and contrary to the Respondent and our dissenting colleague, that Spier and Lopez were hired prior to the start of the strike. As a result, we agree with the judge that the Respondent violated Section 8(a)(3) and (1) by failing to recall a sufficient number of former strikers to reach the pre-strike complement of 19 employees.

Lopez, whom the judge found to be "a highly credible witness,"[8] testified that he interviewed with Service Manager Bob Gallego on May 13. In addition to answering "yes," when asked by the General Counsel if he recalled an interview "about May 13," Lopez testified that he was confident that the interview took place on May 13 because he recorded it in his calendar and that Gallego offered him a job that day, which Lopez accepted.[9] Lopez then said that on May 18, he went into the office to sign paperwork, including a consent-to-drug-testing form. The Respondent, in contrast, argued that it offered Lopez a job on May 18, relying on an online job application, purportedly submitted by Lopez on the afternoon of May 15, the drug-testing form—which Human Resources Manager Jacinto Miranda testified employees complete the same day they accept a job "90-plus percent of the time," (Tr. 2622)—and an offer letter, dated May 18, saying that Lopez had accepted a position as a strike replacement. Miranda was not present during Lopez' interview with Gallego and, therefore, could not testify what occurred during the interview or even when it occurred. Despite being called to testify on three separate days, all after Lopez had testified, Gallego did not discuss the circumstances of Lopez' hire.

Spier testified to a lack of memory as to when he accepted the Respondent's offer of employment and, as a result, the judge relied on an affidavit that Spier provided during the Region's investigation of the charge. In that affidavit, Spier stated that he interviewed with Gallego for a foreman position sometime in the first week of May.[10] He and Gallego agreed on a tentative start date of May 18. Spier left the interview believing that he had the job, subject to agreement on salary and schedule, and was sufficiently confident that he stopped looking for work, even though he was unemployed at the time. He and the Respondent reached an agreement on salary a few days later. In contrast—after first testifying, twice, that the Respondent hired Spier as a technician before the strike began (Tr. 2742–2743)—Gallego then asserted that, although the Respondent had *offered* Spier a technician position pre-strike, Spier did not agree to work for the Respondent until it offered him a foreman position after the strike began. Spier ultimately began working for the Respondent in that position on June 1. The Respondent additionally relies on an offer letter and drug-testing form, both dated May 20, as evidence that Spier accepted employment after the start of the strike.

The judge found that both Lopez and Spier accepted the Respondent's employment offers before the strike began, thereby increasing the Respondent's pre-strike complement of employees to 19. With respect to Lopez, the judge

[7] All dates are in 2020, unless otherwise noted.

[8] The judge based her credibility determination on the fact that Lopez "testified without embellishment, was totally noncombative on cross-examination and appeared to have a sharp memory for the details of the interview."

[9] We are not persuaded by the dissent's suggestion that the General Counsel's failure to introduce Lopez' calendar detracts from his credibility. Certainly, the calendar would be relevant if there were reason to doubt Lopez' veracity, but the Respondent is not suggesting that Lopez knowingly provided false testimony, nor is there any apparent reason why he would do so. As a former employee who resigned to take another job, Lopez is not an alleged discriminatee and has no interest in the outcome of this proceeding, and the record contains no reason to suspect that he might be biased against the Respondent or in favor of the Union. Rather, the Respondent—seeming to overlook Lopez' calendar testimony—argues that Lopez was confused, only adopting May 13 as his interview date because the General Counsel suggested it. For the reasons stated herein, we agree with the judge that he was not.

[10] This aspect of Spier's account is corroborated by R. Exh. 63, which states that Gallego interviewed Spier on May 1.

declined to credit the Respondent's documentary evidence because Gallego did not testify as to when his interview with Lopez occurred.[11] And as to Spier, the judge found that the timeline provided in his affidavit was accurate, although she credited Gallego's assertion that the Respondent offered Spier the foreman position after Spier suggested he might rescind his acceptance of the technician position due to the strike. Because the judge rejected the Respondent's claim that there was not enough work or space to support a staff of 19,[12] she found that the Respondent violated Section 8(a)(3) and (1) by failing to recall enough former strikers to reach its pre-strike complement of 19 technicians. For the reasons given by the judge, as well as those discussed below, we agree with the judge's finding that Spier and Lopez were pre-strike hires.

B. Discussion

Under extant precedent, an employer that hires permanent replacements to continue its operations while employees are on strike is not required to terminate the replacements when the strike ends, but it must recall a sufficient number of former strikers to fill any existing vacancies (and prefer former strikers over new applicants for future vacancies), unless it has a nondiscriminatory business reason to leave the vacancies unfilled. E.g., *Laidlaw Corp.*, 171 NLRB 1366, 1369 (1986), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). The judge found, and neither the Respondent nor our dissenting colleague disputes, that the number of existing vacancies is determined by the pre-strike complement of employees, including employees who have accepted an offer of employment but have not yet started work.[13]

i. Steve Lopez

The Respondent argues that the judge erred by finding that Gallego offered, and Lopez accepted, employment on May 13. Rather, the Respondent claims, and our dissenting colleague agrees, that documentary evidence and the testimony of HR Manager Miranda establish that Lopez submitted his application on May 15 and accepted the Respondent's offer on May 18. There is, however, no contradiction between Lopez' testimony and Miranda's. Miranda did not testify that it would have been impossible, or even unheard of, for Gallego to offer Lopez a position before he signed his onboarding paperwork. Rather, Miranda's testimony establishes, at most, that it would have been atypical. Under these circumstances, the offer letter prepared by Miranda and consent-to-drug-testing form are not reliable evidence of the date on which Lopez was hired.[14]

Similarly, Lopez did not testify when (or even if) he submitted an online application, and Miranda did not testify that submission of Lopez's finalized application marked the first communication between Lopez and the Respondent; nor did Miranda testify that the Respondent never contacted job seekers without a finalized application on file. Indeed, Miranda testified that individuals could use the Respondent's online hiring system to submit resumes without actually applying and that he occasionally had to "remind" applicants to submit applications using the online tool. (Tr. 2531). There is, moreover, good reason to believe that there are instances where the Respondent has delivered such "reminders" to employees when they interview.[15]

[11] The judge also purported to rely on Miranda's admission that the Respondent's online hiring platform was "inherently unreliable, in that [documents generated by it] regularly failed to reflect dates with accuracy." This is not a reasonable characterization or interpretation of Miranda's testimony, and we do not rely on it. As explained below, however, based on Miranda's testimony about the hiring system's idiosyncrasies, as well as documentary evidence not discussed by the judge, we reject the Respondent's claim that submission of Lopez' online application necessarily preceded his interview with Gallego.

[12] In adopting the judge's rejection of the Respondent's business-justification defenses to its failure to recall striking employees, we note that the Respondent fails to explain what, if anything, changed with respect to its space constraints or volume of work between the start of the strike on May 15, by which date it had expanded its pre-strike work force by extending job offers to Spier and Lopez, and May 21, when the strikers unconditionally offered to return to work.

[13] We agree that employees who have accepted job offers, but not yet reported for work are appropriately included in the pre-strike complement. Cf. *H. & F. Binch Co.*, 188 NLRB 720, 723 (1971) ("[I]f the employer makes a commitment to the applicant for the striker's job, we will normally regard that commitment as a legitimate replacement even though the striker requests reinstatement before the replacement actually begins to work."), enfd. as modified 456 F.2d 357 (2d Cir. 1972). Contrary to our dissenting colleague, however, we believe that, in the *Laidlaw* context, the fact that an employee has accepted a job offer pre-strike (and then goes on to work for the employer after the strike commences) is significant not because it establishes "[a]n employment relationship under the Act," but rather because it provides reliable evidence that the employer decided, before the strike began, to expand its work force. Because we find that Spier and Lopez accepted their employment offers pre-strike, we need not address here what, if any, evidence other than an accepted job offer would be sufficiently reliable to establish a *Laidlaw* vacancy in an expanded work force.

[14] The offer letter is also unreliable given that Miranda essentially admitted to backdating a similar letter addressed to employee Adan Cordova. Tr. 2473; R. Exh. 61 at 601. That document, which Miranda hand dated May 13, states that Cordova was being hired as a permanent replacement for a strike, unanticipated by the Respondent, that did not begin until May 15.

[15] Respondent's Exh. 62 is a May 19 email exchange between would-be strike replacement Edgar Sanchez and Gallego. In the course of responding to an email from Gallego seeking to confirm his start date, Sanchez noted that he had "d[one his] paperwork and application," which would make little sense if Sanchez had submitted his application in advance of the interview with Gallego.

Simply put, neither Miranda's testimony, nor the documents, directly contradict Lopez' testimony that he accepted the Respondent's job offer during his May 13 interview with Gallego. In the absence of such a conflict in their testimonies, there is no need to credit Lopez over Miranda. In any event, the judge found Lopez to be "highly credible" and made factual findings consistent with his testimony, as noted above. In doing so, she implicitly discredited Miranda's testimony to the extent it conflicted with Lopez'. In contrast, the judge was unimpressed with other portions of Miranda's testimony. Furthermore, even assuming we were called upon to credit one witness's testimony over the other's, it is clear to us that Lopez' testimony should be credited. As mentioned above, he is a disinterested and seemingly neutral witness. Moreover, as discussed, Miranda appears to have fabricated evidence in anticipation of litigation before the Board and, at the very least, he authenticated a document that he knew to be backdated. That alone would provide reason to discredit him were it necessary to do so.

Finally, as discussed above, the judge discounted the Respondent's documentary evidence as to Lopez because Gallego failed to testify as to the circumstances under which Lopez was hired.[16] The dissent, however, gives no weight to this adverse inference. Even if we agreed with our dissenting colleague that, after considering Miranda's and Lopez' testimony and the Respondent's documents, the evidence was in equipoise—and we do not believe it is—once the adverse inference drawn from Gallego's failure to testify concerning Lopez is considered, the General Counsel would satisfy her burden to show that the Respondent hired Lopez before the strike began.[17]

Because we find that Lopez accepted employment on May 13, we conclude that the judge appropriately counted him as part of the Respondent's pre-strike employee complement.

ii. Josh Spier

We also agree with the judge's conclusion that the Respondent added Spier to its employment rolls before the strike began. As an initial matter, we reject the Respondent's argument that the only relevant job offer extended by the Respondent was for the foreman position that Spier ultimately went on to work in. Rather, we agree with the judge that the essential question is whether Spier accepted an offer to work in a bargaining-unit position before the strike began. Because we adopt the judge's conclusion that the Respondent's foremen are statutory employees, at issue is whether Spier agreed to work for the Respondent before May 15. We believe it is clear that he did.

As discussed above, the judge found that, in early May, Spier tentatively accepted the Respondent's offer of employment with a soft start date of May 18, subject to agreement on salary and schedule. We find that Spier's tentative acceptance of the offer occurred on May 1, as that date is consistent with both Spier's affidavit and a document provided by the Respondent. Sometime thereafter, although prior to the start of the strike, Spier and the Respondent agreed on Spier's salary.[18] These facts are, in our view, sufficient to support a determination that Spier had accepted an offer to work for the Respondent before the strike began.[19] Moreover, the Respondent admitted several times during its opening statement that "Spier was offered and accepted [a nonsupervisory] position prior to

[16] Specifically, the judge stated that "[t]he failure of Gallego to contradict Lopez' specific account leads me to cast a doubtful eye on Respondent's documentary evidence, which its own witness, Miranda, admitted was inherently unreliable, in that they regularly failed to reflect dates with accuracy." As mentioned above, we do not rely on the judge's finding that the dates the Respondent's hiring software produced were unreliable.

Our dissenting colleague asserts that an adverse inference is unwarranted here, inferring instead that "the Respondent elected not to call Gallego to discuss Lopez' hiring because Lopez' online submission of a date-stamped job application after the strike occurred made Gallego's testimony unnecessary." We disagree. In the circumstances presented, the judge properly exercised her discretion to draw an adverse inference against the Respondent based on Gallego's failure to testify about the circumstances of Lopez' hire. See, e.g., *International Automated Machines*, 285 NLRB 1122, 1123 (1987). Moreover, *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006), cited by our dissenting colleague, is not to the contrary. There, the Board found that an adverse inference was unwarranted where the missing witness's testimony would have "added little" to the mutually consistent testimony of multiple other witnesses and "undisputed documentary evidence." Here, however, Gallego's testimony was not cumulative since he was present at the interview while Miranda was not, and Miranda's testimony was not supported by undisputed documentary evidence.

[17] If anything, the judge may have erred by not drawing the stronger inference that if asked, Gallego would have confirmed that Lopez accepted the job offer during their May 13 interview. Because we find that the General Counsel met her burden without such an inference, we need not reach this issue.

[18] Spier's affidavit describes an interview with General Manager Jae Lee in early to mid-April and an interview with Gallego, during the first week of May. The affidavit further states that Spier and the Respondent agreed on salary "a couple days following [Spier's] interview with Lee." An agreement on salary "a couple days" after either the April or early May interviews would have taken place prior to the start of the strike on May 19. Based on the entire record and our reading of the affidavit as a whole, we respectfully disagree with our dissenting colleague's inference that the reference to an agreement on salary "a couple days following [Spier's] interview with Lee" establishes that there was a third, undated interview, thereby creating ambiguity over whether the agreement on salary predated the strike.

[19] In this regard, it seems unlikely that a soft agreement to start work on Monday, May 18, had yet to become firm by the morning of Friday, May 15—more than 2 weeks after the offer was initially extended—particularly given that the record reflects regular communication between Spier and the Respondent in the interim.

the strike."[20] Even in its exceptions, the Respondent all but acknowledges that Spier had accepted its offer to work as a technician at some point before May 15, stating in its brief that "Spier subsequently tried to back out of the [technician] position." Ordinarily, one backs out of a commitment, not an unaccepted offer.[21] Our dissenting colleague fails to give any weight to these admissions.

Further, our dissenting colleague's reliance on Gallego's and Miranda's testimony as to Spier's hire date is misplaced. The Respondent consistently distinguishes between the initial offer to work as a technician, which we find that Spier accepted before the strike, and the subsequent offer of employment as a foreman. Much of the testimony upon which our colleague relies is clearly cabined to the foreman offer, rather than the initial offer to join the Respondent's payroll. And given that this is an ambiguity of the Respondent's own making, we are unwilling to assume that the Respondent's witnesses are discussing the technician offer (rather than the subsequent foreman offer) absent a clear indication to the contrary.

At a minimum, the record reflects that, by May 15, there was a mutual understanding between Spier and the Respondent that he would begin working for the Respondent in a unit position on or about May 18. Had there been no strike, we have no doubt that he would have. And Spier did, indeed, go on to work for the Respondent only 2 weeks after his original planned start date, as a unit employee. We find that is sufficient to establish that Spier joined the Respondent's employee complement before the strike began.

We therefore adopt the judge's conclusion that the Respondent hired Spier before the strike began.

II. INTERROGATION

The Respondent served Humeston and Jackson with subpoenas (foreman subpoenas) seeking, among other things, the following:[22]

> 8. For the period of January 1, 2020 through the present, all DOCUMENTS, including, but not limited to, emails, text messages, letters, notes and any other form of communication between YOU and [Counsel for the General Counsel] Jason Wong.

The General Counsel and the Union filed petitions to revoke the subpoenas, contending, in relevant part, that they interfered with the employees' Section 7 rights. The Respondent filed an opposition to the petitions, and the Union filed a reply. In a December 29 Order, the judge partially granted the petitions to revoke. A few days after filing the petition to revoke, the General Counsel amended the complaint to allege that the Respondent unlawfully interrogated employees by issuing them the subpoenas in violation of Section 8(a)(1).

The judge dismissed the allegation that the Respondent unlawfully interrogated employees.[23] Relying on *Ozark Automotive Distributors, Inc. v. NLRB*, 779 F.3d 576 (D.C. Cir. 2015), the judge reasoned that the subpoenaed information sought communications between employees and individuals whose supervisory status was disputed and was relevant to whether Humeston and Jackson were statutory supervisors and whether they engaged in objectionable prounion conduct. This reasoning does not extend to Paragraph 8 of the foreman subpoenas. We therefore reverse.[24]

The General Counsel argues that we should be guided by *Guess?, Inc.*, 339 NLRB 432 (2003), where the Board set forth a three-step test to determine whether a party engages in unlawful interrogation or surveillance when it

[20] Transcript 19; accord Tr. 20 ("[I]t was decided at that point [after the strike had begun] that the offer to Josh Spier would change. That he would not be the nonsupervisory foreman that was *offered and accepted* before, but the[Respondent] would actually give him a permanent replacement position as a supervising foreman . . . . So Counsel [for the General Counsel] telling you that, oh, one of these guys was hired before [the strike], *sure, he was hired before*. He was hired in a different position[,] and *he wasn't hired as a permanent replacement*.") (emphasis added).

Similarly, later in the hearing, the Respondent's counsel was asked at the hearing whether the Respondent was arguing that Spier "accepted an offer of employment and then unaccepted it because of things that happened subsequently" and responded "[e]xactly, and that's what the text messages bear out specifically." (Tr. 1330).

In support of its position with respect to Spier, the Respondent introduced a series of text messages between Gallego and Spier, beginning on May 18, in which Spier asks for and obtains a foreman position. After considering these text messages, the judge found that "while it does appear that the strike gave Spier some pause about reporting for work as planned on May 18, it is also clear that Respondent had made an offer, prior to the strike to Spier in some capacity, and, as of the commencement of the strike, he had accepted that offer." We agree with this finding, which is not based solely on the text messages themselves, but on the record as a whole. Accordingly, it is immaterial that the text messages, standing alone, may be "inconclusive," as our dissenting colleague asserts.

[21] Moreover, as mentioned above, Gallego twice testified that Spier had, in fact, accepted the Respondent's offer.

[22] The Respondent also served subpoenas on a number of formerly striking technicians (technician subpoenas) seeking, among other things, documents reflecting communications with the foremen.

[23] Although the judge did not discuss the foreman subpoenas in her decision, she cited to her December 29 Order ruling on the petitions to revoke, and we find that in doing so she incorporated by reference all rulings on the foreman subpoenas discussed herein.

[24] Because we find that Paragraph 8 amounted to unlawful interrogation, we find it unnecessary to pass on the lawfulness of the technician subpoenas or on the other paragraphs in the foreman subpoenas, as any such additional findings would be cumulative and would not affect the remedy.

seeks to obtain information that would ordinarily be protected by Section 7 using the tools of judicial or administrative discovery. First, the information sought must be relevant to the claims being litigated.[25] Second, the party seeking to obtain the information must not be acting with an objective that is illegal under the Act.[26] Third, if the information subpoenaed is relevant and not sought for an unlawful purpose, the litigant's interest in obtaining the information must outweigh the employees' confidentiality interests under Section 7 of the Act.[27]

We start with the threshold question of whether Paragraph 8 sought Section 7–protected information. The answer is clearly yes. We have rejected the Respondent's contention that the foremen are statutory supervisors who lack Section 7 rights,[28] and the Board has long held that employees have a Section 7 right to assist in the General Counsel's investigation or litigation of an unfair labor practice charge.[29] Further, outside the discovery context, the Board has held that interrogating employees about statements provided to the Board or communications with Board agents is "inherently coercive."[30] The Board has also held that a party acts with an illegal purpose if it subpoenas employees for their Board affidavits despite knowing that provision of such documents contravenes Board policy.[31] In light of this precedent, Paragraph 8 of the foreman subpoena, on its face, certainly would seem to violate Section 8(a)(1). Application of *Guess?*, as advocated by the General Counsel, yields the same conclusion. We assume, arguendo and for purposes of this decision, that any communications that the foremen may have had with Wong would be relevant to the Respondent's defenses and election objections and that the Respondent was not acting with an illegal objective. Under Step 3 of *Guess?*, however, we find that the employees' interests in the confidentiality of their communications with Wong outweigh the Respondent's need for the information. In this regard, although communications between a cooperating witness and the General Counsel are likely to contain relevant information, rarely, if ever, will the fact that particular information was communicated to or from the General Counsel, in and of itself, be relevant to anything being litigated in a Board proceeding. And in this case, the Respondent has not explained, in either its opposition to the petitions to revoke or its opposition to the General Counsel's and Union's cross-exceptions, why it needed the foremen's communications with Wong or believed the communications would contain information unavailable elsewhere.

