NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Flex-N-Gate Texas, LLC *and* United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO. Cases 16–CA–027742 and 16–CA–027790

June 27, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HAYES AND BLOCK

On December 28, 2011, Administrative Law Judge Margaret G. Brakebusch issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply 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 record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, as modified, and orders that the Respondent, Flex-N-Gate Texas, LLC, Arlington, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the modified Order.

1. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. June 27, 2012

Mark Gaston Pearce, Chairman

Brian E. Hayes, Member

Sharon Block, Member

(SEAL) 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.

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[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.

In finding that Plant Manager Mike Luckie unlawfully promised to grant employee Raul Castaneda unspecified benefits if Castaneda refused to support the Union, the judge stated that the conversation containing the promise took place before the election. Although Castaneda testified that the conversation occurred after the election, he also testified that Luckie told him that he (Luckie) did not want Castaneda to support the Union, and that if Castaneda had a problem, to come to Luckie and the Respondent would fix it. The conversation's content plainly supports the judge's finding that, contrary to Castaneda's recollection, the conversation took place before the election.

In adopting the judge's finding that the Respondent unlawfully discharged employees Chris Rainey, Alsee Irving III, and Rockey Lloyd, we agree that lower-level managers' knowledge of the employees' union activity can be imputed to General Manager Paul Connolly, the ultimate decisionmaker, who was himself present at the Respondent's Arlington facility at times when this activity took place. Additionally, there is no dispute that Plant Manager Luckie was aware of the employees' union activity, and the record establishes that he had direct input into the decision to discharge the three employees. Indeed, Luckie admitted knowledge of Rainey's and Irving's union activity. With respect to Lloyd, the evidence establishes that Luckie was among a group of supervisors who observed Lloyd wearing a prounion button and that, in the course of a mandatory meeting at which Luckie was present, Lloyd indicated his union sympathies by encouraging a coworker not to respond to a supervisor's question asking why that coworker supported the Union.

We do not, however, rely on the judge's finding that terminating employees to balance staffing numbers is "illogical" or on her suggestion that the Respondent should have given Rainey, Irving, and Lloyd the opportunity to accept demotions rather than be terminated. Further, we do not rely on the judge's broad interpretation of the parties' stipulation concerning the documents the Respondent relied on in deciding to discharge the employees, viz., that the Respondent effectively stipulated that its sole motive was to balance staffing numbers without regard to costs or productivity. Even if more narrowly and literally construed, the stipulation does not affect the outcome of the case.

[2] We shall substitute a new notice to conform to the Board's standard remedial language.

WE WILL NOT interrogate our employees by asking them whether they want an antiunion sticker.

WE WILL NOT interrogate our employees about their union sympathies.

WE WILL NOT promise our employees increased benefits and improved terms and conditions of employment if they refuse to support the Union.

WE WILL NOT threaten our employees that they will be terminated because of their union activities and/or sympathies.

WE WILL NOT discharge or otherwise discriminate against any of you for assisting the Union and engaging in concerted activities.

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 this Order, offer Chris Rainey, Alsee Irving III, and Rockey Lloyd full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they previously enjoyed.

WE WILL make Chris Rainey, Alsee Irving III, and Rockey Lloyd whole for any loss of earnings and other benefits resulting from their discharge, less interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Chris Rainey, Alsee Irving III, and Rockey Lloyd and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

FLEX-N-GATE TEXAS, LLC

Erica Berencsi, Esq., for the General Counsel.
John T. Koenig, Esq., of Atlanta, Georgia, for the Respondent.

DECISION

STATEMENT OF THE CASE

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Fort Worth, Texas, on July 20 and 21, 2011. The charge in Case 16–CA–27742 was filed on November 10, 2010, by the United Automobile, Aerospace and Agricultural Implement Workers of America, AFL–CIO (the Union) and amended on November 22, 2010. The charge in Case 16–CA–27790 was filed by the Union on December 13, 2010.[1] Based on the allegations contained in Cases 16–CA–27742 and 16–CA–27790, the Regional Director for Region 16 of the National Labor Relations Board (the Board) issued an order consolidating cases, consolidated complaint, and notice of hearing on February 28, 2011. The complaint alleges that in September 2010, acting through various named supervisors, Flex-N-Gate Texas, LLC (Respondent) engaged in violations of Section 8(a)(1) of the Act. Specifically, the complaint alleges that Respondent engaged in the following conduct: (1) interrogated employees by asking them whether they wanted an antiunion sticker; (2) interrogated employees about their union activities and/or sympathies; (3) created an impression among employees that their union activities were under surveillance; (4) solicited employee complaints and grievances; (5) promised employees increased benefits and improved terms and conditions of employment if the employees refused to support the Union; and (6) threatened that employees would be terminated because of their union activities and/or sympathies. The complaint further alleges that on November 5, 2010, Respondent terminated Chris Rainey, Rockey Lloyd, and Alsee Irving III because these employees assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, with an office and place of business in Arlington, Texas, has been engaged as an automotive sequencing facility. During the previous calendar year, Respondent, in conducting its business operations, purchased and received at its Arlington, Texas facility goods valued in excess of $50,000 directly from points located outside the State of Texas. Respondent admits, and I find that Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

[1] All dates are in 2010, unless otherwise indicated.

[2] Counsel for the Acting General Counsel filed a motion to correct the official hearing transcript in conjunction with the posthearing brief. Specifically, counsel submits that there are eight errors in the transcript in which incorrect words or series of words have been inadvertently included in the official transcript. Counsel for the Acting General Counsel submits that a copy of the motion was provided to Respondent's counsel and that Respondent's counsel agrees with six of the proposed corrections. Respondent's counsel could not take a position with respect to the remaining two proposed corrections as the disputed wording appears in a witness's affidavit and Respondent's counsel does not have a copy of the affidavit. I have reviewed the transcript with respect to the six proposed changes to which there is agreement by counsel for the Acting General Counsel and counsel for Respondent and I find sufficient basis for the corrections sought by counsel for the Acting General Counsel. With respect to the remaining two proposed corrections that relate to the text from the witness's affidavit, I cannot evaluate counsel's proposed correction. Unlike the other six proposed changes, the alleged errors in the text are not discernable because the existing transcript text does not appear to be incomplete or contradictory to the remaining testimony. Thus, because I cannot verify the proposed changes with the underlying affidavit and because there is no agreement by Respondent, I deny the motion with respect to the proposed changes that correlate to items numbered 5 and 6 in the motion.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

At issue in this case is whether Respondent, acting through various supervisors, engaged in conduct violative of Section 8(a)(1) of the Act. Additionally, at issue is whether Respondent terminated the employment of Christopher Rainey, Alsee Irving III, and Rockey Lloyd less than 6 weeks after the union election in retaliation for their union support and activities. Because Respondent contends that these three individuals are supervisors within the meaning of the Act, a separate determination of their supervisory status is required in determining the lawfulness of their terminations.

B. Background

1. Respondent's operation

As an automotive supplier, Respondent operates manufacturing plants that produce metal and plastic parts and sequencing facilities where parts are assembled for the end customer. Shahid Khan is the owner of approximately 56 facilities that comprise Respondent's operation. The facility at issue in this matter is Respondent's facility in Arlington, Texas; one of Respondent's five sequencing facilities. The Arlington, Texas sequencing plant services General Motors (GM) at its nearby sport utility vehicle (SUV) assembly plant. Respondent assembles front and rear fascias at the Arlington facility and delivers them to GM in the same order or sequence as the SUV's being built at the GM plant. There are approximately 80 employees who work at the Arlington facility and the facility is supervised by Plant Manager Mike Luckie. Many of the component parts that are used to assemble the products in Arlington are manufactured at Respondent's Ada, Oklahoma plant; a facility employing approximately 350 employees. Paul Connolly is Respondent's general manager who oversees Respondent's facilities in both Ada and Arlington.

As plant manager and the highest ranking company officer for the Arlington, Texas facility, Luckie reports directly to Connolly. Mason Fishback is Respondent's operations manager and he supervises Superintendants Margaret Johnson, David Mitchell, and Brian Holland. Rick Schmidt is Respondent's human resources manager for the Arlington facility. Floor Supervisors Mathew Workman and Henry Bates fall below the superintendants in the chain of command. Joe Lee is the IT manager at the Arlington facility. Respondent admits that Luckie, Connolly, Fishback, Johnson, Mitchell, Holland, Workman, Lee, and Bates are supervisors and agents within the meaning of the Act.

