No. 13-1103

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GESTAMP SOUTH CAROLINA, LLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Recess Appointments Clause of the Constitution provides that "[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Art. II, § 2, Cl. 3. The question presented is whether the President's recess-appointment power may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between sessions of the Senate.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the National Labor Relations Board, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-5a) is not published in the *Federal Reporter* but is available at 2013 WL 5630054. The decision and order of the National Labor Relations Board (App., *infra*, 6a-61a) are reported at 357 NLRB No. 130.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 2013. The court of appeals denied a petition for rehearing on December 13, 2013 (App., *infra*, 62a-63a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Recess Appointments Clause of the Constitution (Art. II, § 2, Cl. 3) provides as follows:

> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

STATEMENT

1. a. The National Labor Relations Board is an independent agency charged with the administration of the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq*. The Board consists of five members, who are appointed by the President by and with the advice and consent of the Senate and who serve five-year terms. 29 U.S.C. 153(a). Three members of the Board constitute a quorum, 29 U.S.C. 153(b), and when three positions on the Board become vacant, it cannot adjudicate cases involving unfair labor practices, see *New Process Steel, L.P.* v. *NLRB*, 560 U.S. 674, 679-688 (2010).

b. On July 9, 2009, the President nominated Craig Becker to fill a vacant seat on the Board. See 155 Cong. Rec. 17,228. The Senate neither confirmed nor rejected the nomination, instead returning it to the President, pursuant to Senate Rule XXXI(6), upon adjourning sine die on December 24, 2009. See 155 Cong. Rec. 33,430. On January 20, 2010, the President renominated Becker to the same seat. See 156 Cong. Rec. 296.

On March 26, 2010, the Senate began a 17-day recess pursuant to a concurrent adjournment resolution with the House of Representatives. See 156 Cong. Rec. S2180 (daily ed.); H.R. Con. Res. 257, 111th Cong., 2d Sess. (2010). At that time, the Board had only two members, a circumstance that had given rise to *New Process Steel*, which was then pending in this Court. To

remedy that situation, on March 27, 2010, "the President made two recess appointments to the Board," *New Process Steel*, 560 U.S. at 678, one of whom was Becker, App., *infra*, 4a.

Because the Recess Appointments Clause provides that the term of a recess appointee "shall expire at the End of [the Senate's] next Session," and Becker's recess appointment had been made during the Second Session of the 111th Congress, it was understood that his commission would expire at the end of the First Session of the 112th Congress (*i.e.*, on or before January 3, 2012). See *Noel Canning* v. *NLRB*, 705 F.3d 490, 499, 513 (D.C. Cir. 2013) (describing January 3, 2012 expiration of Becker's appointment), cert. granted, No. 12-1281 (argued Jan. 13, 2014). Accordingly, Becker was serving as a Board member when the Board rendered its decision in this case in December 2011. App., *infra*, 6a.

2. Respondent, an employer in South Carolina, operates a plant that manufactures motor-vehicle parts. App., *infra*, 19a. In late 2009 and early 2010, several of respondent's employees began participating in efforts to unionize the plant. *Id.* at 25a-30a. Respondent discharged two of those employees in February 2010. *Id.* at 33a, 38a-40a.

The employees filed unfair-labor-practice charges with the Board, and the Board's Acting General Counsel issued a complaint alleging that respondent violated various provisions of the NLRA in its treatment of the discharged employees. App., *infra*, 2a-3a, 9a-10a. An administrative law judge conducted a hearing, concluded that respondent had engaged in unfair labor practices, and, in March 2011, issued a recommended order requiring respondent to take certain remedial actions.

Id. at 3a, 55a-59a. On December 8, 2011, a three-member panel of the Board, including Member Becker, affirmed the administrative law judge's rulings, findings, and conclusions, and adopted the recommended order with minor modifications. *Id.* at 8a-9a.

3. Respondent filed a petition for review of the Board's decision in the United States Court of Appeals for the Fourth Circuit, and the Board cross-petitioned to enforce its order. App., *infra*, 3a; see 29 U.S.C. 160(e) and (f). In its briefs and at the October 24, 2012 oral argument, respondent raised only "non-constitutional challenges" to the Board's order. App., *infra*, 3a.

On January 28, 2013, however, respondent filed a letter with the court of appeals pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, contending for the first time that Becker's appointment had violated the Constitution's Recess Appointments Clause. App., *infra*, 3a, 64a-66a. Respondent based that argument on the D.C. Circuit's then-recent holding in *Noel Canning* that the President may make recess appointments only during *inter*-session recesses of the Senate. 705 F.3d at 506. The Board's letter in response contended that respondent had waived that nonjurisdictional challenge to the constitutionality of Becker's appointment by failing to raise it before the case was submitted. App., *infra*, 67a-69a.

Both parties subsequently filed additional letters (C.A. Docs. 50-55), apprising the court of appeals of various circuit-court decisions concerning other parties' Recess Appointments Clause challenges (or waivers of such challenges), including the Fourth Circuit's own decision in *NLRB* v. *Enterprise Leasing Co. S.E., LLC*, 722 F.3d 609 (2013), petition for cert. pending, No.

13-671 (filed Dec. 4, 2013), which held that the President cannot make recess appointments during an intra-session recess of the Senate, *id.* at 652.

Although respondent suggested that the court of appeals could hold the case in abeyance pending this Court's decision in *NLRB* v. *Noel Canning*, No. 12-1281, the Board opposed that suggestion on the ground that *Noel Canning* presents the merits of the constitutionality of the recess appointments at issue in that case, but such issues were "not squarely presented" in this case "in light of [respondent's] waivers." App., *infra*, 71a.

4. On October 16, 2013, the court of appeals issued an unpublished opinion in favor of respondent, vacating the Board's order and remanding to the Board. App., *infra*, 1a-5a. The court noted its *Enterprise Leasing* decision invalidating intra-session recess appointments, and noted that Becker, who participated in this case, had been appointed during an intra-session recess. App., *infra*, 3a-4a. Thus, the court concluded that Board Member Becker's appointment "was constitutionally invalid" and that "the Board lacked the power to lawfully act when it issued its decision in this case." *Id.* at 4a. The court noted that respondent's suggestion to hold this case in abeyance was "opposed by" the Board's post-argument letter. *Id.* at 4a n.*. The court then stated that, "[i]n light of our decision in *Enterprise Leasing*, we decline to delay further resolution of this appeal at this juncture." *Ibid.*

5. On December 2, 2013, the Board filed a petition for panel rehearing, contending that the court of appeals had erred in not addressing respondent's waiver of any Recess-Appointments-Clause challenge, and that the court appeared to have misinterpreted the Board's

position that the case should not be held in abeyance for *Noel Canning* as a concession of the court's ability to address the merits of respondent's constitutional challenge under the NLRA immediately (rather than an argument that the issue squarely presented in *Noel Canning* was not squarely presented here). Pet. for Panel Reh'g 5-13. The Board contended that, if the court of appeals wished to excuse respondent's waiver of its constitutional challenge, the better course would be to hold the case until this Court had completed review of the decision in *Enterprise Leasing*. *Id.* at 1-2, 14-15. The Board subsequently filed a petition for a writ of certiorari in *Enterprise Leasing*, asking this Court to hold the petition in that case pending resolution of *Noel Canning*. See *NLRB* v. *Enterprise Leasing Co.–S.E., LLC*, petition for cert. pending, No. 13-671 (filed Dec. 4, 2013).

The court of appeals denied the rehearing petition on December 13, 2013. App., *infra*, 62a-63a.

REASONS FOR GRANTING THE PETITION

The only question addressed by the court of appeals in this case was whether the President's power under the Recess Appointments Clause may be exercised during a recess that occurs within a session of the Senate, or is instead limited to recesses that occur between sessions of the Senate. That question is among the questions currently before the Court in *NLRB* v. *Noel Canning*, cert. granted, No. 12-1281 (argued Jan. 13, 2014).* The Court should therefore hold the petition in

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* Unlike in *Noel Canning*, the Senate did not hold any "pro forma" sessions during the 17-day intra-session recess during which the President made the appointment of Board Member Becker at issue in this case. See pp. 2-3, *supra*. This case therefore

this case pending the disposition of *Noel Canning* and then dispose of it as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of *Noel Canning*, No. 12-1281, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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MARCH 2014

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does not involve the question, present in *Noel Canning*, of the effect of pro-forma sessions on the President's authority under the Recess Appointments Clause.

APPENDIX A

UNITED STATES COURT OF APPEAL
FOR THE FOURTH CIRCUIT

No. 11-2362

GESTAMP SOUTH CAROLINA, L.L.C., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 12-1041

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GESTAMP SOUTH CAROLINA, L.L.C., RESPONDENT

Argued: Oct. 24, 2012
Decided: Oct. 16, 2013

OPINION

On Petition for Review and Cross-application for Enforcement of an Order of the National Labor Relations Board. (11-CA-22595; 11-CA-22628)

Before: TRAXLER, Chief Judge, KEENAN, Circuit Judge, and R. BRYAN HARWELL, United States District Judge for the District of South Carolina, sitting by designation.

Petition for review granted; cross-application for enforcement denied; vacated and remanded by unpublished per curiam opinion.

* * * * *

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Gestamp South Carolina, LLC, petitions for review of an order of the National Labor Relations Board ("the NLRB" or "the Board") affirming the decision of an administrative law judge ("ALJ") finding that Gestamp violated the National Labor Relations Act ("the NLRA"). For the reasons stated herein, we grant Gestamp's petition for review, deny the Board's cross-application for enforcement, vacate the Board's decision, and remand.

As is relevant to this appeal, the Board's Acting General Counsel issued a complaint alleging that Gestamp violated 29 U.S.C. § 158(a)(3) and (1) by suspending and discharging employee David Anthony Kingsmore and by discharging employee Reggie Alexander because of their

union organization efforts. The complaint also alleged that Supervisor and Quality Engineer Michael Fink violated 29 U.S.C. § 158(a)(1) by warning Kingsmore that he would be fired if General Manager Carmen Evola found out he was trying to unionize the facility. Following a hearing, the ALJ found that Gestamp and Fink had committed the alleged violations.