While the Respondent's need for the communications covered by Paragraph 8 is minimal—perhaps nonexistent—the employees' interest in the confidentiality of their communications with the General Counsel is significant. As noted above, employees have the right to assist the Board in its investigation and prosecution of alleged unfair labor practices. Further, employees would be reluctant to cooperate with Board investigations if parties to a case were able to learn the extent and content of their cooperation with the General Counsel's investigation or preparation for litigation. Any suggestion that the adverse impact of such questioning on employees' "complete freedom" to provide information to the Board is outweighed by legitimate justifications "must be rejected as contrary to the judgment and intent of Congress." *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 6 (2019). Moreover, it is likely that communications between employees and the General Counsel will contain copies of any Board affidavits that they may have provided, but here, the subpoena did not contain instructions to refrain from providing such documents.[32] The Board has long held that Board affidavits may not be subpoenaed.[33]

[25] *Guess?*, 339 NLRB at 434.

[26] Id.

[27] Id.

[28] To be clear, there can still be a basis for quashing a subpoena for communications between a statutory supervisor and the General Counsel or the Board. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978) (holding that prehearing disclosure of Board affidavits has potential to "interfere with enforcement proceedings" within the meaning of Exemption 7(A) of the Freedom of Information Act, 5 U.S.C. § 552(b)(7)(A), in part because "[t]he danger of witness intimidation is particularly acute with respect to current employees—whether rank and file, *supervisory, or managerial*—over whom the employer, by virtue of the employment relationship, may exercise intense leverage") (emphasis added). For the reasons discussed below, that basis would exist in this case.

[29] See, e.g., *Interstate Management Co., LLC*, 369 NLRB No. 84, slip op. at 2 (2020) ("[E]mployees have a Sec[.] 7 right to provide evidence to the Board and to cooperate in Board . . . investigations without interference."); *Hoover, Inc.*, 240 NLRB 593, 605 (1979) (finding that employer violated Sec. 8(a)(1) by threatening reprisal against employees who communicated with the Board); accord *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967) ("Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board.").

[30] *U.S. Cosmetics Corp.*, 368 NLRB No. 21, slip op. at 1, 29 (2019).

[31] *Santa Barbara News-Press*, 358 NLRB 1539, 1541–1542 (2012), incorporated by reference in 361 NLRB 903 (2014).

[32] One of the foremen testified to reviewing his affidavit with Wong in preparation for the hearing, making it likely that a copy of his affidavit was contained within his communications with the General Counsel. At the very least, a reasonable employee in his position would be able to envision scenarios in which his communications with the General Counsel contained a copy of his affidavit. Although the judge's Order instructed employees not to provide affidavits, "the harm is in the very request itself, which would have a chilling effect on employees' willingness to" assist in the General Counsel's investigation and litigation of unfair labor practice allegations. *Chino Valley Medical Center*, 362 NLRB 283, 283 fn. 1 (2015), enfd. in relevant part sub nom. *United Nurses Associations of California v. NLRB*, 871 F.3d 767 (9th Cir. 2017).

[33] *Santa Barbara News-Press*, 358 NLRB at 1541–1542.

We therefore find that the Respondent violated Section 8(a)(1) by subpoenaing employees' communications with the General Counsel. Indeed, it is difficult to imagine a situation in which such a subpoena could be permitted.

AMENDED CONCLUSIONS OF LAW

Delete paragraphs 4 and 5 and substitute the following:

"4. The Respondent has violated Section 8(a)(1) by using subpoenas to interrogate employees about their union and other protected concerted activities and the union and other protected concerted activities of other employees.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act."

AMENDED REMEDY

Having found that the Respondent violated Section 8(a)(1) of the Act by utilizing subpoenas to coercively interrogate employees about their union and other protected concerted activities and the union and other protected concerted activities of other employees, we shall order the Respondent to cease and desist therefrom.

Having found that the Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate economic strikers, upon their unconditional offer to return to work, to their former or substantially equivalent positions of employment where those positions had not been filled by permanent replacements, and by failing and refusing to timely recall economic strikers to existing vacancies in their pre-strike or substantially equivalent positions in the absence of a legitimate and substantial business justification, we shall order the Respondent, if it has not already done so, to offer the affected employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging, if necessary, any employees currently in those positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. The question of when each of the former strikers should have been recalled shall be left to the compliance stage of this proceeding. In addition, to the extent that some of the reinstated strikers were entitled to be recalled earlier than they were, we shall leave to the compliance stage the question of which such strikers were entitled to earlier recall and the amount of backpay due them.

Backpay owed as a result of Respondent's unlawful actions shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), the Respondent shall also compensate these employees for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful contract modifications, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Tracy Auto, L.P. d/b/a Tracy Toyota, Tracy, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to reinstate former economic strikers, upon their unconditional offer to return to work to their former or substantially equivalent positions of employment where those positions have not been filled by permanent replacements.

(b) Failing and refusing to timely recall former economic strikers to existing vacancies in their former or substantially equivalent positions of employment in the absence of a legitimate and substantial business justification.

(c) Using subpoenas to coercively interrogate employees about their union or other protected concerted activities or the union or other protected concerted activities of other employees.

(d) 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, if it has not already done so, offer former economic strikers who were not permanently replaced and who were unlawfully denied reinstatement upon their unconditional offer to return to work, or who were not timely recalled to existing vacancies to which they were entitled based on the preferential recall list, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging, if necessary, any employees currently in those positions, without prejudice to the former strikers' seniority or any other rights or privileges previously enjoyed.

(b) Make whole former economic strikers who were unlawfully denied reinstatement or not timely recalled for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against them, in the manner set forth

in the remedy section of the judge's decision as amended in this decision.

(c) Compensate affected employees for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

(d) File with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay awards.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusals to reinstate or timely recall former economic strikers, and within 3 days thereafter, notify the employees in writing that this has been done and that the refusals to reinstate or timely recall will not be used against them in any way.

(f) 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.

(g) Post at its Tracy, California facility copies of the attached notice marked "Appendix."[34] Copies of the notice, on forms provided by the Regional Director for Region 20, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 21, 2020.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 20 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.

CERTIFICATE OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Machinists and Mechanics Lodge No. 2182, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL–CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time technicians employed by the Employer (or who had accepted offers of employment) as of May 21, 2020, parts department employees, and service advisors employed by the Employer at its facility located at 2895 North Naglee Road, Tracy, California; excluding porters, warranty administrators, confidential employees, office clerical employees, guards, and supervisors as defined in the Act.

Dated, Washington, D.C. July 6, 2023

Lauren McFerran, Chairman

Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER KAPLAN, concurring in part and dissenting in part.

[34] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notices must also be posted by such electronic means within 14 days after service by the Region. If the notices to be physically posted were posted electronically more than 60 days before physical posting of the notices, each notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." If this Order is enforced by a judgment of a United States court of appeals, the words in each 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."

I agree with most of my colleagues' findings in this case.[1] However, I would not find that the Respondent violated Section 8(a)(3) and (1) for failing to recall two strikers after the May 21 unconditional offer to return to work. Because the General Counsel failed to meet her burden of establishing that the Respondent hired Steve Lopez and Josh Spier prior to the strike on May 15, I would dismiss that allegation.

In determining the complement of employees in place at the time of a strike, the Supreme Court and the Board look at the number of employees that a respondent *employs* at the start of the strike. See, e.g., *Int'l Union of Mine, Mill & Smelter Workers, Locals No. 15 v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 347 (1945); *Kurz-Kasch, Inc.*, 301 NLRB 946, 948–949 (1991). An employment relationship under the Act is created when an employer extends a job offer *and* the applicant accepts the offer; the simple extension of a job offer is not sufficient. See *Verve Records, Inc.*, 127 NLRB 1045, 1048 (1960). Accordingly, I disagree with my colleagues' suggestion that an employer's extension of a job offer alone to certain individuals would be sufficient to include those individuals in the calculation of the pre-strike complement of employees.

To establish that Lopez and Spier were employed by the Respondent at the start of the strike, the General Counsel must show at the very least that Lopez and Spier accepted their job offers before May 15. Turning first to Lopez, I find that, although the judge relied on Lopez' testimony that he was hired on May 13, she failed to satisfactorily address the documentary and testimonial evidence that Lopez was hired on May 18. Specifically, Lopez testified that he was interviewed and hired on May 13, but the judge recognized that Lopez was asked about the date in question in response to the General Counsel's leading question. On cross-examination, Lopez testified that he knew that he was hired on May 13 because he had written it in his personal calendar. That calendar, however, was not proffered by the General Counsel. In contrast, Human Resources Manager Jacinto Miranda testified that Lopez accepted the Respondent's job offer on May 18. In support of that testimony, Miranda indicated that it was usual practice for new hires to sign a "consent to alcohol and drug testing" form on the same day on which they accept a job offer. In addition, the Respondent produced a copy of the form referenced by Miranda, signed by Lopez and dated May 18.[2]

Perhaps even more compellingly, the Respondent introduced into evidence the job application that Lopez had submitted to the Respondent. This application, which was submitted through the website "Indeed.com," was dated and time-stamped May 15, 2020, at 12:43:56 PM. Consistent with this document, Miranda testified that he received Lopez' application on or after May 15, and a copy in the record shows that the Respondent printed it on May 16.[3] The fact that this documentary and testimonial evidence supports a finding that Lopez' job application was not submitted until May 15 certainly seems to undermine a finding that he had interviewed and accepted an offer of employment on May 13. That said, the majority's arguments for ignoring Lopez' job application are unconvincing. First, the majority relies on the absence of testimony

[1] In finding that the Respondent unlawfully subpoenaed employee communications with the General Counsel, I find it unnecessary to join my colleagues' speculation that it would be "difficult to imagine" a situation in which such subpoenas could be permitted. Nor do I join my colleagues' speculation that a basis exists in this case to quash a subpoena for communications between a statutory supervisor and the General Counsel or the Board.

I acknowledge and apply *Paragon Systems, Inc.*, 371 NLRB No. 104 (2022), as Board precedent regarding modifications to the Board's electronic notice-posting requirements, although I expressed disagreement there with the Board's approach and would have adhered to the position the Board adopted in *Danbury Ambulance*, 369 NLRB No. 68 (2020).

Finally, I would require the Respondent to compensate these employees for other pecuniary harms only insofar as the losses were directly caused by the unlawful action, or indirectly caused by the unlawful action where the causal link between the loss and the unfair labor practice is sufficiently clear, consistent with my partial dissent in *Thryv, Inc.*, 372 NLRB No. 22 (2022).

[2] Although the judge did not credit the entirety of Miranda's testimony, she did not discredit Miranda's testimony on these points. See *Daikichi Sushi*, 335 NLRB 622, 622 (2001) ("[N]othing is more common in all kinds of judicial decisions than to believe some and not all of a witness' testimony.") (internal quotation marks omitted) (quoting *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951)).

The majority wrongly minimizes the significance of the hiring document confirming that Lopez accepted his job offer on May 18 because Miranda allegedly backdated a similar document for a different employee not at issue here. Contrary to my colleagues' view, I find this irrelevant. There is no evidence that Respondent relied upon any backdated or falsified hiring document to prove that Lopez (or Spier) were hired after the strike, nor is there any evidence that Lopez' (or Spier's) documents themselves were backdated or falsified. Moreover, the majority's pure speculation that Miranda fabricated evidence to prepare for litigation before the Board—something the judge did not find—is not a justification for refusing to consider probative evidence. To the extent there may have been a backdated document, that goes to the judge's credibility determination of Miranda on these points, which she, once again, did not draw. Because the judge failed to credit or discredit this testimony, we cannot determine whether the record supports her finding that Lopez and Spier were hired before May 15. See *Marshall Durbin Poultry Co.*, 312 NLRB 110, 118 (1993) (noting that where judge failed to rule on credibility, Board could not determine whether record supported unfair labor practice finding) enfd. 37 F.3d 632 (5th Cir. 1994).

[3] In this respect, the majority and I agree that the judge mischaracterized Miranda's testimony about dates on printed documents. Miranda testified that sometimes a date will print out on a job application and sometimes it would not. Contrary to the judge's characterization, Miranda did not testify that the system was "unreliable," nor that the system provided inaccurate dates.

surrounding Lopez' submission of his job application and one vague email in the exhibits that has nothing to do with Lopez to conclude that the submission of Lopez' online application did not necessarily precede Lopez' interview with Service Manager Bob Gallego. The email is dated May 19 and appears to have been sent to Gallego from a strike replacement in response to an earlier email in which Gallego seeks to confirm the replacement's start date. The replacement tells Gallego that he "did [his] paperwork and application[.]" However, the General Counsel adduced no testimony about the "application" referenced in the email, nor does anything else in the record shed light on it. Therefore, no meaningful conclusion can be drawn from this email, and, without anything else, the absence of testimony surrounding Lopez' submission of his job application does not overcome the weight of Lopez' time-stamped job application.

Second, the majority contends that the judge drew an adverse inference because Gallego did not testify about the circumstances under which Lopez was hired. Whether the judge drew such an inference is not clear, but even if she had it would have been unwarranted. It is far more reasonable to infer that the Respondent elected not to call Gallego to discuss Lopez' hiring because Lopez' online submission of a date-stamped job application after the strike occurred made Gallego's testimony unnecessary. See *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (finding that the judge erred in drawing an adverse inference when other record evidence made the testimony unnecessary).

In sum, the judge concluded that Lopez was hired on May 13 based on her finding that the Respondent's witnesses did not directly contradict Lopez' testimony. I disagree. Miranda's testimony and the business records in evidence clearly conflict with the testimony of Lopez as to his date of hire. Accordingly, based on the contradictory evidence regarding the date on which Lopez was hired, and in the absence of any adequate justification by the judge to discredit the conflicting documentary evidence, the General Counsel has not met her burden to establish by a preponderance of the evidence that Lopez was hired prior to May 15. See, e.g., *El Paso Elec. Co.*, 350 NLRB 151, 152 (2007) (dismissing allegation where the Board found the evidence to be in equipoise).

I also find that the General Counsel failed to establish by a preponderance of the evidence that Spier was hired prior to May 15. Spier did not testify as to the exact date he was hired, nor is there any other record evidence establishing as a matter of fact that he was hired prior to May 15. Rather, my colleagues' finding that he was hired before May 15 is based solely on assumptions they draw from Spier's pre-hearing Board affidavit. According to the affidavit, Spier interviewed with Gallego in the first week of May. At that time, they agreed to some terms of employment, but no agreement was reached on Spier's salary, which is required for a valid employment agreement. See *Sands v. Ridefilm Corp.*, 212 F.3d 657, 661 (1st Cir. 2000) ("The amount of compensation is an essential term of an employment contract.") (citing *Ferrera v. Carpionato Corp.*, 895 F.2d 818, 822 (1st Cir. 1990)). Only after a different, undated interview with General Manager Jae Lee did Spier reach an agreement with the Respondent regarding his wages. At that point, an employment relationship was created between the parties, but the affidavit does not establish the date upon which that happened. The majority misreads the affidavit by improperly assuming that Spier's interview with Gallego was the same as Spier's interview with Lee. According to the affidavit, however, these were two separate events. Again, the General Counsel had the burden to establish that Spier was hired prior to May 15. Because the only evidence proffered by the General Counsel in support of her position is ambiguous on its face and, contrary to my colleagues' finding, does not contain sufficient facts to support an inference that Spier was hired prior to May 15, the General Counsel failed to meet her burden.

By contrast, Gallego affirmatively testified that Spier was not hired until after the strike. The judge did not discredit this testimony. Although the judge noted that Spier's hire date was subject to conflicting testimony, she found that he was hired on May 15 after reviewing the text messages between Spier and Gallego. Yet the text messages are inconclusive; they only begin on May 18. No evidence demonstrates that Spier *accepted* a job offer on May 15, much less that it was before the strike.[4] Additionally, for largely the same reasons as with Lopez, the judge failed to provide reasonable grounds for not relying on the alcohol and drug testing consent form that Spier signed on May 20, the hiring document confirming that Spier accepted his job offer on May 20, or Miranda's testimony that Spier was hired on May 20. Based on the above evidence, I find that the General Counsel failed to prove that the Respondent increased its pre-strike employee complement by two employees and therefore

[4] The majority additionally claims that Respondent's counsel admitted during the hearing that Spier accepted an offer of employment prior to May 15. Neither the judge or the General Counsel relies on this purported "admission" and rightfully so. The loose misstatements by counsel are hardly probative. In my view, the majority's citations to these misstatements represent another attempt by the majority to find a violation based on unwarranted inferences rather than on a focus on whether the evidence proffered by the General Counsel was in fact sufficient to meet her burden. This approach inappropriately shifts the burden to the Respondent to disprove what the General Counsel failed to prove.

unlawfully failed to recall two strikers after the May 21 unconditional offer to return to work.

Accordingly, I respectfully dissent from this aspect of my colleagues' decision.

Dated, Washington, D.C. July 6, 2023

Marvin E. Kaplan, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to reinstate former economic strikers who were not permanently replaced upon their unconditional offer to return to work.

WE WILL NOT fail and refuse to reinstate former economic strikers to existing vacancies in their former or substantially equivalent positions of employment in the absence of a legitimate and substantial business justification.

WE WILL NOT use subpoenas to coercively interrogate you about your union or other protected concerted activities or about the union or other protected concerted activities of other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer former economic strikers who were not permanently replaced and who were unlawfully denied reinstatement upon their May 21, 2020 unconditional offer to return to work, or who were unlawfully denied timely recall to vacancies in their former or substantially equivalent positions of employment, full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging, if necessary, any employees currently in those positions, without prejudice to their former seniority or any other rights or privileges previously enjoyed.

WE WILL make whole former strikers who were unlawfully denied reinstatement or not timely recalled for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest, and WE WILL also make them whole for other direct or foreseeable pecuniary harms suffered as a result of the unlawful denial or reinstatement or failure to timely recall, including reasonable search-for work and interim employment expenses, plus interest.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, copies of each backpay recipient's corresponding W-2 form(s) reflecting the backpay awards.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful refusals to reinstate or recall economic strikers, and WE WILL, within 3 days thereafter, notify the affected employees in writing that this has been done and that the refusals to reinstate or recall them will not be used against them in any way.

TRACY AUTO, L.P. D/B/A TRACY TOYOTA

The Board's decision can be found at www.nlrb.gov/case/32-CA-260614 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Jason P. Wong, Esq., for the General Counsel.
John P. Boggs, Esq. (Fine, Boggs & Perkins, LLP), for the Respondent/Employer.
Caren P. Cencer and *William T. Hanley, Esqs. (Weinberg, Roger & Rosenfeld, PC),* for the Charging Party/Petitioner.

DECISION

STATEMENT OF THE CASE

MARA-LOUISE ANZALONE, Administrative Law Judge. I heard this case over the course of 17 days between November 30, 2020 and January 29, 2021, via videoconference. This case was tried following the issuance of an August 25, 2020 order consolidating cases and consolidated complaint by the Regional Director for Region 20 of the National Labor Relations Board in Cases 32–CA–260614 and 32–CA–262291 and an October 23, 2020 notice of hearing and order consolidating cases for hearing in case 32–RC–260453.