2. Employees Chris Rainey, Rocky Lloyd, and Alsee Irving III

Chris Rainey (Rainey) began working at the Arlington facility as a temporary employee in June 2005. The record reflects that employees at the facility are initially hired as temporary employees before later converting to permanent employees. Initially, Rainey's work involved a range of different jobs giving him the opportunity to learn a variety of plant functions. Rainey testified that as a general worker he was expected to learn the overall function of all the jobs in the plant. He testified that while there were jobs that he did not perform, there were no jobs that he had not learned. Approximately 3 months after he began working at the facility, he started working in Respondent's IT department and at the time of his termination on November 5, 2010, Rainey was the IT team leader.

Alsee Irving III (Irving) began working for Respondent in November 2005 and was terminated on November 5, 2010. At the time of his termination, Irving was the front line production team leader. Approximately 13 to 15 employees worked on the front line. Because Irving had previously worked as an absentee replacement, he could perform all the jobs in the building with the exception of the paperwork required for the job in receiving. Irving testified that he was specifically trained to operate the forklift, the cherry picker, and to do all the jobs on both the front lines. He was also trained to work the dock in receiving.

Rockey Lloyd (Lloyd) began working for Respondent in November 2006 and ultimately became a team leader approximately a year after he was hired. Prior to working as a team leader, Lloyd worked as a sequencer. Lloyd explained that a sequencer is the last person who sees the part before it is transferred to General Motors. Lloyd testified that there were no jobs below team leader that he could not do at the plant.

C. Union Organizing Activities at Respondent's Arlington Facility

In late June or early July 2010, Rainey contacted the Union concerning representing the employees at the Arlington facility. On August 11, 2010, the Union filed a petition with the Board seeking to represent Respondent's full-time production and maintenance employees at the Arlington facility. Based upon a stipulated election agreement, an election was held on September 22, 2010. Although the specific results of the election were not made a part of the record, a majority of Respondent's employees did not select the Union as their collective-bargaining representative.

Rainey served on an employee committee that was established to provide information about the Union to other employees. He testified that committee members passed out union flyers, invited employees to union meetings, and solicited employees to sign union authorization cards. Rainey testified that Superintendants David Mitchell (Mitchell) and Brian Holland (Holland) observed him in the parking lot passing out leaflets and talking with employees. Rainey also recalled that he spoke with both Mitchell and Holland about the Union and told them that he had been the employee who initially contacted the Union. Neither Holland nor Mitchell testified or disputed Rainey's testimony.

In addition to attending approximately six to eight union meetings, Rainey also wore union buttons and union shirts. Although other employees also wore union shirts, Rainey and Irving designed personalized union shirts to appear different from those worn by other employees. Rainey received the union shirt approximately a month before the union election and wore it to work every day thereafter. In addition to wearing the personalized union shirt, Rainey also wore approximately 15 to 20 union buttons on his shirt each day. Rainey testified that no other employees wore as many buttons as he wore.

Irving's union shirt was different from that worn by Rainy or by any other employees. His shirt was especially unique because he incorporated Plant Manager Luckie's name into the wording on the shirt. The front of the shirt contained the wording: "WE LUCKIE (TENEMOS SUERTE)." Irving wore the union shirt every day for 2 weeks before the election and for 2 weeks after the election. Connolly was aware that employees were wearing union shirts and that someone was wearing a shirt with Luckie's name on it. Irving testified that in addition to wearing the personalized union shirt, he wore approximately 8 to 12 union buttons every day, talked with employees about the Union, and passed out authorization cards and information about the Union. Irving attended four to five union meetings and also served on the Union's employee organizing committee. Irving recalled that Luckie told him that he was "highly disappointed" in him for voting for the Union.

During the union campaign, Respondent's management staff conducted mandatory employee meetings on Thursdays. During the meetings, Respondent's representatives presented information about the Union. Rainey recalled that with the exception of the first meeting, he spoke out in each meeting. He recalled that he talked about the discrepancies in what employees wanted versus what employees received with respect to wages, vacations, and benefits. Rainy recalled that when Irving spoke up during the meetings, he talked about health care issues. Irving confirmed that approximately a week before the election, the owner of the Company spoke to the employees in one of the mandatory employee meetings. Irving recalled that the last time that he had attended a meeting with the owner was approximately 3 years before when there was another union organizing campaign. Employee Jamy Nickerson testified that Rainey, Irving, and he were the employees who spoke out in the company meetings.

Lloyd testified that approximately 2 weeks before the election he wore a union button to one of Respondent's meetings with employees during the organizing campaign. He recalled that Luckie, Holland, Mason Fishback (Fishback), and Rick Schmidt (Schmidt) were present in the meeting. Lloyd recalled that when he walked into the meeting wearing the button, he observed Schmidt looking at him. After Lloyd sat down, Schmidt walked over to him and asked, "Are you alright?" Even though Lloyd answered that he was alright, Schmidt asked again and continued to look at the union button on the left side of Lloyd's chest. When Schmidt left Lloyd he walked back to where Luckie, Holland, and Fishback were standing. After Schmidt said something to them, they all three looked over at Lloyd.

D. Respondent's Response to the Union's Campaign

In response to the Union's organizing efforts, Respondent distributed a number of leaflets and flyers urging employees to reject the Union's organizing efforts. The materials were passed out by management and also left in the employees' workstations. Mandatory meeting were scheduled with employees on Thursday as well as special meetings that were occasionally scheduled on other days of the week. Respondent also distributed company shirts and stickers with the wording "No means no."

E. Alleged 8(a)(1) Violations

1. Allegations concerning company stickers and paragraphs 7(a), (b), and (c)

Paragraphs 7(a), (b), and (c) allege that in September 2010, Supervisors Workman, Bates, and Lee interrogated employees by asking them whether they wanted an antiunion sticker. Lloyd testified that each day during the campaign, Supervisors Workman and Lee handed out the "No means No" stickers to employees. Even though he declined the stickers, these supervisors repeated their inquiry. He specifically recalled that after he declined Lee's inquiry, Lee continued to ask jokingly if he wanted a sticker. Employee Juan Garcia works on first shift as a forklift driver in the materials department. He testified that Supervisors Workman and Margaret Johnson[3] offered him the company stickers during the campaign. He did not identify how many times they did so or his response when they offered him the stickers.

Employee Jamy Nickerson served on the Union's employee organizing committee with Irving and Rainey. Nickerson testified that a week before the election, a person he identified as Henry asked him if he wanted a "No" sticker approximately once or twice. Although he recalled that the individual handed out the stickers to some other employees, he could not remember their names. Although Nickerson did not identify the individual's last name, he confirmed that the individual was a part of the office personnel or supervision. Respondent admits that Henry Bates is a quality supervisor and Respondent presented no evidence to show that there was a nonsupervisory individual associated with Respondent's office whose name was also "Henry." Respondent contends in the posthearing brief that Nickerson testified in an investigative affidavit that no supervisor ever asked him to wear the sticker. Respondent argues that this affidavit testimony undercuts his testimony at hearing and contradicts the complaint allegation. Inasmuch as Nickerson acknowledged in his hearing testimony that he did not know whether "Henry" was designated as a supervisor or part of the office personnel, I do not find that his testimony is undercut or contradicted by his affidavit testimony.

Luckie testified that when some of the operators who were against the Union inquired about whether they could get buttons to express their views, Respondent denied their request. Luckie asserts that the same employees then asked if, as an alternative to buttons, whether Respondent could create some labels or stickers. In response, Respondent printed out the "No Means No" stickers. When the stickers arrived at the Arlington facility, Luckie made them available to his staff. He testified that he told his managers that they could only distribute the stickers if employees asked for them. He contended that his staff was not trained to go to employees and ask the employees if they wanted the stickers. He also contended that he was not aware of any instance when a manager asked employees if they wanted a sticker. Lee testified that when he received the stickers, Luckie told him that he could give an employee a sticker if

[3] Although Respondent does not dispute the supervisory status of Margaret Johnson (Hoffman), there is no complaint allegation with respect to Johnson's offering the antiunion sticker to employees.

they asked for one. Lee asserted that he never asked an employee if they wanted a sticker.

As neither Bates nor Workman testified at the hearing, the testimony of Nickerson, Garcia, and Lloyd remains unrebutted with respect to the actions of Bates and Workman. Although Lee denied that he ever asked an employee if they wanted a sticker, he also could not recall whether he had spoken with Lloyd about the union despite the fact that he spoke with Lloyd each day. Thus, crediting the unrebutted testimony of Nickerson, Garcia, and Lloyd, and finding an insufficient basis to credit Lee's denial, I find that Respondent's supervisors interrogated employees by asking them whether they wanted an antiunion sticker as alleged in the complaint.

