

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TRANSPORTATION SOLUTIONS, INC.

and

GENERAL TEAMSTERS, CHAUFFEURS AND
HELPERS, LOCAL 249, a/w INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Cases 6-CA-35206
6-CA-35301
6-CA-35432
6-CA-35486

TRANSPORTATION SOLUTIONS, INC.

and

SHANA McCOY, an individual

Case 6-CA-35500

Robin F. Wiegand, Esq., and Dalia Belinkoff, Esq.,
for the General Counsel.

James J. Brink, Esq., and Kimberly J. Kisner, Esq.,
of Pittsburgh, Pennsylvania, for the Respondent.

Mr. James W. McClelland, Jr., of Pittsburgh,
Pennsylvania, for the Charging Party Union.

DECISION

STATEMENT OF THE CASE

MARK D. RUBIN, Administrative Law Judge. These cases were tried in Pittsburgh, Pennsylvania, on March 26–29, 2007, based on charges filed by General Teamsters, Chauffeurs and Helpers, Local 249 a/w International Brotherhood of Teamsters (the Charging Party Union or the Union) on June 8, 2006, August 30, 2006, December 6, 2006, and February 5, 2007, and on a charge filed by Shana McCoy (the Charging Party Individual) on February 9, 2007, against Transportation Solutions, Inc. (the Respondent or the Employer).

The Acting Regional Director's third amended consolidated complaint, dated March 7, 2007, alleges, in pertinent part, that the Respondent violated Section 8(a)(3) by refusing to consider for hire or hire its former employee Vaunell Evans, by issuing disciplinary warnings to employee Lisa Glenn, and by discharging employees Edward Charlie,¹ Lisa Glenn, and Stephanie Wimbs. The complaint further alleges that the Respondent violated Section 8(a)(1) by the following actions: informing an employee that it could not reward the employee with a wage increase for job performance because the employees selected the Union; advising a

¹ Charlie's discharge is also alleged as a violation of Sec. 8(a)(4).

former employee that the Respondent would not consider him for hire or hire him because of the Union; engaging in surveillance of its employees' union activities; advising employees "that no union or group was going to tell it what to do"; informing its employees that their union actions had "stabbed it in the back"; creating an impression of surveillance of its employees' union activities; advising employees that all of them who attended a union meeting were already, or would be, fired; and by informing its employees that they would have received a wage increase if they had not engaged in union, or other protected concerted activities.

The Respondent defends by denying it acted with illegal motivation in respect to the 8(a)(3) and (4) allegations, and by denying that it engaged in the actions pleaded as 8(a)(1) violations or by asserting a lawful context. All of the substantive allegations occurred in the context of the Union's attempt to organize the Respondent's employees.

At the trial, the parties were afforded a full opportunity to examine and cross-examine witnesses, to adduce competent, relevant, and material evidence, to argue their positions orally, and to file post-trial briefs. Based on the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs of the Respondent and the General Counsel, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a Pennsylvania corporation, maintains an office and place of business in Pittsburgh, Pennsylvania, the facility involved herein, where it has been engaged in the operation of a shuttle bus and van passenger transportation business pursuant to contracts with various customers, including the University of Pittsburgh Medical Center (UPMC). During the 12-month period ending May 31, 2006, the Respondent purchased and received at its Pittsburgh facility goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania, and derived gross revenues in excess of \$250,000 from its transportation business operations. I find, and it is admitted, that at all times material hereto, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Labor Organization

I find, and it was admitted on the record, that the Union is, and has been at all times material hereto, a labor organization within the meaning of Section 2(5) of the Act.

III. Alleged Unfair Labor Practices

Background

The actions alleged as unfair labor practices occurred in the context of the Union's attempt to organize the Respondent's employees in 2006.² The Union filed its representation petition with the Board on April 13. A Board-conducted election was held on May 26, with a majority of votes cast for the Union. The Respondent filed objections to the conduct of the election which were eventually overruled, and the Board issued a certification to the Union on February 20, 2007.

² All dates discussed herein occurred in 2006, unless otherwise noted.