On appeal, a three-member panel of the NLRB, comprised of Board Members Mark Gaston Pearce, Craig Becker and Brian E. Hayes, affirmed the ALJ's decision and adopted the ALJ's recommended order with minor modifications. Gestamp petitioned for review of the Board's order, raising several non-constitutional challenges to the decision, and the Board cross-petitioned for enforcement of the order. Following oral argument, however, Gestamp raised an additional, constitutional challenge to the Board's power to act at the time it issued its decision, based upon our recent decision in *NLRB v. Enterprise Leasing Co. Southeast*, 722 F.3d 609 (4th Cir. 2013).

In *Enterprise Leasing*, we held that the President's recess appointment of a board member to the NLRB is constitutionally valid under the Recess Appointments Clause of the United States Constitution only if the appointment is made during an intersession, as opposed to an intrasession, recess of the Senate. *See id.* at 652. Further, if the recess appointment of any one member of a three-member NLRB panel is invalid, the appointment is "invalid from [its] inception," and there can exist no lawful quorum to exercise the authority of the Board under the NLRA. *Id.* at 660 (internal quotation marks omitted); see *New Process Steel, L.P. v. NLRB*, 130 S.

Ct. 2635, 2638 (2010) ("[F]ollowing a delegation of the Board's powers to a three-member group, two members [cannot] continue to exercise that delegated authority once the group's (and the Board's) membership falls to two."). In doing so, we followed recent rulings of our sister circuits on this important constitutional issue. *See NLRB v. New Vista Nursing and Rehab., LLC*, 719 F.3d 203 (3rd Cir. 2013); *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted, 133 S. Ct. 2861 (June 24, 2013).

Board Member Craig Becker served as one of the three panel members in this case. However, Member Becker was appointed by the President on March 27, 2010, during a two-week adjournment of the Senate. *See New Vista*, 719 F.3d at 213. Because his appointment was constitutionally invalid from its inception, see *id.* at 221, there were not enough valid members to meet the requisite quorum and the Board lacked the power to lawfully act when it issued its decision in this case. Accordingly, we grant Gestamp's petition for review, deny the Board's cross-application for enforcement, vacate the Board's decision, and remand the case to the NLRB for further proceedings as may be appropriate.[*]

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[*] As noted above, the United States Supreme Court has granted certiorari review in *Noel Canning*. *See NLRB v. Noel Canning*, 133 S. Ct. 2861 (June 24, 2013). Although no formal motion has been made to hold this case in abeyance pending the Supreme Court's decision in *Noel Canning*, the option was suggested by Gestamp and opposed by the NLRB in their respective Rule 28(j) letters. *See* Fed. R. App. P. 28(j). In light of our decision in *Enterprise Leasing*, we decline to delay further resolution of this appeal at this juncture. We

PETITION FOR REVIEW GRANTED; CROSS-APPLICATION FOR ENFORCEMENT DENIED; VACATED AND REMANDED

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also deny Gestamp's Motion to Strike the NLRB's 28(j) letter and/or for supplemental briefing.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD

Cases: 11-CA-22595 and 11-CA-22628

GESTAMP SOUTH CAROLINA, LLC *AND* DAVID ANTHONY KINGSMORE *AND* REGGIE ALEXANDER

Dec. 8, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

On March 2, 2011, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions.

The Board has considered the decision and the record[1] in light of the exceptions and has decided to affirm

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[1] The Respondent has requested oral argument. The request is denied as the record and exceptions adequately present the issues and the positions of the parties.

the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

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[2] 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.

Member Hayes agrees with the judge that the General Counsel established the animus element of his prima facie case under *Wright Line*, 251 NLRB 1083 (1980), enfd. 663 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), based on Supervisor Fink's comment to Kingsmore that "you're gone" if Manager Evola found out about his union activity, the timing of the adverse actions against employees Kingsmore and Alexander, and the Respondent's shifting reasons for disciplining Kingsmore. Further, he agrees that the Respondent failed to meet its *Wright Line* rebuttal burden to show that it would have terminated Kingsmore and suspended and fired Alexander even in the absence of their protected activity. In finding the violations, however, Member Hayes does not rely on the quality of the Respondent's investigation, the severity of the Respondent's punishments, or the alleged failure to follow the progressive discipline system in finding animus. Nor does Member Hayes rely on the judge's finding that it "is reasonable to believe that other employees reported Alexander's and Kingsmore's union activity to management" in finding that the Respondent knew of the employees' union activity. Further, he would not draw an adverse inference based on the failure of General Manager Evola to testify regarding when he learned about Kingsmore's inability to access the BMW site.

[3] We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Gestamp South Carolina, LLC, Union, South Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified by substituting the following for paragraph 2(f).

"(f) Within 14 days after service by the Region, post at its Union, South Carolina facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceed-

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[4] 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."

ings, 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 February 1, 2010."

Dated, Washington, D.C. Dec. 8, 2011

Mark Gaston Pearce,	Chairman
Craig Becker,	Member
Brian E. Hayes,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Jasper C. Brown Jr., Esq., for the General Counsel.

John J. Coleman III and *Marcel L. Debruge, Esqs. (Burr & Forman, LLP),* of Birmingham, Alabama, for the Respondent.

DECISION

Statement of the Case

IRA SANDRON, Administrative Law Judge. This matter arises out of a consolidated complaint and notice of hearing issued on September 30, 2010,[1] against Gestamp South Carolina, LLC (the Respondent or Gestamp), stemming from unfair labor practice (ULP) charges filed by David Anthony Kingsmore and Reggie Alexander, individuals. The complaint alleges that the Respondent violated Section 8(a)(3) and (1) of the National Labor Re-

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

lations Act (the Act) by suspending and then discharging Kingsmore and by discharging Alexander because they engaged in organizing activities on behalf of the United Steelworkers (the Union). The complaint further alleges that a supervisor committed two independent violations of Section 8(a)(1).

Pursuant to notice, I conducted a trial in Columbia, South Carolina, from December 6-10, at which I afforded the parties full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence.

Issues

(1) Did the Respondent suspend Kingsmore on February 17, and then discharge him on February 24, because he did not disprove the Respondent's suspicion that he misrepresented the nature of his separation from prior employer BMW during his September 29, 2009 interview for a supervisory position, or because of his union activities?

(2) Did the Respondent discharge Alexander on February 19 because he deliberately falsified his timesheet by claiming 38 extra minutes of pay for February 9, or because of his union activities?

(3) Is Michael Fink a statutory supervisor and agent of the Respondent?

(4) Did Fink, in approximately early February, unlawfully threaten Kingsmore with discharge for his union activities?

(5) Did Fink, on February 11, unlawfully interrogate Alexander about his union activities?

Witnesses and Credibility

The General Counsel called Alexander and Kingsmore, Union Organizer Randy Rigsby, and the following employees: Human Resources (HR) Assistant Mary Harper, CMM Technician Jimmy Stewart, Jr., and Forklift Driver Dean Tollison.

The Respondent called the following managers/supervisors: HR Manager Susan Becksted, Maintenance Manager Dennis Blanton, General Manager Carmen Evola,[2] Director of Purchasing and Logistics Roger Fuller, Quality Supervisor James Holt (who was an hourly employee at all times relevant), Maintenance Supervisor Daniel Morris, Assembly Shift Supervisor Jason O'Dell, Shipping and Receiving Manager Michael Sullivan, and Quality Manager Jurgen Weckerman.

The Respondent also called Quality Engineers Michael Fink and Charles Beasley. The General Counsel alleges Fink to be a statutory supervisor, a contention that the Respondent denies. Although Beasley holds the same position as Fink, he is not named in the complaint, and it is immaterial for purposes of this decision whether or not he is a statutory supervisor.

Further, the Respondent called two employees: Line Technician Dominic Gist, Sr., and IMS Leader Jennifer Meese.

Deciding the issues in this case hinges on credibility resolution, including the plausibility of certain accounts

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[2] Evola has been the highest management official at the facility at all times relevant. See R. Exh. 10, an organizational chart.

of conversations and actions. Before going into specifics, I cite the well-established precept that "'[N]othing is more common in all kinds of judicial decisions than to believe some and not all' of a witness' testimony." *Jerry Ryce Builders,* 352 NLRB 1262, 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951). The trier of fact must consider the plausibility of a witness' testimony and appropriately weigh it with the evidence as a whole. *Golden Hours Convalescent Hospitals,* 182 NLRB 796, 787-799 (1970).

Alexander was generally credible. He answered questions readily and with no apparent efforts to embellish or slant them, was appropriately consistent in his answers on direct and cross-examination, and his testimony comported with that of Rigsby, who was also credible.

Kingsmore, on the other hand, was not fully reliable. I do take into account his apparent lack of sophistication and perhaps naïveté. This is reflected in his answer to my question of why he confided in Fink that he was trying to get the Union in. He readily answered that Fink "kind of made Alex Keller [Kingsmore's supervisor] leave me alone . . . Keller was not a very nice person. . . . I'd had him throw stuff at me, cuss at me and grab me once."[3] That Kingsmore took such abuse from

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[3] Tr. 437. Kingsmore's testimony about his relationship with Fink was supported by Fink's credible testimony that Kingsmore and other employees came to him to "vent" or seek advice when they experi-

a supervisor certainly indicates that he was unaware of his avenues of recourse.

Nonetheless, the following factors diminish his credibility, particularly vis-à-vis other witnesses who struck me as more reliable. As Kingsmore's testimony progressed, he expanded on antiunion sentiments expressed by management/supervisors; his testimony that the Union did not instruct him to try to keep organizational activeties from management's knowledge was contradicted by Rigsby and Alexander (and possibly by common sense); and his testimony on cross-examination did not fully comport with what he said on direct examination.

The Respondent raised an issue about Harper's status as a confidential employee, but in any event, she credibly testified only about general timekeeping practices in early 2010, and not on anything specific pertaining to Alexander or Kingsmore.

Stewart, in contrast, was not a reliable witness. His demeanor was markedly defensive. That aside, his testimony was unbelievable. Thus, he testified that at around the time Alexander was discharged, he was working at a computer when he overheard Supervisor O'Dell make the statement on the floor, about 7 or 8 feet away, "We got one of them. Now the rest of them will probably be scared now, but there's a couple more of them we got to get."[4] Yet, according to Stewart's own testimony, he reacted casually and did not even bother to look up

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enced language problems with Keller and other members of the salaried group who had come from Germany. Tr. 607.