The complaint was based on unfair labor practice charges, as captioned above, filed by Charging Party Machinists and Mechanics Lodge No. 2182, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL–CIO (Charging Party, the Union or the Petitioner) against Tracy Auto L.P. d/b/a Tracy Toyota (Respondent, Tracy Toyota or the Employer). Specifically, it is alleged that Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, et. seq. (the Act), by failing to recall striking employees despite their unconditional offer to return to work.[1] Respondent denies committing the alleged unfair labor practices as alleged.

The Regional Director for Region 20 also issued a Report on Objections in Case 32–RC–260453 on October 23, 2020, finding that certain objections filed by the Employer therein warranted a hearing.

At trial, all parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file posthearing briefs.[2] Counsel for the Acting General Counsel (herein the General Counsel) and Respondent filed posthearing briefs, which have been carefully considered. Accordingly, based upon the entire record herein,[3] including the posthearing briefs and my observation of the credibility of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union has been a labor organization within the meaning of Section 2(5) of the Act. Accordingly, I find that this dispute affects commerce and that the National Labor Relations Board (the Board) has jurisdiction of this case, pursuant to Section 10(a) of the Act.

II. THE REPRESENTATION CASE

The Union filed its petition in Case 32–RC–260453 on May 15, 2020.[4] On June 24, the parties entered into a Stipulated Election Agreement providing for a mail-ballot election in a unit comprised of "[a]ll full-time and regular part-time technicians employed by the Employer (or who had accepted offers of employment) as of May 21, 2020, parts department employees, and service advisors employed by the Employer at its [facility]," and excluding "porters, warranty administrators, confidential employees, office clerical employees, guards, and supervisors as defined by the Act." (GC Exh. 1(a); U. Exh. 3 at 1.)

The mail-ballot election was conducted between July 17 and August 5. (GC Exh. 1(a).) The Union won the election by a vote of 17 to 8, out of 37 eligible voters. On August 14, 2020, the Employer filed 21 postelection objections, three of which were directed to be heard by the Regional Director for Region 20. These objections assert that, during the critical period,[5] May 15 through August 5:

- Objection 16(a): Jesse Juarez, the Union's Area Director of Organizing, "impliedly threatened [replacement worker] Josh Spier and, by extension, any employee witnesses, by disclosing his name and home address over a megaphone."
- Objections 20 and 21: Foremen Tyrome Jackson and Kevin Humeston, alleged by the Petitioner to be statutory supervisors, engaged in pro-Union activity, thereby intimidating, coercing and interfering with employee free choice in the election.

III. FACTUAL BACKGROUND COMMON TO MULTIPLE ALLEGATIONS[6]

A. Respondent's Operations

Respondent, a California corporation with a place of business

[1] During the course of the hearing, counsel for the Acting General Counsel amended the complaint to include an allegation that Respondent additionally violated Sec. 8(a)(1) of the Act by unlawfully interrogating employees via the issuance of a trial subpoena seeking information protected by Sec. 7 of the Act.

[2] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." For General Counsel's Exhibit; "R Exh." for Respondent's Exhibit; "U. Exh." for the Union's Exhibit; "Jt. Exh." for Joint Exhibit; "GC Br." for the General Counsel's posthearing brief; "R Br." for Respondent's posthearing brief; and "U Br." for the Union's posthearing brief.

[3] I note and correct the following inaccuracies in the transcript: the phrase, "Let's shoot it up," appearing at Tr. 17, ll.14–15, is corrected to read, "We're suited up"; the term, "Weinman [sic]" appearing at Tr. 120, l.10, is corrected to read, "*Weingarten*"; the name, "Monk" appearing at Tr. 218, l.22, is corrected to read, "Mong"; the word "beat" appearing at Tr. 247, l. 19, is corrected to read, "bead"; the initials, "TAS" appearing at Tr. 716, l.24, is corrected to read, "TIS"; and the phrase, "prove you" appearing at Tr. 873, l.15, is corrected to read, "previously."

[4] Unless otherwise noted, all dates herein refer to the year 2020.

[5] In a mail-ballot election, the critical period begins with the filing of the petition and continues through the last day that ballots are accepted. See, e.g., *Kaiser Foundation Hospitals*, 358 NLRB 758 (2018).

[6] Certain of my findings are based on witness credibility. A credibility determination may rest on various factors, including "the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole."

in Tracy, California, operates a car dealership, which includes a service department that employs mechanics who perform maintenance work on vehicles, as well as diagnose and repair broken vehicles, including major repairs, such as transmission and brake jobs. The mechanics are known by several names, including service technicians, flat-rate techs, productive techs, main shop techs or simply "techs"). Techs are classified as either foreman or "line techs." As discussed in more detail below, the most fundamental difference between the foremen and the line techs is that the foremen assign work, in the form of repair orders ("ROs") to the line techs. Also, part of the service department are service advisors who interact directly with customers, as well as "lube techs," who perform oil changes and tire rotations. (Tr. 207, 228, 320, 539, 543–544.)

Service technicians perform several distinct types of repairs. Work performed on a car that is covered by the Toyota manufacturer's warranty is referred to a "warranty job." This includes work performed pursuant to any type of manufacturer recall. "Customer pay" work involves a repair to a vehicle that is no longer under warranty; as the name suggests, the customer is responsible for the cost of this work. (Tr. 539–540.)

During the relevant time period, the service department was overseen by service manager Bob Gallego (Gallego),[7] who reported to general manager Jae Lee (Lee). Human resources manager Jacinto Miranda (Miranda) was responsible for making offers to job applicants and "onboarding" new employees, among other things. (Tr. 2445–2446, 2525, 2557.)

B. Technician certifications

Technicians are certified through a Toyota-run program. The lowest level of certification is referred to as "Toyota maintenance certified"; this base-level certification, which requires that the tech complete five through six Toyota training modules, only qualifies the individual to perform lube tech work (i.e., oil changes and tire rotations). In order to perform warranty work, a tech must be certified in one of five categories of certification, including: engine, drivetrain, suspension, electrical, and hybrid. Within each of these categories, there are two levels of certification: certified and expert certified. To perform recall work, a tech must be expert certified in the relevant category. A mechanic who is expert certified in all five categories is considered "master certified." (Tr. 205, 216–218, 229–230, 956–957, 1061, 1669, 2401–2402.)

Techs may also obtain certifications through the National Institute for Automotive Service Excellence (known as "ASE certifications"), although these certifications are not sufficient alone to perform warranty/recall work. The highest ASE certification is master diagnostic technician or MDT, which requires expert certification in all five categories, as well as passing a 150-question test. (Tr. 205, 287–288, 1061.)

Not all work requires a certification. Specifically, customer pay work does not require any certification; this work is generally considered "entry level" work, in that it generally consists of basic maintenance work (such as brake alignments) and seldom involves performing actual repairs. In addition, work paid for by the dealership itself, referred to as "internal" jobs, does not require a certification. This work includes "come backs" (work performed to repair a failed first repair) and "used car work" (repairs undertaken to recondition a car to sell as used). (Tr. 205, 228–229, 328, 544–545.)

MDT Cesar Caro testified about how the certifications generally impacted the distribution of work at the shop:

> . . . [m]ajority of my day is doing recalls and diagnostic work that other people can't do because I get the higher—the harder diagnostics. And now if you're an entry level tech with no certifications, you'll be doing, like, brakes, service work, which is like coolant flushes or you know, transmission flushes, or valve cover gaskets and spark plugs. Easier work.

(Tr. 212.) In the middle, he explained, are techs who are certified, but not "one of the higher certified guys"; these mechanics were typically assigned "a mixture of recalls and repair work and some diagnostics as well." (Tr. 212–213.)

C. The Organizing Effort, Walkout and Strike

1. Organizing meetings and online chat groups

Jesse Juarez (Juarez), the Union's area director of organizing, headed up the organizing campaign that forms the factual backdrop for this proceeding. In early May, all but one or two of Respondent's service techs gathered at one tech's home to meet with Juarez and discuss the prospect of unionizing. About a week later, the entire tech complement attended a follow-up meeting, at which point they determined to go forward with the organizing effort. Foremen Jackson and Humeston were, as of the organizing campaign, each long-term (over 8 year) employees of Respondent. There is no evidence, however, that either of them was responsible for initiating the organizing campaign or for introducing the mechanics to Juarez.

On May 11, at Juarez' request, Jackson created a "group chat" in the app, "WhatsApp," which the techs used to continue their prounion discussions, communicate with Juarez and determine their next steps.[8] As the creator of the group chat, Jackson did not have any special "host" powers over the chat (to admit or exclude people). (Tr. 181–182, 529–530, 923, 2120–2123, 2830; R. Exh. 71 at 000006–000213.)

On May 14, Juarez posted that a petition had been filed with the National Labor Relations Board to represent them and invited the chat group members to meet him the following day at 10 a.m., so that they could, as a group, confront Respondent's general manager Lee. The next morning, Juarez reminded the techs

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See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom. 56 Fed.Appx. 516 (D.C. Cir. 2003). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness' testimony. *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citation omitted). Where there is inconsistent evidence on a relevant point, my credibility findings are incorporated into my legal analysis.

[7] Gallego became Respondent's service manager on March 28, 2020. (Tr. 1473.)

[8] At some point, a second "WhatsApp" group chat was created to include Respondent's service advisors and parts department employees, who were asserted by Respondent to be part of any appropriate unit. See Tr. 2123.

of their 10 a.m. appointment; his post was met with a "thumbs up" emoji and other supportive posts by what appear to be 11 group chat members,[9] including Jackson and Humeston, whose responses appeared second and fourth in order, respectively. (R. Exh. 71 at 000006–000007.)

2. The walk out

The next morning (May 15), the techs met as planned; Juarez said that he was going to take them to see Lee and that, on their behalf, he would demand recognition of the Union as their bargaining representative. Lee agreed to the meeting; with the techs present, Juarez announced that he was "with the Union" and that the "guys" were all onboard. Lee then asked the techs, "is this really what you guys want?" to which they responded yes. (Tr. 185–186.) Lee then said that he would have to contact Respondent's owner, Lott, to which Juarez replied, "the guys are not going to go back to work unless we know, you know, whether it's yes or no." Lee again asked the men directly, "is this really what you guys want?" Again, each of the techs responded in the affirmative. Lee said he would contact Lott and get back to them as soon as possible. Juarez and the techs left and went to the lube center, where they waited for about an hour and a half, at which point Juarez instructed them to go home. (Tr. 187–188.)[10]

Later that night, a tech in the group chat posted, "are we going to work tomorrow?" He was answered by two other techs (not Jackson or Humeston) who encouraged the group to stay home until their demands were met. Shortly afterwards, Juarez posted, "no work stay home" and promised that, if he heard from Respondent, he would let the men know. A tech, followed by Jackson, responded with a "thumbs up" emoji. Jackson then asked if they would begin picketing the next day. In response, Juarez posted that the group would "need to get on them Monday morning with signs and speak to the customers at the driveway." He then announced, "[w]e will coordinate a plan and let everyone know tomorrow. I will speak to both foreman later so we strategize." Approximately 3-1/2 hours later, Juarez posted: "Just finished a conf call with your 2 foreman. We agreed to stick to our 5-day plan. We also agreed to stand down for now and ramp it up if necessary." Rather than picketing right away, he informed the group, he and the foreman felt that playing things "low key" might get their demands met sooner. He then told them to make some picket signs "just in case." (R. Exh. 71 at 000006–000008.)

3. The strike, picketing and continued online organizing

None of the strikers reported for work on May 16; the following day (Sunday), the shop was closed, per Respondent's regular schedule. On Monday, May 18, one striker—Travis Cattolico—returned to work. The same day, Juarez polled the strikers' interest in picketing Respondent, posting, "[p]erhaps it's time to show up tomorrow morning with signs?" After several employees expressed support, Jackson posted that he had just spoken with Juarez and that "we're ready to go picketing. Y'all ready?" to which the employees responded with "thumbs up" and other positive emojis. Employees, including Jackson, discussed their efforts to reach out to the local and regional news to arrange for coverage. Humeston posted photos of the signs he had made, which garnered admiring emojis and comments from others in the chat and requests that he bring them for the employees to use. (Tr. 431; R. Exh. 71 at 000011–000013.)

For 3 days beginning on Tuesday, May 19, 14 techs picketed on the sidewalk next to the dealership's service drive from for approximately 4 hours each morning. They carried signs stating, "We Want Respect" and "We Want a Union." (Tr. 197–200, 2131–2132.) During the online chat, Juarez posted information about the techs' rights as strikers and individual techs gave each other advice on how to be effective on the picket line. See, e.g., R. Exh. 71 at 000023 (unnamed tech advises, "[g]uys don't forget your buttons. Wear them on you uniform as we have the legal right to do so").

Around the same time, the techs used their online chat group to discuss their working conditions. This effort was kicked off by Jackson, who posted that he had reached out to a Toyota representative, who had asked him to make a list of issues or concerns the techs had about workplace safety and whether Gallego had been properly adhering to the rules of the Toyota warranty program. He then solicited input from the chat group members; Humeston, for his part, posted that he had spoken with the same Toyota representative. It appears that this effort was aimed at putting pressure on Respondent's owner, Lott, who was facing the renewal of his 2–year contract with Toyota to manage the dealership. In response to Jackson's post, employees posted complaints about arbitrary discharges, unfair discipline, being harassed about their productivity and being forced to work with damaged equipment. (Tr. 2134; R. Exh. 17 at 000014–000016.)

Although the Employer contends that Jackson's solicitation of complaints amounted to an attempt to undermine the dealership by providing Toyota with "false information," there is no evidence that any of these complaints was actually forwarded to any Toyota representative and additionally no evidence that any of the complaints were in any manner untrue.

The online discussion also included techs, including Jackson and Humeston, strategizing about how to bring pressure to bear on the Employer in the shop, including by encouraging techs not to "stress" themselves and instead "[m]ake the workload fall back on [Gallego]." (R. Exh. 71 at 000044.) There is no evidence, however, that such sporadic comments constituted serious "orders" or were part of a larger work-to-rule campaign actually engaged in by techs.

4. Respondent's antiunion campaign

Following the walkout, Respondent launched a robust

[9] In order to protect their Section 7 rights, the names of techs other than Humeston and Jackson were redacted from the group chat admitted into evidence.

[10] My factual recitation of the May 15 meeting and walkout is based on the testimony of Ceasar Caro (Caro). This is partially due to his status as a current line technician. *Flexsteel Industries*, 316 NLRB 745, 745 (1995), enfd. 83 F.3d 419 (5th Cir. 1996) ("the testimony of current employees that contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests" (citing *Gold Standard Enterprises, Inc.*, 234 NLRB 618, 619 (1978), enf. denied on other grounds 607 F.2d 1208 (7th Cir. 1979) and *Georgia Rug Mill*, 131 NLRB 1304, 1304 fn. 2 (1961). Moreover, he presented as highly credible, working hard to answer questions fully and honestly, both on direct and cross-examination.

antiunion campaign, including retaining an outside consultant. Employees received flyers warning about the economic impact of striking, which was described as potentially "crippling" financially for the strikers. Employees were also required to attend meetings in which the Union was attacked as untruthful and Juarez was personally derided. During the period that the techs were on strike, at least one individual manager warned employees in the voting unit that the union was a "bad idea." (Tr. 2871–2874; U. Exh. 1; R. Exh. 71 at 000030, 000039, 000117, 000135.)

5. The offer to return to work and meeting with GM Lee

On Wednesday, May 20, Juarez instructed the chat group members to email Lee "ASAP" with specific language demanding a representation election and an immediate return to work. Each of the striking techs did so, but there was no response from Respondent. Accordingly, the strike and picketing continued. (R. Exh. 17 at 000019; Tr. 198–200.)

The following day, Respondent's management team agreed to meet with the strikers. The meeting, which took place in two parts, included the strikers, as well as Lott, Lee, Gallego and Respondent's attorney, John Boggs. When pressed by Lee as to whether they were prepared to come back to work unconditionally, one of the techs responded "yes, but not without the union." Confusion ensued, and the techs withdrew from the meeting to discuss the matter. They consulted with Juarez, who instructed them to make an unconditional offer to return and additionally designated Humeston and Jackson as spokespersons to deliver this message. The meeting resumed, and Humeston and Jackson, speaking for the group, offered to return unconditionally. Lee asked the entire group to confirm that this was their position, which they all did. Lee responded that management would determine how many positions Respondent had available, make a list and recall the techs "as needed." (Tr. 200–203, 469–473.)

iv. the alleged refusal to recall strikers as vacancies occurred

The General Counsel argues that, by various actions, Respondent refused to reinstate strikers in a timely manner. First, it is argued that Respondent hired additional employees prior to the strike, increasing the number of strikers it was obligated to reinstate following their unconditional offer to return to work. Second, the General Counsel argues that, in June and July following the strikers' offer to return to work, Respondent filled an open line tech position with a permanent replacement employee and additionally sought to fill an open foreman position with a previously reinstated striker, as opposed to reinstating former strikers to those positions.

A. Factual Background

It is undisputed that, prior to the strike on May 15, Respondent's service department employed at least 16 service techs, including 2 foremen (Jackson and Humeston), 11 active line techs, and three-line techs on disability leave. The General Counsel argues, however, that, prior to the strike, Respondent hired three additional employees: Steve Lopez (Lopez), Adan Cordova (Cordova) and Josh Spier (Spier). Respondent counters that Lopez and Spier were actually hired as permanent strike replacements following the walk out. Respondent by its posthearing brief admits that Cordova was offered employment prior to the strike. (See R. Br. at 102.)

1. Respondent's revenues and shop utilization

As noted, Respondent's service department consists of a main shop where the service techs work. The main shop area is fitted with 14 mechanic stalls. The techs are scheduled as "teams"; each team is assigned four 10-hour shifts per week, rotating to cover a 6-day workweek. If the stalls are distributed among the techs in teams of equal size, this arrangement can accommodate three scheduled teams of 6 (including lube techs), plus 2 foremen, for a total active work force of 20, with one stall left empty on each shift.

Also working in the main shop are noncertified techs, referred to a "lube techs," who perform oil changes and other minor maintenance work. Prior to 2020, the lube techs performed this work in Respondent's "lube center," a separate shop located adjacent to the main shop. However, the lube center was closed in January 2020 and, until it was reopened in July of that year, the lube techs worked out of the main shop. Thus, during the first 6 months of 2020, the lube techs worked as "floaters," each working out of a mobile cart and using a mechanic stall in the main facility. (Tr. 318.)

As noted, Gallego took over as service manager on March 28, 2020. As of April 1, he testified, the COVID-19 pandemic and accompanying shutdown and stay-at-home orders had "disrupted business quite a bit," and incoming work for the shop had "dropped drastically." According to Gallego, these circumstances forced him, during April and May, to lay off 2 lube techs for lack of work. Respondent's monthly sales reports do document a decline in revenue beginning in March that began to rebound beginning in May. Respondent's measure of its "utilization," i.e., its percentage use of available stalls in its main shop, also fell off during this time period. These figures, as well as the corresponding total number of techs Respondent employed during these months, were as follows:

MONTH	TOTAL SALES	UTILIZATION %	ACTIVE TECHS	ALL TECHS
January	371,180	95.53	18	20
February	360,214	93.06	17	19
March	295,526	80.51	17	20
April	234,231	62.92	15	18
May	255,756	48.79	16	19
June	299,988	63.56	15	17
July	334,623	64.36	17	17

(Tr. 1473, 2694; R. Exhs. 40, 42.)