Having found that Respondent engaged in such interrogation, I must nevertheless determine whether such actions violated the Act as alleged. Citing *Tappan Co.*, 254 NLRB 656 (1981), and *Garland Knitting Mills,* 170 NLRB 821 (1968), counsel for the Acting General Counsel asserts that an employer violates 8(a)(1) when its representatives offer employees antiunion paraphernalia and force employees to make an observable choice about whether or not to accept the item. In *Tappan*, a supervisor walked through his department with procompany T-shirts over his arm. He contended that he offered shirts only to employees who asked for them. The Board, however, concluded that the supervisor had engaged in a "form of interrogation" by walking through the department with the shirts. The Board observed that such action "required employees to make an open choice." In its 1968 decision in *Garland Knitting Mills*, the Board found that when supervisors observed which employees accepted or rejected procompany tags offered to them, the conduct in effect forced each employee who was approached to manifest his or her choice and thus violated 8(a)(1) of the Act.

Respondent cites the Board's decisions in *Intermet Stevensville,* 350 NLRB 1349 (2007), and *Jefferson Stores, Inc*., 201 NLRB 672 (1973); contending that supervisors' distribution of campaign literature to employees has not been found to violate the Act. I note, however, that in its decision in *Intermet Stevensville,* the Board specifically distinguished between distributing campaign literature to employees and asking employees to wear antiunion or proemployer paraphernalia. Quoting from its earlier decision in *Barton Nelson, Inc.*, 318 NLRB 712 (1995), the Board stated: "[W]hen supervisors approach individual employees and solicit them to wear antiunion or proemployer paraphernalia, the employees are forced to make an observable choice that demonstrates their support for or rejection of the union." 318 NLRB at 712. The Board concluded in *Intermet Stevensville* that the employer's distribution of campaign literature that was not intended or designed to be displayed by an employee as an expression of union sentiments and required only an acceptance of the offered literature was not unlawful. The cards given to employees in *Jefferson Stores* had no pins with which they could be attached to clothing and thus there was no compulsion for employees to wear them. 201 NLRB at 673.

Respondent also cites the 1974 Board decision in *McDonald's*, 214 NLRB 879, in which the Board affirmed the judge in finding that the employer did not violate the Act when its president pinned an antiunion button on an employee. As the Board later explained in its decision in *DynCorp,* 343 NLRB 1197, 1199 (2004), these circumstances are distinguishable because the supervisor pinned the "vote no" button on the employee's shirt and left without observing the employee's reaction and thus the employee was not forced to choose whether to accept the button presented by the supervisor.

In *Phillips Industries*, 295 NLRB 717, 718 (1989), the employer's distribution of company shirts was not found to be violative as the distribution was only to employees who asked for them and there was no coercion on employees. The circumstances of the current case are further distinguishable from those in *Wm. T. Burnett & Co*., 273 NLRB 1084, 1092–1093 (1984), where a supervisor tossed an antiunion button over on a table utilized by two employees in their work. One of the employees picked up the button and wore it for the remainder of the day. In finding no violation of the Act, the judge noted that the employee could have left the button where it lay without in any way indicating his union inclinations. Furthermore, no other violations were attributed to this supervisor and the judge concluded that the incident was essentially isolated and noncoercive. Respondent also cites the Board's decision in *Schwartz Mfg. Co*., 289 NLRB 874 (1988), where supervisors announced to employees in a meeting that the company had hats and "vote no" buttons for employees. The items were distributed to employees, however, by nonsupervisory employees outside the presence of any supervisory personnel. In finding no violation, the Board specifically noted that there was no evidence to reveal either any direct involvement by the supervisors in the distribution process or any evidence that the supervisors engaged in open surveillance of employees leaving the meeting. Thus, the Board concluded that "the central availability of procompany insignia, in the absence of supervisory involvement in the distribution process or other evidence that management pressured employees into making an observable choice or open acknowledgment concerning their campaign position, did not reasonably tend to interfere with employee rights under the Act."

As the Board stated in *Westwood Health Care Center*, 330 NLRB 935 (2000): "In the final analysis, our 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." In the instant case, the employees approached by Workman, Bates, and Lee had to make an observable choice to support the Union or Respondent and in doing so, they were coerced into relinquishing their Section 7 rights. Accordingly, I find that Respondent unlawfully interrogated its employees by asking them if they wanted an antiunion sticker as alleged in complaint paragraphs 7(a), (b), and (c).

2. Paragraph 7(d)

Paragraph 7(d) of the complaint alleges that on an unspecified date occurring in or about September 2010, Respondent, acting through Fishback, interrogated an employee about the Union's activities and/or sympathies. When Juan Garcia (Garcia) was initially asked if any company representative asked

him about his feelings concerning the Union, he answered "No." When asked specifically if Fishback talked with him about the Union, he responded: "Oh, he asked me one time what I think about the union." He estimated that this remark occurred about 3 weeks before the election. Garcia did not identify what he said in response to the inquiry or how the question came up during their conversation.

Respondent asserts that there is simply no evidence whatsoever of any coercion or other evidence of unlawful interrogation based on this scant testimony. Respondent's argument has merit. The Board's applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the "totality-of-the-circumstances" test adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *Hotel Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board has also determined that in analyzing alleged interrogations under the *Rossmore House* test, it is appropriate to consider what have come to be known as "the Bourne factors," arising from the court of appeals decision in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). In order to apply the analysis, however, there must be some information about the background of the comments, the nature of the information sought, the identity of the questioner, the place and method of the questioning, and the truthfulness of the employee's reply. Id.

Garcia's abbreviated testimony confirms only that his conversation was with supervisor Fishback and the inquiry occurred only one time. There is no information to reflect what was said by either Fishback or Garcia prior to this alleged interrogation or after this alleged interrogation. Garcia does not provide any specificity as to where the conversation occurred. He does not allege that it was behind closed doors or the result of his being called into the office to speak with Fishback. With only this one-sentence inquiry, there is no information as to whether Fishback appeared to be seeking the information as a basis to take action against Garcia. Perhaps most significantly, there is no evidence concerning how Garcia responded to the inquiry. Based on Garcia's initial response denying that any company representative asked him about his feelings concerning the Union, it may be that Garcia did not perceive the comment as a probe into his union sentiments. Although the standard for interference with Section 7 rights is not a subjective one based upon an employee's personal sensitivity, an employee's apparent perception and response is nevertheless a factor in looking at the "totality-of-the-circumstances."

Accordingly, there is insufficient evidence to support a finding that Fishback's comment to Garcia constituted unlawful interrogation and I recommend dismissal of complaint paragraph 7(d).

3. Paragraph 7(e)

Complaint paragraph 7(e) alleges that on an unspecified date occurring on or about August or September 2010, Luckie created an impression among employees that their union activities were under surveillance and he interrogated an employee regarding employees' union activities. Employee Raquel Silva became involved with the Union's organizing campaign in July 2010 when she attended a union meeting at the union hall in Grand Prairie, Texas. She continued to attend union meetings and she ultimately became a member of the employee organizing committee. To show her support for the Union she wore a union shirt and buttons. She recalled that at the end of July or the first of August, she was called into Luckie's office. After she entered the office and after the door was closed, Luckie asked her if it was true that she was pressuring employees on the production floor to sign union cards. Silva told him that was not true. On cross-examination, Silva acknowledged that there is an employee handbook rule that prohibits employees from soliciting other employees during working times and in working areas. Silva further confirmed that when Luckie spoke with her, he was asking her about that solicitation policy.

In his response to this allegation, Luckie testified that he called Silva to his office to talk about complaints that she had pressured employees in the work area during working time. His testimony provided no further information about the remainder of the conversation or about what he specifically asked Silva when she was in the office. He did not disclose whether he told Silva the identity of the employee who had complained. His account of the conversation was as abbreviated as Silva's.

As noted by the Board in its decision in *Flexsteel Industries*, 311 NLRB 257 (1993), the test for determining whether an employer has created an impression of surveillance is whether the employee would reasonably assume from the statement that their union activities had been placed under surveillance. Id at 257. Specifically, an employer creates an impression of surveillance by indicating that it is closely monitoring the degree of an employee's union involvement. Id.

The Board has also found, however, that an employer has not created an impression of surveillance when an employer simply reports to an employee what other employees have volunteered to supervisors and there is no evidence that management solicited that information. *North Hills Office Services*, 346 NLRB 1099, 1104 (2006); *Register Guard,* 344 NLRB 1142, 1144 (2005); *Rock-Tenn Co.*, 315 NLRB 670, 682 fn. 19 (1994), enfd. 69 F.3d 803 (7th Cir. 1995), and overruled on another point by *Chelsea Industries*, 331 NLRB 1648 (2000), enfd. 285 F.3d 1073 (D.C. Cir. 2002). Conversely, an unlawful impression of surveillance is created when an employer reveals specific information about a union activity that is not generally known, and does not reveal its source leaving the employee to conclude that the information was obtained through the employer's monitoring. *Stevens Creek Chrysler Jeep Dodge*, 357 NLRB No. 57 (2011); *Sam's Club*, 342 NLRB 620, 620–621 (2004).