The Respondent's Business

5 The Respondent operates a passenger transportation business in Pittsburgh, Pennsylvania, in which it provides van and shuttle service to health care employees, patients, and their families, principally under contract with the University of Pittsburgh Medical Center (UPMC). The shuttles are larger vehicles that travel a regular route in the general medical center area, during which they pick up and drop off passengers. Shuttle drivers must possess a commercial driver's license. The vans are smaller vehicles that provide point-to-point
10 transportation in a somewhat larger geographic area.

The Respondent is owned by its president, Dwight Mayo, Sr. (Mayo), who founded the company about 17 years ago. Managers reporting to Mayo Sr. include Senior Operations
15 Manager Elnora Briston, Vice President Steve Simmonds, and Patient Transport and Employee Shuttle Manager Phil Davis. Briston, with the Respondent since its inception, oversees both van and shuttle operations, and is the senior manager, reporting directly to Mayo. Davis oversees the day-to-day operations of the van drivers. Mayo's son, Dwight Mayo, Jr., has occupied the position of payroll clerk for between 2 and 3 years. Leon Rhodes occupied the positions of road supervisor, security supervisor, and safety supervisor from 2002 to his
20 discharge on June 20, 2006.

The Respondent's shuttles operate on a schedule along routes connecting the medical facilities to various parking lots, including lots referred to on the record as Baum, East, and
25 Second Avenue. The shuttles begin at 4 a.m. and continue until 1:30 a.m., and transport about 10,000 passengers a day. The Respondent's vans operate daily on an as-needed basis, providing transportation for patients to and from their residences and various medical facilities. While a majority of van trips are pre-scheduled, the vans do not operate on a regular route or schedule, as do the shuttles.

30 Union Organizational Activity

The Union's organizing drive began on February 11, when the Union's organizer, James McClelland, received a phone call from an employee of the Respondent, informing him of a
35 meeting that evening of interested employees. McClelland attended this meeting at a local restaurant, and spoke of what union organizing entailed. McClelland held additional organizing meetings for employees, generally at the Union's hall located at 4701 Butler Street in Pittsburgh, on February 25, March 11, April 8, and May 20. One of the meetings was held at the residence of Lisa Glenn. McClelland printed flyers announcing the union meetings, gave the flyers to employees, including Glenn, who then distributed the flyers to other employees. Among others,
40 McClelland obtained authorization cards from employees Lisa Glenn, Vaunell Evans, Ed Charlie, and Stephanie Wimbs. Subsequent to the election, two union meetings were held, one in July and one on December 9. Glenn distributed flyers announcing the December 9 meeting.

After the petition was filed, in late April representatives of the Union and the Respondent
45 attended a hearing at the regional office of the Board, during which the parties agreed to a stipulated election. At the hearing, the Union was represented by McClelland, the Union's attorney, and employee Edward Charlie. Charlie was the only employee present at the hearing. The Respondent was represented by Mayo and the Respondent's attorney. The same individuals, with the addition of manager Phil Davis, were again present in the regional office on
50 May 25, the day before the election, for a meeting to discuss the *Excelsior* list. At the election, Charlie served as the Union's observer.

Unfair Labor Practice Allegations

Lisa Glenn

5 Smoking

Glenn was employed by the Respondent as a shuttle driver from July 2004, to her discharge on November 27, 2006.³ Glenn worked from 5:30 a.m. to 2 p.m., and operated the “blue” shuttle which operated on a specific schedule with set stops, but without a specific route to reach the stops. Shuttle driver Wayne Goodworth took over the blue shuttle when Glenn’s workday ended. Glenn occasionally made drop off stops in addition to scheduled ones, when requested either by telephone or “when a family member would tell me what facility they were going to.” Glenn was not required to seek permission from management when making these extra stops. Although the “Ross Building” was included as a stop on the blue shuttle, Glenn did not stop there as the building was under construction during Glenn’s employment. Prior to the events set forth below, Glenn had never been disciplined during the course of her employment with the Respondent.