[4] Tr. 68.

from the computer. This is particularly odd in light of Rigsby's credited testimony that Kingsmore and Stewart were the first employees to have contact with the Union and were the most active members of the Union's organized committee.

O'Dell denied making any such statement, and I do not believe that he would have been so crass. In this regard, I credit the Respondent's witnesses' testimony that training was given to supervisors concerning what they should and should not say to employees. I also accept their testimony that everyone in the production area must wear ear plugs, which interferes with hearing normal speaking other than in face-to-face conversation. Accordingly, I do not credit Stewart's testimony.

One other witness was noticeably defensive: Manager Sullivan, who appeared ill at ease throughout his testimony. As with Stewart, reasons aside from demeanor also lead me to doubt his believability. Thus, he testified that he had no conversations with Alexander about the discrepancy in the latter's timecard records but then was directly impeached on this point by statements in his NLRB affidavit. He further testified that the reports two employees made to him that Alexander had come in late on February 9 did not lead him to investigate and compare the records, testimony that again was contradicted by his affidavit. Moreover, his testimony that he came across the discrepancies the following Monday in his routine checking of employees' weekly hours for payroll was also inconsistent with his affidavit. I further note that his testimony about his role in checking the pertinent payroll records conflicted with Becksted's account.

This brings up a significant flaw in the Respondent's presentation of its case. Alexander's direct supervisor, Jean DeShields, was not called as a witness even though both Sullivan and Becksted testified (albeit differently) that she played a role in the investigation of Alexander's timecard and how it compared with the time clock records. I would have expected DeShields to testify on her role in Alexander's investigation, particularly when the Respondent's witnesses were inconsistent.

Similarly, Becksted testified that in early February, General Manager Evola told her that he had "just" learned that Kingsmore had been barred from BMW (an event that occurred in August 2009, 6 months earlier) and that they discussed what to do, yet the Respondent did not have Evola testify either about the circumstances of how he learned or about his conversation with Becksted. Leaving aside Kingsmore's testimony, Supervisor Morris testified that he told Keller and Maintenance Supervisor Axel Zimmerman that day. Moreover, Becksted testified that when she called Keller in Germany in February, Keller confirmed Kingsmore's testimony that on the day Kingsmore was barred, he called Keller and reported it. I would have expected Evola to testify about when and from whom he "just" learned of the BMW incident in February, especially in light of the timing of the investigation and disciplinary action vis-à-vis Kingsmore's union activities.

The Respondent's failure to call DeShields or to elicit testimony from Evola on the above must be deemed to raise the suspicion that their testimony would not have corroborated Becksted and would have been unfavorable

to the Respondent's case. I therefore draw an adverse inference against the Respondent on these matters. See *Palagonia Bakery Co.,* 339 NLRB 515, 538 (2003); *Dalikichi Sushi*, 335 NLRB 622, 622 (2001); *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem 861 F.3d 730 (6th Cir. 1988).

I further note with regard to Becksted's testimony that although she provided a very detailed account of her suspension interview with Kingsmore on February 17 (and her subsequent conversations with him), she professed little recall of specifics about her discharge interview with Alexander, just 2 days later. I also find suspicious her testimony that she did not know the name or identity of the person at BMW with whom she allegedly spoke concerning Kingsmore, and purportedly could not recall if she even documented such conversation at all. I would expect that, as an experienced and trained HR manager at a facility employing over 100 hourly employees, she would have realized the importance of documenting any such conversation, especially when Kingsmore was on suspension and facing discharge.

In contrast to my reservations about Becksted's credibility, Managers/Supervisors Blanton, Holt, Morris, O'Dell, and Weckerman appeared candid, they answered questions without any obvious attempt to slant the answers, and nothing in their testimony rang implausible. I will address Fink separately since his supervisory status is disputed.

Blanton indirectly supported Alexander's testimony that at a management meeting about the Union, certain

employees threatened or implied violence against union supporters. Kingsmore testified that Blanton stated at such a group meeting, "[W]hat pisses me off is and I take personally is Gestamp came in here and bought us out, and the way we thank them is by calling the damn union."[5] No other witnesses corroborated Kingsmore on this, and I seriously doubt that Blanton would have used such intemperate language. Accordingly, I do not credit Kingsmore on this point.

Fuller denied Alexander's testimony that they had a conversation about how other employees were treating Alexander or about the Union. The General Counsel does not allege that Fuller said anything violating Section 8(a)(1) and, in light of other credited testimony, I need not resolve this conflict.

Holt denied telling Kingsmore that Evola was firing employees because of their union activities, and I credit him. Kingsmore did not testify at all about such an alleged statement until cross-examination—an unfathomable omission on direct examination and an example of how he expanded his testimony as he went along. Moreover, nothing in the record reflects that anyone was fired at the time.

As noted earlier, Morris testified that he informed Keller and Zimmerman on the day that BMW barred Kingsmore. He also corroborated in part Alexander's testimony that antiunion employees had harassed him.

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[5] Tr. 443.

Weckerman denied Kingsmore's testimony that immediately after they left Kingsmore's suspension meeting, they engaged in a brief conversation during which Weckerman said, "[P]eople are telling Carmen [Evola] that you are the one that called the Union and he believe[d] them."[6] Weckerman testified that in their conversation, Evola was not mentioned. According to Weckerman, Kingsmore sua sponte stated that his suspension was due to people saying he was related to the Union, and Weckerman did not respond. Because Kingsmore equivocated on whether he or Weckerman brought up the Union in the conversation, and in light of my overall credibility determinations, I credit Weckerman's account.

Fink struck me as truthful and reliable, a conclusion based both on his demeanor and on the substance of his testimony. In particularly, he candidly described a conversation that he had with Kingsmore about the Union in January-February, and he readily answered my questions concerning his supervisory authority over two offsite Gestamp employees who work fulltime at BMW. I further take note that although Alexander testified that Fink made a comment to him in early February that demonstrated knowledge of Alexander's union activities, the Respondent's counsel did not elicit from Fink a denial or, indeed, any testimony, about such a remark. Thus, Alexander's version went unrebutted, and I credit it.

To the extent that Beasley's testimony was inconsistent with Fink's in terms of their responsibilities and

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[6] Tr. 454; see also Tr. 597.

duties, I credit the latter. Finally, Gist, and Meese offered limited but generally credible testimony.

Facts

Based on the entire record, including testimony and my observations of witness demeanor, documents,[7] and stipulations, as well as the thoughtful posttrial briefs that the General Counsel and the Respondent filed, I find the following.

The Respondent, a subsidiary of a company headquartered in Troy, Michigan, which in turn is a division of Gestamp Automocion in Spain, owns and operates a plant in Union, South Carolina (the facility). There, it assembles and presses large "Class A" motor vehicle parts, the large outer pieces of a vehicle that the consumer first sees (including doors, hood, and roof). The Respondent has admitted jurisdiction as alleged in the complaint, and I so find.

The Respondent purchased the facility from LSP effective October 1, 2009. It retained LSP's employees and continued LSP's personnel policies, including those set forth in the LSP employees' handbook.[8] The handbook provided, inter alia, that misleading or false statements made in an application form or during an interview would result in withdrawal of an offer of employment or in immediate dismissal (p. 11). The handbook also contained a provision (p. 25) setting out three steps of disci-

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[7] The Respondent's unopposed motion to supplement the record, filed on January 14, 2011, is granted.

[8] R. Exh. 9, in effect at all times material.

pline: verbal warning, written warning, and termination, depending on the severity of behavior; stating that the Company could also utilize a fourth step of suspension without pay; and reserving the Company's right, in its sole discretion, to determine the appropriate corrective action, including termination.

At the time of the Union's organizing efforts, in January-February, the Respondent employed approximately 100-110 hourly production employees and 35 salaried employees, including supervisors and engineers. The Respondent's sole customer was BMW, for which it made Class A parts for the BMW X6, a "crossover" or luxury vehicle. Most employees worked either the first (8 a.m.-4 p.m.) or second (4 p.m.-midnight) shifts. Only a small "skeleton" crew worked the third shift, midnight-8 a.m.

Alexander, hired by LSP in June 2007, was a supply coordinator on the first shift and responsible for taking care of parts and supplies that employees needed throughout the plant. He was the sole employee based in the tool crib or general storage area and spent about 80 percent of his working time there, the remainder in various areas of the facility. Alexander's supervisor was Logistics Manager Jean DeShields; however, Sullivan had the responsibility of timekeeping for her employees, as well as those he directly supervised. Alexander testified without controversion that prior to his termination, he received no written warnings or suspensions.

Kingsmore, whom LSP hired in May 2007, was a first-shift quality inspector. His job was to inspect body parts and inner body parts for defects or for any other

problems that would keep them from passing BMW's standards. On a daily basis, he left his work station and went to other areas of the building to perform his duties. At times, another individual performed more detailed checks, and Kingsmore had a counterpart on the second shift. Keller was his supervisor until Michael Greene took over in that position shortly before Kingsmore's discharge. The Respondent's counsel represented that prior disciplines Kingsmore received played no part in his discharge.[9]

Fink's Status Under Section 2(11)

For purposes of this decision, Section 2(11) of the Act defines "supervisor" as an individual having authority, in the interest of the employer, to, inter alia, assign, reward, or responsibly direct other employees, or effectively to recommend such action, if the exercise of such authority is not merely routine or clerical in nature but requires the use of independent judgment. An individual need possess only one of these indicia. *NLRB v. Yeshiva University*, 444 U.S. 672, 682 fn. 13 (1980); *Mountaineer Park, Inc.*, 343 NLRB 1473, 1474 (2004); *Arlington Masonry Supply, Inc.*, 339 NLRB 817, 818 (2003).

Kingsmore testified that Fink regularly assigned him work and overtime and authorized his requests for time off. On the other hand, both Fink and Manager Weckerman, Keller's supervisor, testified to the contrary, stating that Fink had no supervisory authority over Kingsmore. Fink did testify that, once a month or so, at most, he

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[9] Tr. 488.

instructed Kingsmore to perform certain work, after first consulting with Keller, and that, on occasion, he has signed off on an employee's request for vacation when Keller was on vacation or otherwise unavailable.

