

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

NAPA AMBULANCE SERVICE, INC., d/b/a PINER'S
NAPA AMBULANCE SERVICE

and

Case 20-CA-32875

REBECCA ROSECRANS, An Individual

Christy J. Kwon and Cecily A. Vix, San Francisco, Calif., for
the General Counsel
Patrick W. Jordan (with *Nanette Joslyn* on brief), San Rafael,
California, for Respondent.

DECISION

Statement of the Case

JAMES M. KENNEDY, Administrative Law Judge: This case was tried in San Francisco, California on August 14-18, 2006, based upon a third consolidated complaint issued May 31, 2006 by the Regional Director for Region 20. The original unfair labor practice charge was filed by Rebecca Rosecrans, an individual, on February 2, 2006 and amended on February 22. The case had been consolidated with Cases 20-CA-32497, 32693 and 32965, all filed by the National Emergency Medical Services Association (the Union). On August 18, 2006, the Union withdrew its charges and asked that the corresponding portions of the complaint be dismissed as the parties had signed a collective bargaining contract. I granted that motion. The remainder of the complaint, based on Rosecrans's charge, alleges that Napa Ambulance Service, Inc., d/b/a Piner's Napa Ambulance Service (Respondent) violated §8(a)(1) and (3) of the National Labor Relations Act.¹ Respondent's answer denies the pertinent allegations remaining in the complaint.

Issues

The principal issues are whether Respondent disciplined and subsequently discharged Rosecrans because she was a Union activist. Warnings were issued to her on April 4, 2005,² August 22 and August 30. She was also discharged on August 30. Respondent asserts that the warnings and the discharge were for good cause, i.e., that they were connected to Rosecrans's behavior as an employee and had nothing to do with the fact that she was a known union activist.

¹ The case has therefore been recaptioned. Nothing in the settlement precludes me from utilizing evidence adduced in the course of the hearing even if it was advanced in support or in defense of the other cases, so long as it has relevance to the extant case.

² All dates are 2005 unless otherwise indicated.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to orally argue and to file briefs. The General Counsel and Respondent have both filed briefs which have been carefully considered. Based upon the entire record of the case, as well as my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction

According to the pleadings, Respondent is a California corporation having its headquarters in the City of Napa from which it operates an emergency ambulance and paramedic service in several Napa County communities. It admits that during the calendar year 2004, in the course and conduct of its business, it provided services valued in excess of \$50,000 to the United States Government, to the State of California and to private businesses, which in turn meet one of the Board's standards for the assertion of jurisdiction on a direct basis. During the same time period its gross volume of business exceeded \$500,000. Accordingly, it admits it is an employer engaged in commerce within the meaning of §2(2), (6) and (7) of the Act. It further admits the Union is a labor organization within the meaning of §2(5) of the Act.

II. The Alleged Unfair Labor Practices

Some Preliminary Matters

Given the withdrawal of the Union's charges and the dismissal of its portion of the complaint, discussion of the Rosecrans matter necessarily reaches back into the organizing drive and shifts those events into background, even if not directly connected to her.³ These include: Rosecrans's participation in the organizing; pre-election warnings to other union activists; an April warning to Rosecrans arising from complaints by co-workers about her; a similar warning in August; some issues arising from a July memo prohibiting Rosecrans and fellow dispatchers from turning off the telephone tape recorders; as well as the events of August 20 which all arose from Rosecrans's inability that day to come to work, the event which triggered her discharge, and an additional issue concerning turning off the tape recorders.

Background; Pre-Election Matters

The Union, the National Emergency Medical Services Association (NEMSA), began its organizing in early 2005. It filed its NLRB election petition on February 28. The election was conducted on April 15; the Union won, and on May 2 was certified as the exclusive collective bargaining representative of Respondent's ambulance drivers and dispatchers. Although the

³ Respondent filed a motion to strike portions of the General Counsel's brief as they adverted to matters raised by the Union's charges. As I am considering those only for purposes of background, the motion is denied. Nevertheless, I am not considering fact patterns previously alleged to be §8(a)(5) violations, such as breaches of unilaterally imposed rules and subsequent discipline to be evidence of union animus as might support a §8(a)(3) violation. While those changes may have violated the Act had they been litigated, they are based on the breach of a legally imposed duty (i.e., the §8(d) obligation to bargain in good faith). The failure to meet such a requirement is not the same as the deliberate interference with an individual employee's §7 rights such that it can be used as an element of §8(a)(3). In other words, it cannot be used as the sort of animus which can support a discharge independent of §8(a)(5).

administrative employees worked in close physical proximity to the dispatchers in Respondent's administrative/accounting office, the administrative employees were excluded from the voting/bargaining unit and were not a part of the organizing.

5 The administrative office is located on the same grounds as several other Piner businesses in Napa. These include a nursing home, a retirement residence, a health care supply center, a welding shop and a bicycle shop. The administrative office, sometimes referred to as the accounting office, is a small structure, a closed-in carport, approximately 17' x 10 17,' adjacent to the nursing home. That small space is further subdivided to house the dispatch office. Dispatch is in a corner behind a two-wall partition which does not extend to the ceiling; its door is always open. The non-dispatch portion of the floor is so small that office staff schedules must be staggered so the desks can be shared.

15 There were four full time dispatchers. Each worked a 12-hour shift. Day dispatchers worked from 7 a.m. to 7 p.m. The night dispatchers worked from 7 p.m. to 7 a.m. Rosecrans, for example, worked the daytime hours on one weekend day and Mondays, Tuesdays and alternate Wednesdays. The other day shift dispatcher was Donovan Balsley who worked Thursdays, Fridays, one weekend day and the other alternate Wednesdays. The night dispatchers worked similar schedules; they were Hope Pruett and Andrea Gurule. The 20 weekends seemed to vary a little more as relief dispatchers would often take one of those four shifts. A 48-hour work week was common.

25 Balsley had become lead dispatcher in 2004. As the lead dispatcher, he was responsible for putting the schedule together for each month, in charge of their training and served as the point man for questions, including equipment repair. There is a small dispute, unnecessary to resolve, concerning whether he was also the person the on-duty dispatcher should notify in the event the arriving shift dispatcher called to advise he or she couldn't get to work for some reason. There was also a standing procedure whereby open shifts were to be offered to off-duty dispatchers on a seniority basis.⁴

30 The office manager and company controller was, and is, Geri Bise. She has worked for the Piner's companies for almost 20 years. In that capacity she was Balsley's (and the dispatchers') direct supervisor, though she did not carry out that responsibility in a hands-on manner. In large part the dispatchers required little oversight. They were a responsible group.

35 Bise came to work each day at 4 a.m. and worked till about 2 p.m. Others who worked in the accounting office were: Cheri Blaylock, the bookkeeper; Ed Herrera, the bill collector; Sherine Purdey, an administrative assistant; and Melanie Gomez, the ambulance billing clerk. Gomez came to work in the afternoon and worked into the evening; she was, as Purdey observed, a part-time worker. Herrera commonly served as a relief dispatcher. In August, 40 Balsley began training Gomez and Meleah Mahoney to become relief dispatchers.⁵

45 ⁴ Balsley is alleged in the complaint to be a supervisor within the meaning of §2(11) of the Act. As will be seen, it is unnecessary to making any finding about that. His duties, as described do not require a finding that he is a supervisor. See, *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1048 n. 15, (2003) citing *Jordan Marsh Stores Corp.*, 317 NLRB 460, 467 (1995) (individual who directed, assigned, and made up the work schedules of employees was found not to be statutory supervisor).

