Nos. 08-0479, 09-1012, 09-2307, 09-2484

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ROCHELLE WASTE DISPOSAL, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO

Intervenor

ON PETITIONS FOR REVIEW AND CROSS-APPLICATIONS FOR ENFORCEMENT OF TWO ORDERS OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The jurisdictional statement of Rochelle Waste Disposal, LLC ("the Company") is not complete and correct. These consolidated cases are before the

Court on the petitions of Rochelle Waste Disposal, LLC ("the Company") to review and set aside, and on the cross-applications of the National Labor Relations Board ("the Board") to enforce, two Board orders issued against the Company. In the Board Decision and Order that issued on October 20, 2008, and is reported at 353 NLRB No. 38 (Board Case No. 33-CA-15298) (A 4-14), the Board found that the Company unlawfully discharged Jeff Jarvis. In the Board Decision and Order that issued on April 30, 2009, and is reported at 354 NLRB No. 18 (Board Case No. 33-CA-15765) (A 1-3), the Board found that the Company unlawfully refused to recognize and to bargain with the Union as the certified bargaining representative of a unit of its employees.[1] The Board's Orders are final orders with respect to all parties.[2]

The Board had jurisdiction over the proceedings under Section 10(a) of the National Labor Relations Act, as amended ("the Act"). 29 U.S.C. §§ 151, 160(a).

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[1] "A" refers to the appendix filed by the Company. "TrR" and "TrU" refer, respectively, to the transcripts of the hearings in the underlying representation proceeding that found that Jarvis was not a supervisor, and the unfair labor practice proceeding that found that Jarvis was unlawfully discharged. "GCX" refers to exhibits introduced at the unfair labor practice hearing by the General Counsel. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] The Board's Orders were issued by a properly constituted, two-member quorum within the meaning of Section 3(b) of the Act (29 U.S.C. § 153 (b)). *See New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert granted*, No. 08-1457 (Nov. 2, 2009).

This Court has jurisdiction over the Company's petitions for review and the Board's cross-applications for enforcement pursuant to Section 10(e) and (f) of the Act because the unfair labor practices at issue occurred in Illinois. (29 U.S.C. § 160(e) and (f).) The Company's petitions for review and the Board's cross-applications for enforcement were timely filed, as the Act imposes no time limit for such filings. On June 15, 2009, the Court consolidated both of the cases. International Union of Operating Engineers, Local 150, AFL-CIO ("the Union"), has intervened on the Board's behalf.

The Board's unfair labor practice order, finding that the Company unlawfully refused to recognize and bargain with the Union, is based, in part, on findings made in an underlying representation proceeding (Board Case No. 33-RC-5002). Therefore, pursuant to Section 9(d) of the Act, the record before the Court includes the record in that proceeding. 29 U.S.C. § 159(d); *see also Boire v. Greyhound Corp.*, 376 U.S. 473, 476-79 (1964). Section 9(d) authorizes judicial review of the Board's actions in the representation proceeding for the limited purpose of deciding whether to "enforc[e], modify[], or set[] aside in whole or in part the [unfair labor practice] order of the Board . . . ," but does not give the Court general authority over the representation proceeding. 29 U.S.C. § 159(d). The Board retains authority under Section 9(c) of the Act to resume processing the representation case in a manner consistent with the ruling of the Court in the unfair

labor practice case. 29 U.S.C. § 159(c); *see, e.g.*, *Freund Baking Co.*, 330 NLRB 17, 17 and n.3 (1999); *Medina County Publ'ns*, 274 NLRB 873, 873 (1985).

STATEMENT OF THE ISSUES PRESENTED

1. Whether substantial evidence supports the Board's finding that Jeff Jarvis was properly included in the bargaining unit because he was not a supervisor, as defined by Section 2(11) of the Act.

2. Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(3), (4), and (1) of the Act by discharging Jeff Jarvis because he engaged in activity on behalf of the Union and because he testified at a Board representation hearing.

If the Court upholds both the Board's finding that Jarvis was not a supervisor and the Board's finding that Jarvis' preelection discharge was unlawful, then there is no dispute that, as the Board ordered, Jarvis' ballot should have been opened and counted, the Union should have been certified as the employees' exclusive bargaining representative, and Company's refusal to bargain with the Union constituted an unfair labor practice.

STATEMENT OF THE CASES

Consolidated for this Court's review are the Board orders resulting from the following two proceedings:

A. The Company's Discharge of Jarvis

Following an unfair labor practice charge filed by the Union and a complaint filed by the General Counsel, a Board administrative law judge conducted a hearing and found the Company had violated Section 8(a)(3), (4) and (1) of the Act (29 U.S.C. § 158(a)(3), (4), and (1)) by discharging Jarvis. (A 5-14; A 28-31.) The Company filed exceptions to the administrative law judge's decision and recommended order. The Board issued its Decision and Order affirming the judge's rulings, findings and conclusions. (A 4-14.)

B. The Company's Refusal to Bargain

Following an unfair labor practice charge filed by the Union and a complaint filed by the General Counsel, the Board (A 1-3) found that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union as the certified collective-bargaining representative of an appropriate unit of employees at its Illinois landfill.[3] The Company (Br 4) admits that it refused to bargain, but contends the Board's certification of the Union should be found invalid because Jarvis' determinative ballot should not have been opened, either because the Board erred in including Jarvis' position in the

[3] The bargaining unit includes "[a]ll full-time and regular part-time heavy equipment operators including the scale operator and the landfill supervisor . . . ." (A 2.)

bargaining unit or because the Board erred in finding Jarvis' preelection discharge unlawful.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company's Operations

Since 1995, the Company has provided waste disposal services at Rochelle Municipal No. 2 Landfill, a landfill owned by the City of Rochelle, Illinois. The Company is co-owned by Clyde Gelderloos and Winnebago Reclamation Service, an entity owned by William Charles Waste Companies. Gelderloos also owns Rochelle Disposal Services, a waste hauling company that is one of the customers that provides waste to the landfill. (A 6, 7; TrU 18, 254**,** 267-68, 284-85, GCX 1(h) par. 2, 4, 1(l) par. 2, 4.) At the relevant times, the Company had five permanent employees and two temporary employees at the landfill. The five permanent employees (Tracy Spires, Joe Nelson, Matt Cater, Mike Grubic, and Jeff Jarvis) operated various landfill equipment, including the scale, tipper, bulldozer, loader, scraper, and compactor. (A 6, 7, 65; TrU 19-21, 49-51, 88-89, 93-94, 105, 117-18, 120, 268, 284-85.)