In the instant case, neither Silva nor Luckie provide sufficient information in their testimony to fully explain the discussion that occurred in Luckie's office. Although there is no evidence that Luckie identified the specific employee who reported that Silva had pressured him concerning the Union, the testimony of both individuals reflects that Luckie informed Silva that there was a complaint that she had violated the Company's solicitation policy during her worktime and in the work area. There is no indication that Luckie questioned her otherwise or threatened her with discipline for the solicitation or union activity. Overall, I find that Luckie's statements to Silva indicated that other employees had volunteered information

about her union activities and therefore would not have tended to create an impression of surveillance.

Based on the total evidence, it appears that at the time of the conversation Silva was a known union supporter. She was a member of the employee organizing committee and openly wore union buttons and shirts. As noted above, there is no allegation that there was any threat or promise in conjunction with Luckie's inquiry about the violation of the solicitation policy. Accordingly, inasmuch as Silva was an open and active union supporter and in the absence of threats or promises, I find that the totality-of-the circumstances do not support a finding that Luckie's comments constituted unlawful interrogation. *Rossmore House*, 269 NLRB 1176, 1177 (1984).

Accordingly, I recommend that complaint paragraph 7(e) be dismissed in its entirety.

4. Paragraph 7(f)(i) and (ii)

Complaint paragraph 7(f) alleges that on an unspecified date occurring on or about September 2010, Luckie interrogated an employee about union sympathies, solicited employee complaints and grievances, and promised increased benefits and improved terms and conditions of employment if the employees refused to support the Union. Raul Castaneda works on the line on second shift. Castaneda testified concerning two conversations that he had with Luckie prior to the September 22, 2010 election. Both conversations occurred in Luckie's office with only Castaneda and Luckie present. During one conversation, Castaneda specifically recalled that the door was closed. Castaneda testified that on both occasions, he had gone to the office voluntarily to talk with Luckie about an incident involving the forklift. In describing one of the conversations, Castaneda testified that while he was in the office, Luckie asked him how he felt about the Union. In an affidavit given to the Board during the investigation of the charge, Castaneda also testified concerning a second conversation with Luckie. In the affidavit he testified that while he was in the office, Luckie asked him whether he wanted the Union. He also recalled that Luckie told him that he didn't want Castaneda to support the Union. When Castaneda asked Luckie "what is better," Luckie replied that the employees make decent money at the facility. He added that if Castaneda had a problem, he should come to Luckie and Respondent would fix it.

Although he met with a Board agent in December 2010, to provide information to the Board, Castaneda declined to meet with an agent or counsel for the Acting General Counsel in preparation for the July 2011 hearing. In the affidavit Castaneda had also told the Board agent that when he had been contacted by the Board, he had gone to Luckie to ask what he should do. Luckie helped him to find the website for the Board and how to locate the name of the Board agent. Castaneda also testified that Luckie told him to simply tell the truth to the Board because the employees had been terminated because of the economy and not because they supported the Union. Luckie did not dispute Castaneda's testimony concerning the two conversations.

Respondent contends that it has established that the Company has had an open door policy for many years where employees can talk with Luckie or Connolly if they have any work-related issues. Respondent asserts that the open door policy is set forth in the employee handbook and that Lloyd acknowledged that he was free to talk with Luckie concerning any issues. Respondent contends that there is a long line of Board and court cases that stand for the proposition that an employer may continue that practice during an organizing campaign. Respondent cites the Board's decisions in *Johnson Technology, Inc*., 345 NLRB 762, 764 (2005); *TNT Logistics North America, Inc*., 345 NLRB 290 (2005); *Wal-Mart Stores*, 339 NLRB 1187, 1187 (2003); *Curwood, Inc*., 339 NLRB 1137 (2003), affd. in part, vacated in part 397 F.3d 548 (7th Cir. 2005); *MacDonald Machinery Co*., 335 NLRB 319 (2001), in support of this argument.

Although all of these cases deal with circumstances in which the employer had a past practice of soliciting employee grievances prior to a union organizing campaign, the cases also point out a factor that is distinguished from the circumstances of the instant case. Citing its prior decision in *Wal-Mart Stores*, ibid at 640, the Board affirmed in *Johnson Technology,* ibid at 764, that an employer with a past practice of soliciting employee grievances may continue such a practice during a union's organizing campaign. The Board went on to point out, however, that it is not the solicitation of grievances itself that violates the Act, it is the employer's explicit or implicit promise to remedy the solicited grievances that impresses upon employees the notion that union representation is unnecessary. *Wal-Mart Stores,* ibid at 640. I further note that while the employer had a past practice of soliciting employee complaints in *Curwood*, the Board also found that there was no record evidence to support any theory that the employer implicitly promised to remedy the complaints solicited during the union campaign. *Curwood,* ibid at 1139. In its decision in *MacDonald Machinery Co*, the employer established that it had a practice of listening to employee complaints and responding to the complaints. The Board pointed out, however, that the ultimate question is whether there has been a promise of benefits in order to influence a union campaign and no such promise was found by the Board. *MacDonald Machinery Co.,* ibid at 320.

Castaneda's undisputed testimony reflects that he went to Luckie's office to talk about something other than the Union. Behind closed door, Luckie took the opportunity to inquire about Castaneda's union sentiments. There is no evidence that Castaneda was a known union supporter. In fact, when Luckie asked him how he felt about the Union, Castaneda acknowledged that he had no knowledge about the Union. During the second conversation, Luckie told Castaneda that he did not want him to support the Union. When Castaneda asked Luckie, "what is better," Luckie told him that if he had a problem to come to him and Respondent would fix it.

Thus, based upon the total record evidence, I find that Luckie unlawfully interrogated Castaneda concerning his union sympathies and promised unspecified benefits if he refused to support the Union as alleged in complaint paragraph 7(f)(i) and (iii). Based on Castaneda's testimony, I do not find that Luckie solicited grievances as alleged in complaint paragraph 7(ii). Therefore, I recommend that complaint paragraph 7(f)(ii) be dismissed.

5. Complaint paragraph 7(g)

Complaint paragraph 7(g) alleges that since about August 1, 2010, and ending on or about September 30, 2010, Respondent, by Lee repeatedly threatened that employees would be terminated because of their union activities and/or sympathies. The evidence presented by the Acting General Counsel in support of this allegation relates to alleged threats made in relation to Rainey and Irving. The evidence and my findings concerning this allegation are discussed below in my determination of whether these employees were unlawfully terminated.

F. Terminations of Rainey, Irving, and Lloyd

Employees Rainey, Irving, and Lloyd were all terminated on November 5, 2010. The Acting General Counsel alleges that these employees were terminated because of their activities in support of the Union. Respondent asserts that even before the Union filed its petition. Connolly had already decided that the plant was "too heavy" with team leaders and the discharge of these team leaders was part of Respondent's effort to align the staffing for the Arlington plant with comparable facilities throughout the Company.

In order to determine whether these employees were unlawfully terminated, the Board has established a specific framework for analysis. Under the principles of *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d. 899 (1st. Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved by the United States Supreme Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393, 401–402 (1983), the General Counsel must establish that union activity was a motivating factor in the action taken against these employees. To establish the initial burden under *Wright Line*, the General Counsel must prove that antiunion animus was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. *Oaktree Central Management,LLC*. 353 NLRB 1242, 1246 fn. 7 (2009); *Willamette Industries*, 341 NLRB 560, 562 (2004).

Once the General Counsel has met this burden, the burden shifts to the respondent to establish, by a preponderance of the evidence, that it would have taken the action even in the absence of the employees' union activity. *Wright Line*, 251 NLRB at 1089. See *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). The burden shifts only if the General Counsel establishes that the employees' protected conduct was a "substantial or motivating factor in the employer's decision." *Budrovich Contracting Co*., 331 NLRB 1333 (2000).

1. Respondent's asserted reasons for the discharges

The parties stipulated that Respondent did not rely on financial records, financial comparisons, or analyses of any kind, including but not limited to, records regarding profitability, productivity, wage comparisons, costs to retain temporary employees, or anything similar in making the decision to terminate Lloyd, Irving, and Rainey. Furthermore, both Luckie and Connolly testified that these employees were not terminated because of their job performance or because of disciplinary problems. Respondent asserts in the posthearing brief that the reduction in force of the three team leaders was a part of an ongoing effort to align the staffing at the Arlington plant with comparable facilities throughout the Company.