⁵ Gina Peterson (from the ambulance side) and Gloria DeLuna (whose regular job is not clear from the record) also served as relief dispatchers. As with DeLuna, Mahoney's regular job cannot be determined from the record. Purdey, too, said she had trained as a dispatcher.

Finally, the general manager until midsummer was Chris Piper, a long-term executive. He resigned abruptly and was replaced in July by Jeremy Piner, the owner's son. Previously the manager of the bicycle shop, Jeremy became both Respondent's acting general manager and its operations manager. Bise and the other department heads began reporting to him at that point. He still held both jobs when he testified. The corporate president is Gary Piner.

Rebecca Rosecrans

Rebecca Rosecrans has been a dispatcher for Respondent since 2001. There is no dispute that until April 2005 she had been an excellent employee, even being named employee of the year in 2002. Geri Bise held her in generally high esteem. In 2004, the first crack in that reputation occurred when Rosecrans wrongly accused her friend Pruett of lying about the reason Pruett had given for an absence (car repair issues v. home refinance meeting). When Bise issued Pruett a warning about it, she learned that someone had likely misspoken. She didn't revoke the warning to Pruett, but was nevertheless left to wonder whether Rosecrans had provided accurate information. Despite Rosecrans's report, Pruett and Rosecrans maintained their personal friendship.

In March, or at least 'at all material times' according to a stipulation of fact, Respondent became aware of Rosecrans's organizing activities: "At all material times Respondent had knowledge that Rebecca Rosecrans, Hope Pruett and Craig Pitcher⁶ were the leaders of the Union organizing campaign, and Respondent also had knowledge that they were engaged in union activities."

In mid-March, according to Rosecrans, Bise and others who worked in the office began giving her the silent treatment. Bise denies it, saying that on one occasion Rosecrans seemed upset about something and when she inquired, Rosecrans told her she didn't want to talk to anyone, ". . . [S]he hadn't slept well. Didn't feel that good. Just didn't want to talk. . . [T]he very next day I went back into the dispatch office with the same comment. And she said she just didn't want to talk and to leave her alone." So from then on, Bise did so. Even assuming Rosecrans should be credited over Bise, there is no evidence that this silent treatment had anything to do with her union activities.

April Warnings

In early April, General Manager Chris Piper observed employee Dustin McNabb talking on his cellular phone while driving one of the ambulances in a non-emergency mode. Piper instantly called the ambulance on his Nextel walkie-talkie cell phone, spoke to McNabb's partner Craig Pitcher and told them to stop it. A few days later he had a conversation with Pitcher to the effect that it was against the rules to have a personal cell phone in the ambulance. Pitcher, who says Piper told him it was a 'coach counseling,' did not agree that there is such a rule. The employee manual is subject to different interpretations. At pp. 55-56 it says: "Employees may not carry personal pagers or personal cell phones on their persons while on duty, to prevent interference with patient care or other responsibilities. Personal pagers or cellular phones. . . may be kept in quarters or onboard company vehicles. Cellular phones, either personal or company, may never be used [w]hile driving a company vehicle."

The General Counsel cites this incident as evidence of union animus. And it is true that Pitcher was a union activist. Yet there is good reason to doubt that this is evidence of animus. First, there is no doubt that it is against the rule to drive an ambulance while talking on a cellular phone. That is what Piper called about, for he had seen the driver doing it. There is no

⁶ Pitcher was an ambulance crew member.

evidence one way or another regarding whether he had recognized the driver as McNabb; he undoubtedly knew he had spoken to Pitcher. Second, there is no evidence in Pitcher's personnel file of any discipline, assuming 'coach counseling' is the first step in the progressive disciplinary system.⁷ It seems to me that if it were a warning of any type which required a record be kept, one would have been. As I view it, this 'coach counseling' is nothing more than ordinary supervision – nothing more than a supervisor explaining the proper manner in which an employee is to conduct himself. It is not a warning at all. And certainly some sort of reminder needed to be made, even if Piper cited part of the rule incorrectly or spoke to the wrong employee (and who is to say that McNabb didn't receive a similar lesson? No party inquired one way or the other). The important thing was to remind ambulance personnel that talking on a cell phone while driving was not allowed. Common sense, even without the rule, dictates the same.

Finally, there is no connection whatsoever to Pitcher's union activities in Piper's admonishment. It does not constitute evidence of union animus and certainly has no bearing on what happened to Rosecrans 6 months later. Not every chewing out, even those which are in part erroneous, is discriminatory. Both Pitcher and McNabb together comprised the ambulance crew. McNabb clearly erred when he spoke on his cell phone while driving. Piper was right to be concerned and to mention it to the more senior employee. His commentary amounted to nothing insofar as the disciplinary system was concerned. Pitcher may have thought the criticism unfair and perhaps it was, but it did not interfere with anyone's §7 rights. It therefore does not qualify as animus which might inform us about what happened later to Rosecrans.

On April 4, ten days before the NLRB election, Bise issued a 'white slip' to Rosecrans. None of the 'warning' boxes was checked and it may be reasonably assumed that this was a verbal warning, rather than a written one. It described Rosecrans's 'ongoing' behavior which had begun on March 18, was repeated on March 21 and occurred again in early April. Bise cited as witnesses and complainants the three office employees, Blaylock, Herrera and Gomez. She said: "Complaints have been stated by several employees, these complaints being brought to my attention individually. The statements are of non work related conversations at the dispatch window often loud and very disturbing to their productivity. Also of extreme rudeness when asking a work related question."

Rosecrans wrote on the slip: "I do not agree. I have been given the silent treatment for well over three weeks now by Geri and most of the acctg office staff."

The mere fact of this warning, supported by the presumably valid complaints of the three office workers does not establish union animus. It is in no way connected to Rosecrans's union activity. Contrary to Bise's note, the loudness appears to have been work-related – usually shouting through the outside window to drivers, according to Gomez. Bise had reason to believe the three office employees and Rosecrans's response was not a denial. She offered no contrary version. The 'silent treatment' response did not address her co-workers' complaint.

On April 14, the day before the representation election, paramedic Valerie Davis and her ambulance partner Steve Dykstra were pulling the 8 a.m. to 8 p.m. shift at the St. Helena station. After performing their routine duties, at about 9:30 that morning Dykstra retired to the back room and took a nap. Similarly, Davis fell asleep in the front room reclining chair while

⁷ It is not. The progressive discipline system is found on p. 44 of the employee manual. It describes 'verbal counseling' as the first step. The forms used in the system do not include, as an option, 'verbal warning.' The first choice is 'warning,' followed by 'suspension' and then 'dismissal.' Under the rules it would appear that a verbal warning would be recorded and maintained in a file for future reference.

watching television. Both should have remained awake as it was a daytime shift. They were awakened by loud knocking. Davis answered the door to find General Manager Piper, accompanied by a female high school student who was participating in a 'shadow' program where students follow a worker during their day; this day the student was shadowing Piper. He was discomfited to find Davis, at least, sleeping and wearing her T-shirt, not the company uniform shirt, which was hanging on the recliner. Piper made a short comment to her about being out of uniform, quickly showed the student around the station and then left. On April 17, ambulance supervisor Jason Bond, per Piper's instruction, issued Davis a verbal warning for being out of uniform on April 14.