Jarvis worked as a truck driver for Rochelle Disposal Services from August 1992 until December 1993, and he began working for the Company at the landfill on January 27, 2004. Jarvis primarily operated the bulldozer, but he also operated all of

the other equipment at the landfill, and performed maintenance. (A 7; TrU 49-51, 75.) The Company classified Jarvis as a "Landfill Supervisor." He and Gelderloos were both certified landfill operators, certified by the Illinois Environmental Protection Agency. Regulations required the Company to have one certified operator on site or available at all times. Gelderloos typically came to the landfill twice a day for a total of about 1 hour. (A 7, 9; TrU 40-41, 50-51, 64-65, 97, 288.)

B. Jarvis Engages in Union Activity and Testifies at a Board Representation Hearing in Which the Board Determined that Jarvis Was Not a Statutory Supervisor

In August of 2006, Jarvis, Cater, and Grubic contacted the Union and signed authorization cards. (A 9; TrU 52.) On August 18, the Union filed a representation petition to represent the Company's scale and heavy equipment operators. (A 6; GCX 1(a).) Thereafter, at a preelection representation hearing, the Company challenged the proposed unit on, as relevant here, the grounds that Jarvis' "landfill supervisor" position was supervisory, as defined by Section 2(11) of the Act (29 U.S.C. §152(11)), and, accordingly, that he was ineligible for inclusion in the bargaining unit. (A 63-64.) At a representation hearing in the presence of company officials, including Clyde Gelderloos, three prounion employees—Jarvis, Cater, and Grubic—sat together immediately behind the union organizer and the attorney representing the Union. Jarvis testified regarding his duties and responsibilities. (A 6, 9; TrU 52-55, 91-93, 119-20.)

On September 28, the Regional Director issued a Decision and Direction of Election in which he found that Jarvis' "landfill supervisor" position was not supervisory, and he included that position in the unit and directed a secret-ballot election. (A 63-84.) The next day, the Board issued decisions in three cases, including *Oakwood Healthcare Inc*., 348 NLRB 686 (2006) ("*Oakwood*"), in which the Board reexamined its test for determining supervisory status in light of the Supreme Court's decision in *NLRB v. Kentucky River Community Care, Inc*., 532 U.S. 706 (2001). Specifically, the Board in *Oakwood* addressed the meaning of the terms "assign," "responsibly to direct," and "independent judgment" used in Section 2(11) of the Act.

Thereafter, the Company filed a request for review of the Regional Director's decision and asserted that, since the Regional Director's decision was issued without benefit of the Board's new *Oakwood* decision, "his decision regarding the term[] 'responsib[ly] to direct' . . . depart[ed] from Board precedent." (October 12, 2006, Request For Review pp. 3-4.) In response, the Regional Director interceded and issued an order advising that he was treating the request for review as a motion for reconsideration. The Regional Director then vacated the original decision as it pertained to the supervisory status of Jarvis and reopened the representation hearing for the sole issue of reexamining Jarvis' supervisory status under the Act. (A 6, 34.)

C. Jarvis Testifies at the Second Board Representation Hearing, After Which the Regional Director Again Determined that Jarvis Was Not a Statutory Supervisor

At the second representation hearing, Jarvis, again in the presence of company officials, testified regarding his duties and responsibilities. (A 6, 9; TrU 52-55, 91-93, 119-20.) The Regional Director then issued a Supplemental Decision and Direction of Election in which he reaffirmed his prior determination that Jarvis was not a statutory supervisor and again directed a secret-ballot election, which was subsequently scheduled for February 1, 2007. (A 6, 33-61.) Thereafter, the Company filed a request for review with the Board. (January 3, 2007, Request for Review.) The Company's request for review did not take issue with the principles the Board had set forth in *Oakwood* as to what constitutes the authority "responsibly to direct." (Request for Review pp. 7-8, 13-14.) Rather, the Company asserted that the Regional Director's supplemental decision "depart[ed] from Board precedent" because it "incorrectly appli[ed] the Board's refined definition for 'responsib[ly] to direct.'" (Request for Review p. 7.)

D. The Company Discharges Jarvis 1 Week Before the Election

On January 16, 2007, Co-Owner Clyde Gelderloos introduced Evan Buskohl to the unit employees as the landfill's "operations manager." (A 9; TrU 68-69, 99, 128-29.) Jarvis commented to Buskohl, "I guess I'm not the supervisor anymore." (A 9; TrU 322-23.) Buskohl responded, "Well, you indicated that you weren't."

(A 9; TrU 323.) Prior to January 16, Buskohl was the Environmental Compliance Manager for the Company's partner, the William Charles Waste Companies. Over the course of the prior year, Buskohl, in his position as Compliance Manager, had been on site at the landfill an average of 2 days per week. On a monthly basis, Buskohl had been at the landfill anywhere from a couple of days to the entire month. (A 8, 9; TrU 180-81, 254, 314-15, TrR 308-09, 323.)

On Monday, January 22, Buskohl had each employee evaluate himself on a scale of 1 to 10 regarding his competence in operating the various pieces of equipment. (A 7, 10; TrU 71, 133-34, 320-21, GCX 11-15.) In mid-afternoon on January 24, Buskohl called Cater into a meeting with Clyde Gelderloos, and Clyde's son, Chad. Buskohl told Cater that the landfill was overstaffed and offered him a position with Rochelle Disposal Services, the hauling company. Cater declined the offer. (A 9, 10; TrU 134-37.)