2. Connolly's interaction with the Arlington plant

Although Connolly is the general manager for both the Arlington, Texas facility and the Ada, Oklahoma facility, he spends the majority of his time at the Ada facility that is approximately a 3-hour drive from Arlington. Both Connolly and Luckie estimate that Connolly normally visits the Arlington facility once or twice a month. Luckie recalled that when he took a vacation during the first part of August 2010, Connolly ran the plant in his absence. Luckie asserted that when he returned from vacation, Connolly told him by telephone that he had noticed the number of employees on the production floor versus the number of team leaders. Connolly recalled that he told Luckie that some changes needed to be made. Luckie testified that Connolly initially discussed his idea of eliminating some of the team leaders in approximately the third week of August. Luckie recalled that the decision to terminate Rainey, Irving, and Lloyd was made approximately a week before their termination on November 5, 2010.

Connolly recalled that he put together a list of all of the team leaders based on their seniority. He selected the three team leaders with the least seniority with the exception of Rainey who was in a different classification than the other team leaders. Connolly confirmed that he only reviewed and compared the manpower charts of nine other facilities in relation to Arlington in his decision to terminate the team leaders.

Both Connolly and Luckie confirmed that during the period of time between their first telephone conversation in August concerning this matter and November 5, 2010, there were no emails, memos, or letters discussing the decision to terminate these three team leaders. Connolly testified that he only discussed his decision to terminate the three team leaders with Luckie. He denied that he sent anything to his superior to notify him of the terminations. Respondent presented no documents or testimony to confirm that Connolly discussed this action with Respondent's human relations department or with any other management officials.

3. The *Wright Line* analysis

As discussed above, the evidence establishes that Rainey, Irving, and Lloyd engaged in activities that were protected by the Act. There is no dispute that all three employees were terminated and suffered adverse employment action. Thus, there is no dispute with respect to these two elements of the *Wright Line* analysis.

a. Respondent's knowledge of the employees' union support

Luckie acknowledged that prior to their terminations, he was aware that Irving and Rainey supported the Union and he had observed the union shirts they wore. Rainey testified without dispute that in a conversation with Supervisors Holland and Mitchell, he disclosed that he had been the employee who had first contacted the Union because he had believed that it would be good for the employees. Rainey continued to demonstrate his support for the Union by wearing his personalized union

shirt to work every day in addition to multiple union buttons. He also testified without contradiction that supervisors observed him distributing union literature and cards to employees in the plant parking lot. Furthermore, Rainey was one of the most outspoken employees in Respondent's mandatory employee meetings during the Union's campaign period.

In addition to speaking favorably about the Union during Respondent's preelection employee meetings, Irving also wore a customized union shirt to work every day for the 2 weeks before the election and for the 2 weeks after the election. Irving's shirt was especially noticeable as the wording incorporated Luckie's name in the shirt's union slogan. Other than Rainey, Irving wore more union buttons on his clothing than any other employees. Irving testified that after the election, Luckie told him that he was "highly disappointed" in him for supporting the Union. When asked about this conversation in his testimony, Luckie responded: "Well, I was disappointed." Luckie went on to testify that as a team leader, he had considered Irving as a wing part of his management. In describing team leaders he added: "When stuff flares up on the floor, they're actually supposed to help calm stuff down, and I felt as [if] he had jumped ship."

Although the record reflects that in comparison to Rainey and Irving, Lloyd was not as active or as well known a union supporter, counsel for the Acting General Counsel asserts that Respondent's supervisors and managers were aware that Lloyd supported the Union. On the one occasion when he wore the union button, he garnered the attention of Schmidt, Holland, Fishback, and Workman. Although none of them said anything to him about his wearing the button, Schmidt walked over to where he was standing and appeared to be looking at the button as he spoke with Lloyd. When he returned to the company of Fishback, Holland, and Workman, all four of the supervisors directed their attention to him. It is reasonable that because he had not been a demonstrative union supporter previously, his wearing the button caught the supervisors' attention. None of these supervisors testified at the hearing. When Lee and Workman offered Lloyd the "No means no" stickers, Lloyd always declined.

Lloyd also testified that during one of Connolly's visits to the plant during the campaign, Connolly approached him and asked him to explain his problems with the situation at the plant. When Lloyd told Connolly about his frustration with nothing resulting from evaluations and recommendations for 4 years, Connolly remarked that it seemed as if the team leaders were having all the problems. Connolly then wrote down Lloyd's comments before leaving to talk with other employees.

b. Conclusions concerning Respondent's knowledge

Counsel for Respondent urges that the Acting General Counsel failed to present any evidence that the sole decision maker; Paul Connolly, had any knowledge that Rainey, Irving, and Lloyd engaged in protected activity. Respondent's counsel goes on to argue that counsel for the Acting General Counsel never asked Connolly if he knew that these three employees were union supporters. Respondent further argues that the issue of Connolly's knowledge was "the elephant in the room" completely ignored by the Acting General Counsel. Furthermore, Respondent asks that I draw an adverse inference from the fact that the Acting General Counsel failed to ask such a "critical question" of this "critical witness" who was called by the counsel for the Acting General Counsel in her case in chief. Despite the fact that Respondent asks that I draw this adverse inference, I also note that Respondent's counsel had the opportunity to explore this denial and yet never asked this same question during his examination of Connolly. Clearly, as the alleged decision maker and the highest level supervisor testifying in this proceeding, Connolly was an adverse witness for counsel for the Acting General Counsel and counsel for the Acting General Counsel had no duty to make such inquiry. Respondent's failure to gain a denial of knowledge from Connolly; a witness distinctly under Respondent's control, however, presents a far more compelling basis to draw an adverse inference.

In an affidavit given to the Board, Connolly also estimated that he knows approximately three-fourths of the Arlington employees. There is no dispute that Connolly has daily telephone contact with Luckie. As evidenced by Lloyd's testimony, Connolly was present at the plant and interacted with employees during the union campaign. With a total of only 80 employees, it is reasonable that Connolly was fully aware of those employees who openly demonstrated their support for the Union. Furthermore, it is not essential that Connolly specifically acknowledged that he was aware of the union activity by Rainey, Irving, and Lloyd. This knowledge is established through Luckie or any of the other admitted supervisors at the facility. It has long been established that knowledge of an employee's protected activities acquired by a lower-level supervisor may be imputed to the higher managerial decision maker. *GATX Logistics, Inc*., 323 NLRB 328, 333 (1997). Accordingly, I find that counsel for the General Counsel has established that Respondent had knowledge of these employees' union activities and support.

c. The motivational link

The motivational link is established by proof of antiunion animus. *Oaktree Capital Management,* 353 NLRB 1242, 1242 (2009). Antiunion animus may be based on direct evidence or may be inferred from circumstantial evidence based on the record as a whole. *Fluor Daniel, Inc*., 304 NLRB 970, 970 (1991). Indirect evidence is often the only way in which motivation can be proven since an employer will rarely, if ever, openly acknowledge that an employee was fired because of an unlawful reason. *Sahara Las Vegas Corp.,* 284 NLRB 337, 347 (1987). An inference of animus has been found to have been appropriately raised by timing, knowledge, and the manner of adverse action implementation. *Sawyer of Napa*, 300 NLRB 131, 150 (1990), citing *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984).

(1) The alleged threat to Rainey and Irving

As Lloyd worked on first shift, he often saw Lee when Lee repaired the computers in his work area. Lloyd testified that Lee sometimes talked with him about how the organizing campaign was progressing on the second shift. Lloyd recalled that Lee remarked about the union shirt worn by Irving. Lee told Lloyd that Irving and Rainey were "taking it too far." Lee also remarked that Irving and Rainey didn't have a long life at Re-

spondent's facility if they kept up all the things that they were doing contending "they're nothing but problems." Lee denied that he ever told anyone in the plant that Irving, Rainey, or Lloyd had a short life at Respondent's facility. This alleged threat is the substance of complaint paragraph 7(g) as referenced above. Overall, I found Lloyd's testimony to be the more credible with respect to this alleged incident. Lloyd's account of the conversation was straightforward without any apparent attempt to embellish or aggrandize the details. Lloyd further acknowledged that even before the Union's campaign, Lee had complained about Rainey. Although Lee may have had a less than amicable relationship with Rainey prior to the union campaign, Lee did not limit his prediction only to Rainey in this conversation with Lloyd. He specifically included Irving as well. The undisputed record evidence reflects that Rainey and Irving went out of their way to show their support for the Union. They were not content with simply wearing the shirts provided by the Union. They went to the trouble to design their own shirts to show their personal feelings about the Union. Because Lloyd was not as active or as vocal in his support for the Union, it is reasonable that Lee would have tried to warn Lloyd of the consequences of such active union support that Rainey and Irving had demonstrated. Accordingly, crediting the testimony of Lloyd, I find merit to complaint allegation 7(g).