The General Counsel observes that Davis was one of the members of the union organizing committee, but that her partner Dykstra was not. Dykstra was not disciplined, but according to Davis, Dykstra, unlike her, was wearing his uniform shirt, even though it was unbuttoned. From that circumstance the General Counsel asserts that union animus may be inferred. I do not agree. Davis was in fact out of uniform; Dykstra was not. Furthermore, Piper said nothing to her at the time to suggest that discipline was forthcoming. The election was scheduled for the next day. Had Piper wished to coerce Davis, he would have taken steps before the election itself. In any event, it is not a type of animus which suggests that Respondent is willing to discharge an employee for anti-union purposes. Moreover, a post-election warning such as this would not have accomplished such a coercive aim. It was clearly aimed at her appearance, nothing more. Accordingly, I do not find Piper's verbal warning to be of any significance under the Act.⁸

I therefore find that the April incidents have no bearing on what occurred in August.

July–August; Events Leading to Rosecrans's Discharge

The Union was certified as the exclusive collective bargaining representative on May 2. Negotiations began on July 20. Rosecrans attended all but one of those meetings and served as the union's recording secretary for the purpose of keeping the Union's negotiation minutes. Similarly, her co-worker and friend, night dispatcher Hope Pruett, also attended the meetings as a bargaining committee member. As co-workers on 12-hour shifts they regularly relieved one another. Usually a shift change involves an update concerning the previous shift's events and it was not uncommon for them to converse about nonbusiness matters of mutual interest. Since both were on the Union's bargaining committee, one of their usual topics was what had transpired during any negotiation session which both had recently attended. These discussions often took place in the dispatch office or in the doorway leading to it. This meant that their conversation was audible to those accounting office employees who happened to be present. Sometimes those conversations seemed to disturb those workers, as had occurred in April, resulting in a warning to Rosecrans.

At 7 p.m., on August 16, another conversation took place at that location. This resulted in Melanie Gomez complaining to Geri Bise that the conversation had been loud, about the Union, and disruptive to her. Gomez's complaint asserted that the conversation was not work related and lasted for some 45 minutes. On August 22 Bice and Jeremy Piner met with Rosecrans. During the meeting, Bice issued a white slip to Rosecrans concerning the incident, saying: "it has been reported once again that loud & disruptive conversation is taking place in

⁸ That there is testimony that Respondent's enforcement of the uniform policy was inconsistent, at least when the drivers were waiting at station, is insignificant. Piper was undoubtedly embarrassed to find one of his drivers out of uniform during the daytime while showing the business off to an outsider, even if it was a high school student. Davis did not present the image Piper expected to see.

the office/dispatch area. Hope reported to work & punched in at 7 PM. The conversation unrelated to the shift change began. You punched out at 7:15, creating double time. Melanie was subjected to very uncomfortable non work related conversation. She confronted me on Wed. in tears stating she did not wish to work in the office when only Rebecca was present. This is not acceptable behavior on your part."

Gomez's handwritten report about the incident focused both on Rosecrans's voice volume and on the subject matter, the union negotiation meeting: "On Aug. 17 '05 I had witnessed an employee Rebecca Rosecrans talking loudly to Hope Pruett about the union meetings that had gone on during that day since Hope was one of the attendants. For approximately 45 minutes they proceeded to talk loudly about the union and issues that were discussed during that meeting, making it very uncomfortable for me. During this 45 minutes I became very uncomfortable and unproductive, and was ready to walk out early. I finished my shift and the next day in tears spoke to Geri about the situation and how uncomfortable I felt the previous day."

None of the discipline boxes in the August 22 form was checked, and it would appear that this, like the previous one, was regarded as a verbal warning. Pruett, however, was not disciplined for the incident. It would appear that she escaped because Gomez was principally complaining about Rosecrans and Pruett was not implicated in a late punch-out resulting in overtime pay.

In addition, according to Rosecrans, Jeremy Piner remarked during the meeting that he equated speaking about the Union at work as the equivalent of sexual harassment and he wouldn't stand for it. Piner did not offer a denial of her evidence. Rosecrans's testimony:

Q BY MS. KWON: Okay. Tell us what you said to Geri, and what Geri said to you.

A (WITNESS ROSECRANS) I told her that I did not remember the conversation, but that Hope and I talked on a regular basis at shift change and other times. I did ask to see the supporting document. I asked to have a copy of it, but I was not given a copy of it.

At that time Jeremy Piner spoke up and said that talking about sensitive subjects such as the union in the office was distressing to others in the office. That it was the same as sexual harassment. That it was against federal law and they wouldn't stand for it. I'd already been -- I'd already had one warning for this that was not resolved, and here we are with another one. (Emphasis supplied.)

Aside from Piner's injection, which carries legal consequences, there are at least two suspicious factors here. The first is why Gomez made any complaint at all. Gomez says she said nothing to either Rosecrans or Pruett to interdict the situation "Because I know Hope, and I knew that both Hope and Rebecca were big Union supporters and they were very intimidating and since it was two of them against just me, I didn't want to cause any disruption." Gomez would have us believe that she is easily upset by matters relating to the Union and that her co-workers are intimidating, principally due to their being middle-aged. Why that would be so eludes me. If she had some strong objections to labor unions, e.g., a religious reason or some negative past experience, it seems to me that it would have been presented. Beyond that, the Union's presence at the Company did not affect her; she was not part of the voting/bargaining unit. It wasn't her concern.

As matters stand, Respondent simply observes that Gomez burst into tears when making her complaint to Bise and was too weak to have taken matters into her own hands by telling the two conversants that they were interfering with her work. It's a simple matter for one employee to tell another to 'keep it down; I'm trying to work here,' yet Gomez, who is 28 years

old, somehow couldn't find the gumption to speak up in her own interest.⁹ She became tearful far too readily for an adult. So the question is whether Gomez has made a legitimate complaint about disruption (Gomez's description of a 45-minute conversation, denied by Rosecrans, seems somewhat contrived) or whether she simply can't abide the Union's presence even though it will have no impact on her.

The second suspicion arises from Bise's approach to Gomez's complaint. Bise never asked Rosecrans for her version of what had happened that evening. Her first discussion with Rosecrans about the incident was during the meeting where she gave Rosecrans the warning, nearly a week after it happened. Moreover, Bise was very careful to couch her warning to Rosecrans in neutral terms. The subject matter of the Rosecrans-Pruett conversation was what had taken place at the negotiation session. That, of course, was protected union talk. The warning, supposedly, is not for the discussion's subject matter, but for the volume of Rosecrans's voice and for its length as well as the additional pay obligation. Bise knew the exchange was about Union business, but focused on Rosecrans's loudness, not the substance of the discussion.

Given the fact that she did not question Rosecrans about the incident, but simply took Gomez's word, I am uncomfortable with her approach. Rosecrans had generally been an excellent employee and Gomez was known to be hypersensitive. There was good reason for Bise to be more thorough than she was. Even if Bise knew Rosecrans didn't want to talk about social matters and was reluctant to speak to her, Gomez's complaint transcended that small hurdle and Bise's failure to cross it must be a fact-finder's concern.

There is a small discrepancy with dates here. Gomez says the incident occurred on August 17, which was a Wednesday. That would mean it occurred during the 7 p.m. shift change that day. Yet she dates her report August 17, after testifying that she came back to the office early the following morning to complain to Bise – who usually came to work at 4 a.m. Bise gave her the form, so it should have been dated August 18. Curiously, however, the dispatcher work schedule, found in R.Exh. 3, shows that Rosecrans did not work on Wednesday that week, probably because it was not her Wednesday. She did work on Tuesday, August 16, which is the date Bise used in the disciplinary report. So when did this incident occur? It was not on August 17 as Gomez says. Did Gomez wait a full day before reporting it? Or did she mistake the 16th for the 17th?