2. Gallego's predicted summer recovery and spring hiring

Despite the significant business downturn during the first 4 months of the year, Gallego was expecting robust business in the months that followed; he therefore began an effort in early May to get "up to full capacity" with hiring. (Tr. 2695.)

a. Lopez is hired on May 13

Lopez testified that he was interviewed and offered a job by

Gallego on May 13, 2020.[11] Moreover, he was adamant that, during this interview, there was no discussion about an ongoing strike at the shop or him being hired as replacement worker, and that he only learned about the strike 2 days after he had accepted the job. Gallego, who twice testified on behalf of Respondent, never rebutted Lopez' testimony; instead, relying on business records,[12] Respondent claims that Lopez was hired only after the strike commenced. The failure of Gallego to contradict Lopez' specific account leads me to cast a doubtful eye on Respondent's documentary evidence, which its own witness, Miranda, admitted was inherently unreliable, in that they regularly failed to reflect dates with accuracy. (Tr. 878, 2531.)

Ultimately, I credit Lopez' first-hand recollection of the interview over these documents and find that, by hiring him on May 13, Respondent increased its prestrike employee complement by an additional position.

b. Spier is hired during the first week of May

Spier's hire date is the subject of conflicting testimony. His own account, as reflected in his pre-hearing Board affidavit, appears to provide a generally accurate timeline. By his telling, he actually applied to be Respondent's service manager in March and interviewed with Jae Lee for that position in April. During this interview, he testified, Lee expressed interest in hiring him as a foreman and subsequently offered him "several positions." Spier further recalled that, during the first week of May, Gallego (who had since been hired as service manager) interviewed Spier and agreed to hire him as a foreman beginning May 18. (Tr. 1135, 1180–1181, 1243.)

Gallego told a slightly different account. According to him, Spier was offered a line tech position prior to the strike, which he then "tried to back out of." Following the strike's commencement, Gallego testified, Spier was offered a permanent replacement position as foreman. Text messages between Spier and Gallego indicate that the truth lies somewhere between the two men's accounts; while it does appear that the strike gave Spier some pause about reporting for work as planned on May 18, it is also clear that Respondent had made an offer, prior to the strike to Spier in some capacity, and, as of the commencement of the strike, he had accepted that offer. That he may have parlayed the circumstances of the strike (and Respondent's corresponding lack of foremen) into a "field promotion" of sorts does not change that fact. (R. Exh. 21.) Accordingly, I find that Respondent hired Spier on May 15, increasing its prestrike employee complement by another position.[13]

c. The initial May 21 recall

Based on the above, I conclude that, as of the May 15 walk out, Respondent employed 19 techs (including 3 techs out on leave).[14] All of the active techs joined the strike, leaving Respondent with newly hired Spier, Lopez, and Cordova. Between May 18 and 19, Respondent hired seven replacement workers (six techs and one foreman, Rene Cabrera). Added to Spier, Lopez, and Cordova, this brought the complement to 12 (including the then-2 techs on leave). During the same period, one of the strikers, Travis Cattolico (Cattolico) returned to work. Thus, as of the employees' offer to return to work on May 21, Respondent employed 13 techs (including 2 out on leave). That day, Respondent recalled four techs (Caro, Solano, M. Lo., and P. Lo), bringing its complement to 17, which is 2 fewer positions than its prestrike complement. (Tr. 2461–2476, 2600; GC Exh. 8.)

At hearing, the General Counsel adduced evidence that, during the strike and even following the recall, the techs were unable to keep up with the volume of shop's warranty work (which may only be performed by a Toyota-certified tech), This resulted in "holdovers" (i.e., cars that took more than one day to repair); Respondent even resorted to turning customers away. According to Caro's unrebutted testimony, Gallego mentioned this problem to him multiple times. (Tr. 258–262, 352.)

The only first-hand testimonial evidence regarding the recall decision consisted of Gallego's account. As discussed below, he alternately claimed that Respondent: (a) lacked physical space sufficient to accommodate more than four former strikers; and (b) did not have enough business to justify more recalls. At times appearing to pivot between the two competing rationales, Gallego ultimately presented a scenario in which, based on his prior experience as a service manager, he determined that recalling strikers sufficient to restore the shop's prestrike complement would have resulted in a dire set of consequences, including paying techs excessive "idle time," risking the departure of high producing techs for lack of work, potentially being forced to lay off other techs and losing the dealership's customer service rating.

Absent from Gallego's testimony was an elucidation regarding when exactly he had determined that he was concerned about the risks of overstaffing (i.e., before, during or after his early May spate of hiring), or what specific event or events led to this revelation. He authenticated numerous monthly reports maintained by Respondent, including productivity reports, Toyota financial statements and "RAP" reports, that would appear relevant to this issue; bizarrely, however, he never actually testified that he relied on any of their contents in deciding that

[11] Unfortunately, Lopez was asked about the date in question in leading fashion (albeit without objection). I nonetheless find that he was a highly credible witness who testified without embellishment, was totally noncombative on cross-examination and appeared to have a sharp memory for the details of the interview.

[12] These included a self-styled "offer letter" to Lopez dated May 19 and documents generated by a third-party online application system indicating that he did not apply for a position with Respondent until May 15.

[13] To the extent it affects individual employees' remedial reinstatement relief, I will leave to a compliance proceeding the issue of whether Respondent added a third foreman position by hiring Spiers or in fact created a line tech vacancy when it effectively promoted him during the strike.

[14] It appears that one of the employees on leave, Mauro Martinez (Martinez) was released to return to work but failed to do so. (Tr. 2598.) Respondent's productivity reports indicate that, as of July 2020, Respondent considered Martinez to be on strike and that he returned to work during the month of September as a "fill in" and that he was considered on "temp recall" as of October 2020. (See R. Exh. 40 at 000007, 000009 & 000010.) I will therefore also leave to a compliance proceeding the issue of whether Respondent has a remedial obligation to restore Martinez to a tech position.

Respondent was facing an "overstaffing" situation. (See R. Exhs. 40, 42, 44.)

As a witness, Gallego generally had an easy going, confident demeanor; these qualities, however, were notably absent when he responded to questions about the shop's physical space limitations, the timing of Respondent's downturn in business and his concerns about overstaffing. During these portions of his testimony, his recitation presented as forced, awkward and frankly rehearsed. Specifically asked who made the decision to recall only 4 techs, he initially responded with the conditional, "I would have."[15] When pressed, he then acknowledged that he merely *recommended* this course of action to Respondent's general manager, Lee, who was the final decisionmaker. (Tr. 2799–2800.) Notably, Lee—who, as of the hearing worked at the location from which Respondent's management witnesses testified—inexplicably failed to appear to defend his action.

d. Respondent's "reshuffling" of active techs

As noted, the General Counsel contends that Respondent manipulated its staffing in order to avoid recalling former strikers. Specifically, it is alleged that Respondent attempted to promote an active tech (Caro) to a foreman position, instead of recalling a former striker-foreman (i.e., Jackson or Humeston). It is also alleged that Respondent demoted a permanent replacement (Cabrera) to a position abandoned by a permanent replacement worker, instead of offering that position to a former striker.

(i) Attempted promotion of Caro in lieu of recalling former striker

In early June, replacement foreman Spier quit his job. On June 11, Gallego texted Caro (one of the techs recalled on May 21) and informed him that he would be made a foreman as of the following Monday. On June 12, the two met; Gallego confirmed that Caro would be promoted because Spier "was gone." Caro countered by demanding a pay raise and a foreman promotion for another recalled former striker (Mong Lo). Later that day, Gallego told Caro he would agree to the pay increase, but that, due to "legal issues," he could not also make Mong Lo a foreman. In response, Caro declined to take Spier's place. (Tr. 203, 272–274, 276–277; GC Exh. 3.)

(ii) Demotion of Cabrera in lieu of recalling former striker

On May 18, Respondent hired Edgar Sanchez (Sanchez) as a permanent replacement set to start on May 21. Sanchez then arranged to start on May 25, but failed to report that day, reporting that he had injured his hand. After a series of emails and phone calls, Sanchez had still not reported for work as of July 3, when Gallego emailed him to inquire about his recovery. Sanchez and Gallego then appear to have discussed an early July start date, but on July 8, Sanchez reported that a family member had been exposed to COVID and that he needed to wait for test results before starting work. That was the last communication from Sanchez. According to Gallego, approximately a week later, he gave up hope that Sanchez was going to report for work and demoted permanent replacement Rene Cabrera (Cabrera) to Sanchez' position effective on or about July 15. (Tr. 2500–2501, 2545–2546, 2698–2702; R. Exh. 61, 62.)

B. Analysis

In this matter, there is no dispute that Respondent hired certain employees, following the strike and prior to the strikers' offer to return, as permanent replacements. However, I have found that three of the alleged permanent replacements (Spier, Cordova and Lopez) were actually hired before the strike commenced, thereby creating additional pre-strike vacancies that were not filled on May 21 when the strikers made their unconditional offer to return. I have also found that Respondent attempted to promote active employee Caro to a foreman position and did in fact demote active employee Cabrera to a line tech position, in lieu of filling those positions with former strikers. The next question is whether this conduct violated the Act.

1. The legal standard

Economic strikers retain their status as employees and, after the strike's conclusion, they are entitled to reinstatement to their former positions unless their employer establishes, by a preponderance of the evidence, that it had legitimate and substantial reasons for not recalling them. Thus, unless it sustains its burden of proof, an employer that refuses or delays the reinstatement of former economic strikers acts in violation of Section 8(a)(3) and (1) of the Act. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 380–381 (1967); *NLRB v. Great Dane Trailers*, 388 U.S. 26, 34 (1967); *Laidlaw Corp.*, 171 NLRB 1366, 1369 (1986), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). Evidence of antiunion motivation is not required; as the Board has explained, this is because refusing to reinstate former strikers, by definition "discourages employees from exercising their rights to organize and to strike guaranteed by Sections 7 and 13 of the Act." *Fleetwood Trailers Co.*, supra at 378–380; see also *Laidlaw*, supra at 1366 ("[t]he underlying principle in both *Fleetwood* and *NLRB v. Great Dane*, 388 U.S. 26, is that certain employer conduct, standing alone, is so inherently destructive of employee rights that evidence of specific antiunion motivation is not needed").

A struck employer, however, is not without rights. Specifically, an employer faced with a strike is entitled to continue its business by hiring permanent replacements to perform the jobs left vacant by strikers and is not bound to discharge those replacement workers merely because the strikers desire to resume their employment. *NLRB v. Mackay Radio Co.*, 304 U.S. 333, 345–346 (1938). Thus, one recognized legitimate and substantial business justification for refusing to reinstate economic strikers is that their jobs are occupied by workers hired as permanent replacements. *Fleetwood*, supra at 379; *NLRB v. Great Dane Trailers*, supra at 34; *NLRB v. Mackay Radio Co.*, 304 U.S. 333, 345–346 (1938).

Following strikers' unconditional offer to return to work, reinstatement remains contingent on the occurrence of a genuine job vacancy (known as a "*Laidlaw* vacancy") among the employer's then-existing work force; such a vacancy "is

[15] The grammatical tense of this response itself raises doubts as to Gallego's veracity. The phrase "would have" is recognized as a grammatic hedge (i.e., an expression that qualifies a statement with regard to its truth), and certainly appeared aimed by Gallego to serve that purpose. See Aarts, B., *Oxford Modern English Grammar*, p. 311, sec. 10.3.12 (Oxford Univ. Press 2011).

engendered when the employer expands its work force, discharges an employee, or when an employee quits or leaves the employer." *Sparks Restaurant*, 366 NLRB No. 97 (2018), enfd. 805 Fed.Appx. 2 (D.C. Cir. 2019). The General Counsel bears the burden of establishing that a *Laidlaw* vacancy exists. *Pirelli Cable Corp.*, 331 NLRB 1538, 1540 (2000).[16] The existence of a *Laidlaw* vacancy entitles a former striker to reinstatement to his former job unless he has obtained substantially equivalent employment elsewhere or unless the employer is able to sustain its burden of proof that the failure to recall was justified by legitimate and substantial business reasons. *Fleetwood Trailer Co.*, supra at 378; *Laidlaw Corp.*, supra at 1369–1370.

2. The initial failure to recall

In this matter, Respondent offers two main rationales for not reinstating three additional individuals from its preferential recall list: the first argues that Respondent's service department did not have the physical capacity for the additional three workers; the second urges that it had insufficient business to support additional techs. With respect to the first argument, the General Counsel counters that, as a practical matter, the main shop's work stalls could have easily accommodated up to 18 service techs and 3 foremen. As to the "lack of work" argument, the General Counsel argues that Respondent failed to demonstrate that it was in fact motivated by a concern that it would be unable to generate enough business to support additional recalled techs.

a. The limited shop space defense

Respondent argues that the 14 mechanic stalls in its main shop could not physically accommodate a total of 19 line techs. What Respondent suggests is that, as of May 15, it had hired more techs than its own facilities could accommodate. In this regard, Respondent relies chiefly on the testimony of Gallego; asked why he did not recall more than four strikers, he sketched out a scenario in which all 14 stalls were filled for a single shift. Respondent also cites anecdotal testimony by Caro that, when he returned following the strike, he did not see any empty stalls on any given shift. However, what Respondent failed to establish was that the fact that it was limited to 14 workspaces per shift translated into an inability to house the prestrike tech complement.

As noted, Respondent's main shop held 14 mechanic stalls and it assigned techs to 1 of 3 "teams," who were assigned four shifts per week. Because its practice was to schedule each team for 10-hour shifts staggered over a 6-day workweek, Respondent had more than enough mechanics stalls to accommodate three additional reinstated strikers.[17] This is consistent with Respondent's past practice, as reflected in own productivity reports, which show that, between January and April of 2020, the shop accommodated between 15 and 18 active techs on a monthly basis. (R. Exh. 40.)

Respondent argues that its lube center being closed during the first half of 2020 made recalling additional strikers impossible, space-wise, because its lube techs needed to "float" among mechanics bays in the main shop. Gallego testified that he had initially planned to have the lube center reopened "sometime around June" but that employee absences caused by COVID, as well as by the techs' strike, meant that he was forced to spend his own time performing mechanical work such as rotating tires and doing oil changes, instead of contacting vendors to get the repairs done. (Tr. 2686–2690.)

Gallego's demeanor in relating this rather dramatic account was as awkward and forced as the narrative itself. Essentially, to credit this explanation requires ignoring that the lube center had been closed since January 2020, yet, during the first 4 months of the year, between 15 and 18 active flat-rate techs were nonetheless able to work in staggered shifts in the main shop. (R. Exh. 40.) That Gallego allegedly had trouble contacting vendors did not make the lube center any more "closed" than it had been during those 4 months, and Respondent failed to explain why, following the strike, it somehow became impossible to "float" its lube techs in the main shop as it had done before.[18] Based on this evidence, I conclude that Respondent failed to meet its initial burden to show that its failure to recall additional strikers was based on a legitimate lack of workspace in which to house those individuals.

b. The lack-of-work defense

Respondent's secondary rationale for failing to include additional strikers in its initial recall is that to have done so would have threatened to reduce the volume of work assigned to individual techs. Oddly, Gallego during his testimony appeared to add this proffered justification almost as an "afterthought" to his claim that the main shop lacked a sufficient number of mechanic stalls to accommodate additional recalls. Pressed by his own counsel as to why he could not have recalled additional strikers, he pivoted, suggesting that "there wasn't enough work to sustain three more," and to bring back more strikers "would starve everybody out." (Tr. 2696–2697.) When staffing levels are too high, he testified, a potential risk is created that high-quality techs will resign because they cannot get enough work, which can, in turn, reflect badly on the dealership's customer service index. (Tr. 2421–2426.)

It is true that a legitimate business justification for failing to recall strikers may exist where the employer demonstrates that changes in business conditions forced it to change its methods of operation or production. *Fleetwood Trailer*, 389 U.S. at 379. In such a case, the Board will not force on an employer a recalled

[16] I note that the General Counsel does not argue, pursuant to *Kurz-Kasch, Inc.*, 301 NLRB 946, 949 (1991), that a decline in the employer's workforce below prestrike levels "creates the presumption that vacancies existed." As Administrative Law Judge Lauren Esposito has noted, this concept was merely part of the Sixth Circuit's burden-shifting analysis in that case and has not been applied with any consistency by the Board since. See *Sparks Restaurant*, supra at 7, fn. 6.

[17] Recall that the shop was outfitted with enough mechanic stalls to house two teams of six techs, plus a foreman for each team, on each shift with a stall to spare ([6 x 2] + 1 = 13).

[18] Likewise, Respondent's claims that it could not recall more strikers because it was bound to hold two positions open for techs out on medical leave ignores the fact that these individuals (Ahn Mai and Jesus Alcazar) had each also been on medical leave when Respondent saw fit to increase the size of its employee complement by hiring Spier, Cordova, and Lopez.

striker for whom there exists no genuine *Laidlaw* vacancy. Purely after-the-fact rationalizations that business necessities obviated the need to return to a prestrike staffing level, however, are insufficient; instead, an employer must show actual reliance on its proffered substantial and legitimate business reason for refusing to recall strikers. For example, in *Chicago Tribune Co.*, 318 NLRB 920 (1995), the Board found that the employer had wrongfully failed to reinstate strikers to full-time vacancies when they arose on the departure of permanent replacements, deliberately operated short-handed and used extra overtime to avoid recalling strikers. The Board noted that the employer had neither prepared nor contemporaneously relied on cost effectiveness studies and therefore rejected its argument that it was more cost effective to work replacements at overtime rates rather than recalling strikers at regular pay.

Respondent's economic downturn argument is reminiscent of the "cost effectiveness" defense offered in the *Chicago Tribune* case, in that Respondent failed at hearing to offer convincing evidence that its contemporaneous motivation for limiting its recall to four techs was a concern about "starving out" its work force by bringing back more. Several factors lead me to this conclusion. As a preliminary matter, the timing of Respondent's sudden concern over keeping techs busy is suspect. In the face of a business downturn in early 2020, Gallego doubled down, pursuing a full hiring agenda with an eye towards a more profitable summer. In fact, by the time the strike commenced, business had begun to increase, not decrease. Nor was there any evidence that, during the strike itself, business took a precipitous nosedive that obviated the need for the number of mechanics it had employed 6 days earlier. Indeed, by his own telling, the show was so *understaffed* and Gallego so busy performing tech work himself that he could not arrange to get the lube center opened until July. Finally, the preponderance of the evidence indicates that Respondent's poststrike work force was overwhelmed with certain types of work, including warranty work, for which too few techs were certified; at the same time that Gallego claimed to have been concerned about "starving out" techs, appointments were regularly being cancelled and customers were waiting days for repairs.[19]

The knock-out punch to Respondent's lack-of-work defense was the failure of Lee, the ultimate decisionmaker, to testify in its support. Respondent did not demonstrate that Lee, who works at the very location from which Respondent's witnesses testified, was somehow unavailable. Where a respondent fails, as part of its defense, to present the decisionmaker as a witness, the Board will not hesitate to draw an adverse inference. *Southern New England Telephone Co.*, 356 NLRB 338 (2011) (failure to call decisionmaker warrants adverse inference); *Dorn's Transportation Co.,* 168 NLRB 457, 460 (1967) (failure of the decisionmaker to testify "is damaging beyond repair"), enfd. 405 F.2d 706, 713 (2d Cir. 1969); see also *Flexsteel Industries*, 316 NLRB 745, 758 (1995) (failure to examine a favorable witness regarding factual issue upon which that witness would likely have knowledge gives rise to the "strongest possible adverse inference" regarding such fact), affd. 83 F.3d 419 (5th Cir. 1996).