Glenn attended the union meeting at the restaurant on February 11, and became actively involved in the Union’s organizational drive, including attending four additional meetings at the Union’s hall. Besides attending union meetings and calling other employees about the Union, her union activities included distributing union literature and flyers to other employees, signing a union authorization card, and wearing a t-shirt⁴ in support of the Union. Early on in the Union’s organizational effort, Glenn called then-employee, now supervisor, Ted Hill to inform him of the union organizational activity.⁵ Indeed, Hill, called as a witness by the Respondent, testified that he first learned of the Union’s organizing drive when Glenn called and informed him. This occurred while Hill was still a unit employee, before he was promoted to supervision.

On August 21, Glenn parked her shuttle and took a break during a shuttle run. She sat on a step of the shuttle, with the shuttle door open, and smoked a cigarette. The Respondent maintains a smoking policy as follows in pertinent part: “There is a non-smoking policy for all vehicles.”⁶ There were no passengers on the shuttle. Manager Ted Hill, driving by, pulled over when he noticed the parked shuttle. He walked up to the shuttle and saw Glenn sitting on the shuttle steps, smoking. Hill noticed smoke inside the shuttle, and told Glenn, “there is no smoking in the bus.” Glenn responded that she was not smoking in the bus, she was on the steps. Hill said that the steps were inside the bus. Glenn kept smoking her cigarette. Hill asked, “Lisa, are you going to put your cigarette out? Glenn replied, “No.” Hill and Glenn

³ Glenn’s discharge is alleged as a violation of Sec. 8(a)(3).

⁴ Counsels for the General Counsel, citing Glenn’s testimony, assert in their brief that Glenn “wore a Union t-shirt to work.” The record shows that counsel for the General Counsel asked Glenn as follows: “Did you wear any, during the campaign, did you wear any Union insignia?” Glenn answered: “Yes.” Counsel for the General Counsel then asked: “What did you wear? Glenn answered: “A t-shirt.” Of course, it’s possible that Glenn wore the union t-shirt to work as counsels for the General Counsel assert in their brief. But that question wasn’t asked, and Glenn did not so testify.

⁵ Hill testified that he became a supervisor on July 22. Documents introduced at the hearing established that he was promoted by the Respondent to acting supervisor on June 7, and that other employees were informed by memo dated June 7, that they were to “report any questions, concerns or issues to Ted as you would with your managers.”

⁶ Glenn testified that she knew that her smoking was a violation of the Respondent’s policy.

continued the conversation, until Glenn finished and threw out her cigarette. Hill told her he would speak to her later about the incident.⁷ Indeed, later that day Hill handed Glenn a written warning for smoking while driving.⁸ Hill requested that Glenn sign the warning, but she refused. When Glenn refused to sign the warning, Hill told her that she would have to meet with
 5 management. Glenn told Hill that she would talk over the write-up with the Respondent's vice-president, Simmonds, with whom she had a meeting scheduled later that day.

In fact, Glenn met with Simmonds, for their scheduled meeting, later that day.⁹ Glenn gave Simmonds letters from customers to Glenn, praising her work (that she and Simmonds had previously discussed). Simmonds told Glenn that the letters would be placed in her
 10 personnel file, and asked her for permission to place them on the Respondent's website. Glenn agreed. After Glenn handed Simmonds the praiseful letters, Glenn took them and said, "I feel bad at this time but I can't give you a raise. Our hands are tied because of the Union."¹⁰ Glenn did not respond to this comment, but did bring up the subject of her warning for smoking.