After August 16, Rosecrans was not scheduled to work again until the 20th, the fateful Saturday, so Bise's seeming delay in delivering the warning is in fact unremarkable.

Given Gomez's peculiar behavior, Bise's carefully worded warning, both being overlaid by Piner's comment, I am unimpressed with the manner in which Respondent handled this warning. Not asking Rosecrans for her version was not entirely fair to her. It may properly be asked why they did not. Was it because Rosecrans was a known union organizer and/or because she was heavily involved with the Union's negotiation team? Why did Bise regard Gomez's complaint as having validity? What of the date inconsistency? Bise knew Gomez was hypersensitive and also knew Gomez used protective earphones. Was Respondent attempting to create a paper record of misconduct in order to build it to a discharge? Did Bise legitimately regard the matter as a continuation of the nearly identical infraction in April? Did Bise tie it to

⁹ Gomez emphasizes her timidity by observing that she usually listened to a portable music player through its earphones, effectively masking any Rosecrans-Pruett conversation. She says that evening she had forgotten to bring it to work. It is not unreasonable to assume that the older women were aware of her earphone listening and therefore were unconcerned about interfering with her.

5 what had occurred between the talking incident of August 16 and Rosecrans's failure to report to work on August 20? If she did make that connection, was it because of Rosecrans's union activity or because of her misconduct? Or did it only become important in the context of Rosecrans's failure to report to work two days before and the complications that brought? Finally, what impact does Jeremy Piner's comment have upon the analysis?

August 20 – August 30

10 Rosecrans was not initially scheduled to work the day shift on Saturday, August 20. It was initially assigned to Donovan Balsley, her day shift counterpart and lead dispatcher. Balsley had opened the shift to others and, although Rosecrans could have taken the shift outright based on the seniority practice, did not do so right away. Because of that, the shift was given to collections agent Ed Herrera, who served as a relief dispatcher. At some point
15 Rosecrans realized she was able to take the shift and bumped Herrera.

15 The General Counsel observes that on August 20, "a series of unfortunate events occurred." In my opinion, "unfortunate" significantly under-describes the scenario. Rosecrans lives in Davis, California, approximately 45 miles from Respondent's facility in Napa. The commute is principally over Interstate-80 and then about twelve miles of state highway.
20 Interstate-80 is an extremely busy freeway, serving as the commute route between Sacramento and San Francisco-Oakland. It can be a difficult road at any time of day but is particularly heavy-going during commute hours. Rosecrans normally allows an hour and 15 minutes to get to work.

25 For reasons of the heart, Rosecrans had a late night on the evening of August 19-20. She was to report to work that morning at 7 a.m. She overslept and did not awake until 6:50. She had absolutely no chance to get to work on time. Even an hour and 15 minute tardiness, such as this presaged, would put great strain on Respondent's two shift system, not to mention the harm to a shift skipped in its entirety. Here it would leave the night shift dispatcher on duty without immediate relief in sight. Since it was a Saturday, Rosecrans thought there was no
30 supervisor immediately available for anyone to consult. The only person was night dispatcher Hope Pruett, still on duty.

35 Rosecrans testified that the first thing she did that morning was to telephone Pruett at the dispatch office. She telephoned on her landline cordless telephone. She testified that as she spoke to Pruett, the telephone went dead. She tried again and was able to tell Pruett that she would be late. The phone went dead again. She testified that the instrument had been left off its cradle and had lost its charge. Her telephone bill shows only that one call was made at 6:59 a.m.

40 Rosecrans's lateness that morning created a problem for Pruett because she had scheduled an 8:30 test at a community college in Vallejo, about 14 miles distant. She simply could not stay and cover the shift. Rather than calling lead dispatcher Balsley at home or call Bise, who was the direct supervisor for the dispatchers, she began calling other dispatchers. She first called Herrera, knowing that Rosecrans had taken the shift from him. By then, Herrera had made other plans and declined. She then called Meleah Mahoney, who was training as a
45 dispatcher. Mahoney told her she had not been released to handle a shift by herself. Pruett knew Gomez had been training on dispatch for a few days and so called her, though she says she did not know Gomez had not been cleared to work by herself. Gomez lives within walking distance of the office. Pruett told Gomez that she estimated Rosecrans would be about 45 minutes late. She made that estimate even though Rosecrans had said nothing concerning how long it would take her to get from Davis to Napa.

Curiously, Pruett contends that there were several telephone calls between her and Rosecrans after the first one about 7 a.m. Respondent's telephone records do not show any calls during that time frame between the Company and Rosecrans. Nonetheless, Pruett asserts that they spoke several times and she assured Rosecrans that the shift would be taken by Gomez. Rosecrans agrees, despite the absence of any record proof the call was made. What number would Pruett have called, since the land line was dead and which, according to Rosecrans later, would not ring? Rosecrans's cell phone? And, what phone did Pruett use? The Company records show no long-distance calls at that time. Did she have a cell phone of her own? If so, those records have not been presented. Moreover, she turned the dispatch tape recorders off while she tried to figure out what to do. Why? Did she think this was not company business? Was she trying to shield her friend Rosecrans by avoiding making a record? Wouldn't that allow Rosecrans to make up a cover story for her lateness which could not easily be disproven?

Having received Pruett's assurance that she'd only need to work for 45 minutes, Gomez agreed to walk over and begin the shift. In the meantime, Rosecrans was having difficulties of her own making. Once she had spoken to Pruett, she decided that she didn't need to hurry because she presumed Gomez would want several hours work. As a result, she took her time getting ready to leave. She took a shower, had a leisurely breakfast and otherwise readied herself for work. When she was finished, about 8:30, she began looking for her car keys but could not find them. She said she looked high and low throughout her apartment and out to the car. She even searched her freezer and the planter box outside. She testified that she had panicked, thinking that the company would use her behavior as an excuse to fire her.

Having spent much of the previous evening with her boyfriend, she said she went outside her building and, using her cell phone, called him on his, leaving a code (the missed call message) for him to call back. Since it was not a completed call, she explained, her cell phone records do not reflect it. The boyfriend was said to be a power line worker from Southern California who was working temporarily on a project in Yuba City or Marysville, around 50 miles from Davis. She testified that he later called back and told her he had her car keys, promising to return them after work that day. (Presumably, he had driven her car on their date the night before and had neglected to return the keys.)

Despite the fact that she says her cell phone worked well enough to call her boyfriend, she did not take any steps to use it to call Respondent. Instead, she let the matter go. To me she testified she had difficulty getting a cellular signal unless she went outside her apartment building. This inconsistency is troubling since she had done that very thing to call the boyfriend.

About 10:30, her cordless phone received a call from Donovan Balsley. She said, while crying, that she had awakened late, was unable to find her car keys and she was having a very bad morning. She explained that her keys might be with her boyfriend but she could not leave the house because she couldn't lock it. Therefore, she testified, she told Balsley she was not coming to work. (Should one infer from that testimony, using negative pregnant logic, that while she didn't have a house key, she did possess a spare set of car keys, yet didn't want to admit it? Most people do have spare keys; it is foolish not to. Is her explanation concerning securing her front door credible? Modern entry doors can usually be locked without a key upon leaving; only a deadbolt could not be.) Why could she not testify that she did not have any keys at all, and stop there? If she had, that would have rendered her testimony about her inability to secure her door unnecessary. She testified that she behaved in this manner because she panicked.