Rather than having Lee testify as to his motivation for failing to return Respondent's shop work force to its prestrike levels, Respondent attempted to backfill the record by calling, as an expert witness, Steve Hallock, a self-styled automotive industry "consultant." According to Respondent, Mr. Hallock is qualified as an expert in "looking at financial and operational data to determine what the trends and what needs to be done in order to meet the staffing and operational requirements of that data," specifically within the automobile industry. (Tr. 1599.)

Pursuant to the Federal Rules of Evidence, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Fed. R. Evid. (FRE) 702. Over the General Counsel's objection concerning whether Hallock qualified as an expert witness under FRE 702, I permitted him to testify, but I did so only provisionally, subject to any arguments that the parties might make in their posttrial briefs concerning his qualifications as an expert and the admissibility of his testimony. As discussed below, assuming that Hallock's experience as a consultant advising numerous dealerships regarding appropriate staffing qualifies him as an expert, I find that his testimony should be excluded under FRE 702 because the specialized knowledge that he offered does not assist me, as the trier of fact, with understanding the evidence or determining any facts in issue in this case.

Hallock gave testimony about management and staffing levels in the automobile dealership industry as a whole. He then echoed Gallego's testimony about the dangers of overstaffing, generalizing that "[i]f you start adding too many technicians, your top-end technicians are going to leave to go work where they can make their hours." He then offered his conclusion that adding additional techs in May, June and July "could've very well" lost good techs. Finally, he testified that he had compared Respondent's staffing levels during 2020 to two recognized industry standards and determined that, because of the COVID-19 related business slowdown in the spring, Respondent only needed to have employed between eight to nine techs in April and 10–11 techs in May. (Tr. 1637–1638, 1644–1646.) There is no evidence that any Respondent decisionmaker considered, or was even aware of, either of these industry standards in making the May recall decision.

By its decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court has made clear that the core requirements for expert testimony are relevance and reliability. Assuming arguendo that Hallock holds a genuine expertise in assessing appropriate staffing levels in car dealership service departments, I found his testimony to have failed in both regards. *Huey v. United Parcel Service, Inc.*, 165 F.3d 1084, 1087 (1999) ("[e]xpertise is a necessary but not a sufficient condition of admissibility under Rule 702").

First of all, Hallock's testimony pertaining to the workings of automobile dealerships generally does little to assist me, as the

[19] As the Board has observed that, despite there being no requirement of antiunion animus in cases such as this, an employer's "preference for strangers over tested and competent employees is sufficient basis for inferring such motive." *Laidlaw*, supra at fn. 14.

trier of fact, with understanding the evidence or determining any facts in issue in this case. The rather lengthy record in this case includes the testimony of numerous seasoned mechanics and managers, exhaustively detailing the nature of the work performed at Respondent's facility and how it is staffed. None of this evidence was so complex that it required explanation by an expert witness. Insofar as Hallock's "methodology" amounted to vetting Respondent's staffing levels against industry standards, I find his testimony equally unhelpful, in that it fails in any way to inform me in any meaningful way as to whether Respondent was, in fact, motivated by a concern for overstaffing, as opposed to a desire to reinstate strikers in the midst of an ongoing organizing campaign.[20]

Finally, in the absence of any analysis, statistical or otherwise, tending to show that a concern for overstaffing was actually the cause of Respondent's limited recall, Hallock's opinion as to what "need[ed] to be done" to properly staff Respondent's service department is reduced to an unsupported legal conclusion that Respondent was motivated by a legitimate business reason. This is an ultimate issue that, at least in the first instance, I am charged with deciding. *Huey*, supra at 1087 (affirming district court's exclusion of expert witness testimony, in absence of statistical or other scientific analysis, that plaintiff was discharged in retaliation for filing race discrimination claim); see also *Woods v. Lecureux,* 110 F.3d 1215, 1220 (6th Cir.1997) (expert testimony offering nothing more than a legal conclusion is properly excluded under FRE 704(a)).

Ultimately, Hallock served as a poor substitute for Lee—the actual decisionmaker—leading me to believe that the latter would not have testified that a concern for overstaffing motivated him to recall fewer strikers than needed to restore Respondent's prestrike employee complement. As the Supreme Court has instructed, "[t]he production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse" and "[s]ilence then becomes evidence of the most convincing character." *Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939) (citations omitted). For the reasons stated above, I find that Respondent's refusal to timely reinstate two former strikers upon their unconditional offers to return to work violated Section 8(a)(3) and (1) as alleged in paragraph 7(d) of the complaint.[21]

3. Reassignment of current employees in lieu of recalling strikers

The General Counsel alleges that, after Spier resigned his foreman position on or about June 12, Respondent (in lieu of recalling Jackson or Humeston) unlawfully attempted to promote active tech Caro to his position. It is additionally alleged that, in about mid-July 2020, after determining that that permanent replacement Sanchez had abandoned his position, Respondent (instead of filling his position from the recall list) unlawfully demoted a permanent replacement employee to fill it.

It is well established that *Laidlaw* vacancies arising from departure of replacement workers must not be preferentially offered to currently working personnel. Accordingly, the failure to reinstate an economic striker, following her unconditional return to work, in favor of transferring an active worker to the vacated position, is unlawful on its face. See *North Fork Services Joint Venture*, 346 NLRB 1025, 1031 (2006) (citing *Pirelli Cable Corp.*, 331 NLRB at 1540), enfd. 232 Fed.Appx. 270 (4th Cir. 2007); see also *MCC Pacific Valves*, 244 NLRB 931, 933–934 (1979), enfd. mem. in pertinent part 665 F.2d 1053 (9th Cir. 1981). Respondent suggests that this general rule does not apply here, because it was merely "reshuffling" its existing work force. In this regard, Respondent relies on *Textron*, *Inc.*, 257 NLRB 1 (1981), enfd. in part 687 F.2d 1240 (8th Cir. 1982), cert. denied 461 U.S. 914 (1983).

In that case, the Board found that alleged that an employer who had an established practice of temporarily transferring employees between departments to satisfy its production requirements did not create genuine *Laidlaw* vacancies by doing so. Clearly, such is not the case here and Respondent's reliance on *Textron* is misguided. See *MCC Pacific Valves*, supra at 934 ("Respondent was obligated to offer the *initial* job vacancies created by the departure of strike replacements to unreinstated, qualified strikers"); accord: *Textron, Inc. v. NLRB*, 687 F.2d at 1246–1247 (citing *MCC Pacific Valves* with approval and holding that vacancies "must not be preferentially offered to currently working personnel"). Respondent has failed to establish legitimate and substantial business justifications for its conduct. Accordingly, I find that, in filling the line tech vacancy occasioned by Sanchez' no-show and by attempting to promote a current employee to a foreman position, Respondent violated the Act as alleged.

V. RESPONDENT'S POSTELECTION OBJECTIONS

As noted, three of the Employer's objections to the election are before me. Two of the objections (Objections 20 and 21) concern the conduct of then-shop foremen Jackson and Humeston. The Employer contends that they were statutory supervisors during the critical period (May 15 through August 5) and that their prounion conduct destroyed the laboratory conditions required for a fair election. Before reaching the merits of these objections, I must therefore assess Jackson and Humeston's supervisory indicia during the critical period.

The Employer's third objection to the election (Objection 16(a)) concerns alleged statements by Union Organizer Jesse Juarez (Juarez); this objection will be analyzed last.

A. Jackson and Humeston's Status as 2(11) Supervisors

As foremen, Jackson and Humeston worked alongside the service technicians but spent approximately 25 percent of their workday dispatching repair orders (known as "ROs"). They also acted as de facto "expediters," by taking on high priority work and handling recalls requiring a high level of certification. They also occasionally performed test drives on vehicles. They received a "dispatch bonus" that other techs did not; this amounted the total labor hours allotted for the jobs for the entire shop

[20] Indeed, Hallock's testimony could be interpreted as undermining Respondent's defense in that, by his numbers, had Respondent been justifiably concerned about overstaffing, it would likely have laid off employees in addition to not recalling former strikers.

[21] While the complaint alleges that Respondent's initial recall amounted to a failure to recall "at least two" former strikers, the record reflects, as set forth in General Counsel's post-brief, that the correct number is two.

multiplied by $0.50. (Tr. 254, 536–539, 568–569, 582–584, 925, 1009, 1016.)

1. The supervisory standard

Section 2(11) of the Act defines a supervisor as:

> [A]ny 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.

In *Oakwood Healthcare*, the Board set forth a formulation of the legal standard for assessing supervisor status under this statutory definition, holding that:

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

348 NLRB 686, 687 (2006) (footnotes and some internal quotation marks omitted).

In addition to these primary indicia, the Board may, in "borderline cases," consider secondary indicia such as the attendance at supervisor meetings, granting time off, and other factors suggesting that the alleged supervisor possesses a status separate and apart from rank-and-file employees. *Pratt Towers, Inc.*, 338 NLRB 61, 71 (2002). However, secondary indicia will not establish supervisory status absent some showing of at least one supervisory authority among those expressly listed in Section 2(11) of the Act. *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003).

a. The burden of proof

"[T]he burden of proving supervisory status rests on the party asserting that such status exists." Oakwood Healthcare, supra at 694 (quoting *Dean & Deluca,* supra at 1047); accord *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–713 (2001); *Benchmark Mechanical Contractors*, 327 NLRB 829 (1999); *Youville Health Care Center*, 326 NLRB 495, 496 (1998). This requires the presentation of "detailed, specific evidence" that is not "in conflict or otherwise inconclusive." *Oakwood Healthcare*, supra at 694; see also *Veolia Transportation Services*, 363 NLRB 1879, 1886 fn. 19 (2016); *G4S Regulated Security Solutions*, 362 NLRB 1072, 1072–1073 (2015); *Busco Tug and Barge, Inc.*, 359 NLRB 486, 490 (2012), enfd. 696 Fed. Appx. 519 (D.C. Cir. 2017). Mere inferences or conclusory statements, without such detailed, specific evidence, are insufficient to establish supervisory authority. *UPS Ground Freight, Inc.*, 365 NLRB No. 113, slip op. at 1 (2017) (citing *Lynwood Manor*, 350 NLRB 489, 490 (2007); *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006)).

b. The independent judgement requirement

The "Board has exercised caution "'not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect.'" *Oakwood Healthcare*, supra at 688 (quoting *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). Thus, the Act protects "straw bosses, lead men, and set up men" even though they perform "'minor supervisory duties,'" id. (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280–281(1974)), and the mere fact that a lead is at times the highest-ranking employee or "in charge" of an operation will not confer supervisory status. *Flex-N-Gate Texas, LLC.*, 358 NLRB 622, 635 (2012); *Dean & Deluca.*, supra at 1047; *Billows Electric Supply*, 311 NLRB 878, 879 (1993).

This principle is reflected in the conjunctive requirement that, regardless of the specific kind of supervisory authority at issue, its exercise must involve the use of true independent judgment in the employer's interest before such exercise of authority becomes that of a supervisor. *Oakwood Healthcar*e, supra at 688; *Advanced Mining Group*, 260 NLRB 486, 506–507 (1982), enfd. 701 F.3d 221 (D.C. Cir. 1983); *Children's Farm Home*, 324 NLRB 61 (1997). "[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." *Oakwood Heathcare*, supra at 692–693. 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. at 693; see also *Busco Tug & Barge, Inc.*, 359 NLRB at 490.

2. Analysis of the Employer's theories of supervisory status

The Employer offers several theories in support of classifying each of them as supervisors. Specifically, the Employer argues that they had the authority, in the Employer's interest, to assign work, reward, responsibly direct, grant time off, and recommend discipline and training for line techs, in each case using nonroutine, independent judgement.[22] As described in detail below, I conclude that the Employer has fallen short of meeting its burden of proof that either Jackson or Humeston was a supervisor under Section 2(11) of the Act during the critical period preceding the election (May 15 through August 5).

Insofar as the facts underlying my determination of the two foremen's supervisory status, I generally credit their testimony as opposed to that of the Employer's witnesses Gallego and Miranda. They each listened carefully to questions and were not argumentative during cross examination. Miranda, by contrast, was noticeably agitated under questioning and, at times, somewhat argumentative during cross examination. While Gallego's presentation was smoother, he often parsed his words, leading me to believe that he was tailoring his testimony to assist the Employer's case.

[22] Both Jackson and Humeston offered unrebutted testimony that they had no authority to hire, fire, layoff, recall, promote, conduct written evaluations, grant overtime, or grant wage increases or bonuses. (Tr. 534–536, 857–858, 924.)

a. Authority to assign

The Employer claims, that, by virtue of their dispatch function, Jackson and Humeston regularly exercised the power to assign sufficient to render them Section 2(11) supervisors.

(i) Facts

As discussed, work in the shop was assigned via repair orders or ROs. Each RO is generated by a service advisor (also known as a "writer" or "assistant service manager") after consulting with the customer; the document identifies repair needed, as well as a "due time" (i.e., the completion time for the repair, as agreed to by the customer). The foremen have no input into the due time listed on the RO. (Tr. 547–548, 928–930, 933.)

As part of dispatching, Jackson and Humeston were expected to prioritize which ROs were assigned first, based on due time assigned to the repair. This essentially involved putting certain ROs in the "back of the pile" because they involved simple jobs and/or had later due times. In cases in which the customer was in a rush and two qualified techs were available, the foreman generally assigned the job to the tech who was faster at performing the particular work in question. Other high priority cases, however, were prioritized by upper management, not Jackson or Humeston. This typically involved a "waiter" or a "heat case," terms which refer to a customer being upset that a diagnostic or repair was taking too long. In such cases, Gallego or Lee themselves designated the case as high priority. The manager would then either reassign the RO directly to a particular tech and prohibit the foreman from assigning that tech any other work or, alternately, order the foreman to reassign the case to a faster technician. (Tr. 556–558, 564, 719, 838, 1010–1011.)

a. Dispatching warranty work

To dispatch warranty work, Jackson and Lee input the car's vehicle identification number (VIN) into a Toyota-provided website called, "TIS." This system listed the names of the tech(s) in the shop who were Toyota-certified in the particular category of work called for in the RO (i.e., engine, chassis, drive train, electrical or hybrid). The foreman then selected from this list a technician who was available that day. At times, there was only one tech available, timewise; however, if more than one qualified tech was available, the foreman would select one whose workload will permit him to complete the work by the due time stated on the RO.

There is no evidence that either Jackson or Humeston had the authority to second guess the TIS system's determination of who was qualified to perform a particular job; as Humeston explained, he never unilaterally withheld work from a tech deemed certified by the system for a particular job by the TIS system, although he did recall instances where the service manager ordered him to do so. (Tr. 550–554, 560-561, 930–932, 931, 935–937, 939–940.)

b. Dispatching customer pay and internal work

Customer pay work was also dispatched with the assistance of a web-based program. This program, called, ALLDATA, provides labor time to complete each customer pay job. According to Jackson, after consulting this program, he then selected a tech who had the assigned amount of time to complete the job. Again, at times, there would only be one such tech available. For internal work (such as a comeback), Jackson testified that he at times referenced the Employer's records to see who had worked on the vehicle previously. To assign work that did not require a certification, the two foremen considered the techs' relative experience and any ASC certifications; according to Jackson, he also sometimes consulted with the a given technician in order to determine if they were comfortable doing a certain job. As the Employer's witness Josh Spier testified, such dispatches basically involved assigning an RO to a mechanic considered qualified, and, if that tech was unsuccessful with the repair, reassigning it "up the ladder" to a more experienced mechanic. (Tr. 560–563, 708–709, 943, 1164.)

c. Backup dispatchers

Numerous witnesses testified that, in the foremen's absence, the service manager designated a line tech as "dispatcher" or "back up dispatcher." Nonforeman "back up" dispatchers earned a pro-rata portion of the dispatch bonus for each hour they actually dispatched. (Tr. 208, 255, 264–265, 567, 570–571, 631, 634–635, 764–766, 1071.)

d. Self-dispatches, line tech input on RO assignments and refused dispatches

It appears that the dispatch function, while officially assigned to the foreman on duty, in fact involved group decisionmaking and individual techs taking initiative. According to Humeston, if two qualified techs were equally available to do a particular job, they would generally work it out among themselves. As he testified:

> for the most part, everyone worked together pretty well, and one will say, you can have it. If it's a decent job, one will be, like, you can have it, or they'll talk amongst themselves and then it goes from there. I – – I don't just dictate who gets what. We all kind of work together.

(Tr. 1005.) There is also evidence that senior line techs were permitted to assign themselves ROs without consulting Jackson or Humeston. As Jackson explained, a senior tech "can just walk up and grab an RO and start working on it. I don't necessarily have to dispatch it to them." Jackson also testified that, as a dispatcher, he was aware of other senior techs doing this about 5–6 times per week. He also testified that, after transitioning from foreman to line tech, he assigned himself work approximately 5–8 times per week. Jackson was unaware of any tech being disciplined for just grabbing an RO and working on it. (Tr. 724–726, 844–845.)

Significantly, the General Counsel also adduced evidence that the Employer's techs were not obliged to accept a dispatch from Jackson or Humeston; the evidence establishes that they could, in fact, refuse a given RO. As Jackson explained, this would happen when the tech was not comfortable doing the job or did not have enough time to complete the job based on their workload. On such occasions, Jackson and Humeston did not have the authority to "override" the tech's refusal, but would find someone else who was available, do the job themselves or involve the service manager. (Tr. 565, 840, 944–946.) Respondent offered no testimony to rebut this evidence and specifically failed to introduce evidence of any tech ever being disciplined

for refusing an assignment of work from either Humeston or Jackson.

(ii) Analysis

It is well established that merely having the authority to assign work does not establish statutory supervisory authority. Rather, as with every supervisory indicia, assignment must be done with independent judgment before it is considered to be supervisory under Section 2(11). *Oakwood Healthcare*, supra at 692–693. The Employer argues that, based on the Board's 2019 decision in *Entergy Mississippi, Inc.*,[23] Jackson and Humeston dispatched work using independent judgement. I disagree.

That case considered the supervisory status of transmission and distribution dispatchers responsible for performing switching operations to alter the flow of electricity through a statewide electrical transmission and distribution system. As part of their duties, the dispatchers assigned repair crews to outage locations; in situations involving multiple outages, the dispatcher prioritized which locations would receive a crew first and how many employees would be sent. This determination was made without the use of written guidelines or standard operating procedures, based on the dispatcher's knowledge, experience and judgement. Depending on how repairs proceeded in the field, the dispatcher determined whether additional employees should be sent to the scene; again, this determination was made in the absence of any guidelines but based on the dispatcher's sole judgement "guided by a wide range of discretionary factors." 367 NLRB No. 109, slip op. at 2–5 & fn. 7.

Jackson and Humeston, who essentially handed out ROs to individual mechanics, exercised no such discretion. The only prioritizing they engaged in was quite rote (i.e., placing the simple jobs with no customer waiting in the back of the queue), and high priority "heat" cases were often managed by upper management. Rather than making macro-level, discretionary decisions as to how many employees should be assigned (or reassigned) among various sites in a fluid situation, like the *Entergy Mississippi* dispatchers, Jackson and Humeston made assignments within a framework of deadlines and procedures over which they lacked control. Indeed, Jackson and Humeston's day-to-day dispatch decisions were often constrained, and sometimes predetermined, by strict Toyota certification requirements as dictated by the Employer's TIS system, which generated a list of mechanics certified to perform particular repairs, as well as by the "due times" set by the service writers. See, e.g., *NLRB v. Meenan Oil Co., L.P.*, 139 F.3d 311, 321 (1998) (finding dispatchers whose assignments guided by a computerized system and subject to time commitments set by customer service representatives not supervisors), enfg. 323 NLRB 342 (1997).