Glenn told Simmonds that she was not driving while she was smoking (which the written warning specified she was), and that she felt she was being harassed. Simmonds scratched out the words "while driving" from the warning, and initialed the change. Simmonds told Glenn
 15 that he would speak to Hill about the warning, and mentioned that Eleanor Briston and Phil Davis were attending management classes "on how to talk to their employees properly." Sometime later in August, Simmonds told Glenn not to worry about the smoking warning as he had thrown it out of her personnel file.¹¹

Switching Shifts

Early in November, Glenn asked fellow driver Wayne Goodworth to switch shifts with her, so that he would take her shift on November 13. Goodworth agreed, and worked Glenn's
 25 shift on November 13. At the end of her shift on November 14, supervisor Hill handed Glenn a written warning and told her the warning was for changing her shift without notifying a

⁷ In general, based on my observations of his demeanor on the witness stand and inconsistencies in his testimony, I did not find Hill to be a reliable witness. His memory seemed to come and go on the witness stand depending on the question, and who was asking it. His
 30 confused and conflicting account on cross-examination as to when he assumed supervisory status is an example of such testimony. However, here, Glenn admits smoking on the shuttle bus steps. Hill's testimony as to the incident is consistent with Glenn's admission and is credited.

⁸ Alleged as a violation of Sec. 8(a)(3).

⁹ Simmonds and Glenn had spoken the prior week about the route schedule. During the conversation, Simmonds told Glenn that his wife (also an employee) told him she had received a phone call "from family members" praising Glenn's work. Glenn told Simmonds that she had
 40 received cards and letters "from family members" praising her work. Simmonds asked Glenn to bring the letters to him, and they scheduled a meeting for the next day, August 21.

¹⁰ Alleged as a violation of Sec. 8(a)(1).

¹¹ I credit Glenn in respect to her conversations and interactions with Simmonds, whom the Respondent did not call as a witness. Her testimony is uncontroverted and based on this and her demeanor while so testifying, I find this testimony credible. In her overall testimony, Glenn
 45 displayed good recall, answered the questions of all counsel noncombatively and, generally, without hesitation, and, in my judgment, appeared to be earnestly attempting to honestly answer questions.

supervisor.¹² Glenn refused to sign the warning. Hill responded that she would, then, have to meet with management in the office. Glenn met with Briston and Hill on November 17. Hill told Glenn that she was “there” because she didn’t notify a supervisor that she had changed shifts (with Goodworth). Glenn responded that she never had to notify a supervisor when she
 5 switched shifts in the past. Briston replied that the people “downtown” wanted everything on paper. Glenn replied that she believed she was being harassed, that the Respondent never had problems “out of me” in the past. While in the office, Glenn noticed her personnel file, and saw that the smoking warning remained in the file. Glenn told Briston that Simmonds had said that the warning was being removed from her file.

10 Later that evening, Glenn called Briston and apologized for becoming upset during the meeting. Glenn explained that she had become upset because she had been disciplined and Wayne Goodworth hadn’t been. Briston replied that Goodworth had not been disciplined because he had given Hill a “statement.” Glenn replied that she didn’t understand. Briston said
 15 she would look into it and get back in touch with Glenn.

At the time Glenn switched shifts with Goodworth, the Respondent had no official policy in respect to drivers switching shifts.¹³ On November 28, the day after Glenn was eventually discharged, the Respondent issued a memo to employees officially stating its policy in respect
 20 to switching shifts for the first time: “When you cover another driver’s shift, you are REQUIRED to write that individuals name you’ve replaced on your time card. A manager also needs to sign your time card.” (Emphasis contained in original.)

25 Threatening/Swearing at a Supervisor

On November 24, Glenn, during the course of her work day, was parked in her shuttle bus at a McDonald’s Restaurant at the corner of Oakland Avenue and Forbes, talking on her cell phone to fellow driver Stephanie Wimbs. Hill approached the bus. Glenn rolled down the window. Hill asked why she was parked there. Glenn responded that she was not due at her
 30 next stop for 15 minutes. Hill produced a copy of the blue shuttle driven by Glenn, and said that according to the schedule Glenn should be at the Ross Building. Glenn responded that she hadn’t stopped at the Ross Building in 2 years (as it had been under construction). Glenn asked Hill why he was bothering her, that it was too early in the morning. Glenn told Hill that it would be in Hill’s best interest to leave her alone.¹⁴ Glenn’s testimony that the Ross Building had not
 35 been a stop on her route for 2 years is uncontroverted and credited.

¹² Alleged as a violation of Sec. 8(a)(3).