Fink was a more credible witness than Kingsmore, and I credit his corroborated testimony over Kingsmore's. I again note that according to both Kingsmore and Fink, Fink sometimes operated as something of an intermediary between Kingsmore and Keller, with whom Kingsmore had a difficult relationship, in part because of language issues.

As to Fink's occasionally substituting for Keller in granting requests for vacation leave, sporadic assumption of supervisory duties is insufficient to establish supervisory status at other times. *See, e.g.*, *Kanawha Stone Co.*, 334 NLRB 235, 237 (2001); *Carlisle Engineered Products*, 330 NLRB 1359, 1361 (2000). This same rationale would appear applicable to Fink's less-than-monthly instructions to Kingsmore to perform certain work. Moreover, nothing in the record reflects whether Fink sua sponte determined that Kingsmore should perform certain work or received requests for such from other employees or supervisors and then related them to Keller. In any event, the burden to show supervisory status is on the party asserting such. *Loyalhanna Care Center*, 352 NLRB 863, 865 (2008); *Masterform Tool Co.*, 327 NLRB 1071, 1071 (1999). The General Counsel has not done so.

Accordingly, I find that Fink had no supervisory authority over any hourly employees in the plant. On the

other hand, his testimony reflected his supervisory authority over the two Gestamp employees who work full-time off-site at BMW's plant in Greer, South Carolina: Christopher Coggins and Reginald Fleming. Thus, he gives them instructions, and if they have any problems, they report them to him or Beasley. When they need to take off early, they inform him or Beasley. If they need time off for an emergency, they contact him or Beasley. In such situations, Fink gives initial approval; final approval is left to Weckerman, who has never disagreed with him. Fink and Beasley prepare their biannual evaluations and review their training reports, the results of which can impact on their getting raises; Weckerman has never disagreed with Fink's recommendations. Fink's authority to effectively recommend the performance evaluations of the two off-site employees, which affects their remuneration, is sufficient, standing alone, to establish supervisory status. As the Supreme Court articulated in *Yeshiva University*, above, at 683 fn. 17:

> The statutory definition of "supervisor' expressly contemplates that those employees who "effectively . . . recommend" the enumerated actions are to be excluded as supervisory. 29 U.S.C. § 152(11). Consistent with the concern for divided loyalty, the relevant consideration is effective recommendation or control rather than final authority.

In *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999), the Board stated, "The fact that the account representatives exercise their authority over employees who are not included in the bargaining unit does not preclude the Board from finding the account representatives to be statutory

supervisors. Where the performance of supervisory functions is 'part and parcel of the individual's primary work product rather than an ancillary part of their duties,' the Board has found individuals to be statutory supervisors although they exercise such authority over nonunit personnel." *See also Union Square Theatre Management*, 326 NLRB 70, 72 (1998); *Rite Aid Corp.*, 325 NLRB 717 (1998); *Detroit College of Business*, 296 NLRB 318, 320-321 (1989).

I recognize that the above cases pertain to whether an individual was eligible to join the bargaining unit or was precluded as a 2(11) supervisor. However, the same reasoning appears applicable to whether statements made by such an individual to rank-and-file employees are imputable to the employer. I am unaware of any Board decisions expressing the doctrine that an individual can be found a statutory supervisor for some purposes but not for others. In other words, whether an individual is or is not a statutory supervisor is an all-or-nothing proposition, and holding otherwise would be anomalous.

I find, based on Fink's testimony, that Fink's supervision of Coggins and Fleming is an important component of his primary work responsibilities, particularly in light of the dependence of Gestamp on BMW. Accordingly, I conclude that Fink has been a statutory supervisor over the Respondent's employees at the BMW plant. Ergo, I further conclude that his statements to employees at the facility, including Alexander and Kingsmore, were imputable to the Respondent.

Union Organizing Activity

In late December 2009, Kingsmore initiated contact with the Union in Pittsburgh, Pennsylvania, concerning organizing the facility's hourly employees.[10] The Union assigned Rigsby to follow up with him. Rigsby's first contacts were with Kingsmore and Stewart. The Union's strategy, conveyed to Alexander, Kingsmore, and other employees, was to keep organizing efforts from the Company's knowledge.

Alexander and Kingsmore were among the seven or eight employees on the organizing committee that Rigsby formed. Rigsby held approximately four meetings of employees in late January and early February, three at a hotel in Union, South Carolina, and one in an apartment. Alexander and Rigsby attended all but one of them. Alexander was vocal at these meetings. After the last of the meetings, in mid-February, the Union decided to discontinue its organizing efforts.

Both Alexander and Kingsmore spoke to other employees about supporting the Union after work, on breaks, and during and after lunch times.

In January-February, management became aware of the Union's organizing efforts because of the many questions that employees were asking on the subject,[11] and Evola heard of such activity on or before February 1.[12]

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[10] R. Exh. 6 at 1–2.

[11] Tr. 771, testimony of Blanton.

[12] Tr. 909, testimony of Becksted.

In approximately early February, Kingsmore had conversations concerning the Union with Fink and Sullivan, as follows.[13]

At his work area, Kingsmore told Fink that he was going to try to unionize the plant. Fink warned him to be careful because if Evola found out, "[Y]ou're gone."[14] As noted earlier, Fink recalled that Kingsmore initiated a conversation about the Union but could not recall the specifics, and both of them offered testimony demonstrating why Kingsmore would have considered Fink something of a confidant.

Kingsmore spoke to Sullivan in the smoking dock area. He asked Sullivan what he thought about the Union. Sullivan replied that it was good for employees and bad for management and talked about his experiences working in union plants and the pro's and con's of union representation. Kingsmore said that he was going to try to get the Union in. Kingsmore credibly testified that he had this conversation with Sullivan because he considered him sympathetic. I again note Sullivan's unreliability as a witness.

Shortly thereafter, Kingsmore spoke to Sullivan before the latter was scheduled to attend a meeting with the Company's legal counsel concerning the Union. Sullivan stated that if Kingsmore had anything to say to him about the Union, to say it then because after the

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[13] The dates he gave for them were somewhat contradictory and confusing as far as whether they occurred in late January-early February or in mid-February.

[14] Tr. 436.

meeting, Sullivan would no longer be able to talk to him on the subject.

It is undisputed that Kingsmore later called Evola and told him that rumors that Kingsmore was for the Union were false. At the time, Evola testified, he had not heard any such rumors "other than discussions with my attorneys."[15]

In early to mid-February, management, through Evola or Blanton, conducted group meetings with approximately 20 employees each, explaining the Respondent's perspective regarding unionization. The General Counsel has not alleged that anything Evola or Blanton said violated the Act.

Alexander and Meese attended one of Evola's meetings, on about February 11,[16] and Kingsmore one that Blanton led on about that same date. Statements that other employees made at and after those meetings reflect how divisive the issue of unionization was among them and the maelstrom of emotion generated.

Kingsmore testified that at the meeting he attended, an employee asked who had called the Union. Blanton replied that it did not matter, and the employee said that when they found out, "[W]e're going to catch him in the parking lot and whip his ass."[17] Although Blanton did

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[15] Tr. 742.

[16] The date is based on Alexander's testimony; the Respondent provided no documents or other evidence of another specific date of the meeting.

[17] Tr. 444.

not recall any employees making threats at that meeting, he did recollect stating, "[T]here's no place for that. We need to make sure that that doesn't happen."[18] These remarks would naturally follow the making of a threat or suggestion of violence or other illegal retaliation against union supporters, thereby indirectly corroborating Kingsmore's testimony, which I therefore credit.

At the meeting Alexander attended, Meese and other employees made remarks about the effects on employees if the Union came in, including a possible shutdown. After the meeting, Alexander returned to his work station. Soon afterward, three employees came over, two together and one separately, and accused him of being one of those trying to bring in the Union. Alexander named Gist as one of them. Although Gist put the time of their conversation as shortly after he and Alexander arrived to work, he did recall approaching Alexander and stating that he had overheard that Alexander might have something to do with the Union.

In part because Morris corroborated Alexander's version of what occurred, I credit Alexander. However, in any event, Gist's account is not necessarily inconsistent with Alexander's as far as substance and similarly reflects suspicions among employees that Alexander was one of the chief union supporters.

Later that day, Alexander testified, he had a conversation with Morris in the tool crib in which he related the accusations that the three employees had made against

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[18] Tr. 777.

him. Morris asked if they were causing a hostile work environment, and Alexander replied that he did not know. Morris' account was quite similar. He recalled a conversation in the tool crib that they had after he observed Alexander appearing quite upset. He asked Alexander why he was so bothered, and Alexander answered that "his coworkers were harassing him about this 'union stuff.'"[19] Morris asked if he was being harassed, and he said no. Morris reminded him of the Company's anti-harassment policy and that Morris had an open door at all times.

I credit Alexander's unrebutted testimony that following the conversation with Morris, Fink came by the tool crib and made the comment, "I didn't know you were one of the ones that was trying to bring the Union in."[20] Alexander did not respond. Another employee, whose identity Alexander could not recall, was in the vicinity.

Alexander further testified that on the day he was discharged, February 19, he brought the subject up again with Fuller. According to Alexander, as Fuller walked by the tool crib, they exchanged greetings, after which Alexander injected, "I've had three different people come up to me, talking to me about my union activity."[21] Fuller simply replied that he would get back to him.

Fuller denied ever having such a conversation. My problem with Alexander's version concerns the date he

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[19] Tr. 648.

[20] Tr. 316.

[21] Tr. 318.

gave—a week after the incident occurred—and the absence of an explanation of why he would have abruptly interjected the subject at that time. Possibly, Alexander did make the statement to Fuller but was mistaken as to the date and circumstances. Regardless, the version that Alexander set out was implausible, and I do not credit it.

Review of Alexander's February 9 Time Records

Alexander, Becksted, Harper, and Sullivan all testified that it was normal procedure at Gestamp for hourly employees to create weekly self-prepared timesheets detailing their start times, end times, and total hours, and to submit them to their supervisors. All further testified that employees also "swiped" in and out of an electronic time system upon arrival and departure, thereby creating an electronic timecard report that supervisors used to verify the reporting on the timesheets. This system of dual timekeeping began in December 2009, and Harper testified that through February employees were paid according to their timesheets, which supervisors normally turned in to Harper by 5 p.m. on Mondays. As previously stated, Sullivan handled timekeeping for DeShield's employees, including Alexander.