(2) How management viewed Rainey and Irving's association with the Union

Approximately 15 to 30 minutes after the votes were counted on September 22, 2010, Rainey and Irving were standing together near the rear production line. Both Rainey and Irving were wearing their union shirts and union buttons. Some of the nearby employees called Rainey's attention to Lee who was leaving the IT office. Rainey testified that he turned around to see Lee laughing and raising his middle finger toward them before he walked out to his car. Irving testified, however, that Lee held up his index finger. Irving also confirmed that when he had given a sworn affidavit to the Board during the investigation, he had stated that Lee "walked by, smiled at us, and threw his hands up in the air." Lee denied that he saw Rainey, Irving, or Lloyd after the votes were counted and he denied giving them the middle finger, jeering, or pointing at them. Both Rainey and Irving testified that they reported the incident with Lee to Luckie. Although Luckie testified that neither Rainey nor Irving had complained about threats made to them, he did not specifically deny that they had complained about Lee's conduct on the day of the election. Luckie testified that although Rainey complained to him about Lee, the complaints were not related to the Union. As evidenced by the discussion above concerning the allegations in complaint paragraph 7(g), it is apparent that Lee engaged in negative comments relating to both Rainey and Irving. Although Lee denies that he saw Rainey and Irving after the election, I credit Rainey's and Irving's testimony that they saw Lee after the election and that he responded by making gestures toward them. I do not, however, credit Rainey's recall that Lee gestured with extending his middle finger. I found Irving's testimony to be more credible in this regard. Despite the fact that Lee may not have expressed the level of hostility that is often associated with the extended middle finger, it is reasonable that his gestures or body language otherwise communicated his negative feelings toward Irving and Rainey in relation to the vote count. Although he was a lower-level supervisor, Lee's actions toward Rainey and Irving after the election clearly evidenced the extent to which Respondent viewed the close association between these two employees and the Union.

(3) Timing as a factor in establishing the motivational link

Timing of an employer's action has long been considered as evidence of unlawful motive. *La Gloria Oil & Gas Co*., 337 NLRB 1120, 1124 (2002); *Howard's Sheet Metal, Inc.,* 333 NLRB 361 (2001). In fact, timing alone may be sufficient to establish that antiunion animus was a motivating factor in a discharge decision. *NLRB v. Windsor Industries*, 730 F.2d 860, 864 (2d Cir. 1984); *Dayton Typographical Service*, 778 F.2d 1188, 1193 (6th Cir. 1985). In the instant case, Luckie testified that the decision to terminate Rainey, Irving, and Lloyd was made approximately a week before their termination on November 5, 2010. Although this alleged decision date occurs approximately 5 weeks after the election, Luckie also admits that Connolly first discussed a plan to eliminate some of the team leaders as early as the third week in August. Crediting Luckie's recall of this initial discussion, I find that Connolly and Luckie began these discussions to get rid of team leaders on or about the time that the Union filed its petition and Rainey began wearing his union shirts. Although Luckie contends that he first discussed the termination of team leaders on or about the third week in August 2010, both Connolly and Luckie admit that there are no memos, emails, letters, or any other written documentation to corroborate the substance or the dates of any of these discussions. Connolly testified that because he was knowledgeable about "regulations" pertaining to the period before the election, no action was taken until after the election. Thus, even though Respondent waited a number of weeks after the election to terminate these employees, the initial decision to eliminate team leaders occurred during the union campaign. Accordingly, the timing of the decision to eliminate these team leader positions is suspect and supports a finding of unlawful motive.

(4) Respondent's proffered reason for the terminations

Respondent contends that the termination of these three team leaders was part of an ongoing effort to align the staffing at the Arlington plant with comparable facilities throughout the Company. In preparation for the hearing, the Acting General Counsel subpoenaed a number of Respondent's financial records. In lieu of the production of those records, Respondent entered into the following stipulation:

> The company did not rely on financial records, financial comparisons, or analyses of any kind, including but not limited to, records regarding profitability, productivity, wage comparisons, costs to retain temporary employees, or anything similar in making the decision to terminate Rockey Lloyd, Alsee Irving III, or Christopher Rainey.
>
> The decision to terminate them did not relate to any economic downturn of the company or the industry. The only docu-

ments that the company asserts that it relied on to make the decision to terminate the aforementioned employees, were manpower comparisons among the plants in the plastics division. See Joint Exhibits 1 and 2.

As reflected in the stipulation, Respondent contends that Connolly relied only on two documents in making the decision to terminate Rainey, Irving, and Lloyd. Those exhibits, identified for the record as Joint Exhibits 1 and 2 consist of two separate documents. The first document includes 8 pages listing various classifications and the number of employees in each classification for nine of Respondent's facilities. This summary of facilities did not include the Arlington facility. The number of salaried employees, direct hourly employees, indirect hourly employees, and total hourly employees are identified for each facility as well as the ratio of indirect/salary employees to hourly employees. The second document that was included in Joint Exhibit 2 was a 1-page summary listing the nine facilities as well as the Arlington facility. The summary showed the number of employees in each facility, the number of IT employees in each facility, the ratio of IT employees to total employees for each facility, and the number of team leaders for each facility. Although these documents were addressed briefly when they were admitted by joint stipulation and briefly during the testimony of Connolly and Luckie, Respondent provided no detailed explanation as to how Connolly utilized these documents to arrive at the decision to terminate these three employees. Connolly simply explained that because "team leaders are much like supervisors," he looked at the number of supervisors that he had in the Ada plant and he looked at the fact that he had 80 employees and 10[4] team leaders at the Arlington plant. Interestingly, the 1-page summary that compared the Arlington facility with the other nine facilities reflects that while the Arlington plant had 12 team leaders, none of the other facilities had any team leaders. Luckie further admitted that he was unaware of any facility listed in Joint Exhibit 2 that performed the same work as the Arlington, facility. Although Luckie asserted that Connolly would be more knowledgeable to know if any of the other plants did similar work, Connolly did not address or rebut Luckie's testimony.

d. Conclusions concerning the discharges

Thus, Respondent asserts that the decision to terminate these employees was made without reliance on financial records or financial comparison or analyses including records regarding profitability, productivity, wage comparison, costs to retain temporary employees or any similar kinds of records. Respondent asserts that its decision to terminate the employees had nothing to do with the economic downturn of the Company or the industry. Furthermore, Respondent admits that the decision to terminate these three employees was not based on their individual work performance or for disciplinary reasons. Respondent asserts simply that it sought to align the staffing at the Arlington plant with comparable facilities. For a number of reasons, I do not find this rationale credible.

[4] Jt. Exh. 2 reflects that there were 12 production team leaders prior to the terminations of Rainey, Irving, and Lloyd.

In its brief, Respondent contends that eliminating the jobs for these three individuals was simply a part of an ongoing process to improve and streamline its production. While Connolly asserted that Respondent constantly reviews staffing levels, there was no evidence presented as to how these ongoing reviews are conducted or when these reviews are conducted. Although Respondent contends that it has previously eliminated management and team leader positions through attrition and consolidation of operations, Respondent failed to show how the terminations of these three individuals fit into a systematic or planned reduction in force. Furthermore, Luckie admitted that other than Rainey, Irving, and Lloyd, Respondent had never previously terminated any team leaders as a reduction in force. Connolly simply asserted that when he filled in at the plant during Luckie's vacation, he realized that there were too many team leaders. Although Connolly contended that he made this decision by comparing the staffing levels at nine other facilities, there were no team leaders in the other facilities and there is no evidence to show that the other facilities did the same work as Arlington. Interestingly, Connolly left in place all of the other team leaders on November 5, 2010, and only eliminated the positions of Rainey, Irving, and Lloyd. Respondent contends that it simply eliminated the least senior team leader on each shift and eliminated the IT team leader because there was an IT manager and some of Respondent's larger operations were staffed with only one IT person. Thus, by using this rationale, Respondent was able to eliminate two of the most outspoken union proponents. While Lloyd was not as active a union supporter as Rainey and Irving, he was also the least senior team leader on his shift. In order to give the appearance of conformity, Irving could not have been terminated unless Lloyd was terminated.

While the record does not reflect the date in which team leaders were first established at the Arlington facility, it is undisputed that Irving became a production team leader in the middle of 2006 and Lloyd became a production team leader in late 2007. Although Respondent contends that it conducted ongoing staffing reviews, it was only after the Union began its 2010 organizing campaign that Connolly scrutinized the number of team leaders at the Arlington facility. During cross-examination, Connolly was asked how he used the staffing summaries to make his decision to terminate the team leaders. He explained that by equating the team leaders to supervisors, he then compared the ratio of employees to supervisors at the Ada plant versus the number of employees to team leaders at the Arlington plant. It is noteworthy that while Connolly alleges that he equated the team leaders with supervisors in formulating the decision to eliminate team leaders, Respondent never took the position that team leaders were supervisors prior to the September 22, 2010 election or before the filing of the underlying unfair labor practices.