Even work not requiring a certification was largely dispatched based on the individual techs' availability and ability to perform a given task by the ROs due time, as well as the need to equalize workloads. *Springfield Terrace LTD*, 355 NLRB 937, 943 (2010) (assignments based on employee availability do not involve the exercise of independent judgment); *Shaw, Inc.*, 350 NLRB 354, 355–356 (2007); *Hexacomb Corp.*, 313 NLRB 983, 984 (1994) (assignments made to equalize workloads do not involve independent judgment). Nor did their reassignments of work involve independent judgement; as Respondent's witness Spier testified, dispatch typically followed a pattern of assigning a job to someone capable of performing it and, if necessary, reassigning it to the next highest qualified individual until it was successfully completed. Simply reassigning work 'up the food chain,' does not amount to independent discretion. See *WSI Savannah River Site*, 363 NLRB 977, 979 (2016) (basing an assignment on whether the employee is capable of performing the job does not involve independent judgment) (citing *Volair Contractors, Inc.*, 341 NLRB 673, 675 fn. 10 (2004)); *Cook Inlet Tug & Barge, Inc.*, 362 NLRB 1153, 1154 (2015) (citing *Croft Metals, Inc.*, 348 NLRB 717, 722 (2006)).

The record is clear that, even where multiple techs were available for a particular assignment, Jackson and Humeston assigned the RO based on individual techs' known certifications and skills. This the Board has consistently found to be non-supervisory. *CNN America, Inc.*, 361 NLRB 439, 460 (2014) (citing *KGW-TV*, 329 NLRB 378, 381–382 (1999)); *Shaw, Inc.*, 350 NLRB 354, 356 fn. 9 (2007) (citation omitted); see also *CHS, Inc.*, 357 NLRB 514, 514 fn. 3 (2011) (no supervisory status where individual assigned work to mechanics based on "common knowledge, present in any small workplace, of which employees have certain skills," and did not involve independent judgment); *Armstrong Mach. Co.*, 343 NLRB 1149, 1150 (2004) (employee was not supervisor where his assignment of tasks to other employees was based on his knowledge as to their respective skills); *Quadrex Environmental Co.,* 308 NLRB 101 (1992) (field service employees designated as "leads" not statutory supervisors where "the leads' assignment of tasks to work crew employees demonstrates nothing more than the knowledge expected of experienced persons regarding which employees can best perform particular tasks").

Finally, unlike the *Entergy Mississippi* dispatches, Jackson and Humeston's assignments lacked the force of authority dictated by the urgency of a multi-site power outage. See *Entergy Mississippi*, supra at 2 ("[e]mergency switching is often performed in situations that require immediate action to prevent the loss of life or property"). To demonstrate that a putative supervisor possesses authority to assign, there must be evidence that he or she "has the ability to *require* that a certain action be taken; supervisory authority is not established where the putative supervisor has the authority merely to *request* that a certain action be taken." *Golden Crest Healthcare Center*, 348 NLRB at 729 (emphasis in original); see also *UPS Ground Freight, Inc.*, supra at 3 (dispatcher found not to constitute supervisor where, although responsible for ensuring that all scheduled routes were covered, lacked authority to require a driver to accept a particular route).

Indeed, the record indicates that individual techs had meaningful input into how work was distributed, could at times assign themselves ROs and even worked together to equalize their workloads. To the extent that the foremen's dispatch duty was carried out in collaboration with, and with input from, the line techs, it lacked the necessary independent judgement free from the control of others. See, e.g., *KGW-TV*, 329 NLRB 378, 381–

[23] 367 NLRB No. 109 (2019).

382 (1999) (finding assignment editors' responsibility of matching particular stories with the right reporters and photographers not supervisory where assignment process was a collaborative effort in which reporters' preferences were considered); see also *Children's Farm Home*, 324 NLRB 61, 64 (1997) (assignments based on expressed preferences of the employees do not reflect independent judgement). Because Jackson and Humeston lacked the authority to force a tech to accept a particular work assignment, their assignments were not supervisory.[24]

Accordingly, I find that, during the critical period, Jackson and Humeston did not have the authority to assign work within the meaning of Section 2(11) of the Act.

b. Authority to reward

The Employer claims that Jackson and Humeston should be considered statutory supervisors because, based on the Employer's pay system and efficiency requirements for its techs meant that the two foremen had the power to reward individual techs by assigning them more financially lucrative work and punish others with lower paying work. This power to reward and punish, the Employer argues, inured to its benefit because it enabled the foremen to "incentivize" high-performing techs and to "starve out" unproductive and/or poor performing techs.

(i) Facts

The service technicians were compensated a flat-rate system under which they were paid a preset number of hours (called "flat hours," "flag hours" or "labor hours") for each job they were assigned, regardless of how long it actually took them to complete it. This meant that an efficient worker could make more money in hourly pay than he actually spent on the clock. On the other hand, if a tech took more clock time than the flat hours paid for the job, he would lose money, being paid "idle time" (two times the minimum wage) for the excess time worked. (Tr. 240, 507, 946–947.)

The Employer regularly measured the efficiency of its techs; the term "efficiency" in this regard refers to the ratio of labor hours assigned a given RO ("labor time") over clock time actually spent performing that repair. For example, a tech who performed a job in half the labor time was considered 200 percent efficient. All techs (including foremen) were expected to be at least 100 percent efficient, meaning that, for every 100 hours clocked in, they gained 100 or more flat rate hours. The expression "making my hours" refers to a tech meeting the 100 percent efficiency standard for the 80-hour pay period. If a tech's efficiency was continuously less than 100 percent, typically the service manager would "talk to" them and "acknowledge the fact that they are not being efficient." (Tr. 508–509, 582–583, 936, 947–948, 1956.)

The flat-rate system, coupled with the 100 percent efficiency requirement, meant that certain "good paying" jobs (called "good," "decent" or "gravy" jobs) were generally sought after by the line techs in an effort to make their hours. These were jobs that could more easily be performed within their assigned labor hours. Respondent argues, based on this, that foremen Jackson and Humeston were empowered to impact the techs' efficiency ratings, in Gallego's words, by "feeding" good paying jobs to one tech while "starving out" another. (Tr. 514–515, 1005, 1064, 1064, 1066, 2396–2398.)

By its posthearing brief, the Employer suggests that the two foremen were "enabled" to use their theoretical power to reward and punish in the Employer's interest, but I find no record evidence that Respondent in fact charged either man with doing so. As Humeston explained, he was expected, to the best of his ability, to engage in "fair dispatch"—assigning the good paying jobs and the bad paying jobs evenly among the work force. While deviating from fair dispatch (i.e., assigning a particular tech excessive bad paying jobs) was sometimes necessary in order to complete the shop's pending ROs, there is no evidence that either he or Jackson utilized this practice in order to incentivize or punish a particular tech. (Tr. 1006, 1957, 1965, 2065.)

As evidence of the foremen's power to reward and punish through their RO assignments, Respondent offered Jackson's admission that, on October 13 (i.e., following the election and after he was no longer a foreman), he bragged to another tech that, he planned, when acting as backup dispatcher, to give less lucrative ROs to replacement worker Cabrera.[25] According to the Employer, this incident was significant because it demonstrated that Jackson could punish a tech he "did not like." (R. Br. at 52.) The Employer also points to a post by an unnamed tech[26] in the WhatsApp group chat about another incident with Cabrara. This tech (presumably as backup dispatcher) posted that, after Cabrera had refused to accept an RO assignment, the dispatching tech retaliated by assigning him oil changes for an entire shift. (See Tr. 2117–2118; R. Exh. 71 at 000079.)

(ii) Analysis

As with other supervisory indicia, purely conclusory evidence is not sufficient to establish supervisory status. Indeed, the Board has explicitly rejected the categorical assumption that the power to award "plum" assignments and "bum" assignments will necessarily be used to punish or reward individual employees. As the *Oakwood* Board explained:

> [t]he purpose behind assigning an employee to a more demanding job may be to see if that employee is up to the challenge. Far from an imposition of discipline, it could well be a prelude to advancement. By the same token, assigning an employee to comparatively easy overall tasks is not necessarily a reward. It could signal lack of confidence in the employee's ability to accomplish anything more challenging. And, quite apart from any of the foregoing considerations, the assignment of "plum" and "bum" jobs may well reflect nothing more than the fact that both sorts of jobs must be done, and somebody must do them.

[24] While it appears that the *Entergy Mississippi* dispatchers lacked authority to force employees to work overtime or to call-out, they possessed authority to enforce their original assignment of employees to an outage. See 357 NLRB 2150, 2151 (2011) ("[t]he dispatcher can pull a field employee off that employee's regular assignment to attend to the outage").

[25] I his words, Jackson wrote, "I'm not going to give him anything more when I dispatch and I'm not going to have anyone do it either." (R. Exh. 71 at 000004)

[26] As noted, the names of techs other than Jackson and Humeston were redacted from the group chat entered into evidence.

Oakwood Healthcare, 348 NLRB 686, 689 (2006). Accordingly, the Employer must demonstrate that Jackson and Humeston had the authority to use work assignments to reward or punish techs, that they exercised independent judgement in doing so, and that they did so on behalf of the Employer and in its interests. This I find the Employer failed to do.

As noted above, I have previously found that neither Jackson nor Humeston exercised independent judgement in assigning ROs to line techs. Moreover, even assuming they did, their assignments were ineffectual, in that techs were free to reject them. Likewise, I find that the Employer failed to establish that Jackson and Humeston's ability to dispatch "good" and "bad" work to individual techs amounted to the power to reward or punish techs in the Employer's interest.

Not only is there no evidence of either man dispatching a good paying job to "incentivize" a high-performing tech or assigning bad paying jobs to "starve out" an unproductive and/or poor performing techs, there is no indication that they were ever charged with doing so. Neither man testified that he considered it part of his foreman duties to assign work in a manner designed to reward or punish certain conduct; indeed, as Humeston explained it, he simply tried to be fair in his dispatch, while serving the overall goal of getting the shop's work done for the day, "plum" and "bum" assignments included.

The Employer did not present a single instance of either foreman using his dispatch authority to punish (or reward) on the Employer's behalf; in fact, the only scenarios on which it relies consisted of nonforemen, backup dispatchers using their intermittent dispatch authority punish a workplace adversary (replacement worker Cabrera) for personal reasons. While it is true that, without adherence to the principle of fair dispatch, any individual assigning ROs in the shop had the potential to reward or punish an individual tech by making it easier or harder for that tech to meet the 100 percent productivity standard, there is simply no evidence that, as foremen, either Jackson or Humeston ever did so in the Employer's interest.

Accordingly, I find that, during the critical period, Jackson and Humeston did not have the authority to assign reward or punish within the meaning of Section 2(11) of the Act.

c. Authority to discipline

The Employer argues that Jackson and Humeston are properly considered statutory supervisors because shop foremen generally "are directly involved in discipline" and foremen preceding and succeeding Jackson and Humeston were involved in the issuance of discipline to line techs. Alternately, the Employer argues that Jackson and Humeston effectively recommended discipline by signing off on "vehicle come back reports," which (as discussed below) document failed repairs.

(i) Facts

Both Jackson and Humeston credibly testified that they lacked the authority to discipline employees.[27] The Employer did not squarely rebut this evidence, but rather offered a scatter shot of vague testimony by Miranda and Gallego. The two testified that, at some point in early 2020, Jackson issued a written discipline to tech Carlos Burciaga; Miranda additionally offered that Jackson was involved with "write ups." As he put it, "I know that he will bring me any write-ups also. Like, if he was to write somebody up, let's say, you know, he will bring him up there . . ." I do not credit either man's testimony, which went uncorroborated by documentation and presented as forced and rehearsed. The Employer also presented evidence that former shop foreman named Jorge Santiago (Santiago) disciplined employees prior to 2020, and that Spier, as foreman, issued Jackson (then a line tech) a discipline in early 2020. (Tr. 534–536, 857–858, 924, 2449, 2611.)

While there is no evidence that Jackson and Humeston expressly recommended discipline of line techs, the record does indicate that they did play a role in determining whether technicians had improperly diagnosed a vehicle or engaged in poor workmanship. This occurred when there was a "come back," that is, a vehicle returned to the dealership because the customer was dissatisfied with the repair. In such cases, a form called a "vehicle come back report" was generated; containing signature lines for the foreman, tech, and service manager, it also listed possible causes for the comeback, including: misdiagnosis, part failure, poor communication and improper repair/poor workmanship, in each case with a "box" to be checked. There is no space on the form for any recommended action to be taken against the tech in question. As foremen, Jackson and Humeston admittedly completed this portion of the form. Specifically, the record contains a comeback report in which Jackson citied improper repair/poor workmanship. Humeston completed reports on at least three occasions in late 2019 and early 2020, one for a misdiagnosis and two for improper repair/poor workmanship. (R. Exhs. 26, 27, 29; Tr. 813, 860–861.)

There is no evidence that any come back report completed by either Jackson or Humeston resulted in discipline. Miranda testified that a number of comeback reports were maintained in employees' personnel files, but the only such reports offered into the record were signed by former foreman Santiago between November 2018 and January 2020. As Miranda testified, there was no set rule as to whether a tech would receive discipline based on the contents of a comeback report. He claims that "a couple" of employees historically had been discharged based on having received too many come back reports, but that the last time this happened was in 2019. The Employer failed to corroborate his testimony in any manner. (Tr. 2480–2487, 2648–2649; R. Exhs. 10, 32.)

(ii) Analysis

As noted, I have declined to credit the vague and conclusory testimony of Gallego and Miranda that that Jackson disciplined employees. Nor am I convinced that disciplinary authority exercised by foremen Santiago and Spier is properly attributed to Jackson and Humeston merely because they shared the same job title. As the Board has made clear, the issue of supervisory status

[27] Respondent's counsel spent a significant amount of time attempting to impeach Jackson on the issue of whether *he* had received a valid discipline in 2017. Respondent offered this testimony ostensibly to impeach Jackson's prior testimony that he was unaware of any foreman ever being "involved" in issuing discipline. However, Jackson did not in fact so testify. What he did say was that he was unaware of any other foreman who had themselves actually disciplined a tech. (Tr. 641–650.) Wordplay and "gotcha games" do not amount to impeachment.

is highly fact-dependent, and the party claiming an individual with the title "foreman" is a supervisor may not simply point to supervisory traits exhibited by others with the same job title. See *NLRB v. ADCO Electric, Inc.*, 6 F.3d 1110, 1117 (5th Cir. 1993). The only remaining evidence to be considered is whether Jackson and Humeston's role in creating come back reports rendered them supervisors in that they were effectively recommending discipline.

Board law is clear that the ability to evaluate others' work performance—or report incidents of substandard performance—is not enough to render the evaluator/reporter a supervisor; this occurs only if the evaluation or report, "by itself, directly affect[s] the wages and/or job status of the individual being evaluated." *Modesto Radiology Imaging, Inc.*, 361 NLRB 888, 889 (2014); *Veolia Transportation Services*, 363 NLRB 902, 909 (2016) ("[w]arnings that simply bring substandard performance to the employer's attention without recommendations for future discipline serve nothing more than a reporting function, and are not evidence of supervisory authority") (citations omitted); see also *Riverboat Services of Indiana*, 345 NLRB 1286, 1286 (2005) (employees not supervisors where their involvement in discipline was merely to refer problems to their superiors); *Somerset Welding & Steel, Inc.*, 291 NLRB 913, 914 (1988) (leadmen/inspectors does not demonstrate authority to discipline or effective recommend the same merely by inspecting work of others and reporting performance issues to management).

Jackson and Humeston's involvement with comeback reports is reminiscent of the facts of a 1997 Board case, *Illinois Veterans Home*, 323 NLRB 890 (1997). There, putative supervisors used "personnel action" forms to document incidents involving problems with employees. Like the comeback reports, the forms contained no space for the reporter's recommendation as to whether or what action should be taken against the employee in question. The forms were submitted to a manager, who, in determining whether discipline is warranted, did not follow any established system, such as a progressive disciplinary system, but rather determined each outcome on a case-by-case basis. As with the comeback reports, there was no predetermined disciplinary system or other evidence that any particular reported offense would necessarily lead to any particular discipline. Under the circumstances, the Board concluded that the purported supervisors' conduct was "merely reportorial" and therefore not indicative of supervisory status. Id. at 890–891 (citations omitted).

I find that, like *Illinois Veterans Home*, the employer in that case, the Employer failed to prove that Jackson and Humeston's merely reportorial role in reporting come backs conferred supervisory status upon them. Accordingly, I find that, during the critical period, Jackson and Humeston did not discipline or recommend discipline of employees within the meaning of Section 2(11) of the Act.

d. Authority to responsibly direct

Humeston and Jackson in their role as foremen admittedly decided the order in which to dispatch ROs (other than high priority "heat" cases), I find therefore that they did direct the work of the line techs. The Employer argues that Jackson and Humeston should be considered supervisors under the Act because they were held accountable for such direction (i.e., for the job performance of the line techs to whom they assigned work). The Employer additionally argues that Jackson exercised the authority to responsibly direct by handling attendance issues, including unilaterally sending home employees who reported COVID symptoms and that he arranged for the Employer to provide documentation to techs as to the dealership's status as an essential business (allowing them to travel) during the pandemic. Finally, by its posthearing brief, the Employer also argues that Jackson and Humeston "wrote the technician schedule," thereby rendering them supervisors. (R. Br. at 73.)

(i) Facts

(a) Accountability for techs' job performance

The Employer at hearing elicited admissions by the Jackson and Humeston as to what *they* considered their scope of responsibility for techs' performance. See, e.g., Tr. 667 (Jackson testifying that ". . . as dispatcher . . . you have to staff the work, that it needs to be completed . . ."); Tr. 1936 (Humeston agreeing that he "runs the shop" at certain times). The record evidence that either man was actually held so responsible by the Employer, however, is another matter. There is no evidence that either man ever suffered any consequences for a technician's delayed repairs, come backs or otherwise faulty work, or that they were rated in any performance evaluation based on the techs' work.[28] Nor is there any evidence that management ever informed Jackson or Humeston that they might receive discipline based on the techs' performance. Missed due times were resolved between the tech and the service advisor; as Jackson testified, if a tech to which he dispatched work failed to meet his due time, this did not affect or involve him. Instead, in such a case, either the tech or the customer would contact the service advisor about the time being exceeded and adjust the due time. (Tr. 548–549, 762–763.)

The Employer introduced evidence that foremen other than Jackson and Humeston have been held accountable for techs' performance. The consisted of Gallego detailing how, in early July, he demoted Cabrera from a foreman position because he had failed "to dispatch the work properly" and "make sure that the mechanics got their jobs done in a timely manner." He then predicted that, if there were "constant" customer complaints about a particular tech's ability perform timely repairs, he would "get involved" and try to resolve the problem, including having a "sit down and talk" with the foreman "if they were the concern." This, he admitted, had never happened with either Jackson or Humeston. (Tr. 2395–2396, 2782–2783.)

Contrary to the Employer's claim that the two foremen wrote the techs' work schedule, the record makes clear that this did not, in fact, occur. Instead, the unrebutted evidence is that, when Gallego first became service manager for the shop, he requested that Humeston brief him on the schedule then in place. In this context, Humeston prepared a schedule for Gallego's review, which the latter then marked as "Revised 4-30-20 by Kevin."

[28] Correspondingly, there is no indication that they experienced any positive consequences based on the performance of the line techs; notably, their dispatch bonus was based on the labor hours they assigned, not the techs' efficiency.

(Tr. 1038–1039, 1042–1043; R. Exh. 8(a).) As such, there is no evidence that either Humeston or Jackson had any substantive role in setting or revising techs' work schedules.