During the week of February 8, Alexander arrived late on two occasions, February 9 and 10.[22] He maintained a preprepared template on his computer with 7 a.m. start times for his timesheet. Most likely on Friday, February 12, he changed his start time for February 10

[22] See GC Exh. 2, his timesheet for the week.

to reflect his late arrival at 7:15 a.m. but neglected to do so to reflect his late arrival at 7:38 a.m. on February 9. Alexander had no record of time-sheet-cheating or any other dishonest conduct, and I find it quite unlikely that he would have deliberately falsified his timesheet, knowing that Sullivan weekly checked his timesheet against the electronic records. I therefore credit Alexander's testimony that he did not deliberately seek to steal 38 minutes of time but instead simply forgot to make the change.

On the morning of February 9, two hourly employees whom Sullivan directly supervised, Melvernia Jeter and Dean Tollison, asked whether Alexander had a new start time after they observed him arrive late.[23]

Sullivan's account of his subsequent actions conflicted with his affidavit. He testified that their comment did not lead him to inquire into Alexander's timesheet and that he came upon Alexander's timecard 6 days later, in the usual course of business of checking timecards for all logistics department employees. Similarly, he testified that their comment did not cause him to handle Alexander's timecard any differently. However, in his affidavit, he stated that their remark triggered his investigation into Alexander's timesheet.

In any event, when Sullivan compared Alexander's electronic timecard[24] to the timesheet Alexander sub-

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[23] I credit Sullivan on this. His testimony comported with statements in his affidavit, GC Exh. 11, and Tollison testified that he did not remember and therefore did not controvert Sullivan's version.

[24] GC Exh. 3.

mitted, he noticed the discrepancy between the 7 a.m. start time in the timesheet and the 7:38 a.m. start time reported by the electronic timecard system for February 9. He advised Alexander of this discrepancy when Alexander came to his office to request a vacation day. Alexander insisted that if he wrote 7 a.m., then 7 a.m. was correct. Alexander testified that Sullivan responded, "Well, I'll fix it this time. Be more careful about your time."[25] Sullivan denied ever having any conversation with Alexander about the discrepancy—testimony directly contradicted by Sullivan's affidavit and by Tollison's, account that he witnessed Sullivan and Alexander discuss the electronic time clock in Sullivan's office. In light of Sullivan's impeachment on this point and his general unreliability, I credit all of Alexander's testimony regarding this conversation and find that Sullivan promised to fix the discrepancy. Prior to Alexander's termination meeting, no one from management ever again mentioned the matter to Alexander.

Because Sullivan and Becksted offered different accounts of DeShields' involvement in the investigation of Alexander's time records, and the Respondent did not call DeShields as a witness, I am not satisfied that the Respondent provided a full and accurate account of what subsequently transpired. Suffice to say, Sullivan, on February 15, corrected the timesheet by striking out the 7 a.m. start time and manually writing in 7:38 a.m. above it, and correspondingly adjusted the total hours for the day from 8 hours to 7.12 hours. These corrections were

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[25] Tr. 320.

made before Alexander's timesheet for the week went to payroll, and he was in fact paid for only the actual hours that he worked.

Becksted testified that after she confirmed the discrepancy with DeShields, she brought the matter to Evola's attention. However, she did not describe the conversation on the record, and Evola offered no testimony thereon.

I credit the following testimony of Alexander over Sullivan's denial. On two earlier occasions, both about 3 months before Alexander's termination, Sullivan corrected his timesheets. In both instances, they concerned Alexander's inadvertent failure to put in dates. I note that Sullivan admitted to correcting other employees' timesheets on occasions when the electronic time system was not working properly.

Alexander's Discharge on February 19, 2010

Becksted conducted a termination meeting with Alexander on the afternoon of February 19, in Fuller's office. Fuller and DeShields were also present. Fuller testified that he played no part in the decision to discharge Alexander and attended solely as a witness. Becksted began by describing the time discrepancy on February 9 between the 7 a.m. self-reported start time and the 7:38 a.m. start time shown by the electronic timecard. Alexander replied that he had discussed the problem with Sullivan, who had promised to fix it. Fuller interjected that he had no knowledge of that. Becksted stated that Alexander had violated company policy and was immediately terminated for falsifying his timesheet.

Kingsmore's Suspension on February 17

Before coming to LSP, Kingsmore was employed at BMW from August 9, 1999 to May 21, 2007.[26] His employment application for LSP was blank as far as previous employment,[27] and he did not fill out a new application when Gestamp assumed control of the facility.

In August 2009 (the exact date is unknown), while the plant was still under LSP ownership, both Kingsmore and Supervisor Morris were scheduled to take a tour of BMW's Geer, South Carolina plant. Morris was allowed entry, but Kingsmore was denied entrance. BMW representatives gave neither him nor Morris any reason for this bar. Morris proceeded to go on with the tour, which lasted 2 to 3 hours. Afterward, he returned to the LSP plant and informed both his own supervisor, Axel Zimmerman, and Kingsmore's supervisor, Keller, that Kingsmore was denied access. Immediately after being barred, Kingsmore called Keller from the BMW parking lot and informed him of what had occurred. When Becksted spoke with Keller in February, he confirmed that Kingsmore had called him in August 2009 and stated that he had been denied access into the BMW plant.

Kingsmore testified, in considerable detail, that as soon as he returned to LSP that day, he went into Evola's office and told Evola that guards at BMW had refused to allow him to enter the plant. Per Kingsmore, "I went to Carmen's office, and I said they wouldn't let me in. And

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[26] See GC Exh. 5.

[27] R. Exh. 12.

he said I don't know what I was thinking. He said I knew they wasn't [sic] going to let you in; you used to work there. I said yes, sir. He said, well, I'm sorry I wasted your time. I said, no, you didn't waste my time. I said I've been on the clock."[28] Kingsmore's account of informing Evola remained substantively consistent throughout his testimony.

Evola directly contradicted this account, testifying both that he and Kingsmore never had any conversations about Kingsmore's inability to enter BMW and that in August 2009, he had no knowledge that Kingsmore was barred from BMW. In this regard, Becksted testified that Evola approached her in early February and told her that he had "just" learned that Kingsmore had been barred from BMW.[29] She could not recall what he said about who informed him. The Respondent's failure to have Evola testify about how and when he learned that Kingsmore was barred from BMW (or concerning his conversation with Becksted) raises the suspicion that Evola's testimony on when he learned of the bar would have been unfavorable to the Respondent's case. I therefore draw an adverse inference against the Respondent on the matter and credit Kingsmore's testimony that he told Evola in August 2009.

On September 2, 2009, Kingsmore applied internally for promotion to a quality supervisor position, for which Becksted and Weckerman interviewed him on September 29, 2009. In the course thereof, Becksted asked why he

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[28] Tr. 472.

[29] Tr. 924.

had left BMW. He replied that he was tired of the long commute and being away from his family. She did not specifically ask if his separation from BMW was voluntary or involuntary, and nothing in either her interview summary or Kingsmore's internal job application addresses this point.[30] Kingsmore's ability to access the BMW plant was never mentioned. Kingsmore did not receive the promotion.

Becksted testified as follows. In early February, Evola called her into his office and stated that he had just learned that Kingsmore was banned from BMW. Becksted was startled because she believed that Kingsmore had told her in the interview that he left BMW voluntarily, and she found it inconsistent that someone could both leave BMW voluntarily and be banned from the plant. She was also concerned because Gestamp employees need to be able to go to BMW, as Gestamp's only client. She expressed those concerns to Evola, who instructed her to investigate fully the reasons why Kingsmore left BMW and why he was banned from their premises. Next, she called Keller, who was in Germany. He told her that Kingsmore advised him of the ban in August 2009. Becksted then returned to Evola, described her conversation with Keller, and said that she planned to call Kingsmore into a meeting to ask him face-to-face whether or not he had left BMW voluntarily and whether or not he was in fact banned.

On February 17, Becksted met with Kingsmore and Weckerman in the latter's office. Weckerman played no

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[30] See R. Exh. 14.

role in the decision to suspend Kingsmore. In that meeting, Kingsmore stated that he left BMW on a voluntary basis because of the long drive and his desire to spend more time with his family. When Becksted said that she learned Kingsmore was barred from BMW, he did not deny it. She stated that she would need additional information about why he was banned from BMW's premises and asked him to sign a release form authorizing her to get information directly from BMW.[31] Kingsmore hesitated, stating that he did not understand what the document was. He asked what would happen if he did not sign, and she replied that he could be terminated. Kingsmore signed the release and asked for a copy.

Becksted left to confer with Evola. They agreed that Kingsmore should not receive a copy of the release because it was an internal company document. She returned to Weckerman's office and so informed Kingsmore. She told him that he was suspended with pay, effective immediately, and that during his suspension he was not allowed to enter the Respondent's premises or communicate with other employees because it would interfere with the investigation.

Weckerman went with Kingsmore to retrieve his personal items and then to the front door to exit the facility. At the breezeway near the exit, they engaged in a brief conversation. Kingsmore stated that he believed his suspension was due to the Union. Weckerman replied that he did not know about that.

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[31] GC Exh. 4.

Kingsmore's Discharge on February 24

On the day of the suspension, February 17, Becksted sent the release to BMW, to which she received no response. As a result, within 2 business days following Kingsmore's suspension, she called BMW. A man there stated that he would not give her any information regarding Kingsmore's employment at BMW. By her own admission, the conversation lasted mere "seconds."[32] Becksted testified, incredibly, that she could not recall if she made any kind of notation of the phone call, and she could not provide a specific time and date or the name and title of this BMW employee.[33] If a memorandum was in fact made, it was not offered in evidence.