In any event, the communication from Balsley was the first she had had with any individual who held scheduling responsibility. It was not until Balsley's telephone call that anyone at Respondent, beyond Pruett, became aware that Rosecrans was not coming in. The next day Rosecrans wrote an incident report, GCExh. 18, in an attempt to explain what had happened. The report is two paragraphs long:

I was unable to get to work on 8/19 [sic] (Day Dispatch) because my friend inadvertently took my keys to work with him. He was unable to call me until almost 11:00 to let me know he had my keys because he was working on a pole in the Marysville–Yuba City area.

To compound the problem, I had overslept and was going to be late, anyway — but then discovered I could not find my keys. My home phone was not working properly because it had been left off the cradle charger for too long.

Clearly, this report is far from complete. It does not describe her first telephone call to Pruett; it does not discuss any further conversations she later claimed to have had with Pruett, particularly whether she had knowledge that Pruett had called Gomez in for temporary duty. Furthermore, it omits entirely the fact that she had a working cell phone. Nor does she describe the conversations she had with Balsley. Beyond that, there is no mention of whether she had a spare car key or whether she could not lock her door if she left. Finally, she does not try to excuse herself as having been in a state of panic. Yet all of these things were part of her testimony to me, either direct or implied.

While this was developing, Gomez had been wondering where Rosecrans was, but had done nothing to get relieved. Pruett completed her business in Vallejo and called Gomez in dispatch to confirm that Rosecrans had arrived. The records show that call was made at 10:28 a.m. When Gomez explained that Rosecrans had not come in, Pruett asked Gomez if she had called Rosecrans for an update. Gomez then called Rosecrans first on her home line, but no one answered. Then she tried Rosecrans's cell phone and left a voice mail message when no one answered that, either. This failure caused Gomez to call Bise. In tears, she explained that since Pruett had been unable to stay, she had agreed cover the dispatch office to allow Rosecrans time to arrive. Bise told her to call Balsley. She did and in rapid succession Balsley called Herrera, Pruett, and Bice. He then made the previously described call to Rosecrans.

Unable to get anyone else to cover for the not-fully trained Gomez, Balsley with Bise's concurrence, made arrangements for the ambulance supervisor, whose station was adjacent to the office, to assist Gomez if she needed it. Balsley also told her to call him any time she thought she needed to.

Although Gomez successfully completed the shift, Rosecrans's absence had created a circumstance which was risky and entirely avoidable. Gomez had not been cleared as a trained dispatcher, and although Pruett bears a great deal of responsibility,¹⁰ the entire incident was triggered by Rosecrans. Furthermore, Rosecrans's honesty in describing the episode in her incident report and in her testimony before me is suspect. Assuming that she was telling the truth about her missing car keys, the fact remains that she never called the Company to tell them of her difficulty. She says she knew Gomez was covering, and also knew that Gomez was untrained. It was her responsibility to notify someone in charge or get to work as promptly as she could. Her explanation for failing to notify the Company that she could not come in at all seems hollow indeed. She testified that her cell phone worked when she left her apartment building. She had used it to call her boyfriend. Why did she not also call the Company with the

¹⁰ Pruett did not escape discipline for her role in the incident. See GCExhs. 31 and 32.

cell phone, assuming that her cordless home phone was still inoperable? There is no explanation and it would appear to me that she was not dealing with the problem in an honest or responsible manner. Moreover, in her incident report she did not mention that she had a cell phone which was working that day. Why did she omit that from the report, but describe it to me? In any event, her testimony does not match the telephone records and her testimony about that morning is farfetched; indeed, extremely implausible.

On Sunday, August 21 (the day she wrote her incident report), Bise and Balsley sought to speak with Rosecrans, but she declined, saying she wanted Union representation. Despite that declination, Respondent permitted her to work her scheduled days, August 21, 22, 23 and 27, 28. During that period management began sorting through the various reports it had obtained about the August 20 incident. As already noted on August 22, she did meet with Bise and Jeremy Piner, by then willing to talk. In that meeting Bise issued her the verbal warnings concerning the August 16 loud talking matter (described in more detail above) and a warning for 'shift abandonment' on August 20. According to Bise, Rosecrans told them that her 'phones were not working.' They asked Rosecrans why she couldn't have used a pay phone or a neighbor's phone, but she responded she didn't know where to find one and for some reason she couldn't ask her neighbors if she could borrow theirs. Unsurprisingly, that response was viewed as unsatisfactory.

On Tuesday, Bise and Balsley, apparently based on something Jeremy Piner had said, discussed the August 20 matter a little more, having doubts about the credibility of Rosecrans's claim that her phone was not working on Saturday morning. They decided to pursue it further.

On Wednesday, Respondent's management conducted a lengthy meeting to discuss with its attorney Patrick Jordan the direction of its ongoing collective bargaining. During that meeting they also discussed the facts, to the extent that they knew them, concerning Rosecrans's August 20 behavior. It had already issued her the warning for shift abandonment, but information had now developed concerning Rosecrans's lack of truthfulness. Company president Gary Piner, who apparently had not been involved in issuing the earlier warning(s), but had asked for information concerning what Rosecrans had said and done about the absence itself, had become focused on whether Rosecrans had breached the company rule requiring total honesty. The rule, found in the employee handbook, is set forth in the footnote below.¹¹ After the management team had consulted with Jordan concerning the issue, Jordan excused himself while management decided what to do. He was not present during the decision-making process. It is instructive to quote Jeremy Piner at length:

[Witness JEREMY PINER] Yeah, on Monday [August 22], Geri [Bise] and Donovan [Balsley] had come up that they had had a big problem, and they started coming up with facts and we started looking at them.

Q [By Mr. JORDAN] And in particular, what was your role in terms of reviewing facts or accumulating same?

¹¹ Honesty — Honesty may be the single most important trait of an employee. Honesty presents itself most often in our communication as well as the security of other people's property.

Piner's abhors dishonesty and will not tolerate dishonesty among its employees. Furthermore, Piner's does not believe in degrees of honesty or placing a value on the item taken (i.e. 'a lie is a lie' and we don't care whether it is 'white' or not and 'stealing is stealing' regardless of the value of the item). *If you want minor items such as a copy, a rose, etc., just ask, you may be able to get what you want.*

When there is a problem, you'll find that "Honesty" gives management an opportunity for correction, but "Dishonesty" eliminates the opportunity for management to work with you to correct a situation. Therefore, any employee, against whom there is evidence of the dishonest act, beyond a reasonable doubt, will be terminated. [Italics in original.]

- 5 A One of the things that had come up is, you know, we could get a record of all this, our tape recording, we figured the tape recording would be working. I went in there personally, got the tape, took it back to my office where I have another recorder that can play these tapes at the rate that they need to be played at so, I reviewed the tape and the tape went off that morning¹² and so we had no record of what had gone on.
- Q That morning being which date?
- A The morning of August 20th.
- 10 Q On what day did you engage in that activity?
- A I believe that, the tape came up, I think it was Wednesday.
- Q Directing your attention to that Wednesday, and I'm hoping that it's August 25th? [13]
- A That would be about right.
- Q Did you meet with me?
- A Yes.
- 15 Q Was this a prearranged meeting?
- A I recall that we were going to discuss Union negotiation items, preparing for a negotiation meeting coming up, I believe it was either the end of that week or the first of the next week.
- Q Without reviewing what we discussed but confining yourself only to a topic, was the Rosecrans issues, as I'll refer to it, a topic of discussion with me as your counsel?
- 20 A Yes.
- Q For how long a period of time?
- A We were in there for five hours. We had an exhaustive meeting.
- Q Independent of communications with me during the course of that day, did you engage in activities relating to the investigation?
- 25 A Yes. We had gone over all these details with my father and Geri Bise to try to make a time line out of this make some sense out of it, because the stories were very convoluted and we determined that it became rather unlikely that the facts that were presented to us could be accurate.
- Q My question was, independent of being with me, did you engage in activities regarding the investigation on August 25th?
- 30 A Physical activities?
- Q Yes.
- A Yeah, I did inspect the tape that morning.
- Q Upon my departure, did you participate in a meeting to discuss what would be done with respect to Rebecca Rosecrans?
- 35 A Yes, I did.
- Q Who else attended that meeting?
- A That was Geri Bise and my father, and myself.
- Q Where did the meeting take place?
- 40 A In my father's office.
- Q How long did the meeting last?
- A I don't think it could have been more than a half hour, maybe an hour but, it definitely wasn't more than an hour.
- Q Do you know what the conclusion was, what was said regarding the decision between the three of you?
- 45 A Well, it was said basically --
- Q By whom?