¹³ Testimony of Briston. Hill testified that there was an “unwritten policy” to the effect an employee must first notify and get permission from a supervisor before switching shifts. Upon
 40 being asked by the Respondent’s counsel how the policy is communicated to employees, Hill testified that “the managers and [sic] staff meetings we express it all the time.” In the absence of specific evidence that such a policy was communicated to employees at any single staff meeting or any other time, in view of Briston’s testimony that the Respondent did not have an official policy, and because I found Hill not to be a reliable witness, I find that any such unwritten
 45 policy, if it existed, was not communicated to employees.

¹⁴ I have credited Glenn’s version of this conversation. According to Hill, when he first approached the parked bus, Glenn was asleep. After Hill retrieved the shuttle schedule, he again approached Glenn’s bus. This time Glenn was talking on her phone, and Hill knocked on the bus window. According to Hill, Glenn asked, what the “f-k” he wanted. When Hill told her
 50 that according to the schedule, the shuttle should be at the Baum Building, Glenn responded, “Don’t f-k with me, you don’t want to f-k with me, it’s in your best interest that you don’t f-k with

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Discharge

5 Subsequently, on November 27, Hill called Glenn on the shuttle phone and told her to report to the office at the end of her shift. At the end of her shift, Glenn reported to the office where Briston and Hill were present. Hill told Glenn that the reason she was in the office was because her position with the Respondent had been terminated, effective immediately. Hill, reading from a letter, told Glenn that the reasons were for swearing and threatening a supervisor. Glenn asked which supervisor she "supposedly" did this to. Hill responded, "Me."

10 The discharge letter, in evidence, states the following as reasons for Glenn's discharge: "threatening a supervisor; swearing at a supervisor; going off-route; and unauthorized shift changes." The Respondent at no point sought Glenn's version of the November 24 incident, and did not undertake any investigation of said incident prior to discharging Glenn.

15 At the trial, the Respondent introduced evidence of messages from customers complaining about operation of the blue shuttle, ostensibly driven by Glenn. Three of the four complaints are dated February 2, 2005, over a year and half prior to Glenn's discharge, and the fourth, dated March 20, 2006, contains the notation, "shuttle broke down."

Edward Charlie

20 Edward Charlie was hired by the Respondent in April 2001 as a shuttle driver, transporting hospital workers at UPMC back and forth from parking lots to the hospital. He was discharged on June 7.¹⁵ In late 2005, Charlie requested, and secured, a transfer from working the East parking lot route to the more desirable Baum lot route, with an increase in hours from the previous workday of 6 a.m. to 11 to the new workday of 5 a.m. to 1 p.m.

30 Charlie first learned of the Union's organizational campaign in February, from Lisa Glenn. Charlie signed an authorization card and attended four union meetings, in February, March, April, and May. As noted above, on April 28, Charlie attended a meeting for a representation petition hearing at the regional offices of the Board in the company of the Union's attorney and McClelland, and sat with them during the meeting. Mayo and the Respondent's attorney were also present at the hearing. Charlie was the only employee of the Respondent present at the hearing.

40 me." Further, according to Hill, Glenn put the bus into gear and as she was driving away continued to make comments to Hill in a similar vein, using similar obscene language. Glenn testified that she did not swear at Hill. While I do not credit Hill that Glenn repeatedly used obscene language to Hill during the incident, the incident did become heated and it's not impossible that Glenn used strong language in her responses to Hill.

45 I credit Glenn because, as noted earlier, I found Hill not to be a reliable witness based on my observations of his general testimonial demeanor. Further, on a number of occasions his memory appeared selective depending on the question asked and who was asking the question. Illustrative of this tendency, is his testimony at p. 772 of the transcript, when in response to a question on cross-examination, Hill flatly testified that he couldn't remember the date he prepared a document memorializing the incident with Glenn. When asked a similar question by the counsel for the General Counsel, and by the undersigned, Hill identified not only the day of the week, but the explicit date. Hill's testimony as to his confrontation with Glenn is detailed, but not reliable.