(b) Authority to grant time off

Line techs were required to "call in" their absences directly to Gallego; when, occasionally, they elected to contact Jackson or Humeston instead, the foremen typically relayed the message to Gallego or Miranda, rather than approve it on the spot. (Tr. 740–741, 1033, 2061–2062, 2449; R. Exh.17 at 3.) During the COVID-19 outbreak in the spring of 2020, however, Jackson appears to have deviated from this practice. At least 2 times, when a tech informed Jackson that he was either being tested and/or quarantined for COVID-19, Jackson approved these absences, telling Lee, Miranda and/or Gallego after the fact what had occurred. On another occasion, a tech informed Jackson that he had a high fever and was feeling ill. There was no manager present, and Jackson responded by sending the tech home and then emailed Lee that he done so.[29] Jackson explained his actions in the extraordinary context of the early COVID-19 outbreak, stating that, due to the lack of established protocols and personal protective equipment at the shop, he exercised caution in granting leave to potentially infected workers as safety measure. (Tr. 732–735, 755–758; R. Exh. 17 at 000520–000522; 000525.) There is no evidence that either Jackson or Humeston ever sent a tech home for non-health related reasons.

In the Spring of 2020, Respondent's business was deemed an essential business, and therefore the techs were permitted to commute to work despite the local lock-down orders. In March (prior to the critical period), some of Respondent's techs were confronted by authorities because they lacked official documentation identifying them as essential workers. After receiving complaints from techs, on March 25, 2020, Jackson sent an email to Lee (copying Humeston) requesting that the Employer issue the techs passes or badges showing their work affiliation. (R. Exh. 17 at 1; Tr. 728–732.)

(ii) Analysis

As the Board has explained, to satisfy the term "responsibly direct" in Section 2(11),

> the person directing and performing the oversight of the employee must be accountable for the performance of the tasks by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly. . . .

Oakwood Healthcare, supra at 692. Therefore, to establish accountability for purposes of responsible direction, it must be shown that not only that the employer granted to the putative supervisor the authority to direct the work but also that the putative supervisor "is fully accountable" for that work and would be held responsible if the employee does not perform properly. Id.

In this regard, the Board's decision in *Golden Crest Healthcare Center* is instructive. In that case, the Board noted that the employer had failed to present evidence that charge nurses experienced material consequences to their terms and conditions of employment based on their directing the work of CNAs they allegedly supervised. Nor did the employer present evidence that it informed charge nurses that any material consequences might result from their performance in directing CNAs. And while the employer's performance evaluation forms rated charge nurses on their performance in directing CNAs, there was no evidence that this rating might result in action being taken against the charge nurses, rendering it mere "'paper' accountability." 348 NLRB 727, 731 (2006).

I find that the Employer's evidence concerning Jackson and Humeston's authority to responsibly direct the line techs similarly falls short. Neither man ever experienced material consequences to his own terms and conditions of employment based on the performance of any line tech to whom he assigned work, nor was either man warned of any such consequences. Thus, despite the limited testimony, discussed supra, that a tech whose work generated multiple "come backs" might be subject to discipline, there is no indication that, in such a case, the assigning foreman would also be held accountable. See *Peacock Productions of NBC Universal Media, LLC*, 364 NLRB 1523, 1526 (2016) (accountability not shown absent examples of adverse consequences or commendations and testimony was that if subordinate made mistake, superior would hold the subordinate, rather than putative supervisor, responsible for it).

Gallego's generalized claims that he "would" have a sit-down talk with a foreman he determined to be responsible for a tech's continuously delayed work was the very sort of conclusory evidence the Board rejects in making supervisory determinations. Indeed, he gave no examples of actually having taken such action; nor is there any evidence that such a talk would amount to, or result in, disciplinary action. This falls short of even the "paper" accountability rejected by the Board in *Golden Crest Healthcare Center.* See 348 NLRB at 731; see also *Cook Inlet Tug & Barge, Inc.*, 362 NLRB 35, at 36–37 (2015) (testimony lacked specific examples or evidence illustrating accountability, and even hypothetical testimony indicated captains were held accountable for own performance); *Buchanan Marine, L.P.*, 363 NLRB 523 (2015) (simply stating putative supervisor is held accountable for errors of subordinates does not establish accountability in absence of evidence showing how or for what they are held accountable); *Brusco Tug & Barge Co.*, 359 NLRB 486 (2013), incorporated by reference at 362 NLRB 257 (2015) (evidence limited to conclusory assertions without delineation of for what or how putative supervisors were held accountable), enfd. 696 Fed.Appx. 519 (mem) (D.C. Cir. 2017).

I additionally find that the Employer's reliance on Cabrera's demotion from the foreman position misses the mark. Supervisory traits exhibited by others with a certain same job title are not to be merely "transposed" on others who happen to share the same job title. See *NLRB v. ADCO Electric, Inc.*, supra at 1117.[30]

Nor do I find that Jackson's conduct in granting employees time off due to COVID-19 to constitute the exercise of

[29] Each of these instances occurred in early Spring, and there is no record of Jackson approving a COVID-related absence during the critical period leading up to the election.

[30] Based on this principle, I have disregarded testimony regarding the exercise of supervisory authority by foremen other than Jackson and Humeston (e.g., Spier instructing a tech to work on a scheduled day off).

responsible direction. While exercising the authority to send employees home for engaging in misconduct is typically considered evidence of supervisory authority, the Board has held that simply permitting an employee to leave work based on illness is not, in that it does not involve the use of independent judgement. *Sam's Club*, 349 NLRB 1007, 1014 (2007); *Health Resources of Lakeview, Inc.*, 332 NLRB 878 (2000) (same*); Alois Box Co., Inc.*, supra (same). In addition, the Board recognizes that certain decisions, made in the context of extraordinary circumstances, do not demonstrate independent judgement. See *Brusco Tug & Barge, Inc.,* 359 NLRB 486 (2012) (assignment of tasks in emergency and drill situations and assignment of overtime to engineer do not amount to exercise of independent judgment). In this case, even had Jackson excused and sent home employees potentially infected with COVID-19 during the critical period, considering the extraordinary circumstances of the pandemic, did not demonstrate the exercise of independent judgement and therefore do not constitute evidence of supervisory indicia.

That Jackson took it upon himself to request safe-passage letters on behalf of the techs as a likewise fails to demonstrate responsible direction. This is because, as he explained, this action failed to adhere to the fundamental requirement that the directing individual act in the interests of management, as opposed to those of the directed employees. *Oakwood*, supra at 691. To the extent Jackson petitioned management to take an action designed to benefit the techs as a group, he would be more properly classified as a steward than a supervisor.[31]

Accordingly, I find that, during the critical period, Jackson and Humeston did not reasonably direct within the meaning of Section 2(11) of the Act.

e. Authority to recommend training, promotion and certification opportunities

The Employer argues that Jackson and Humeston should be considered statutory supervisors because the engaged in ad-hoc training of less experienced techs. The Employer additionally suggests that their supervisory status is evidenced that foremen historically recommended techs for Toyota certification classes. Finally, based on the testimony of Gallego, he promoted a lube tech to a line tech position based on a recommendation by Humeston.

(i) Facts

Humeston and Jackson each admitted that they regularly assisted new and/or inexperienced line techs with diagnostic work. As Humeston testified, however, this is something that all senior techs—not just foremen—did. He was corroborated by Caro in this regard, who testified that, when acting as a back-up dispatcher, he was expected to help out "the new guys." Gallego testified that foremen generally, but not Humeston or Jackson specifically, recommended techs for the training classes required to obtain Toyota certifications. Notably, he failed to identify a single instance in which either Jackson or Humeston in fact did so and he additionally admitted that, since he had become the Employer's service manager (i.e., during the critical period), such training was largely unavailable due to the COVID-19 pandemic. (Tr. 2683–2684, 2755–2256.)

According to Gallego, Humeston recommended that lube tech Cattolico be promoted to a line tech position and he followed that recommendation; he failed, however, to testify as to the specifics of this interaction. Humeston, for his part, admitted that he assisted Cattolico and another lube tech with preforming diagnostic work in the hopes that they could become flat-rate techs. There is no evidence that he was officially tasked with doing this, or that management was even aware this "mentorship" activity. (Tr. 210, 1953–1954, 2064, 2760–2761.)

(ii) Analysis

I find Gallego's testimony about foremen generically recommending techs for certification training classes to be far too vague and conclusory to be reliable. That he was unable to recall a single instance of either Jackson or Humeston actually coming to him with a such a recommendation itself speaks volumes. See *Golden Crest Healthcare*, 348 NLRB at 727 ("purely conclusory evidence is not sufficient to establish supervisory status; instead, the Board requires evidence that the employee actually possesses the Section 2(11) authority at issue"); *Chevron Shipping*, 317 NLRB 379, 381 fn. 6 (1995) (conclusory statements without supporting evidence do not establish supervisory authority). I therefore reject the Employer's contention, based on this testimony, that the two men constitute statutory supervisors.

Nor is the fact that Jackson and Humeston—like other experienced techs—provided guidance and assistance to less qualified techs to be evidence of supervisory status. That one employee trains another does not, alone, constitute the exercise of supervisory power. *Pacific Coast M.S. Industries Co.*, 355 NLRB 1422, 1423, fn. 13 (2010) ("[t]raining team members is. . .not a supervisory indicium"); see also *F. A. Bartlett Tree Expert Co.*, 325 NLRB 243, 244 (1997) (crew foremen who, like other skilled employees, provide less experienced employees with on-the-job training, are not statutory supervisors). At best, training constitutes a secondary, not statutory, indicia of supervisory status. *Pacific Coast M.S. Industries*, supra (citing *Training School at Vineland*, 332 NLRB 1412, 1412–1413 fn. 3 (2000)). Accordingly, because I have found no primary indicia of supervisory status with respect to either man, I therefore reject the Employer's arguments regarding training.

I do not credit Gallego's conclusory and uncorroborated testimony that he promoted Cattolico on Humeston's recommendation; as I have noted, his overall demeanor suggested to me that, on more than one occasion, he attempted to "gild the lily" with uncorroborated claims of supervisory indicia on the part of either Humeston and/or Jackson. Moreover, even were I to credit this testimony, it was so lacking in specificity or detail that it would be an insufficient basis on which to premise a supervisory finding. See *Busco Tug & Barge,* supra at 490 ("[t]he Board construes a lack of evidence on any of the elements necessary to establish supervisory status against the party asserting that status"); *Dean & Deluca*, supra at 1048 ("any lack of specific evidence

[31] The same can be said of Jackson's act of emailing management on behalf of a tech who had forgotten his TIS username and/or password, in order to have it reset (also alleged by the Employer to evince responsible direction). (Tr. 746–751; R. Exh. 17 at 000523.)

that would support a finding of supervisory status must be construed against the . . . party asserting supervisory status").

Finally, I do not find Humeston's informal mentorship of two lube techs, with the aim of them being qualified as flat-rate techs, to be evidence of supervisory status. To the extent that Humeston may have taken it upon himself to help these individuals, this appears to be an example of a tech acting on another tech's behalf, as opposed to a supervisor charged, on behalf of the Employer, with grooming an individual for promotion. Indeed, thus, there is no evidence that Humeston's unofficial mentoring efforts were undertaken with independent judgement in the interest of the Employer, a requirement for finding supervisory indicia.

Accordingly, I find that, during the critical period, Jackson and Humeston did not recommend training, promotion or certification opportunities within the meaning of Section 2(11) of the Act.

B. Objections 20 and 21 (Regarding Jackson and Humeston, Respectively)

Because I have found, as detailed above, that Jackson and Humeston were not statutory supervisors as claimed by the Petitioner, I need go no further to recommend dismissal of the objections based on their conduct I so recommend. However, in the event that my findings concerning the status of Jackson or Humeston are reversed, I deem it appropriate to express my views on the issue of whether their conduct upset the laboratory conditions for a fair election.

In support of Objections 20 and 21, the Employer contends that Jackson and Humeston engaged in the following coercive, prounion conduct:

- leading line techs in the voting unit and speaking on their behalf on May 15, 2020 and May 21, 2020 to demand recognition of the Union as their bargaining representative;
- engaging in daily picketing alongside line techs in the voting unit and holding prounion picket signs;
- leading the striking line techs and speaking on their behalf in giving an unconditional offer to return to work;
- meeting with line techs in the voting unit to get support for the Union;
- engaging in prounion activity, including posting prounion and antiemployer content in a group WhatsApp chat.
- engaging in (unspecified) "constant, intimidating, coercive and threatening conduct."

The facts underlying each of these objections are set forth above. As noted, I shall examine the Employer's contentions based on a finding, contrary to my conclusions set forth above, that both Jackson and Humeston were statutory supervisors at the time of their alleged conduct.[32]

1. The objectionable conduct standard

To ensure that employees are fully able to exercise their section 7 rights, the Board requires that elections take place under "laboratory conditions" free from coercion by the union or the employer. *Harborside Healthcare, Inc.*, 343 NLRB 906, 909 (2004). That said, it is well settled that representation elections are not lightly set aside. *Quest International*, 338 NLRB 856, 857 (2003); *Safeway, Inc.*, 338 NLRB 525, 525 (2002); *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equipment Co.*, 470 F.2d 1329, 1333 (5th Cir. 1972), cert. denied 412 U.S. 928 (1973)). "There is a strong presumption that ballots cast under specific NLRB procedural safeguards reflect the true desires of the employees." *NLRB v. Hood Furniture Mfg. Co.*, supra at 328, and the burden of proving a Board-supervised election should be set aside is a "heavy one." *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) (citation omitted).

As the objecting party, the Employer has the burden of proving interference with the election. See *Jensen Pre-Cast*, 290 NLRB 547, 547 (1988). The test, applied objectively, is whether the objected-to conduct has the tendency to interfere with the employees' freedom of choice. See *Taylor Wharton Division*, 336 NLRB 157, 158 (2001); *Baja's Place*, 268 NLRB 868, 868 (1984).

2. The *Harborside* standard for prounion supervisory conduct

While most postelection objections based on supervisory conduct involve individuals urging employees to oppose union organization, prounion supervisory conduct is likewise unlawful, if the conduct could reasonably induce employees to support the union because they perceive potential supervisory retaliation or preferential treatment. *Harborside*, 343 NLRB at 906–907. In other words, the law always forbids a supervisor from trying to influence the free choice of employees in exercising their Section 7 rights, regardless of what outcome the supervisor is seeking to achieve. Id. at 907. As with any objectionable conduct, the element of coercion is key; without it, as the Board has cautioned, supervisory prounion speech is not considered objectionable. Id. at 911.

In *Harborside Healthcare,* the Board clarified the legal standards applicable when an employer challenges the results of an election alleging objectionable prounion conduct. Under *Harborside*, the Board considers two factors:

> (1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question. (2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of

[32] The objections also contained several factual allegations with respect to which Respondent offered no evidence at hearing, nor argued for in its posthearing brief. These included those numbered 20(c) and 21(c) (allegedly blocking the entrance to Respondent's facility during the picketing); as well as 20(i) and 21(i) (allegedly attending the ballot count via video). I consider these unsupported allegations withdrawn and do not address them here.

> the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.

Id. at 909.

a. Reasonable tendency to coerce or interfere

The *Harborside* case, which involved the active solicitation of union authorization cards by the supervisor in question, made clear that a supervisor's prounion speech, without more, will not be found objectionable. Thus, while an "express promise or threat" is not required, there must be some showing of coercion on the part of the supervisor, whether an actual threat, an "implied threat of retaliation" or "implicit threats or coercion." Id. at 909, 911.

In *Harborside*, for example, 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. She 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. Id. at 910–911.

This conduct was deemed coercive when viewed within the context of the supervisor's expansive supervisory authority; she wielded broad authority over employees' day-to-day working conditions (i.e., initiated discipline, assigned schedules, gave principal input on evaluations, directly suspended employees, and effectively recommended suspension and termination). Put succinctly by one employee: this individual "could write you up and make you lose your job." Id. at 910.

b. Material effect on election outcome

Even where coercive conduct is established, the Board will not set aside an election for prounion supervisory conduct unless the second *Harborside* factor is satisfied; that is, where it is shown that the conduct in question "interfered with freedom of choice to the extent that it materially affected the outcome of the election." This, in turn depends on "factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct." *Id.* at 909. In other words, even conduct that actually interferes with employee choice will not invalidate the election result unless it actually influenced the outcome. *SSC Mystic Operating Co. C v. NLRB*, 801 F.3d 302, 309 (2015), cert. denied 137 S. Ct. 473 (2016).

In determining the effect of a supervisor's impermissible conduct, the Board takes into account "mitigating circumstances" that may have "sufficiently negated" the coercive activities such that the election result was not materially affected. See *Veritas Health Services v. NLRB,* 671 F.3d 1267, 1272 (D.C. Cir. 2012) (quoting *SNR Enterprises, Inc.*, 348 NLRB 1041, 1042 (2006)). For example, the Board will consider whether any antiunion effort by the employer had the effect of counteracting a supervisor's prounion conduct. *Harborside*, supra at 914. Thus, if the employer "works at cross-purposes to a supervisor's prounion activity during an election, the employer may end up neutralizing the supervisor's wrongdoing and inadvertently preserve the conditions necessary to reach a valid election result." *SSC Mystic*, supra at 310.

3. Analysis of Jackson and Humeston's conduct under *Harborside*

Assuming for purposes of this analysis that Jackson and Humeston are statutory supervisors, I will evaluate whether, under the *Harborside* standard, their prounion conduct was sufficient to warrant setting aside the election.

a. Respondent failed to establish coercive conduct by Jackson or Humeston

As discussed, the first inquiry is whether the prounion conduct of either Jackson or Humeston constituted coercion under *Harborside*. As a preliminary matter, despite characterizing the two foremen's conduct as "constant, intimidating, coercive and threatening conduct,"[33] the Employer identifies no threat—actual or implied—made by either man to a potential voter as to the consequences of the Union losing the election. Nor did the Employer adduce evidence of either man engaging in intimidating or confrontational conduct, invoking the techs' job security or otherwise "hard selling" techs on the union cause.

Indeed, the sum total of Jackson and Humeston's prounion conduct consisted of attending in-person meetings and online discussions about the Union, encouraging employees to support the organizing drive and soliciting suggestions from employees about issues that a union could help resolve. Such conduct has regularly been found noncoercive. See, e.g., *Connecticut Humane Society*, 358 NLRB 187, 223 (2016) (supervisor attending union meetings, encouraging others to attend same and signing a union petition in the presence of employees not coercive); *Northeast Iowa Telephone Co.*, 346 NLRB 465, 466–468 (2006) (supervisor attending union meetings and speaking in favor of union at such meetings not coercive); *Terry Machine Co.*, 332 NLRB 855, 856 (2000) (supervisors encouraging employees to attend union meetings not coercive); *Stevenson Equipment Co.*, 174 NLRB 865, 866 (1969) (supervisors attending union meetings and informing employees about meetings not coercive).

The Employer contends that the two foremen's conduct also included "leading" the line techs out on strike. I find that the factual record does not support such a finding. The group chat repeals that the "call to arms" for the strike came not from either foremen but from nonforeman employees. In addition, no tech testified that he was in any way in any way ordered, intimidated or otherwise strong armed by either foreman into either participating in the strike or unconditionally returning to work. The record as a whole indicates that Juarez—not Jackson or Humeston—was clearly calling the shots as far as the organizing strategy was concerned. That, at times, he appeared to hold out

[33] See, e.g., GC Exh. 1(r), Attachment "A" at 22.

the two foremen—as experienced mechanics and long-term employees—as his de facto "lieutenants" for purposes of getting techs' to "buy in" to the campaign is hardly surprising. But the fact that they occasionally relayed his instructions to the group or were designated as spokesmen in dealing with management simply does not render their conduct coercive.