¹² Meaning that the tape was unreviewable because the machines had been turned off. They had recorded nothing. As noted elsewhere the dispatcher who had turned them off was Hope Pruett.

¹³ Wednesday was August 24.

A I'm sorry?

Q And by whom?

A And by whom. Well, we all went around and around with the facts, because we wanted to
5 make sure that everything was accurate, we were giving due process here. And it came
down that --

MS. KWON: Your Honor, objection, not responsive.

Q BY MR. JORDAN: Tell us what was said, not your thought process.

A Okay. I concluded, as others concluded, that this had to violate our policy on line [lying].

10 Q I'm sorry?

A It had to violate our policies on line [lying].

Q And was there some discussion as how that conclusion was drawn?

A The phone calls and everything were -- I mean we could not, I could not believe that the
15 phone calls that were made, an[d] the omissions that were made, and that the time frame of
three and a half hours to search a small apartment, and maybe a path out to the vehicle to
find keys and -- there were just so many facts that didn't add up. I mean a dispatcher --

Q Is this being discussed, by the way?

A This was all discussed, all these details, we went over it exhaustively. And I determined
there was --

20 [Objection interposed.]

THE WITNESS: My, [pause] [T]he words that I used were that it had to be lying, the facts didn't
work out. It was not really believable that Rebecca, who we all knew or in my opinion I knew
that she had [her] head about her, I didn't believe that she could be panicked and unable to
think and unable to respond. I also -- I mean I didn't believe that she couldn't make the call.
25 Her phone not ringing [¹⁴] while it was charging, I've never heard of that. I've dealt with
electronics a lot and I didn't believe it at all. She may have not been able to pick it up for an
extended period of time --

[Objection interposed]

30 THE WITNESS: So, anyway, I didn't believe that the phone would not ring, and I still do not
believe the phone would not ring.

Q BY MR. JORDAN: Tell us what you were saying?

A I was saying that the phone would have rang. She may not have been able to pick it up and
speak for very long but, the phone would have been ringing. I also didn't believe she was
incapacitated to call in for three and a half hours. That did not make any sense to me either.
35 And I believe that Geri Bise said that she believed it had to be lying also.

Q What about your father?

A There was no doubt in his mind. He stated that this had to be a case of lying.

Q Was there any discussion about what lying meant in the context of your discussions?

[Clarification to witness omitted.]

40 A Yes, yes.

Q What was said by who about the impact of lying?

A Well, the impact of this lying?

Q What was said and by whom, if Rosecrans was lying? The impact of her lying, what was
said about that, if anything?

45 A Well, the impact of her lie was I had stated that she had left this position and made a
dangerous situation out of it by effectively having an inexperienced person come and
replace her. I know that my father stated that, you know, we had a zero tolerance policy on
lying and this certainly qualified.

Q Anything else that was discussed by the three of you during the course of this meeting?

A As far as details?

¹⁴ Referring to Gomez's effort to call, but getting no answer.

Q Anything else?

A Anything else? I can't recall anything else at this time.

Q Have you exhausted your recollection?

5 A Yes.

Q Rebecca Rosecrans was on the Union's negotiating committee?

A Yes.

Q Was the fact of her Union activities discussed by the three of you during the course of this meeting?

10 A No. It had no bearing on our decision.

Q Was it discussed?

A Was it discussed?

Q The fact that she was on the committee?

A Yeah, actually I would say that we did discuss it.

15 Q Was that topic discussed when you met with me for five hours?

A I would say yes.

Q Now, let me ask you this question, did we fire Rebecca Rosecrans because she was on the negotiating committee and was a leader in the Union?

A No.

20 Q What was she fired for?

A She was fired for lying.

25 On August 28, for reasons not explained in the record, Rosecrans turned off the dispatch tape recorders, including the emergency tape recorder required under Respondent's ambulance contract with the County.

30 On August 30, after a bargaining session where she served as the Union's note-taker, Respondent issued her a suspension notice for having turned off those recorders. In the same moment it gave her a discharge slip, citing lying concerning the previous shift abandonment and for turning off the tape recorders on August 28.

35 Respondent operates two tape recorders in its dispatch office. It is not entirely clear how they operate, but at least one is voiced-actuated and records office sounds, not just telephone conversations. One is tied to the County's 911 emergency dispatcher. Respondent's contract with the County requires that recorder to be active at all times. The second was Piner's backup and had the same requirement. It is not entirely clear, but it appears that Respondent's dispatchers had drifted into a practice which was inconsistent with the contract's requirement. In July, Balsley had issued a memo which restated the policy that the tape recorders were to be left on at all times. All the dispatchers, including Rosecrans and Pruett, signed the memo in acknowledgment of its receipt. Despite signing the memo, at least some dispatchers did not take it seriously. Pruett had turned the dispatch tape recorders off during her call to Rosecrans concerning her lateness on August 20. That meant, when Jeremy Piner tried to investigate company records concerning Rosecrans's August 20 behavior, there was nothing to review. Within a week, Rosecrans turned them off herself.

45 There is employee testimony, to which the General Counsel points, that Respondent had both permitted and trained employees to allow them to turned the recorders off while making personal calls. Balsley denied that he trained dispatchers in such manner. Frankly, I am of the view that neither the employees who gave the testimony nor Balsley are entirely correct; he had been seen turning them off himself. Balsley had not been the lead dispatcher all that long (about a year when the incidents occurred) and the previous lead dispatcher had been a night shift employee whose command of the situation on other shifts left much to be desired. In my view this is simply a matter of "drift;" over several years it was a practice which, while contrary to outstanding rules, had taken root without close oversight. Nevertheless, Respondent had

always been bound to the County contract obligating the employees to maintain an audio record. Indeed, a County review would have required corrective measures. Balsley's July memo was a reasonable remediation as Respondent's management came to isolate the issue.¹⁵

III. Analysis and Conclusions

Reviewing the remaining complaint and the arguments made by counsel for the General Counsel concerning purported union animus harbored by Respondent, I have come to the conclusion, mentioned somewhat piecemeal in Section II, that most of the facts cited in support of the allegations concerning Rosecrans must be rejected. For the most part, they are simply irrelevant. The first, the April warning for repeatedly talking too loudly was clearly not aimed at any union connection. The complaints were entirely valid and reported by every employee who worked in the administrative/accounting office. Rosecrans was being disruptive and the conversations about which the staff was complaining have not been convincingly demonstrated to have been a union activity. It sounds mostly in general boisterousness, perhaps impelled by a feeling of empowerment as the union drive got off the ground. But there has been no showing that her union activity was the basis of the office employees' complaints.