Various witnesses of the Respondent testified to the need of Gestamp employees to visit the BMW plant, the Respondent's sole customer at times relevant. They take tours of the BMW plant and may be required to go there when BMW requests assistance or when the two on-site Gestamp employees are off. Becksted testified that quality department supervisors visit the BMW plant on a regular basis, consistent with Holt's testimony that he has gone there three or four times. Regarding what his reaction would be on learning that an employee was refused access to the BMW plant, Evola stated, "I'm 100 percent certain there's no way as a leader in the company that an associate could come to me with such dramatic

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[32] Tr. 945.

[33] More precisely, she professed not to recall if she made any kind of record thereof (Tr. 936), testimony that is even more incredible and damaging to her credibility.

news and me not take any action whatsoever."[34] However, the Respondent's counsel represented that Kingsmore's inability to enter the BMW plant per se played no part in his suspension or discharge, and that "misrepresentation and failure to provide information" were the sole bases for his discipline.[35]

On the morning of Monday, February 22, Becksted called Kingsmore and stated that she had been unable to get any detailed information from BMW on why he had left. She advised Kingsmore that he was now responsible for getting information from BMW that would clearly state why, by 5 p.m. on Wednesday, February 24. Kingsmore replied that he would do his best. I credit his unrebutted testimony that he denied her suggestions that he had been fired from BMW.

Kingsmore called BMW HR. Several representatives told him that BMW would provide only a verification of the dates of his employment. Upon receiving a letter stating such on February 24, Kingsmore faxed it to Becksted at 3:53 p.m., along with an explanation that this was the only information he could obtain.[36] After receiving the fax that afternoon, Becksted called Kingsmore. She said that this was not the information she had requested and that he was terminated.

At trial, I admitted, over the Respondent's objections, two documents going to the issue of Kingsmore's separa-

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[34] Tr. 732.

[35] Tr. 766.

[36] GC Exhs. 5 & 6.

tion from BMW. The first is General Counsel's Exhibit 9, on its face a BMW document dated May 21, 2007 stating that Kingsmore voluntarily resigned his employment. The second is General Counsel's Exhibit 15, a December 10 e-mail to the Region from Steve Warren, BMW's attorney, confirming that a document of resignation signed by Kingsmore is contained in BMW's files. Because neither of these documents were available to any of the parties at the time of Kingsmore's suspension or termination, they cannot have a bearing on deciding the Respondent's motivation for those actions. Whether Kingsmore's separation from BMW was a resignation, resignation in lieu of discharge, or a discharge is not an issue before me.

Other Instances of Discipline by the Respondent

The Respondent presented testimony regarding the discharge of two other employees for first offenses. One was Ron Gist, who was terminated within a month before trial, for failing to report a forklift accident in accordance with Gestamp's accident policy. Becksted terminated him immediately after she conducted a full investigation, which found him responsible, and he admitted culpability. The second was William Gregory, for sanding words into vehicle sides, considered destruction of company property. A department supervisor brought the matter to Becksted's attention. After an investigation and Gregory's admission, Becksted immediately terminated him. The Respondent provided no date for his discharge.

The Respondent also submitted former employee Joseph Hicks' timesheet for the week of April 12, and a

determination by the South Carolina Employment Security Commission that he had been allowed to resign in lieu of discharge.[37] However, the Respondent failed to elicit any testimony regarding the circumstances of his separation, and Becksted could not say when it occurred. I am therefore unable to ascertain how similar or dissimilar his situation was vis-à-vis Alexander's.

Analysis and Conclusions

The General Counsel alleges that the Respondent discharged Alexander and suspended and discharged Kingsmore in violation of Section 8(a)(3) and (1) of the Act.

The framework for analyzing alleged violations of Section 8(a)(3) is *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Under *Wright Line*, the General Counsel must make a prima facie showing sufficient to support an inference that the employee's protected conduct motivated an employer's adverse action. The General Counsel must show, either by direct or circumstantial evidence, that the employee engaged in protected conduct, the employer knew or suspected the employee engaged in such conduct, the employer harbored animus, and the employer took action because of this animus.

Under the *Wright Line* framework, if the General Counsel makes a prima facie case of discriminatory conduct, it meets its initial burden to persuade, by a preponderance of the evidence, that protected activity was a

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[37] R. Exhs. 17 & 18.

motivating factor in the employer's action. Once this is established, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in absence of the protected activity. *NLRB v. Transportation Corp.*, 462 U.S. 393, 399, 403 (1983); *Kamtech, Inc. v. NLRB*, 314 F.3d 800, 811 (6th Cir. 2002); *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (per curiam). To meet this burden, "an employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." *Serrano Painting,* 332 NLRB 1363, 1366 (2000), citing *Roure Bertrand Dupont, Inc.,* 271 NLRB 443 (1984).

If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for the employer's actions are either false or not, in fact, relied on, the employer fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. On the other hand, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

The initial question is whether Alexander's and Kingsmore's actions qualify as protected, concerted activity under Section 7 of the Act. I find that the General

Counsel has established this element inasmuch as Alexander and Kingsmore actively participated in a union-organizing campaign. More specifically, Kingsmore initiated contact with the Union, he and Alexander were on the organizing committee that Rigsby formed, and they attended several union-sponsored meetings for employees at which Alexander was vocal. In addition, both solicited support for the Union from other employees after work, on breaks, and during and after lunch times.

Secondly, I conclude that Respondent knew of their union activities—several members of management/supervision had direct knowledge, as follows. Alexander communicated to Supervisor Morris that "his coworkers were harassing him about this "union stuff," and Supervisor Fink stated that he had heard of Alexander's involvement in seeking to bring in the Union. Kingsmore told Supervisors Fink and Sullivan that he was trying to get the Union in.

It is well-established that a supervisor's knowledge of union activities is imputed to the employer unless credited testimony establishes the contrary. *State Plaza, Inc.*, 347 NLRB 755, 756-757 (2006); *Dobbs International Services*, 335 NLRB 972, 973 (2001); *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82, 82 (1983).

The Respondent chose not to have Evola testify as to whether he had knowledge of Alexander or Kingsmore's union activity at the time of their suspension/terminations, so there is no credited testimony denying that Morris, Sullivan, or Fink transmitted their knowl-

edge to Evola. He did testify that he believed Kingsmore when Kingsmore called and assured him that rumors of Kingsmore's union activity were untrue.[38] However, even if so, this was not tantamount to testimony that he had no knowledge of Kingsmore's union activities at the time Kingsmore was suspended and then discharged. I further note Evola's testimony that at the time of this conversation, he had not heard any rumors about Kingsmore trying to bring in the Union, "other than discussions with my attorneys."

The Respondent argues (R. Br. at 22) that none of the "decisionmaking supervisors" involved in the decision to discharge Alexander or the decisions to suspend and discharge Kingsmore were aware of either's union activities, and (R. Br. at 28) that Becksted made the decisions.

True, the record remains unclear on who made the decisions, but this is because Evola did not testify whether he did or did not play a role therein and, contrary to the Respondent's contention, Becksted did not specifically testify that she made them or who else did. Inasmuch as Becksted admittedly consulted with Evola on whether to investigate Kingsmore and, later, whether she should give Kingsmore a copy of the release he signed, I must doubt whether she would have not also have consulted with him about the far more drastic measure of discharging employees. Ultimately, the Respondent bears the responsibility for the insufficiency of the record evidence on who made the decisions, and I will not reward the Respondent with any favorable inferences.

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[38] Tr. 735.

Assuming arguendo that I accepted the Respondent's argument that supervisors' knowledge should not be imputed to Gestamp's management, the element of knowledge can be satisfied by reasonable inference. *Windsor Convalescent Center of North Long Beach*, 351 NLRB 975, 983 fn. 36 (2007), enfd. in relevant part, 570 F.3d 354 (D.C. Cir. 2009). *See also Active Transportation*, 296 NLRB 431, 431-432 (1989), enfd. 924 F.2d 1057 (6th Cir. 1991) (knowledge inferred where, inter alia, three of four discharged employees engaged in union activities in the presence of employee who was an informer for the employer); *Clark & Wilkins Industries*, 290 NLRB 106, 106 (1988), enfd. 887 F.2d 308 (D.C. Cir. 1989), cert. denied 495 U.S. 934 (1990) (imputing supervisor's knowledge to employer where supervisor observed organizing campaign in small shop).

Here, the union campaign clearly created a highly-charged atmosphere that engendered widespread sentiments among employees, both for and against the Union. This is best reflected in the threat of physical violence that an employee made against union supporters at a management-conducted meeting, and the accusations that three employees leveled against Alexander. In these circumstances, it is reasonable to believe that other employees reported Alexander's and Kingsmore's union activities to management.

The General Counsel's final burden under *Wright Line* is to show that the Respondent harbored antiunion animus and took discriminatory action because of this animus.

The only direct evidence of animus is Supervisor Fink's warning to Kingsmore that, "You're gone" if Evola found out that he was trying to unionize the plant. Nevertheless, inferences of animus and discriminatory motivation can be warranted under all the circumstances of a case, even in the absence of direct evidence. *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991), enfd. 976 F.2d 744 (11th Cir. 1992); *Electronic Data Systems Corp.*, 305 NLRB 219, 219 (1991), enfd. in relevant part 985 F.2d 801, 805 (5th Cir. 1993).

The timing of the Respondent's actions raises a bright red flag, especially as to Kingsmore. Evola and Supervisors Keller, Morris, and Zimmerman all knew in August 2009 that he was barred from entering BMW's plant, but no one from management or supervision again mentioned the subject to Kingsmore until his suspension meeting with Becksted on February 17. Thus, the Respondent had knowledge of Kingsmore's ban from entering BMW's plant for over 6 months yet took no action whatsoever until only weeks after he first engaged in union activities. Alexander, too, was discharged just weeks after he began engaging in union activities. Adverse action occurring shortly after an employee has engaged in protected activity raises an inference of unlawful motive. *State Plaza, Inc.,* above at 756; *La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003).

So does the severity of the discipline that the Respondent imposed in proportion to the offenses. See *Detroit Paneling Systems, Inc.*, 330 NLRB 1170, 1170 (2000); *KNTV*, 319 NLRB 447, 452 (1995). Alexander and

Kingsmore were the first instances of the Respondent immediately discharging an employee for alleged timesheet falsification or the falsification of prior work history.