Respondent contends that it eliminated Rainey's position because there was an IT manager who could perform all the work and because other larger operations were staffed with just one IT position. In accepting this rationale, a logical conclusion would be that Respondent intended to reduce its IT costs by reducing Rainey's position. Respondent's stipulation, however, totally eliminates such a natural conclusion. By virtue of its

stipulation, Respondent denies that financial considerations, costs, or even productivity had anything to do with eliminating this position. Because Respondent also admits that the decision had nothing to do with job performance or discipline, the number of obvious reasons diminishes. Thus, having removed all the other possible reasons for Respondent's actions, I find it illogical that Respondent's only motivation was to balance out numbers on a staffing chart without consideration for costs or productivity.

It is undisputed that when these employees were told that their jobs were eliminated, they all asked if there was another job to which they could transfer and their request was denied. Luckie testified that he denied these requests because he felt that it would not be good for morale for team leaders to move back into lower-level positions. Respondent also contends that there are no "bumping rights" for employees other than for employees to move from one shift to another. Although the employee handbook section pertaining to the bumping procedure identifies bumping only from shift to shift, the handbook also includes a provision providing for team leaders to bump to another shift with the loss of their team leader status. In the instant case, Rainey, Irving, and Lloyd all testified without dispute that they were capable of performing other jobs in the facility. None of these individuals were given the opportunity to move into any other positions, whether by using "bumping rights" or otherwise.

Although Respondent offers a rationale for its action that might otherwise be legitimate in the absence of an unlawful motive, "there is clearly no obligation on the Board to accept at face value the reason advanced by the employer." *NLRB v. Buitoni Foods Corp*., 298 F.2d 169, 174 (3d Cir. 1962). As the Board further explained in *Buitoni Foods*, "the concurrent existence of an otherwise valid reason for the discharge of an employee does not preclude a factual determination that his discharge was discriminatory if it appears from a preponderance of evidence, and the reasonable inferences drawn therefrom, that the discharge was in fact motivated by the employer's opposition to the employee's union activities." Ibid.

As discussed above, I have determined that Respondent, acting through its supervisors engaged in conduct that violated Section 8(a)(1) of the Act. For the most part, the conduct was that of lower-level supervisors and involving Respondent's distribution of the company stickers. The only individual conduct engaged in by Luckie that was found to be unlawful was interrogation of one employee and a promise of benefits. Although there is no allegation that Luckie or Connolly made any direct threats to these three employees because of their union support and activities, Respondent's animus toward Rainey and Irving was evident through Lee's threat to Lloyd. The most telling evidence of animus, however, is demonstrated by Luckie's statement to Irving. As discussed above, Irving testified without dispute that Luckie told him that he was "highly disappointed" in him for supporting the Union. Luckie did not deny that he made the statement and testified that he was, in fact, disappointed. He explained that he had been disappointed because he felt that Irving, as a team leader, "had jumped ship." While the record does not support that the team leaders were supervisors, it is nevertheless clear that prior to the union campaign, Respondent viewed the team leaders as employees who were aligned with management. Luckie, in fact, described the team leaders as the "wing part" of his management. When Lloyd spoke with Connolly during the campaign and explained his concerns with management, Connolly remarked that it seemed that it was the team leaders who were having the problems. Rainey testified without dispute that he had boldly told supervision that he was the employee who had initially contacted the Union. Thus, it is reasonable that Respondent had reason to want to eliminate the team leaders who had so clearly abandoned their loyalty to the Company.

As discussed above, motivation is the pivotal element in determining whether Respondent unlawfully discharged these three employees. Respondent asserts that it terminated these individuals as a means of streamlining its production process and aligning its staffing at the Arlington facility with comparable facilities throughout the company. Although Respondent's asserted rationale provides an otherwise legitimate basis for its actions, it is apparent from the overall record that Respondent's asserted reasons for the discharges are pretextual—that is, either false or were not in fact relied upon. Accordingly, having found that the asserted rationale is pretextual, I may appropriately infer that there is another motive for Respondent's actions; an unlawful one that Respondent seeks to conceal. *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 229 (D.C. Cir. 1995); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1996). Based on the total record evidence, it is apparent that the Acting General Counsel has met the *Wright Line* burden in demonstrating that these employees' union activity and support was a substantial or motivating reason for their terminations.

The Board has long held that if the evidence establishes that the reasons given for a respondent's actions are pretextual, the respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and therefore there is no need to perform the second part of the *Wright Line* analysis. *Golden State Foods Corp*., 340 NLRB 382, 385 (2003); *Limestone Apparel Corp*., 255 NLRB 722 (1981). Furthermore, even without a finding of pretext, Respondent has not demonstrated that it would have eliminated these jobs in the absence of the employees' union activity. Accordingly, I find that Respondent violated Section 8(a)(3) and (1) of the Act by terminating Rainey, Irving, and Lloyd on November 5, 2010.

G. Whether Rainey, Irving, and Lloyd were Supervisors

The term "supervisor" is defined in Section 2(11) of the Act as:

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

Respondent argues that Rainey, Irving, and Lloyd were all three supervisors and thus had no protection under the Act.

Respondent relies upon a number of criteria in its assertion. These criteria and the evidence relating to such criteria are discussed below.

1. How management viewed the team leaders

Relying on the testimony of Luckie, Respondent asserts that it considers the team leaders to be part of its management team and includes them in management meetings. Albeit self-serving, this testimony is further contradicted by the fact that all three of these employees voted without challenge in the September 2010 election. Furthermore, on August 19, 2010, Respondent entered into a Stipulated Election Agreement designating the appropriate bargaining unit as all full-time production and maintenance employees. There was no exclusion for team leaders. In the posthearing brief Respondent contends that the outcome of the election was "lopsided in favor of the Company" and thus there was no need for Respondent to contest their supervisory status in posthearing challenges. A failure to file objections, however, does not address the issue of why Respondent did not raise the issue of supervisory status at the time of the election and made no effort to challenge their voting eligibility. The most plausible reason is that Respondent has not previously considered these employees to be supervisors and raises the issue now only to remove them from the protection of the Act. The undisputed testimony of Lloyd also reflects that while team leaders were previously allowed to participate in meetings with management, this practice changed during the campaign period and team leaders were excluded from some of the scheduled management meetings.

Respondent's power point presentation to employees during the campaign included a comparison of wages at the Arlington facility to five of the Respondent's unionized facilities. Respondent also showed the starting wage at the Arlington facility as compared to the wages paid to the facility's five employee classifications. Although team leaders received more pay than the other four classifications, they were, nevertheless, included in this comparison chart with other nonsupervisory employees.

2. Team leaders' authority for hiring, firing, and disciplining employees

Luckie testified that he seeks input from the team leaders in making decisions on who to hire and who to fire. He did not identify any specific circumstances when he has done so. Luckie admitted, however, that team leaders cannot hire, fire, or discipline employees. He also acknowledged that if an employee is not performing his job on the line, the team leader reports the matter to his supervisor. Lloyd testified that while he could recommend that someone is hired it "would not happen." Irving was asked if he had ever had occasion to recommend that Respondent hire a temporary employee. He testified, "A lot of folks recommend it, but like the supervisor there told us, 'You can recommend what you want to recommend, but it's my choice if I hire them or not.'"

Luckie testified that team leaders have been present or "sat in" on disciplinary meetings. He did not however, explain what role they played in doing so, how frequently this may have occurred, or the specific circumstance when this has occurred. The only evidence that Respondent offered to show that a team leader was involved in any discipline of another employee was a 2006 handwritten statement prepared by Irving. In the statement, Irving documents that he was told by two of the operators that the line was moving slowly. He then observed Rainey talking with one of the employees on the line. Irving documented that he waited for about 10 minutes for Rainey to leave the line. When Rainey did not do so, Irving reported to a supervisor that Rainey had stopped the line. A few minutes later, Irving heard Rainey's phone ring and Rainey left the area. When Rainey returned, he confronted Irving and asked if he told the supervisor that he (Rainey) had stopped the line. When Irving confirmed that he had, Rainey began cursing him and threatened that he would in return "snitch" on Irving. The document does not reflect that Irving did anything other than report that Rainey was interfering with the line. There is no evidence that he recommended any discipline for Rainey. Based on his account, he did not approach Rainey to warn Rainey to stop or even to ask Rainey to stop what he was doing. In fact, he waited a full 10 minutes before reporting Rainey to the supervisor. Based on his cursing and his threat to get even, Rainey apparently did not view Irving as a supervisor. The incident occurred in August 2006 and prior to the time that Rainey became a team leader.