Later that day, Buskohl and Chad Gelderloos met with Jarvis. Buskohl informed Jarvis that the landfill was overstaffed and that he had to terminate someone. Buskohl explained that he had evaluated the workforce, and "that someone was going to be [you, Jarvis]." Jarvis asked why. Buskohl repeated that he had "evaluated the workforce" and that Jarvis was the one "he had chosen." (A 10; TrU 56, 73-74.) A letter to Jarvis, dated January 25 and signed by Buskohl as

the Company's "Operations Supervisor," states that Jarvis was terminated due to "a necessary permanent reduction in force." (A 10, 11; GCX 16.)

E. The Election Tally is a Tie, with Jarvis' Challenged Ballot Determinative; After Jarvis' Ballot Is Opened and the Union Is Certified, the Company Refuses To Bargain with the Union

On January 31, the Board (Members Liebman and Kirsanow, Member Schaumber dissenting), issued an Order denying the Company's Request for Review of the Regional Director's Supplemental Decision and Direction of Election. (A 32.) At the February 1 election, Jarvis voted subject to the Company's challenge. (A 6.) The election resulted in two votes for the Union and two against, making Jarvis' challenged ballot determinative. (A 6; Tally of Ballots.)

A hearing was then held on the lawfulness of Jarvis' discharge (Case No. 33-CA-15298) and the challenge to his ballot (Case No. 33-RC-5002). On June 27, 2008, the administrative law judge issued a decision finding that Jarvis' discharge was unlawful, and recommending that his ballot be opened and counted. (A 5-14.) After Jarvis' ballot was opened and counted, the revised tally of ballots showed a majority of the valid ballots cast for the Union. (Revised Tally of Ballots.) The Board's Regional Director then certified the Union as the exclusive collective-bargaining representative of the designated unit. (A 2; Certification.)

After certification, the Company refused the Union's request to recognize and bargain with the Union. (A 2.) The General Counsel then issued a complaint (Board Case No. 33-CA-15765), based on a charge filed by the Union, alleging that the Company's refusal to bargain violated Section 8(a)(5) and (1) of the Act. (A 1; Complaint.) The Company's answer admitted its refusal to bargain, but claimed that the unit was not appropriate because it included Jarvis' position. (A 1; Answer.)

Thereafter, the General Counsel filed a motion for summary judgment, and the Board issued an order transferring the proceeding to the Board and a notice to show cause why the motion should not be granted. (A 1; Motion for Summary Judgment.) The Company filed a response, admitting its refusal to bargain, but contesting the validity of the Union's certification based on its contention in the underlying representation proceeding that Jarvis was a statutory supervisor. (A 1; Company Response.) Specifically, the Company asserted that "[t]he evidence showed Jarvis was a supervisor under the analytical framework previously announced by the Board in *Oakwood Healthcare*." (Company Response p. 8.)

II. THE BOARD'S CONCLUSIONS AND ORDERS

A. The Company's Unlawful Discharge of Jarvis

On October 20, 2008, the Board (Chairman Schaumber and Member Liebman), in agreement with the administrative law judge, found that the Company

violated Section 8(a)(3), (4), and (1) of the Act by discharging Jarvis because he supported the Union and provided testimony in a Board proceeding. (A 4-5.)

The Board's Order requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with the rights guaranteed by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Board's Order requires the Company to offer Jarvis reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges, and to make him whole for any loss of earnings or other benefits.[4] The Order also requires the Company to remove from its files any reference to Jarvis' unlawful discharge, and to post copies of a remedial notice. (A 4-5.)

B. The Company's Unlawful Refusal To Recognize and Bargain with the Union

On April 30, 2009, the Board (Chairman Liebman and Member Schaumber) issued its Decision and Order, granting the General Counsel's motion for summary judgment. The Board found that "[a]ll representation issues raised by [the Company] were or could have been litigated in the prior representation proceeding." (A 1.) The Board also found that the Company did "not offer to

[4] Subsequent to the issuance of the Board's Order, the parties entered into a settlement that satisfies the Order's backpay and reinstatement obligations; the Board is not asking for court enforcement of these two specific obligations.

adduce at the hearing any newly discovered and previously unavailable evidence, nor [did] it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceedings." (A 1.) Accordingly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union.

The Board's Order requires the Company to cease and desist from the unfair labor practice found and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act (29 U.S.C. § 157). (A 2.) Affirmatively, the Order directs the Company to bargain with the Union upon request, to embody any understanding reached in a signed agreement, and to post an appropriate remedial notice to employees. (A 2.)

SUMMARY OF ARGUMENT

When the Union sought to represent the Company's employees at a landfill in Rochelle, Illinois, the Company tried first to exclude Jeff Jarvis' position as "landfill supervisor" from the bargaining unit as a statutory supervisor. After those efforts proved unsuccessful, the Company had a dilemma because it knew that three of the five bargaining unit employees, including Jarvis, supported the Union in the upcoming election. The Company attempted to resolve its problem by discharging Jarvis shortly before the election. Ultimately, however, the Board found that Jarvis, who had voted subject to challenge, was unlawfully discharged,

and it directed the opening of his determinative ballot. Accordingly, if Jarvis was not a statutory supervisor, and therefore part of the bargaining unit and eligible to vote, and if Jarvis was unlawfully discharged, then the Company also acted unlawfully by refusing to recognize and bargain with the Union.

Here, the Company has offered no evidentiary argument that Jarvis performed duties that would make him a statutory supervisor. Instead, the Company raises an argument that it never raised to the Board—namely, that the Board erred as a matter of law by applying the standard it set forth in *Oakwood Healthcare*, 348 NLRB 686 (2006), as to when an employee "responsibly directs" other employees. By failing to raise that argument to the Board, the Company is precluded from now raising it before this Court.