The Respondent represents Gist and Gregory as other employees terminated for first offenses in similar circumstances (R. Br. at 27-28). However, those situations were distinguishable in that they involved physical damage to company property: Gist was terminated for failing to report a forklift accident and Gregory for deliberately vandalizing a vehicle. In contrast, Alexander's timesheet discrepancy and anything that Kingsmore said in the interview for a supervisory position resulted in no harm to the Respondent whatsoever. Thus, Alexander's error was caught prior to his pay being submitted to payroll, and he received only the remuneration to which he was entitled for the day in question. Even crediting Becksted, Kingsmore's reason for leaving BMW came up as an issue only as a result of his interview for a promotion that he did not receive. I again note the Respondent's counsel's representation that the Respondent discharged Kingsmore solely for misrepresentation and failure to provide information, not because he was barred from BMW. Additionally, both Gist and Gregory admitted to the misconduct, a factor not present here. Significantly, the Respondent did not have affirmative evidence that either Alexander deliberately falsified his timecard or Kingsmore his employment history but instead chose to paint their conduct in the worst light possible.

This brings up another factor that leads to the inference of animus and constitutes evidence of discriminatory

intent against Alexander and Kingsmore: the Respondent's failure to conduct full and fair investigations. *See Hewlett Packard Co.,* 341 NLRB 492, 492 fn. 2 (2004); *Firestone Textile Co.*, 203 NLRB 89, 95 (1973).

Becksted never spoke to Alexander at all prior to his discharge. By her own testimony, she simply looked at the paperwork, decided that Alexander had deliberately lied on his timesheet, and terminated him. Both employees and management were well aware that an electronic system was in place to monitor attendance, and that supervisors compared self-prepared and electronic records, yet Becksted presumably concluded that Alexander deliberately sought to cheat the Respondent out of 38 minutes of work time without first inquiring as to whether he had an alternate explanation for the discrepancy. The Respondent's willingness to discharge Alexander without even interviewing him or affording him an opportunity to defend against the serious accusation of deliberate falsification is evidence that the Respondent's true motivation was Alexander's protected activities. *See Joseph Chevrolet, Inc.*, 343 NLRB 7, 8 (2004); *Tubular Corp. of America*, 3347 NLRB 99, 99 (2001).

Turning to Kingsmore, Becksted, an experienced and trained HR manager, allegedly could not recall if she even documented the conversation she had with a BMW HR representative concerning Kingsmore's employment, and the Respondent produced nothing that memorialized it. This, along with her apparent satisfaction with a conversation that lasted mere seconds, strongly suggests that her investigation lacked diligence and a genuine desire to ascertain the truth. This conclusion is bolstered

by the very short timeframe that she gave Kingsmore to obtain documentary evidence of his separation from BMW, and the absence of any showing of why the Respondent needed it so immediately.

Still another basis for inferring animus is that the Respondent discharged Alexander and Kingsmore, rather than imposing lesser penalties as per the Respondent's progressive discipline system. An employer's failure to follow such a system is frequently indicative of a hidden motive for the imposition of more severe discipline. *Fayette Cotton Mill*, 245 NLRB 428 (1978); *Keller Mfg. Co.*, 237 NLRB 713, 713-714 (1978). This proposition appears particularly apropos to the instant matter because both were employees of long tenure, Alexander had never previously been disciplined for any reason, and the Respondent relied on nothing in Kingsmore's prior disciplinary record in making the decision to terminate him.

Finally, animus can be inferred from the Respondent's shifting rationales for disciplining Kingsmore. Becksted testified that Evola asked her to investigate both why Kingsmore left BMW and why he was banned from entering BMW's premises. However, the Respondent provided no evidence that it ever specifically asked Kingsmore why he was not allowed into BMW's plant, or attempted to obtain such information from BMW. In Kingsmore's employee separation checklist, three reasons are stated for his termination: "Falsification of prior work history, not supplying proper documentation from prior employer as requested and not supplying information for reason of BMW's refusal to allow em-

ployee on property."[39] Although the Respondent elicited considerable testimony on the importance of an employee's need for entry into the BMW plant, the Respondent's counsel expressly represented that Kingsmore's bar from entering BMW was not one of the reasons for his discharge.

Such shifting of rationales is evidence that the Respondent's proffered reasons for discharging Kingsmore are pretextual. See *Approved Electric Corp.*, 356 NLRB No. 45 (2010) (citing *City Stationery, Inc.*, 340 NLRB 523, 524 (2003) (nondiscriminatory reasons for discharge offered at the hearing were found to be pretextual where different from those set forth in the discharge letters); *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997) ("Where . . . an employer provides inconsistent or shifting reasons for its actions, a reasonable inference can be drawn that the reasons proffered are mere pretexts designed to mask an unlawful motive.").

Considering all of the above factors, I conclude that the General Counsel has established the last elements, of animus and of actions based thereon, and thus has met his initial burden of persuasion under *Wright Line*.

I now turn to the Respondent's burden under *Wright Line* to show that it would have taken the same action in the absence of that protected activity. The Respondent has represented that Alexander's timesheet falsification was the sole reason for his discharge and that Kingsmore's misrepresentation and failure to provide infor-

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[39] GC Exh. 7.

mation of prior work history were the sole bases for his suspension and discharge. Based on the same factors that have led me to find inferred animus, I conclude that these proffered reasons were mere pretexts and that antiunion animus motivated the Respondent's actions. Accordingly, no further analysis of the Respondent's defenses is necessary for, as the Board stated in *Rood Trucking Co.*, 342 NLRB 895, 898 (2004):

> A finding of pretext defeats any attempt by the Respondent to show that it would have discharged the discriminatees absent their union activities. This is because where 'the evidence establishes that the reasons given for the Respondent's actions are pretextual —that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).
> . . .

See also SPO Good-Nite Inn, LLC, above.

Accordingly, I conclude that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Alexander and by suspending and then discharging Kingsmore.

Alleged 8(a)(1) Violations

A statement from an employer is an unlawful threat under Section 8(a)(1) if it interferes with, restrains, or coerces employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a).

The General Counsel contends that the Respondent violated Section 8(a)(1) in about early February, when Supervisor Fink unlawfully threatened Kingsmore with discharge for his union activities, and separately on February 11, when Fink unlawfully interrogated Alexander concerning his union activities.

In approximately early February, Kingsmore told Fink that he was going to try to unionize the plant and Fink warned him to be careful because if Evola found out, "You're gone."

Clearly, Kingsmore initiated the conversation and viewed Fink as a confidant due to Fink's role in protecting him from Keller's aggressiveness. Nevertheless, the level of trust between them is not pivotal in assessing Fink's statement. Rather, "[T]he Board does not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act." *Sage Dining Service,* 312 NLRB 845, 846 (1993). Fink's statement reasonably conveyed the message that Kingsmore's protected activeities might harm his employment and thus reasonably could have caused Kingsmore to fear reprisals for engaging in protected activities.

The Respondent references (R. Br. at 41) *Rogers Electric, Inc.*, 346 NLRB 508, 509 (2006), in arguing that Fink's statement was merely a matter of opinion and therefore protected by the free speech provisions of Section 8(c) as an "intemperate expression of personal opinion." Such an argument mischaracterizes the type

of expressions to which the *Rogers Electric* holding applies. Under that decision and related precedent, Section 8(c) protects as free speech an employer's and its agents' flip and intemperate statements disparaging a union as futile, violent, or of other impugned character. *See, e.g.*, *Children's Center for Behavioral Development*, 347 NLRB 35, 35 (2006) (if unaccompanied by threats or promises of benefit, employer may "criticize, disparage, or denigrate a union"); *Miller Industries Towing Equipment, Inc.*, 342 NLRB 1074, 1076 (2004) (employer may offer his "perspective" against union so long as it is not accompanied by threats). In contrast, Fink's statement predicted retaliation against Kingsmore if management learned of his protected activities. Thus, the *Rogers Electric* holding is inapposite.

Accordingly, I conclude that Fink's statement was an unlawful threat within the meaning of Section 8(a)(1).

On February 11, Fink approached Alexander in the tool crib and made the comment, "I didn't know you were one of the ones who's trying to bring the Union in." Asking an employee about his or her knowledge of union activities may, depending on the totality of the circumstances, reasonably tend to interfere with, restrain, or coerce employees in the exercise of Section 7 rights. *Blue Flash Express*, 109 NLRB 591, 592-595 (1954); *see also Michigan Roads Maintenance Co.*, 344 NLRB 617 (2005), citing *Donaldson Bros. Ready Mix*, 341 NLRB 958, 959 (2004). Circumstances considered in evaluating the tendency to interfere include the (1) background, (2) the nature of the information sought, (3) the identity of the questioner, and (4) the place and method of the

interrogation. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985); *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984).

Both Fink and Kingsmore testified to Fink's role in the workplace as something of a mediator between rank-and-file employees and their foreign-speaking managers, in that employees confided to Fink that they were being mistreated. Although a supervisor, Fink was not a senior manager within the company hierarchy, and his supervisory authority was limited to off-site employees. As such, his position and reputation within the organization did not tend be specially coercive or threatening.

Rather than single Alexander out or call him to a management office, Fink spoke at Alexander's workstation and in the presence of another employee. Fink made but a single statement and did not pursue the issue when Alexander did not respond. His words contained no implication that employees would be adversely affected for their support of the Union, and they were presented as a declaration of fact rather than posed as a question.

In the totality of circumstances, I conclude that Fink's statement regarding Alexander's union activities did not amount to coercive interrogation or otherwise reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Accordingly, I find no merit to this allegation.

General Counsel's Motion to Amend Complaint

The General Counsel (GC Br. at 11) moves to amend the complaint to add the allegation that on February 17,

Weckerman unlawfully threatened Kingsmore in violation of Section 8(a)(1). The motion is moot in light of my credibility resolution favoring Weckerman's version of what he said over Kingsmore's account, with the resulting finding that Weckerman said nothing about the Union to Kingsmore that day. Accordingly, I need not address the question of whether Section 10(b) bars such an amendment as untimely.

CONCLUSIONS OF LAW

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

2. By discharging Reggie Alexander and by suspending and discharging David Kingsmore, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(3) and (1) of the Act.

3. By threatening an employee with discharge for engaging in activities on behalf of the United Steelworkers, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)(1) of the Act.