3. Team leader assignments and accountability

Respondent asserts that team leaders are held accountable for directing the work and the production of their team. When asked if team leaders assign people what to do, Luckie replied, "Sure. They help out with where manpower goes." Luckie testified that team leaders have made job assignments and have had some involvement with where temporaries work on the line. Respondent provided no documentary evidence or testimony from Luckie or any other supervisor to demonstrate specific circumstances when team leaders have assigned work to either permanent or temporary employees. Irving testified, without dispute, that he could tell the people on his line what work they had to do but he could not assign them where to go. He asserted that only supervision could make the decision where employees were assigned to work. Furthermore, it is apparent that the team leaders receive their team's assignment at the beginning of the shift and they simply relate the production requirements to the employees on the line. There is no evidence that they use discretion in assigning specific tasks to individual employees. Although Luckie testified that team leaders are held accountable for hitting targets, he provided no specific examples. He asserted that team leaders have been disciplined for their team making a mistake. The only document that Respondent offered in support of this assertion is a written verbal warning that was issued to Irving in March 2009. It is apparent, however, that this kind of discipline involved an isolated incident and that such discipline was not routinely given to team leaders. Irving became a team leader in mid-2006 and continued in this classification until his termination on November 5, 2010. Thus, based on the records submitted by Respondent, this discipline was the only such discipline issued to Irving in a 4-year period. No similar discipline to other team leaders was submitted into evidence.

Luckie explained that Respondent's facility is a "just-in-time plant" with only 2 hours of product between it and its customer;

GM. Luckie contends that it is important that the team leaders keep the lines running. Occasionally, there is a special order or "hotshot" from GM that gives Respondent only 30 minutes to get the product to GM. Luckie asserts that the team leaders are responsible for making sure the hotshots are completed. The process for dealing with a hotshot begins when the supervisor gives the hotshot order to the team leader. Lloyd explained that because the order puller also has a radio and is informed of the order, the order puller immediately begins to pull the order. Once the order is pulled, the part moves to the front of the production line. Lloyd testified that when he worked on the line before becoming a team leader, he understood that when there was a "hotshot" he knew that the employees had to stop what they were doing and get the hotshot to GM within a matter of minutes. With respect to the normal production procedure, the supervisors throughout the course of the shift give the team leaders the part numbers that are to be produced. Although the team leaders who testified agreed that their job was to keep the line running efficiently, there is no evidence that the team leaders had discretion to alter the production orders received from their supervisors.

4. Whether team leaders "run" the plant in the absence of supervision

There were four team leaders who worked on second shift. Irving testified that there were occasions when his supervisor on shift second left the building to go to GM. In the supervisor's absence, Irving and the other three team leaders "ran" the building. Two of the team leaders had company cell phones and two did not. Irving recalled that if he needed anything in his supervisor's absence, he asked one of the team leaders with a cell phone to contact the supervisor to request the supervisor's assistance. Luckie also testified that if the line went down in the supervisor's absence, the team leaders notified the supervisor even though it was the team leader's responsibility to get the line back up and running.

5. Conclusions concerning the team leaders' supervisory status

Although Respondent argues that all three of the employees are team leaders, Rainey was in a very different work situation in comparison to Irving and Lloyd. Rainey's job description provides that the IT technician is to report directly to the IT Manager. According to the job description, the technician's general rules require the technician to exhibit team work skills and actively participate in team activities, demonstrate problem-solving skills, follow company policy, and follow safety rules. With respect to specific job duties, the description sets out the required knowledge and skills required for maintaining and operating the IT function. There are no supervisory functions listed in the job description.

Respondent asserts that its computer software allows it to communicate with GM and to account for what parts will be built in what order. Respondent contends that if the software system broke down, Rainey, as the IT team leader, was solely responsible for making sure that the situation was rectified. Respondent further contends that if he were not there to fix computer issues, the plant would shut down and could not produce parts. Respondent further contends that because Rainey was the only IT employee on the second shift, he used judgment in prioritizing tasks to complete his job. As the only IT employee on the shift, it is reasonable that he needed to use his skills and training to maintain and repair the computer system and that such duties would of necessity require his using some judgment and discretion. Such judgment and discretion, however, was utilized in performing the work to which he personally was assigned. As there were no other IT employees on his shift, his use of discretion or judgment related to his work only and not to work performed by any other employee. Simply put, an employee cannot exercise supervisory authority in a vacuum. Thus, there is no evidence that Rainey possessed or exercised supervisory authority as defined by the Act.

As evidenced by the wage comparisons presented to the employees during the union campaign, it is evidence that production team leaders are the highest paid hourly employees. They do not, however, hire, fire, or discipline employees. There is no evidence that they effectively recommend such actions. Their primary responsibility in the production and maintenance area is to keep the production lines running and to respond to special orders or other production needs determined by their supervisors. It is apparent that they make routine decisions that are a part of the production process as opposed to exercising independent judgment that affects the terms and conditions of work for other employees. While they communicate the orders and the work to be done on their line for the shift they lead, they do not assign employees where they will work and they exercise no discretion in determining the product to be produced by the line.

Although Rainey may have been the highest ranking IT employee on his shift and Irving and Lloyd may have occasionally been the highest ranking employee in the building during a supervisor's absence, the Act does not imply that employees having such responsibility are necessarily supervisors. *Northcrest Nursing Home*, 313 NLRB 491, 499 (1993). Even if the team leaders were at times working in the absence of admitted supervisors, such circumstances does not establish them to be supervisors when admitted supervisors are available for consultation. *NLRB v. KDFW-TV, Inc*., 790 F.2d 1273, 1278 (5th Cir. 1986).

Accordingly, the total record evidence does not support a finding that Rainey, Lloyd, or Irving assigned and responsibly directed employees and/or exercised independent judgment as supervisors within the meaning of Section 2(11) of the Act. *Oakwood Healthcare, Inc*., 348 NLRB 686, 689–693 (2006). As they were not supervisors, they had the full protection of the Act.

CONCLUSIONS OF LAW

1. Respondent, Flex-N-Gate Texas, LLC, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By interrogating employees and by asking them whether they wanted an antiunion sticker, Respondent violated Section 8(a)(1) of the Act.

3. By interrogating employees about their union sympathies, Respondent violated Section 8(a)(1) of the Act.

4. By promising employees increased benefits and improved terms and conditions of employment if the employees refused to support the Union, Respondent violated Section 8(a)(1) of the Act.

5. By threatening its employees that they would be terminated because of their union activities and/or sympathies, Respondent violated Section 8(a)(1) of the Act.

6. By terminating Chris Rainey, Alsee Irving III, and Rockey Lloyd because they assisted the Union and engaged in concerted activities, Respondent violated Section 8(a)(3) and (1) of the Act.

7. The Respondent has not violated the Act in any other manner.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the Act.

The Respondent having discriminatorily discharged Chris Rainey, Alsee Irving III, and Rockey Lloyd, it must offer them reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without loss of seniority or other rights or privileges. Additionally, Respondent must make whole Chris Rainey, Alsee Irving III, and Rockey Lloyd for any loss of earnings and other benefits, computed on a quarterly basis from the date of their discharge to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest compounded daily, *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011), as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Flex-N-Gate Texas, LLC, Arlington, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees by asking them whether they want an antiunion sticker.

(b) Interrogating employees regarding their union sympathies.

(c) Promising employees increased benefits and improved terms and conditions of employment if they refuse to support the Union.

(d) Threatening employees that they will be terminated because of their union activities and/or sympathies.

(e) Discharging or otherwise discriminating against any employee because they assisted the Union and engaged in concerted activities.

(f) 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 the Board's Order, offer Chris Rainey, Alsee Irving III, and Rockey Lloyd full reinstatement to their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Chris Rainey, Alsee Irving III, and Rockey Lloyd whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them as specified in the remedy portion of this decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Chris Rainey, Alsee Irving III, and Rockey Lloyd and within 3 days thereafter, notify them in writing that this has been done and that their discharges will not be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its Arlington, Texas facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in the 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 September 1, 2010. 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.

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

[5] 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.

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

Dated, Washington, D.C., December 28, 2011.

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 interrogate our employees by asking them whether they want an antiunion sticker.

WE WILL NOT interrogate our employees about their union sympathies.

WE WILL NOT promise our employees increased benefits and improved terms and conditions of employment if they refuse to support the Union.

WE WILL NOT threaten our employees that they will be terminated because of their union activities and/or sympathies.

WE WILL NOT discharge or otherwise discriminate against any of you for assisting the Union and engaging in concerted activities.

WE WILL, within 14 days from the date of this Order, offer Chris Rainey, Alsee Irving III, and Rockey Lloyd full reinstatement to their former jobs or, if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges they previously enjoyed.

WE WILL makes Chris Rainey, Alsee Irving III, and Rockey Lloyd whole for any loss of earnings and other benefits resulting from their discharge, less interim earnings, plus interest compounded daily.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Chris Rainey, Alsee Irving III, and Rockey Lloyd, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

FLEX-N-GATE TEXAS, LLC