As to Jarvis' discharge, the evidence also amply supports the Board's finding that it was unlawful. Indeed, the Company's knowledge of Jarvis' union activity and testimony adverse to the Company's position at the Board's representation hearings, along with the timing and context of Jarvis' discharge, provides ample evidence that the discharge was unlawfully motivated. Turning to the Company's affirmative defenses, substantial evidence supports the Board's findings that the Company failed to show that it would have discharged Jarvis absent his protected activity. To the contrary, the Company's emphasis on his culpability for lack of proper cover as the reason for Jarvis' discharge is fatally

undermined by the Company's failure to provide that reason to Jarvis at the time and its failure to contemporaneously investigate the incident, and by its admitted efforts to eliminate the need for getting rid of Jarvis by offering to transfer known union supporter Cater. And any effort by the Company to return to the contemporaneous explanation for Jarvis' discharge, overstaffing, is undermined by the Company's current reliance on a different reason, as well as by evidence that Jarvis' discharge did not actually reduce staffing.

In sum, given that Jarvis was not a statutory supervisor and that he was unlawfully discharged, his determinative vote was properly counted, the Union was properly certified as the employees' bargaining representative, and the Company's refusal to bargain was also an unfair labor practice.

STANDARD OF REVIEW

In reviewing the Board's decisions, the Court gives substantial deference to the Board's findings of fact. The Board's factual determinations must be upheld if they are supported by substantial evidence on the record as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)). *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951); *FedEx Freight East, Inc. v. NLRB*, 431 F.3d 1019, 1024 (7th Cir. 2005). "Substantial evidence in this context means such relevant evidence that a reasonable mind might accept as adequate to support the conclusions of the Board. The presence of contradicting evidence is not of consequence as long as

substantial evidence supports the Board's decision." *L.S.F. Transp., Inc. v. NLRB*, 282 F.3d 972, 980 (7th Cir. 2002). *Accord Ryder Truck Rental v. NLRB*, 401 F.3d 815, 825 (7th Cir. 2005). In sum, the Court will not "interfere with the Board's choice between two permissible views of the evidence, even though [it] may have decided the matter differently had the case been before [it] *de novo*." *L.S.F. Transp.*, 282 F.3d at 980. *See generally, Universal Camera*, 340 U.S. at 477, 488. In addition, in the unfair labor practice proceeding regarding Jarvis' discharge, the Court gives particular deference to the Board's credibility findings, which cannot be disturbed absent "extraordinary circumstances." *FedEx Freight*, 431 F.3d at 1024.

ARGUMENT

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees . . . ."[5] The Company does not contest (Br 4) that it refused to bargain with the Union. Rather, the Company contends that Jarvis was a statutory supervisor who should not have been included in the bargaining unit and that, therefore, without his vote, the Union would not have prevailed in the election.

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[5] A violation of Section 8(a)(1) of the Act, which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the[ir statutory] rights . . . ," is "derivative" of a violation of Section 8(a)(5) of the Act. *See G. Heileman Brewing Co. v. NLRB*, 879 F.2d 1526, 1533 (7th Cir. 1989); *NLRB v. Centra, Inc.*, 954 F.2d 366, 367 n.1 (6th Cir. 1992).

Though not specifically asserted, the Company implicitly also argues that Jarvis' discharge prior to the election also made him ineligible to vote. Therefore, if the Board reasonably found that the Company failed to carry its burden of establishing that Jarvis was a statutory supervisor, and if substantial evidence supports the Board's finding that Jarvis' discharge was unlawful, then the Company's refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act. *See NLRB v. Erie Brush & Mfg. Corp*., 406 F.3d 795, 800 (7th Cir. 2005); *Winkie Mfg. Co. v. NLRB*, 348 F.3d 254, 257 (7th Cir. 2003).

I. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT JEFF JARVIS WAS PROPERLY INCLUDED IN THE BARGAINING UNIT BECAUSE HE WAS NOT A SUPERVISOR, AS DEFINED BY SECTION 2(11) OF THE ACT.

A. The Company Has Not Preserved, for Court Review, Its Challenge to the Board's Standard for Determining Supervisory Status

On this issue, the sole contention in the Company's brief (Br 25-32) is that the Board erred as a matter of law by applying the standard it set forth in *Oakwood Healthcare*, 348 NLRB 686 (2006), as to when an employee "responsibly directs" other employees. Before the Board, however, the Company failed to challenge this standard as an impermissible interpretation of the Act. To the contrary, in the representation proceeding, after the Regional Director applied *Oakwood* to reaffirm his finding that Jarvis was not a supervisor, the Company's request for review asserted only that the Regional Director's decision "depart[ed] from Board

precedent" because it "incorrectly appli[ed] the Board's refined definition for 'responsib[ly] to direct . . . .'" (January 3, 2007, Request for Review p. 7.) Likewise, in the unfair labor practice proceeding alleging that the Company had unlawfully refused to recognize and bargain with the Union, the Company did not challenge the *Oakwood* standard, but only its application to the facts. As the Company asserted in its opposition to the General Counsel's motion for summary judgment, "[t]he evidence showed Jarvis was a supervisor *under the analytical framework previously announced by the Board in Oakwood Healthcare*." (Company Response p. 8 (emphasis added).)

Having failed to raise to the Board any challenge to the legal correctness of the Board's standard for determining whether an alleged supervisor "responsibly directs" other employees, the Company is now precluded from raising this issue before this Court. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 666 (1980); *The Edward S. Quirk Co., Inc. v. NLRB*, 241 F.3d 41, 43-44 (1st Cir. 2001); *NLRB v. Howard Immel, Inc.*, 102 F.3d 948, 951 (7th Cir. 1996). As the *Quirk* decision shows, and the Supreme Court has noted, the rule is not different even where an agency has a "predetermined policy on [the] subject which would have required it to overrule the objection if made." *U.S. v. L.A. Tucker Truck*

Lines, Inc., 344 U.S. 33, 37 (1952), cited in *The Edward S. Quirk Co., Inc. v. NLRB*, 241 F.3d 41, 43-44.[6]

B. The Company Has Offered No Argument to this Court that Jarvis Exercised Any of the Enumerated Powers that Denote Supervisory Authority

Section 2(3) of the Act (29 U.S.C. § 152(3)) excludes from the definition of the term "employee" "any individual employed as a supervisor." Section 2(11) of the Act (29 U.S.C. § 152(11)) defines a "supervisor" 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 or clerical nature, but requires the use of independent judgment.