Next, pursuant to *Harborside*, I assess Jackson and Humeston's conduct within the context of the nature and degree of their supervisory authority. In this regard, the Employer argues that the power of the two foremen "to assign work and initiate discipline" rendered their prounion conduct "inherently coercive." (R. Br. at 93.) I disagree. Unlike the supervisor in *Harborside*, neither Jackson nor Humeston was shown to be vested with any measure of authority to effectuate discipline. While they were charged with determining the cause of failed repairs, there is no credible evidence that they ever made discipline recommendations and, correspondingly, no evidence that any tech believed them capable of getting someone disciplined. As such, the breadth of their disciplinary authority does not bear even a remote resemblance to the facts of *Harborside.*

Respondent also asserts that Jackson and Humeston's ability to reward and punish techs through their work assignments—vis á vis Respondent's flat-rate pay and 100 percent efficiency standard—rendered their prounion conduct coercive. Were either man vested with the actual authority to force work "plum" and "bum" assignments on individual techs, this argument would be a closer call. As it stands, however, the undisputed evidence is that they did not hold such authority, in that their assignments could be rejected and techs could "self assign" work, individually and collaboratively. The authority to assign work, for purpose of determining whether an employee is a supervisor under the NLRA, such that his conduct may have coercive effect on employees that would impair validity of labor union certification election results, requires that the employee have the ability to require that a certain action be taken. *UPS Ground Freight, Inc. v. NLRB*, 921 F.3d 251, 255 (D.C. Cir. 2019).

Based on the above, I find that Respondent has not met its burden of establish the first prong of *Harborside* in that Jackson or Humeston's conduct was not shown to have reasonably tended to coerce or interfere with employee free choice.[34]

b. Respondent failed to demonstrate a material effect on the election's outcome

Even assuming that Jackson and Humeston's prounion conduct was objectionable, I find that it did not materially affect the outcome of the election. Even assuming their conduct was known to the number of employees sufficient to upset the Union's margin of victory, the eligible voters could not reasonably have attributed these prounion supervisory sentiments to the Employer in the face of the vigorous antiunion campaign it waged throughout the election period. See, e.g., *Laguna College of Art & Design*, 362 NLRB 965, 965, fn. 3 (2015) (employer's contemporaneous, aggressive antiunion campaign ensured that employees would not attribute supervisor's prounion views to employer).

Accordingly, I find that Jackson and Humeston's prounion conduct did not breach the laboratory conditions of the election and therefore recommend that the Employer's Objections 20 and 21 be overruled.

C. Objection 16 (Juarez Picket Line Conduct)

According to the Employer, Juarez "verbally attacked" replacement tech Spier by announcing his private information, including his name and home address over a megaphone during the picketing action at the dealership. According to the Employer, "[t]he megaphone discussion was done in front of more than a dozen of the voters, and all voters were told about it through the WhatsApp text messaging group." (GC Exh. 1(r) at 13–14; R. Br. at 99.)

1. Facts

It is undisputed that, during the picketing, Juarez used a bullhorn to express his views. The sole witness offered by the Employer in support of its claim that he "attacked" Spier by announcing his personal information, however, was Spier himself. He testified that, at some point in mid-June, Juarez "[f]or some reason . . . started screaming out my address" and then announced, "you know, we can come visit you at this address. If anybody has questions, come to this address." This announcement, according to Spier, lasted for 5–10 minutes. Spier did not identify any of the individuals supposedly present to overhear the announcement and Respondent did not call any witness to corroborate Spier's account. Although Spier claimed to have filed three police reports regarding the harassment he suffered as a replacement worker, none of these reports was offered into evidence. (Tr. 1310, 2885–2887.)

Juarez, for his part, denied announcing Spier's home address over the megaphone. He did admit to making wisecracks to Spier during the picketing; as he testified, one of the strikers mentioned that it was Spier's birthday, and Juarez blurted out "Happy Birthday!" to him on the megaphone and suggested they go have a drink or some shots together. Spier responded by laughing and giving him a thumbs up. This account was partially corroborated by the organizing group chat, in which Juarez joked on June 26 that he had told Spier that "we need to go have some shots." It also comported with Juarez' demeanor and affect throughout the hearing, at which he served as the Union's designated table representative. (Tr. 2839–2840, 2842, 2853; R. Exh. 71 at 124.)

It is technically true that members of the WhatsApp online chat group chat were "told about" the alleged Juarez-Spier incident. What the Employer failed to disclose in its posthearing brief was that the online discussion in question consisted of Juarez informing the group—following the election—that he had been *alleged* by Respondent in its post-election objections to

[34] At hearing, the Employer also adduced evidence that Humeston and Jackson encouraged line techs to engage in a work slowdown and to undermine the Employer's business by providing Toyota with false information about the Employer's business practices. As noted, even assuming these unalleged objections to have been fully litigated, I do not find either of them to be supported by the evidence. In particular, I note that, to the extent either foreman may have encouraged techs to bring pressure on Gallego by slowing the pace of their work, this did not amount to coercive conduct, in that the record is clear that, as foremen, they had no authority to dictate the pace at which repairs were completed.

have harassed Spier via megaphone. (R. Exh. 71 at 000171–000172, 000189–000190, 000197.)

2. Analysis

I find that the record does not support Respondent's objection. As a preliminary matter, I found Spier's account wholly unconvincing. Initially called to testify by the General Counsel, he presented as an extremely hostile, insolent and evasive witness who engaged in backtalk under questioning (e.g., "[w]e can do this all day") and even interjected "objections" to straight-forward questions posed to him (e.g., "[a]re you kidding me right now?"). While an understandable amount of emotion could be expected from any number of witnesses in the context of a contentious dispute over union representation, Spier's contemptuous and dismissive attitude, along with his overall countenance and hostile demeanor, convince me that his testimony was generally unreliable. Spier's credibility was further diminished by his single-mindedly focus on trotting out the Juarez-megaphone story (he appeared to preemptively "plant" the accusation in response to a preliminary question), as well as his claim that he filed multiple police reports about being harassed by union supporters (a claim that went unsupported by any documentary evidence).

In any event, even were I to credit Spier, his testimony failed to support the Employer's objection. At a minimum, the Board requires that an objecting party demonstrate that voters were in fact aware of the objectionable conduct. Conspicuously missing from Spier's account was a description of where Juarez' alleged statements took place, who they were aimed at and who else appeared to have been in hearing range. Moreover, despite the Employer's insinuation in its posthearing brief, there is no evidence that, during the critical period, any voter became aware of the alleged megaphone incident.

Under such circumstances, I find that Juarez' conduct, even if it did occur, could not have affected the results of an election decided 17 to 8 in favor of the Union. See *Flamingo Las Vegas Operating Co.*, 360 NLRB 243, 246 (2014) (overruling union's postelection objection where no evidence offered that critical-period threats were disseminated to any other employees); *Avante at Boca Raton, Inc.*, 323 NLRB 555, 560 (1997) (overruling employer's objection where no evidence unit employees knew of alleged coercive incident).

I therefore recommend that the Employer's Objection 16 be overruled.

VI. RESPONDENT'S SUBPOENA DUCES TECUM

Following the commencement of hearing in this matter, on or about November 30, 2020, Respondent's counsel caused former strikers Humeston, Jackson, Caro, Vega, Solano, Martinez, Fetui and P. Lo to be served with subpoena duces tecum. The General Counsel moved on November 30 to amend the complaint to allege that these subpoenas constituted unlawful interrogations in violation of Section 8(a)(1) of the Act.

The subpoena seek, inter alia, the production of communications between the subpoenaed line techs and Humeston and Jackson, including, but not limited to, documents reflecting the exercise of supervisory indicia (i.e., hiring, suspending, rewarding, disciplining, directing work, etc.). (See Jt. Exh. 6.) The instructions portion of the subpoena provide that, to the extent a document is withheld based on privilege, the subpoenaed party should provide nonprivileged information about the document in question sufficient to enable an assessment of such claim.

Notably, the subpoenas were presented to the employee-recipients as subject to review and revision by a judge before any production was required. Specifically, shortly after being served with the subpoena, the subpoenaed individuals were notified in writing by Respondent's counsel that a dispute existed regarding which documents would need to be produced and that no documents would be required to be produced until I issued an order directing production. (Jt. Exh. 3.) After briefing and oral argument on petitions to revoke filed by the General Counsel and Charging Party, I issued an order narrowing the subpoena and instructed the subpoenaed individuals to provide documents responsive to non-revoked portions of the subpoena to the General Counsel to review and redact for Section 7 information.[35] Subpoened individuals, when called to testify, were presented with redacted versions of their produced documents and cautioned not to disclose the identity of non-foremen employees.

It appears that, even prior to receipt of the subpoena, individual subpoenaed employees were aware that the Employer was taking the position that Jackson and Humeston were supervisors and that they might be requested to provide information on the subject. On May 22, in the group online organizing chat, Jackson posted that, after consulting with Juarez, Humeston and the Union's attorney, he had learned that management was arguing that he and Humeston were supervisors, not techs: "They…say myself and Kevin are Supervisors. But we're not, we just shop foreman who dispatch. So we need you guys to state that also if questioned." (R. Exh. 17 at 000030.)

The General Counsel argues that the subpoenas encompass materials protected by Section 7 of the Act, for which no showing of relevance has been shown and therefore amount to unlawful interrogations into the subpoenaed employees' union sympathies and/or preferences. Respondent argues that the subpoenas were properly tailored to seek documents relevant to a central issue in this case: whether Humeston and Jackson were statutory supervisors under the Act.

A. The Standard for Subpoenas as Unlawful Interrogation

"The confidentiality interests of employees have long been an overriding concern to the Board. Generally, an employer who seeks to obtain the identities of employees who sign authorization cards and attend union meetings violates the Act." *National Telephone Directory Corp.*, 319 NLRB 420, 421 (1995). The Board has generally sought to protect such information "because of 'the potential chilling effect on union activity that could result from employer knowledge of the information.'" *Veritas Health Services. v. NLRB*, supra at 1274 (quoting *National Telephone Directory Corp.*, supra at 421).

[35] See Order Granting in Part and Denying in Part the General Counsel and Charging Party's Petitions to Revoke Various Subpoena Duces Tecum, 32–CA–260614 et al. (Dec. 29, 2020). The order narrowing the subpoena also included a capitalized, bolded warning that no subpoenaed individual was to provide a copy of any affidavit or other signed or sworn statement provided to a Board agent.

The foreseeable "chill" on employees' free exercise of Section 7 rights has led courts to bar employers from seeking such information through otherwise permissible means. See, e.g., *Committee on Masonic Homes v. NLRB,* 556 F.2d 214. 221 (3d Cir. 1977) (employer may not obtain union authorization cards pursuant to Freedom of Information Act, 5 U.S.C. § 552). Likewise, the Board has found that an employer that questions its employees about such information violates Section 8(a)(1). Id. (citing *Hanover Concrete Co.*, 241 NLRB 936 (1979); *Dependable Lists, Inc.*, 239 NLRB 1304, 1305 (1979); *Campbell Soup Co.*, 225 NLRB 222 (1976)).

That said, an employer accused of unfair labor practices must be afforded a full opportunity to defend itself, including by subpoenaing documents that touch upon an issue in controversy in the case. Likewise, an employer filing timely postelection objections must be permitted to obtain information reasonably relevant to its position. Such was the case in *Ozark Automotive Distributors, Inc. v. NLRB*, relied upon by Respondent.[36] In that case, the employer sought to overturn the results of an election arguing that certain acts of employee misconduct were properly attributed to the union; the subpoenas called for documents bearing on the relevant employees' status as agents of the union. Agreeing with the employer that establishing these individuals was union agents was "critical" to its case, the D.C. Circuit found that this interest outweighed the asserted confidentiality interests of the employees at issue and the need to protect their right to engage in union activity. 779 F.3d at 580–581.

B. Analysis

I agree with Respondent that this case presents circumstances similar to those considered in the *Ozark* case. Respondent's position throughout these proceedings has been that former foremen Jackson and Humeston were statutory supervisors under Section 2(11) of the Act, rendering them ineligible for recall rights as returning strikers and additionally subjecting their prounion conduct to scrutiny under the *Harborside* standard. Like the subpoenas in *Ozark*, Respondent's subpoenas did not seek authorization cards or the identity of those attending union meetings, but rather sought communications between employees and individuals' whose status is critical to Respondent's case.[37] While I was not convinced by Respondent's evidence on the issue of Jackson and Humeston's supervisory status, reviewing bodies may well be, and Respondent had every right to create a full record on this issue.

The question remains whether Respondent's interest in advocating for its position is outweighed by the need to protect its employees' Section 7 right to engage in union activity without fear of reprisal. In this regard, it must be remembered that not all questioning (or subpoenaing) of an employee is automatically considered an unlawful interrogation. Under the Board's established standard, the "task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act." *Westwood Health Care Center*, 330 NLRB 935, 940 (2000).

In this case, I am convinced that Respondent's subpoena did not constitute coercive interrogation. The record as a whole discloses that employees were generally aware that the subpoena were aimed toward the valid purpose of shedding light on the supervisory status of Jackson and Humeston. This is supported not only by the wording of the subpoena themselves, the assurances provided by Respondent's counsel and by Jackson's post in the employees' organizing group chat to the effect that Respondent was arguing that he and Humeston were supervisors and not line techs. Under these circumstances, I do not believe that compliance with the subpoena would reasonably give the subpoenaed employees pause about engaging in Section 7-protected conduct in the future.

CONCLUSIONS OF LAW

1. Respondent Tracy Auto, L.P. d/b/a Tracy Toyota (Respondent or the Employer) is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Machinists and Mechanics Lodge No. 2182, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act with 9(a) status under the Act.

3. Respondent has violated Section 8(a)(3) and (1) of the Act by failing and refusing to recall employees who engaged in a strike, following their unconditional offer to return to work on May 21, 2020.

4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. Respondent has not violated the Act in any other manner as alleged in the complaint.

6. Respondent's objections in Case 32–RC–260453, to the extent not overruled by the Regional Director for Region 20, are without merit and should be dismissed.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices in violation of Section 8(a)(3) and (1) of the Act, 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.

Having found that Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate economic strikers, upon their unconditional offer to return to work, to their

[36] 779 F.3d 576 (D.C. Cir. 2015), denying enf. and remanding 357 NLRB 1041 (2011).

[37] Cf. *Chino Valley Medical Center*, 362 NLRB 283, 283 fn. 1 (2015) (employer violated Sec. 8(a)(1) by issuing subpoenas duces tecum to employees encompassing communications between employees and the union, union authorization and membership cards, and all documents relating to the distribution and/or solicitation of union authorization cards), enfd. sub nom. *United Nurses Associations of California v. NLRB*, 871 F.3d 767 (9th Cir. 2017); *Guess?, Inc.*, 339 NLRB 432, 435 (2003) (employer violated Sec. 8(a)(1) by asking an employee during a deposition in a workers' compensation case to reveal the identities of other employees who attended union meetings); and *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999) (employer violated Sec. 8(a)(1) by subpoenaing employee authorization cards in a state court lawsuit), enfd. 200 F.3d. 1162, 1167 (8th Cir. 2000).

former or substantially equivalent positions of employment where those positions had not been filled by permanent replacements, and by failing and refusing to timely recall economic strikers to existing vacancies in their prestrike or substantially equivalent positions in the absence of a legitimate and substantial business justification, I shall recommend that Respondent, if it has not already done so, be ordered to offer the affected employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging, if necessary, any employees currently in those positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. I shall also recommend that the question of when each of the former strikers should have been recalled be left to the compliance stage of this proceeding. In addition, to the extent that some of the reinstated strikers were entitled to be recalled earlier than they were, I shall leave to the compliance stage the question of which such strikers were entitled to earlier recall and the amount of backpay due them.

Backpay owed as a result of Respondent's unlawful actions shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB 1153 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), Respondent should also be ordered to compensate affected employees for their reasonable search-for-work and interim employment expenses, if any, regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Additionally, Respondent should be ordered to compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each of them. *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). In addition to the backpay-allocation report, Respondent should be ordered to file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award. *Cascades Counterboard Packaging*, 371 NLRB No. 25 (2021).

Finally, Respondent should be ordered to remove from its files any references to the unlawful failures to reinstate or timely recall former strikers and to notify affected employees in writing that this has been done and that the failures to reinstate or recall will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[38]

ORDER

Respondent Tracy Toyota, L.P. d/b/a Tracy Toyota, Tracy, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to reinstate former economic strikers, upon their unconditional offer to return to work, to their former or substantially equivalent positions of employment where those positions have not been filled by permanent replacements.

(b) Failing and refusing to timely recall former economic strikers to existing vacancies in their former or substantially equivalent positions of employment in the absence of a legitimate and substantial business justification.

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

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

(a) Within 14 days from the date of this Order, if it has not already done so, offer former economic strikers who were not permanently replaced and who were unlawfully denied reinstatement upon their unconditional offer to return to work full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging, if necessary, any employees currently in those positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make whole former economic strikers who were not permanently replaced and who were unlawfully denied reinstatement upon their unconditional offer to return to work 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 this decision.

(c) Within 14 days from the date of this Order, if it has not already done so, offer former economic strikers who were not timely recalled to existing vacancies to which they were entitled based on the preferential recall list full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging, if necessary, any employees currently in those positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make whole former economic strikers who were not timely recalled to existing vacancies to which they were entitled based on the preferential recall list 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 this decision.

(e) Compensate the affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 20 a report allocating the backpay awards to the appropriate calendar years for each affected backpay recipient.

[38] 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.

(f) Within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, file with the Regional Director for Region 20 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

(g) Within 14 days from the date of this Order, remove from its files any references to the unlawful refusals to reinstate or timely recall former economic strikers, and within 3 days thereafter, notify affected employees in writing that this has been done and that the refusals to reinstate or timely recall them will not be used against them in any way.

(h) Preserve and, within 14 days of a request following the Board's Order, 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.

(i) Within 14 days after service by the Region, post at Respondent's Tracy, California facility copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by 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, Respondent has gone out of business or closed its facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed at Respondent's facility at any time since May 21, 2020.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

It is further ordered that the complaint allegations are dismissed insofar as they allege violations of the Act not specifically found.

It is also recommended that the objections filed by Respondent in Case 32–RC–260453, to the extent not overruled by the Regional Director for Region 20, be dismissed and that a certification of representative be issued in that proceeding.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT ask you about your communications with Machinists and Mechanics Lodge No. 2182, District Lodge 190, International Association of Machinists and Aerospace Workers, AFL–CIO (the Union).

WE WILL NOT fail and refuse to reinstate former strikers who were not permanently replaced upon their unconditional offer to return to work.

WE WILL NOT fail and refuse to reinstate former strikers to existing vacancies in their former or substantially equivalent positions of employment in the absence of a legitimate and substantial business justification.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

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

WE WILL, within 14 days from the date of the Board's Order, offer former economic strikers who were not permanently replaced and who were unlawfully denied reinstatement upon their May 21, 2020 unconditional offer to return to work reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging if necessary any employees currently in those positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer former economic strikers who were unlawfully denied timely recall to vacancies in their former or substantially equivalent positions of employment reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, discharging if necessary any employees currently in those positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, make whole any other former strikers who were untimely reinstated to their former positions of employment, for any loss of earnings and other benefits resulting from our unlawful conduct, less any interim earnings, plus interest, and WE WILL also make them whole for any reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate all affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

WE WILL, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, or such additional time as the Regional Director may allow for good time shown, file with the Regional Director for Region 20 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful refusals to reinstate or recall economic strikers and WE WILL, within 3 days thereafter, notify the affected employees in writing that this has been done and that our refusals to reinstate or recall them will not be used against them in any way.

TRACY AUTO, L.P. D/B/A TRACY TOYOTA

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32-CA-260614 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.