Similarly, the warning to fellow union activists on the ambulance side shortly after the mid-April NLRB election had no bearing on what Respondent was faced with in August when Rosecrans began to pile up her transgressions. The non-disciplinary admonition to Pitcher concerning cell phone usage in the ambulances and the verbal warning to Davis for being out of uniform offer nothing in support of Rosecrans in August. Neither was aimed at the employee as a response to their union activity. In each case it was simply enforcement of the employee handbook rules.

The warning issued to Rosecrans on August 16 following Gomez's complaint stands on different grounds. The strongest reason to conclude that the warning was discriminatory is Jeremy Piner's equating union talk to sexual harassment. This parallel is simply false. Union activity, including union talk, is protected by law — specifically, §7 of the Act. That protection is not easily lost. Sexual harassment, on the other hand, is unlawful from the outset. Unwanted and coercive sexual overtures are not protected in the workplace; such conduct is forbidden by law.

Here, it is undenied that Jeremy Piner, in discussing with Rosecrans the nature of Gomez's complaint, acknowledged that he knew the conversation was about the Union and the status of the negotiations. To him, it was harassment of Gomez, though the evidence before him did not, and cannot, support such a conclusion. Under his analysis, the warning, even if it had some nondiscriminatory merit (too loud, too disruptive, etc.), was harassment for it offended Gomez. That shallow, and non-objective approach, does not even take into account Gomez's hypersensitivity concerning unions. Nor does it account for Gomez's lack of reasonableness: Why didn't Gomez just ask Rosecrans and Pruett to pipe down? Union negotiations should have been of no interest, even if offensive, to Gomez who was outside the bargaining unit. If she didn't want to hear about it, all she had to do was to assert their conversation was disrupting her work. Piner did not understand that Rosecrans and Pruett's talking about the Union was protected and that Gomez was complaining about a subject matter that those two, within reason, could talk about.

¹⁵ In the settled complaint, Respondent's issuance of the memo was alleged as an §8(a)(5) unilateral change. That allegation would have been dismissed. In any event it is not evidence of union animus as might support an §8(a)(3) violation.

Frankly, Bise's analysis of the circumstances were far more insightful than Piner's. She understood that the conversation's subject matter was off limits, but that interference with another's work was not. And, of course, that is how she wrote the warning. Even so, neither she nor Piner independently inquired about Rosecrans's perception of what happened that evening. Nor does it appear that they asked Pruett about it. That failure means they simply took Gomez's tearful word for what happened.

Objectively, Gomez's complaint should have been viewed more skeptically. The fact that she was in tears should have been of little import; she cries far too easily. Her inability to control her tearfulness suggests that she is not seeing things as they are. Besides, leaving aside her minor date discrepancy, what can one make of the fact that she was not in tears at the time of the incident, but had been so reduced some 9 or 10 hours later when she went to Bise? Isn't her response backwards? Surely the normal sequence would be reversed: cry first when the incident happens and become cool about it later. As an objective matter, there is much about Gomez's behavior and report which lends itself to rejection. Skepticism needed to be applied. Yet Bise and Piner accepted it uncritically.

Collectively, Piner's equating (on a logic basis) lawful union talk with unlawful sexual behavior, his and Bise's failure to recognize the inherent unlikelihood of Gomez's story, and their failure to ask Rosecrans and/or Pruett their version of what had happened, all lead to the conclusion that the warning was really to interdict lawful employee talk about union affairs. Why else would Piner have made his remark?

Accordingly, I find that the August 22 warning issued to Rosecrans for the August 16 talking matter, violated §8(a)(1). Although separately alleged as an §8(a)(3) violation, I do not deem it necessary to make such a finding. The remedy would remain the same.

Furthermore, that warning, being part of the progressive discipline procedure, can be seen as animus of such a nature as to support the finding of a prima facie case for the §8(a)(3) allegation that Respondent suspended and discharged Rosecrans on September 30 because she was a union activist. Indeed, all the elements of a prima facie case are present. Respondent has stipulated that it knew Rosecrans was a union activist and it had, of course, observed her in her duties as the Union's record-keeper during negotiations. The wrongful warning constitutes union animus and it fired her within a time-frame connected to her union activism. This suggests that a motivating factor in discharging Rosecrans was her union activism. See, e.g., *Naomi Knitting Plant*, 328 NLRB 1279 (1999)

The question at that point, as mandated by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved by *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) is whether Respondent has rebutted the prima facie case by demonstrating that it would have suspended and discharged her despite her protected activity. I find that it has met that burden of rebuttal.

While the ultimate reason for her discharge, according to Jeremy Piner, was her lying in breach of the Company rule requiring honesty, that rationale must be viewed in context. Her August 20 behavior is the starting point. Regardless of the reasons why she did not appear for work that day, the fact is that she failed to do so.. In some ways what happened was worse than simply not coming in. After telling Pruett she would be late, she then failed to update any responsible person at work that she had decided not to report all.

Of course, Balsley had learned from Pruett that Rosecrans had said she would be late that morning. Yet she never appeared. Respondent could certainly view Rosecrans's statement as a broken promise, if not, upon further examination, a lie. It certainly denied Respondent time to find a proper replacement for Gomez.

5 Next, Rosecrans's (announced) tardiness resulted in an untrained person being assigned to work in Respondent's most sensitive position, emergency ambulance dispatcher. She acknowledges Pruett told her Gomez had agreed to come in. That alone should have alerted her to stay in touch with the office until she knew a fully trained person was serving as the dispatcher. But she decided to take a relaxed approach. We know that she did not call anyone to update her circumstances; indeed, it was not until Balsley called at 10:43 that Balsley learned she was not coming in at all, adding that since she didn't have her keys, she couldn't leave her house because she couldn't lock the door. That call occurred 3 hours and 43 minutes after her expected reporting time. The fact that she had stayed home for that long without notifying anyone meant she knew she was behind the eight-ball. She also knew if anyone focused on that fact, she would need a story of some kind to credibly explain why she had not called. The truth would be an admission of misconduct. At that point she had one known warning outstanding, the April white slip concerning talking too loudly. Concern about the impact of that slip would have been present, but not overpowering had she called Dispatch, Balsley or Bise within a reasonable time after her 7 a.m. conversation with Pruett. But she did nothing until 10:43, when Balsley called. That eliminated any possibility that she could still provide an acceptable excuse – one that may well have been accurate – the lost key situation.

20 What was difficult to explain was why she hadn't telephoned. If Balsley had not called, it is reasonable for Respondent to have concluded that she never would have advised anyone at the Company what was happening and she knew it. She needed an explanation and chose to assert that her cordless phone had been off its charging cradle too long and she couldn't use it. What she didn't mention in her incident report was that she possessed a working cell phone. She also didn't mention that fact during the August 22 meeting with Bise and Jeremy Piner. Instead, she gave what must have been viewed as a cock and bull story about an inability to borrow a phone from an apartment neighbor and that she didn't know where to find a pay phone. This was viewed, when further scrutinized, as a lie to cover up the fact that she had no good reason not to have called. Furthermore, Jeremy Piner could reasonably believe that her cordless phone would ring so long as it was in its charger/cradle, meaning he thought Gomez's call had been ignored. She did have the caller ID feature on her phone. Curiously, it was working only a few minutes later when Balsley called and she admits she saw it was he, so she answered. I, too, doubt that her phone would not ring.