In accordance with this definition, the Board and the courts consider individuals to be statutory supervisors "if (1) they have the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer.'" *NLRB*

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[6] Even if the Company had raised such a challenge to the Board for the first time in the refusal-to-bargain unfair labor practice proceeding, it would have been untimely, absent extraordinary circumstances, for not having been raised to the Board in the earlier representation proceeding. *See NLRB v. Affiliated Midwest Hosp., Inc.*, 789 F.2d 524, 533 (7th Cir. 1986); *NLRB v. Speedway Petroleum Division of Emro Marketing Co.*, 768 F.2d 151, 159 (7th Cir. 1985); *Prairie Tank Southern, Inc. v. NLRB*, 710 F.2d 1262, 1265 (7th Cir. 1983).

v. Kentucky River Community Care, Inc., 532 U.S. 706, 712-13 (2001) (citation omitted). *Accord NLRB v. GranCare, Inc.*, 170 F.3d 662, 665 (7th Cir. 1999); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006).

The burden of proving an individual's supervisory status rests with the party asserting it. *Kentucky River*, 532 U.S. at 711-12; *NLRB v. Joy Recovery Tech. Corp.*, 134 F.3d 1307, 1313 (7th Cir. 1998). Accordingly, in this case, the Company had the burden of proving that Jarvis was a supervisor under the Act. Moreover, this Court applies a deferential standard of review to the Board's supervisory-status findings. *GranCare, Inc.*, 170 F.3d at 666. "As the issue is primarily one of fact, the Board's determination regarding the supervisory status of an employee will not be overturned as long as substantial evidence exists to support the Board's finding." *NLRB v. Adam & Eve Cosmetics*, 567 F.2d 723, 726-27 (7th Cir. 1977). *Accord Joy Recovery Tech. Corp.*, 134 F.3d at 1313.

Before this Court, the Company no longer contends that substantial evidence does not support the Regional Director's finding, as upheld by the Board, that Jarvis was not a supervisor. As shown, the Company's brief disputes Jarvis' supervisory status only with respect to one enumerated power, responsible

direction.[7] And there, the Company only challenges the Board's finding that Jarvis did not responsibly direct employees on a ground not before the Court: that *Oakwood* was incorrectly decided and legally deficient. The Company makes no alternative factual argument to this Court that if the Board properly applied *Oakwood*, then it erred in finding that the Company did not carry its evidentiary burden of showing that Jarvis responsibly directed employees.[8] Accordingly the Board's application of *Oakwood* to the facts stands unrebutted, and the Company has waived any challenge to that finding by failing to contest it in its opening brief. *Harper v. Vigilant, Ins. Co.*, 433 F.3d 521, 528 (7th Cir. 2005).

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[7] Before the Regional Director in the representation proceeding, the Company also contended that Jarvis assigned and disciplined employees, and hired and fired temporary employees. The Regional Director found that the Company failed to carry its burden on any of those grounds. (A 33-62.) Any reference made by the Company to those alleged responsibilities in the fact section of its brief is insufficient to preserve a challenge on those grounds before this Court. *See Ajayi v. Aramark Business Services, Inc.*, 336 F.3d 520, 529 (7th Cir. 2003).

[8] Although the Company (Br 33-35) suggests that Jarvis exercised independent judgment when directing employees, that claim is only relevant if the Company had first met its burden of showing that Jarvis responsibly directed employees.

C. Though Not Before the Court, the Board Reasonably Found that the Company Failed To Show that Jarvis Responsibly Directed Employees or that, Even if He Did, He Did So Using Independent Judgment

1. Applicable principles

In enacting Section 2(11), Congress sought to distinguish between truly supervisory personnel, who are vested with "'genuine management prerogatives,'" and employees—such as "'straw bosses, leadmen, and set-up men, and other minor supervisory employees'"—who enjoy the Act's protections even though they perform "'minor supervisory duties.'" *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (1974) (quoting Sen. Rep. No. 105, 80th Cong., 1st Sess. 4 (1947)). *Accord NLRB v. Joy Recovery Tech. Corp.*, 134 F.3d 1307, 1313 (7th Cir. 1998). Indeed, "[m]any nominally supervisory functions may be performed without the 'exercis[e of] such a degree of . . . judgment or discretion . . . as would warrant a finding' of supervisory status under the Act." *Kentucky River*, 532 U.S. at 713 (quoting *Weyerhaeuser Timber Co.*, 85 NLRB 1170, 1173 (1949)).

In *Oakwood*, and its two companion cases, *Croft Metals, Inc*., 348 NLRB 717 (2006), and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006), the Board exercised its acknowledged discretion to clarify the term "responsible direction." The Board in *Oakwood* found, in agreement with several circuits that had examined the term "responsible direction," including this Court in *NLRB v. Adam & Eve Cosmetics, Inc*., 567 F.2d 723, 728 (7th Cir. 1977)), that for

"direction to be 'responsible,' the person directing and performing the oversight of the employee must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks performed by the employee are not performed properly." 348 NLRB at 691-92, 700 n.33. "Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps." *Id.* at 692.

Similarly in *Oakwood*, the Board clarified that "to exercise 'independent judgment,' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Oakwood*, 348 NLRB at 693. "[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." *Id.* at 693. Rather, the judgment must involve "a degree of discretion that rises above the 'routine or clerical.'" *Id.* (citations omitted).

2. Substantial evidence supports the Board's findings that Jarvis did not responsibly direct employees or that, even if he did, he did so using independent judgment

The Board found no clear evidence that Jarvis had employees "under him," or that he had "oversight" authority. To the contrary, the Board found that some oversight was provided by Co-Owner Gelderloos and by the professional engineers such as Hilbert and Buskohl, who visited the landfill. (A 45; TrR 10, 43, 70, 73, 115-16, 226, 308-10, 320-23.) The Board further found that Jarvis spent much of the day operating equipment and servicing equipment, and that while he was performing those tasks there was "little evidence" that he "oversees" the work of other employees. (A 45; TrR 124, 132, 134-35, 230, 248, 405-07.) The Board also found that the record failed to show that Jarvis directed the work of the scale operator. (A 45; TrR 327-33.)