REMEDY

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

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest compounded daily, *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), with an applicable rate of interest 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[40]

ORDER

The Respondent, Gestamp South Carolina, LLC, Union, South Carolina, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging, or otherwise discriminating against any employee for engaging in activities on behalf of the United Steelworkers (the Union) or any other labor organization.

(b) Threatening any employee with discharge or any other adverse action for engaging in activities on behalf of the Union or any other labor organization.

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[40] 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.

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

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

(a) Within 14 days from the date of the Board's Order, offer Reggie Alexander and David Kingsmore 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 Reggie Alexander and David Kingsmore whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Reggie Alexander, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Within 14 days from the date of the Board's Order, remove from its files any references to the unlawful suspension and discharge of David Kingsmore, and within 3 days thereafter notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

(e) 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 desig-

nated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Union, South Carolina, copies of the attached notice marked "Appendix."[41] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 1, 2010.

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[41] 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."

(g) 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.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. March 2, 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 suspend, discharge, or otherwise discriminate against you because you engage in activities in

support of the United Steelworkers (the Union) or any other labor organization.

WE WILL NOT threaten you with discharge or any other adverse action because you engage in activities in support of the Union or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights under Section 7 of the Act, as set forth at the top of this notice.

WE WILL within 14 days from the date of the Board's Order, offer Reggie Alexander and David Kingsmore full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Reggie Alexander and David Kingsmore whole for any loss of earnings and other benefits suffered as a result of our discrimination against them, in the manner set forth in the remedy section of the decision.

WE WILL remove from our files any reference to our unlawful discharge of Reggie Alexander, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

WE WILL remove from our files any reference to our unlawful suspension and discharge of David Kingsmore, and within 3 days thereafter notify him in writing that

this has been done and that the suspension and discharge will not be used against him in any way.

GESTAMP SOUTH CAROLINA, LLC

APPENDIX C

UNITED STATES COURT OF APPEAL
FOR THE FOURTH CIRCUIT

No. 11-2362 (L)
(11-CA-22595)
(11-CA-22628)

GESTAMP SOUTH CAROLINA, L.L.C., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

No. 12-1041
(11-CA-22595)
(11-CA-22628)

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GESTAMP SOUTH CAROLINA, L.L.C., PETITIONER

Filed: Dec. 13, 2013

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Chief Judge Traxler, Judge Keenan, and Judge Harwell.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

[BURR FORMAN LOGO]
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Jan. 28, 2013

VIA E-FILE AND OVERNIGHT MAIL

Patricia S. Conner, Clerk
U.S. Court of Appeals for the Fourth Circuit
1100 East Main Street
Suite 501
Richmond, VA 23219-3517

Re: ***Gestamp South Carolina, LLC v. NLRB***
No. 11-2362(L); No. 12-1041
FRAP 28(j) Supplemental Authority Regarding Petitioner/Cross-Respondent Gestamp South Carolina's Opening Brief, Jurisdictional Statement, p.1

Dear Ms. Conner:

Noel Canning v. National Labor Relations Board, No. 12-1115 (D.C. Cir. Jan. 25, 2013) (slip enclosed), holds the NLRB lacks jurisdiction to hear a case when recess appointment of a Board member made for a vacancy not occurring during the same Senate adjournment as the appointment compromises the minimum three person quorum, and declines to enforce such a decision.[1]

Noel Canning matters because Craig Becker, one of three serving Board members on this case's review date, was a March 27, 2010[2] recess appointment to fill a vacancy from a term ending December 31, 2007[3] —one not within the same Senate adjournment as Becker's appointment. As *Noel Canning* makes Becker's appointment invalid, there remain on this Gestamp case's decision date only two duly appointed Board members, not enough for a *New Process* quorum. *Noel Canning* thus shows the Board lacked subject matter jurisdiction to make the Gestamp decision under review.[4]

Though Gestamp only now raises subject matter jurisdiction, *Noel Canning* joins other cases holding this

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[1] *Noel Canning*, No. 12-1115, p. 44; *see New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644-45 (2010) (must have three serving to have quorum).

[2] www.nlrb.gov/who-we-are/board/craig-becker.

[3] www.nlrb.gov/members-nlrb-1935.

[4] *Noel Canning*, No. 12-1115, pp. 10-13.

issue may be raised anytime.[5] *Noel Canning*'s January 25, 2013 holding represents the first known appellate disposition about recess appointments for openings outside the same recess, and research reveals no prior such Becker challenge. Following *Noel Canning* means granting the Review Petition and denying the Enforcement Petition.

Gestamp has served a copy of this letter with enclosure on opposing counsel.

Respectfully,

/s/ JOHN J. COLEMAN, III
JOHN J. COLEMAN, III
Attorney for Gestamp of South Carolina LLC

cc: Usha Dheenan (w/enclosure)
Linda Dreeben
Nina Schichor

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[5] *Id.*; *see GO Computer, Inc. v. Microsoft*, 508 F.3d 170, 175 n.2 (4th Cir. 2007) (court or either party can raise anytime); *Interstate Petroleum v. Morgan*, 249 F.3d 215, 219 (4th Cir. 2001) (Supreme Court gives appellate courts duty "to evaluate not only their own subject matter jurisdiction 'but also [the jurisdiction] of the lower courts . . . even though the parties are prepared to concede it.'").

APPENDIX E

[Seal Omitted]

United States Government
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

Feb. 21, 2013

Patricia S. Connor, Clerk
U.S. Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

Re: *Gestamp South Carolina, LLC* v. *National Labor Relations Board*, Nos. 11-2362 & 12-1041

Dear Ms. Connor:

The National Labor Relations Board submits this letter in response to the letter filed by petitioner/cross-respondent Gestamp South Carolina on January 28, 2013. In that letter, Gestamp asserted for the first time that one member of the Board, Craig Becker, was not constitutionally appointed to his office and that the Board therefore lacked a quorum. The employer bases that claim on *Noel Canning v. NLRB*, No. 12-1115 (D.C. Cir. Jan. 25, 2013).

This case was taken under submission by this Court more than three months ago. Gestamp never raised any claims challenging the constitutionality of Member Becker's appointment before the Board itself or in this Court. Gestamp suggests that its failure to raise such claims is immaterial because the matter is a juris-

dictional one. But the Supreme Court has made clear that whether a federal officer has been appointed unconstitutionally is *not* a jurisdictional issue. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 US 765, 778 n.8 (2000) (declining to decide whether *qui tam* provisions of False Claims Act violate Appointments Clause because that is not "a jurisdictional issue that we must resolve"); *Freytag v. CIR*, 501 U.S. 868, 878 (1991) (characterizing Appointments Clause challenge as "nonjurisdictional"); accord, *Intercollegiate Broadcast Sys. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-756 (D.C. Cir. 2009) (Appointments Clause claim is "nonjurisdictional" and "not subject to the axiom that jurisdiction may not be waived"); *Evans v. Stephens*, 387 F.3d 1220, 1222 n.1 (11th Cir. 2004) (*en banc*) (same).

The Board will be filing a supplemental brief regarding *Noel Canning* in *NLRB v. Enterprise Leasing Co. Southeast LLC*, No. 12-1514 (4th Cir.), and *Huntington Ingalls Inc. v. NLRB*, Nos. 12-2000 & 12-2065 (4th Cir.). Those cases are scheduled for consolidated oral argument on March 22, 2013, and the Board's supplemental brief is due on March 8. The brief will address the merits of the constitutional issues in *Noel Canning*, as well as the issue of whether a litigant waives or forfeits claims challenging a federal officer's appointment if the litigant did not raise the claims in a timely manner.

Sincerely,

/s/ LINDA DREEBEN

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National Labor Relations Board
(202) 273-2960

APPENDIX F

[Seal Omitted]

United States Government
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

Sept. 23, 2013

Patricia S. Connor, Clerk
U.S. Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, VA 23219

Re: *Gestamp South Carolina, LLC v. National Labor Relations Board Case Nos.* 11-2362 and 12-1041

Dear Ms. Connor:

Pursuant to Fed. R. App. P. 28(j), we attach the Eighth Circuit's recent decision in *NLRB v. Relco Locomotives, Inc.*, __ F.3d __, 2013 WL 4420775 (8th Cir. Aug. 20, 2013).

In *Relco*, the Eighth Circuit unanimously held that the NLRB's quorum requirement is not jurisdictional, and thus appellate courts are not required to address untimely objections to various members' recess appointments. *Relco*, 2013 WL at *26-28; *see also id.* at *31 (Smith, J., dissenting) (agreeing with this portion of the majority opinion). The Eighth Circuit relied, among other things, on the Supreme Court's decision in *Freytag v. Commissioner*, 501 U.S. 868 (1990), and the D.C. Circuit's opinion in *Intercollegiate Broadcasting System v. Copyright Royalty Bd.*, 574 F.3d 748

(D.C. Cir. 2009). *Relco*, 2013 WL at *26-28. The Eighth Circuit acknowledged the Third Circuit's contrary decision in *NLRB v. New Vista Nursing and Rehabilitation*, 719 F.3d 203 (3d Cir. 2013), *pet. for rehearing filed* (July 1, 2013), but expressly rejected *New Vista*'s analysis, finding it unpersuasive and inconsistent with Supreme Court case law. *See Relco*, 2013 WL at *27-28.

Relco provides further support for the Board's position, expressed in its prior letters, that Gestamp has waived any Recess Appointments Clause objections here because it failed to make any such objections in its briefs. And contrary to the employer's suggestion in a recent letter, this Court's recent decision in *NLRB v. Enterprise Leasing*, 722 F.3d 609 (2013) does not hold otherwise: the Court merely held that it had the power to consider a recess appointment objection, and did not hold that it was *required* to consider such an objection.

Finally, this Court should not accept Gestamp's suggestion to hold this case pending *Noel Canning v. NLRB*, No. 12-1115 (S. Ct.). In *Noel Canning*, the Supreme Court is considering the merits some of the same recess appointment issues that Gestamp is trying to belatedly inject into this case. In this case, unlike in *Noel Canning*, constitutional objections based on the Recess Appointment Clause are not squarely presented in light of Gestamp's waivers.

Sincerely,

/s/ LINDA DREEBEN
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Encl.

cc: all counsel (via CM/ECF)