35 Nevertheless, that does not answer the question of why she didn't find another phone somewhere. In addition, why did she tell Balsley about her inability to lock her door? If she didn't have her keys, she couldn't drive and therefore had no way to get to work. Why did she add to the mix that she couldn't secure her apartment? Was this embellishment, one which was unnecessary to make herself understood? I make no findings on the point, but Balsley would have been suspicious of that aspect even if he accepted her story about the keys having been taken by the boyfriend. And, he could also have been suspicious about the lost keys in another sense. Didn't she have an extra set somewhere? Common sense would require it and I find that the lost keys story would have created doubt about her credibility as well, particularly since

45

she was, in other respects, a sensible person.¹⁶ Certainly her claim that the cordless phone would not ring didn't sound right to Balsley.

5 And, aside from the story Rosecrans told them, her testimony that she had a working cell phone which she used to signal her boyfriend demonstrates that she was omitting a significant fact when she chose not to mention that second phone in either her incident report or to Bise and Jeremy Piner on August 22. Even if that neglect doesn't help the Company because they didn't know about it, the fact is that she has admitted to her omission in her testimony. From 10 that I can reasonably conclude that she was being deceptive to the Company as she reported the facts both in writing and orally on August 22. She was dishonestly trying to cover up her irresponsible behavior. While the full picture was not available to Respondent on August 22, her story still didn't hold water. As Bise, Jeremy Piner and Gary Piner began to digest it, running a timeline and considering her story as a whole, they rationally reached the conclusion that she had not been truthful in her explanations. 15

20 Thus, even if they believed her story about the boyfriend mistakenly taking her keys, as far-fetched as it is, that wasn't the dishonesty they perceived. They saw first her failure to follow through after advising Pruett she'd be late. What they viewed as lying followed. What bothered them initially was her story about the cordless phone not working and her connected, but implausible contention that she couldn't find a pay phone or call upon a neighbor. They saw it as a transparent effort to cover up her failure to meet her duties as an employee. Their assessment was certainly reasonable and the facts adduced at the hearing bear them out. She clearly provided Respondent with reason to conclude that she had lied to cover up her failure.

25 Because of that, I have no difficulty in determining that the prima facie case proven by the General Counsel has been rebutted. See *McKesson Drug Co.*, 337 NLRB 935, 936 at n. 7 (2002) where the Board noted:

30 In order to meet its burden under *Wright Line* (i.e., to show that it would have discharged the employee even in the absence of protected activity), an employer need not prove that the employee committed the alleged offense. However, the employer must show that it had a reasonable belief that the employee committed the offense, and that it acted on that belief when it discharged him. See *Yuker Construction*, 335 NLRB 1072 (2001) (discharge of employee based on mistaken belief does not constitute unfair labor practice, as employer may discharge an employee for any reason, whether or not it is just, so long as it is not for protected activity); *Affiliated Foods*, 328 NLRB 1107, 1107 and fn. 1 (1999) (it was not necessary for employer to prove that misconduct actually occurred to meet burden and show that it would have discharged employees regardless of their protected activities; demonstrating reasonable, good-faith belief that employees had engaged in misconduct was sufficient); and *GHR Energy*, 294 NLRB 1011, 1012-1013 (1989) (respondent met *Wright Line* burden by showing that employees would have been suspended even in the absence of their protected activities, because respondent reasonably believed they had engaged in serious misconduct endangering other employees and the plant itself). . . . [Chairman Hurtgen's concurring comment omitted.] 35 40

45 ¹⁶ The General Counsel adduced from Rosecrans testimony which, if credited, describes Rosecrans's desperation as she looked for her keys that morning, apparently in an effort to gain a favorable determination of her credibility. In fact, that testimony is entirely irrelevant to the issue of either the prima facie case or Respondent's defense that Rosecrans was fired for lying. At worst it enhances the viability of Respondent's skepticism; at best it can simply be set aside as not tending to prove or disprove the issue. Her testimony concerning the morning's troubles, aside from the phone calls or lack of them, is colorful but ultimately of no consequence to the proper legal analysis.

See also *Jordan Marsh Stores Corp.*, 317 NLRB 460, 476 (1995) where the Board adopted Judge Michael O. Miller's statement of the law: "To rebut that prima facie case and show that Ray would have been discharged for the same conduct even in the absence of her union activity, Respondent must only show that it reasonably believed that she had engaged in misconduct of a level warranting termination. *GHR Energy Corp.*, 294 NLRB 1011, 1012-1013 (1989), *enfd.* 924 F.2d 1055, (5th Cir. 1991)"

Clearly Respondent has met the burden required by *McKesson*.

Furthermore, I would make this finding even absent Respondent's rule regarding employee honesty. Rosecrans's recklessness put into motion a dangerous circumstance – an untrained emergency dispatcher called to work when she never should have been. The fact that Pruett, not Rosecrans, was the one who put Gomez in the dispatch office is irrelevant. Rosecrans did nothing to alleviate the situation once she told Pruett she was coming in late and Pruett advised her that the untrained Gomez would sit in. She then lied about her role in creating that circumstance. She would have been fired even without the rule no matter what protected conduct she had previously engaged in. Accordingly, the allegation concerning Rosecrans's discharge will be dismissed.

This dismissal essentially overrides the §8(a)(3) allegation concerning her simultaneous suspension and it is therefore unnecessary to make any findings about it. Even so, the record shows she had, in July, been instructed not to turn off the tape recorders. She did so anyway. Her misconduct was clear. Suspension was in the offing.

IV. 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 affirmative action shall also require Respondent to post a notice to employees announcing the remedial steps it has undertaken.

Based upon the foregoing findings of fact, legal analysis, and the record as a whole I hereby make the following

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of § 2(2), (6) and (7) of the Act.
2. The National Emergency Medical Services Association is a labor organization within the meaning of § 2(5) of the Act.
3. Respondent violated §8(a)(1) of the Act on August 22, 2005 when it issued a warning to its employee Rebecca Rosecrans which was, in large part, based upon her union activities and because it equated activities protected by §7 with activities prohibited by other laws.
4. The General Counsel has not proven any other violation of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended: ¹⁷

¹⁷ If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

Respondent, Napa Ambulance Service, Inc., d/b/a Piner's Napa Ambulance Service, Napa, California, its officers, agents, and representatives, shall

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1. Cease and desist from:

a. Interfering with, restraining and coercing employees who exercise the rights guaranteed them by §7 of the Act by issuing them warnings because of their activities on behalf of the National Emergency Medical Services Association or any other labor organization and by wrongfully equating union activity with activity prohibited by other laws.

b. In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by §7 of the Act.

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

a. Within 14 days from the date of this Order, remove from its files any reference to Rebecca Rosecrans's August 22, 2005 unlawful warning, and within 3 days thereafter, notify her in writing that this has been done and that the warning will not be used against her in any way.

b. Within 14 days after service by the Region, post at its facilities in Napa County, California copies of the attached notice marked "Appendix." ¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 20 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt 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 Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 22, 2005.

c. 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 any motions outstanding which are inconsistent with this decision are DENIED.

James M. Kennedy
Administrative Law Judge

Dated: Washington, D.C. December 20, 2006

¹⁸ If this Order is enforced by a Judgment of the 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."

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 issue you warnings because of your activities on behalf of the **National Emergency Medical Services Association** or any other labor organization.

WE WILL NOT tell you that protected union activity is prohibited by other laws.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by National Labor Relations Act.

WE WILL within 14 days, remove from our files any reference to our August 22, 2005 unlawful warning to Rebecca Rosecrans, and within 3 days thereafter, notify her in writing that this has been done and advise her that the warning will not be used against her in any way.

**NAPA AMBULANCE SERVICE, INC., d/b/a
PINER'S NAPA AMBULANCE SERVICE**

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market Street, Suite 400, San Francisco, CA 94103-1735

(415) 356-5130, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356-5138.