Though the Board found that Jarvis gave some direction to the equipment operators regarding the tasks that they should perform for the engineers, such direction was sporadic, with no evidence that Jarvis could compel such work or that he considered any factors other than availability. (A 46; TrR 311-15, 318-19, 405.) Finally, the Board did find that Jarvis gave direction to equipment operators on the "packing, placement, and cover of the garbage," and that he was "also involved in deciding where to move the tipper, which was generally moved one

tipper length at a time." (A 45; TrR 41-42, 230-32, 298, 339, 343-45, 439-41, 444-45.)

Accordingly, on these facts, the Board (A 46-47) "[a]ssum[ed]" arguendo that Jarvis had the authority to oversee and direct the work of the landfill employees. The Board reasonably found, however, that the Company had failed to show that such direction was responsible under the principles set forth in *Oakwood*. The Board found little evidence presented by the Company that Jarvis corrected the work performance or even monitored the work of other employees. (A 46-47; TrR 211, 352-56, 397-400.) Nor did the Company show that Jarvis was held accountable. Instead, Co-Owner Gelderloos specifically denied in the initial representation hearing that he had held, or would hold, Jarvis accountable. (A 48; TrR 79, 82-83.) Moreover, although Gelderloos asserted otherwise during the second hearing (A 48; TrR 347-49, 354-55, 357), even that latter testimony was, as the Board found (A 48), "conclusionary testimony, lacking in specific details," and therefore insufficient to establish that Jarvis was held responsible for the performance of other employees. *See Rockspring Development, Inc.*, 353 NLRB No. 105, slip op. p.2 (2009), 2009 WL 514092 *2; *Oakwood*, 348 NLRB at 695; *Golden Crest*, 348 NLRB at 730-31.

The Board (A 48) also reasonably found that accountability was not established by the Illinois EPA regulations, which state that the holder of the

license of the type held by Jarvis is "responsible for directing" the landfill operations or "supervising" the operational staff. The Company put in no evidence showing what was meant by "directing" or "supervising" under the state's EPA regulations or that those terms have the same meaning as they have under the Act, which is controlling here. Section 2(11) of the Act, not the Illinois EPA (a state authority whose concern is environmental regulation, not labor-management relations), determines which workers are statutory supervisors. Plainly, the "criteria for 'supervisor' established by a State do not necessarily satisfy the criteria of Section 2(11)." *See NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403 (1947); *Howard Johnson Co.*, 174 NLRB 1217, 1222 (1969).

Moreover, the Board noted (A 48-49) that it is well settled that "paper accountability" alone is not sufficient to establish supervisory authority. *See Golden Crest*, 348 NLRB at 731. Here, as the Board explained (A 49), the Company "failed to present specific evidence of the circumstances under which the EPA would hold [Jarvis as a] landfill supervisor accountable for the performance of other employees." And assuming that the Illinois EPA imposed accountability, the Company also failed to show why that accountability would not be imposed instead on either Co-Owner Gelderloos or the Company's engineer, who also held EPA licenses.

Because the Board found (A 51) that the Company had not meet its burden of establishing that Jarvis responsibly directed other employees, there was no reason for the Board to have reached the issue of whether Jarvis exercised independent judgment in directing employees. Nevertheless, the Board also reasonably found (A 51) that, even if the Company had established that Jarvis responsibly directed employees, Jarvis did not exercise independent judgment in doing so because the evidence showed that Jarvis' judgment was constrained in several respects.

For example, Co-Owner Gelderloos provided general guidelines as well as specific instructions on how to perform certain tasks, and he was available either in person or by phone. (A 52; TrR 10, 71, 73, 115, 129-31, 175-76, 211-12, 229-30, 423-24.) Such factors undermine a claim that Jarvis exercised independent judgment. *See Oakwood,* 348 NLRB at 693; *Golden Crest,* 348 NLRB at 730 n.10. In addition, the maintenance work performed by Jarvis and the other employees was regulated by the service manuals that Gelderloos had instructed them to strictly adhere to. (A 52; TrR 206-10, 424-25.)

Similarly, the Board found (A 52) that the tasks performed were highly regulated, repetitive, and well known to employees. Thus, the Board found that the landfill is highly regulated by the Illinois EPA. (A 52; TrR 33, 39-41, 79-81, 211-12.) In addition, the Board found evidence (A 52; TrR 20-21, 39, 169-70, 189-90,

197-98, 231-33, 239-41, 248, 254, 327, 331-33, 434-39) that the employees were well trained and experienced, and knew what needed to be done and needed little direction. For example, as the Board noted (A 52; TrR 169) "[t]he scale operator admitted that her job was routine, took her 3 days to learn, and that she has performed the same tasks for the past 7 years." In the context of such regulated, repetitive tasks, that are known to employees, the Board reasonably concluded (A 52) that Jarvis did not exercise independent judgment. *See Oakwood*, 348 NLRB at 693; *Golden Crest*, 348 NLRB at 721-22.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3), (4), AND (1) OF THE ACT BY DISCHARGING JEFF JARVIS BECAUSE OF HIS SUPPORT FOR THE UNION AND HIS TESTIMONY IN A BOARD PROCEEDING

A. Applicable Principles

Section 8(a)(3) of the Act (29 U.S.C. § 158(a)(3)) makes it an unfair labor practice for an employer to discriminate "in regard to . . . tenure of employment or any term or condition of employment to . . . discourage membership in any labor organization." Accordingly, an employer violates Section 8(a)(3) and (1) of the Act by discharging an employee for engaging in activities in support of union

representation. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400-03 (1983); *FedEx Freight East, Inc. v. NLRB*, 431 F.3d at 1025.[9]

Section 8(a)(4) of the Act (29 U.S.C. § 158(a)(4)) makes it an unfair labor practice for an employer to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony under th[e] Act." An employer violates Section 8(a)(4) and (1) of the Act by retaliating against an employee for providing testimony at a Board proceeding. *See Ryder Truck Rental v. NLRB*, 401 F.3d 815, 818 (7th Cir. 2005); *NLRB v. O'Hare-Midway Limousine Service*, 924 F.2d 692, 697 and n.4 (7th Cir. 1991).

The critical inquiry in this case is whether the employer's actions were motivated by either its antiunion animus or its animus toward the employee's participation in the Board's proceedings. *NLRB v. Bestway Trucking, Inc.*, 22 F.3d 177, 180 (7th Cir. 1994). The General Counsel has the burden of persuasion to show that either one of these statutorily protected activities was a substantial or "motivating factor" in an employer's adverse employment action, and not, as the Company contends (Br 37) the "main reason." *Id.* Once the General Counsel

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[9] A Section 8(a)(3) or 8(a)(4) violation produces a "derivative" violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983). Section 8(a)(1) prohibits employers from interfering with, restraining, or coercing employees in the exercise of their statutory rights.

satisfies that burden, the Board will find a violation of the Act, unless the employer demonstrates, as an affirmative defense, that the employer would have taken the same action absent the employee's protected conduct. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400-03 (1983), *approving Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981). *Accord Ryder Truck Rental v. NLRB*, 401 F.3d at 825.

Because an employer rarely admits unlawful discrimination, "an employer's 'motivation is a question of fact to be determined by the Board from consideration of all the evidence and in making this determination the Board is free to rely on circumstantial, as well as direct evidence.'" *NLRB v. So-White Freight Lines, Inc.*, 969 F.2d 401, 408 (7th Cir. 1992) (citation omitted). Questions of motive are usually resolved by inferences drawn from the record as a whole. *See NLRB v. O'Hare-Midway Limousine Service, Inc*., 924 F.2d 692, 695-96 (7th Cir. 1991); *NLRB v. Jakel Motors, Inc.*, 875 F.2d 644, 646 (7th Cir. 1989). Circumstantial evidence supporting an inference of unlawful motive may include the employer's knowledge of the employee's protected activity combined with manifestations of

animus toward that protected activity, suspicious timing,[10] and the presentation of implausible or shifting explanations for the adverse action.[11]

"[T]he Board's conclusion that an employer acted with a discriminatory motive is conclusive if supported by substantial evidence." *U.S. Marine Corp. v. NLRB*, 944 F.2d 1305, 1315 (7th Cir. 1991). Further, the Board is under no obligation to accept at face value an employer's asserted explanation "if there is a reasonable basis for believing it 'furnished the excuse rather than the reason for [its] retaliatory action.'" *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1077 (7th Cir. 1981) (citation omitted).

B. The Company Discharged Jarvis for His Union Activity and for Testifying at a Board Hearing

Ample evidence supports the Board's finding (A 10) that the Company's discharge of Jarvis was motivated by its animus toward his union activity and by its animus toward his testimony before the Board that was adverse to the Company's position. Factors supporting the Board's inference of unlawful motivation include the Company's knowledge of, and animus toward, Jarvis' union

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[10] *See Jet Star, Inc. v. NLRB*, 209 F.3d 671, 676-77 (7th Cir. 2000); *NLRB v. Shelby Memorial Hosp. Ass'n*, 1 F.3d 550, 562 (7th Cir. 1993); *Central Trans., Inc. v. NLRB*, 997 F.2d 1180, 1191 (7th Cir. 1993).

[11] *See NLRB v. Shelby Memorial Hosp. Ass'n*, 1 F.3d 550, 562 (7th Cir. 1993); *NLRB v. Henry Colder Co., Inc.*, 907 F.2d 765, 769 (7th Cir. 1990); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984).

activity and testimony in the Board proceedings, and the timing and context of the discharge.

The Company concedes (Br 37, 45) knowledge of Jarvis' support for the Union. That support began in August of 2006 when Jarvis contacted the Union and signed an authorization card. Thereafter, Company Co-Owner Clyde Gelderloos learned of Jarvis' support for the Union when he twice observed Jarvis with the Union's representative and its attorney at the representation hearing. The Company also listened to Jarvis' testimony at that hearing. As Gelderloos acknowledged (TrU 41), Jarvis did not give testimony that supported the Company's position that Jarvis was a supervisor.[12]

Moreover, the timing and context of Jarvis' discharge provide additional evidence of unlawful motivation. The Company discharged Jarvis on January 24, 2007, just 8 days before the representation election. In addition, the discharge occurred in a unit that contained only five employees, in which the Company (Br 45) admittedly knew, not only that Jarvis supported the Union, but that two other operators also supported the Union. Therefore, as the Board explained (A 10-11),

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[12] In addressing Jarvis' discharge, the argument portion of the Company's brief never addresses or refutes the Board's conclusion that the Company's discharge was unlawfully motivated under Section 8(a)(4) of the Act. We also note that Section 8(a)(4) protects the actions of both employees and supervisors. *NLRB v. Delta Gas, Inc*., 840 F.2d 309, 311 (5th Cir. 1988).

the removal of known union-adherent Jarvis decreased the Union's ability to gain a majority in the upcoming election, and provided evidence of discriminatory motive. *See Hapsco, Inc*., 196 NLRB 936, 939 (1972) (in a unit of only three employees, the employer unlawfully removed a union supporter the day after an election petition was filed); *Super Tire Stores*, 236 NLRB 877, 883 (1978) (in a unit of only two employees, the employer unlawfully transferred an employee 10 days before the election). *See generally NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984) ("Timing alone may suggest anti-union animus as a motivating factor in an employer's action.")

C. The Board Reasonably Found that the Company Did Not Show that It Would Have Discharged Jarvis Absent Either His Union Activity or His Testimony at Board Proceedings

The Company claims in its brief (Br 37-38) that the Board was only able to draw the inference that Jarvis' discharge was unlawfully motivated because the Board "ignore[d] substantial evidence concerning the seriousness of the January 13 cover violation and Jarvis' direct responsibility for it." In this vein, the Company emphasizes throughout its brief (Br 23-24, 38-39, 42-44, 48) that the reason for Jarvis' discharge was his culpability for the lack of a proper cover on the dumpsite on January 13. But an examination of the record does not support the Company's claim that this was the reason for Jarvis' discharge.

If Jarvis had been discharged because of perceived culpability for the lack of a proper cover on the dumpsite on January 13, then the Company should have relied on that reason at the time. *See NLRB v. Waco Insulation, Inc.*, 567 F.2d 596, 601 (4th Cir. 1977) ("[w]e believe that it is extremely unlikely that the reason for [an employee's] discharge was due to the [proffered reason] since it was not articulated as a reason for his discharge at the time he was fired"). *Accord NLRB v. Hotel Employees & Restaurant Employees Int'l Union, Local 26, AFL-CIO*, 446 F.3d 200, 208 (1st Cir. 2006); *Great Chinese American Sewing Co. v. NLRB*, 578 F.2d 251, 255 (9th Cir. 1978). The Company's failure to tell Jarvis either that he was being blamed for the January 13 cover violation or that this was the reason for his discharge undermines the Company's current reliance on that reason.

Indeed, the Board found (A 11) that the Company failed even to investigate responsibility for the January 13 incident prior to Jarvis' discharge. The Company does not dispute this. It is well established that an employer's failure to investigate the incident that allegedly was the real reason for the employee's discharge further undermines the employer's attempt to rely on that incident as the basis for the discharge. *See Gossen Co., a Div. of Gypsum Co. v. NLRB*, 719 F.2d 1354, 1359 (7th Cir. 1983); *W.W. Grainger, Inc. v. NLRB*, 582 F. 2d 1118, 1121 (7th Cir. 1978). Moreover, the Company's failure to investigate is even more telling, given

that substantial evidence supports the Board's finding (A 7, 8, 10, 11; TrU 125-26) that employee Grubic was directly at fault that day for not placing adequate cover.

At the time of Jarvis' discharge, not only did the Company not claim any misbehavior by Jarvis, but the Company asserted an altogether different reason for the discharge, telling Jarvis that it was overstaffed and needed to implement a reduction-in-force. The Company's shifting reasons are strong evidence of an unlawful motive. *See Abbey's Transportation Services, Inc. v. NLRB*, 837 F.2d 575, 581 (2d Cir. 1988) ("Such shifting assertions strengthen the inference that the true reason [for the discharge] was for union activity."). *Accord NLRB v. Rain-Ware, Inc*., 732 F.2d 1349, 1354 (7th Cir. 1984).

Moreover, two additional points expose deep flaws in the Company's original claim of overstaffing. First, any overstaffing problem was created by the Company itself 17 days before the election when it brought Buskohl to the landfill. Then, in an effort to get rid of one of three crucial pro-union votes in the upcoming election, Buskohl first offered to transfer Cater out of the unit. The Company admittedly knew (Br 45) Cater supported the Union. As the Board noted, "if Cater had taken the position, the [Company] would have removed a union supporter from the unit and achieved the objective of remaining union free." (A 12.) When Cater declined, Buskohl selected Jarvis, telling Jarvis nothing about the cover violation,

but instead telling him his removal was the product of a needed reduction-in-force.[13]

Second, getting rid of Jarvis did not even solve the Company's self-created overstaffing problem. As the Company admits in its brief, when "Jarvis was off, only Gelderloos could take his place because none of the other employees held a landfill operator's certificate." (Br 16). So, in selecting Jarvis for discharge, the Company had to add Gelderloos to the landfill on a full-time basis to take his place. Moreover, even adding Gelderloos was not enough to get Jarvis' job done. When Jarvis left, as the Board found (A 10, 11; TrU 318-19), the Company assigned Jarvis' operation of the loader and tipper to a temporary employee. Even then, as the Board also found (A 10, 11; TrU 106), all of Jarvis' maintenance duties were not getting done.

Therefore, the Company's choice of Jarvis to accomplish the purported reduction-in-force had the opposite effect—it actually increased the Company's workforce. Before Jarvis' departure, Buskohl had not worked full time at the workplace; Gelderloos had not worked full time at the workplace; there was no temporary employee doing Jarvis' tipper and loader duties; and there was no

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[13] The Company's insistence at the hearing (TrU 326-28) and in its brief (Br 47)—that just hours before Jarvis' discharge it was looking for a way to keep all three union supporters—further undermines its current claim that Jarvis engaged in egregious conduct on January 13 that justified his discharge.

undone maintenance work. Yet the Company's choosing Jarvis for a reduction-in-force changed all of that. Accordingly, it is no surprise that the Company has essentially abandoned overstaffing as the reason for Jarvis' discharge—the reason given Jarvis at the time—and turned to the reason, discredited above, that Jarvis was discharged because he was culpable for the cover violation.

In these circumstances, the Board was fully warranted in finding that the January 13 cover violation was a mere "serendipitous occurrence" (A 12) that was "immaterial" to Jarvis' discharge (A 8). Indeed the Board had ample reason to find that the Company discharged Jarvis because he supported the Union and because he testified contrary to the Company's interests before the Board.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment enforcing the Board's Orders in full (with the exception noted at p. 13 note 4, above) and denying the Company's cross-petitions for review.

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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	)	
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	)	09-2307, 09-2484
	)	
v.	)	Board Case No.
	)	33-CA-15298
NATIONAL LABOR RELATIONS BOARD	)	
	)	
Respondent/Cross-Petitioner	)	
	)	
and	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO	)	
	)	
Intervenor		

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 8,800 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 24th day of November, 2009

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	)	
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	)	
and	)	
	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO	)	
	)	
Intervenor	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's final brief in the above-captioned case, has served two copies of the brief by first-class mail upon the following counsel at the addresses listed below:

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