50 ¹⁵ Alleged as a violation of Sec. 8(a)(3) and (4).

Also on April 28, after the scheduled hearing, when then Supervisor Leon Rhodes returned to the office, he heard a conversation about the Union between managers Briston and Simmonds. Rhodes asked what was going on. Briston said, "Guess who is going to be the union representative. Rhodes asked, "Who?" Briston said, "Mickey Charlie."¹⁶ Rhodes responded, "Get the hell out of here. Mickey just got through paying union dues to the Port Authority for 20 some years. I know he don't want to start paying union dues all over again." Briston said, "Well, he is the union rep." Briston then asked Rhodes, "Hasn't he had accidents?" Rhodes said, "He had two." Briston responded, "Well, he won't be hard to get."¹⁷

Up until mid-May, Charlie's driving schedule did not include a lunch break, but allowed a pause between stops so that he could take about a 10-minute break for coffee at about 9 a.m. In early May, two additional stops were added to Charlie's shuttle schedule. With the addition of the new stops, Charlie's route schedule was such that it allowed no time for a break, and required him to be in his driver's "seat for continuous eight hours." In mid-May, Charlie spoke to his immediate supervisor, Briston, and advised her that with the addition of the two new stops, he did not even have time to take a restroom break. Briston replied that she would look into the situation. A few days later Charlie again asked Briston whether she was going to do anything about his schedule. Again she replied that she would look into it. When he heard nothing from Briston, he spoke to her again about a week later, and requested a lunch break. Briston told Charlie she would get back to him.

On May 22, when Charlie returned to a parking lot, supervisor Hill was there with another shuttle bus, and told Charlie he was there to relieve him for lunch. Hill asked Charlie how long of a lunch break he wanted, and Charlie responded that a half hour would be fine. Hill asked the question a second time, and Charlie responded the same way. Hill asked the question a third time, and this time Charlie responded, "Okay, I'll take an hour." Charlie credibly testified that there was a change in Hill's tone when he asked the question the second and third time, indicating to Charlie that Hill wanted a different answer than half an hour. Charlie then took an hour for his lunch break. There was no discussion as to whether Charlie could use the shuttle to go to lunch or how to handle the lunch hour when filling out his timecard.¹⁸ He continued to take a lunch hour for his next 7 workdays, and each day was relieved by another driver who brought his own shuttle bus.

¹⁶ Edward Charlie was sometimes called Mickey Charlie at work.

¹⁷ Credited testimony of Rhodes. See below for a discussion of Rhodes' credibility. Briston was not asked about, and did not deny, this conversation.

¹⁸ Credited testimony of Charlie. Hill testified that when he relieved Charlie, Charlie told him that he wanted 30 minutes for lunch, but that when Charlie returned from his lunch break, he told Hill he wanted an hour. Hill testified that Briston told him to relieve Charlie and tell him to "mark his time card and that he won't get paid for it and that he is not to use the company vehicle." Hill further testified that when he relieved Charlie, "I had explained to him that he couldn't take the vehicle to lunch with him and also had to mark on his time card." Finally, Hill testified that Charlie responded, "No problem." Here, once again I do not credit Hill both because of my observation of his general testimonial demeanor and for reasons stated earlier in this decision, including testimony indicative of a selective memory. Further, Briston, who testified extensively during the proceeding, did not corroborate Hill's testimony as to her alleged conversation with Hill.

On June 2, at the end of the 2-week pay period, Charlie, as required, completed and turned in his timecards for that period, which included the eight times he took a lunch hour. Charlie testified that he knew he would not be paid for the lunch breaks but, somehow, neglected to note the lunch hours on his timecard that he submitted to the Respondent. Charlie testified as to his neglect as follows: "I really can't explain that. I've been working for the company for five years and never had a lunch and just neglected to mark the lunch period down." Charlie testified that he didn't expect to be paid for the lunch hours, and was not attempting to falsify his timecard so as to secure such payment.¹⁹

On Friday, June 2, when relieved so that he could take his lunch break, Charlie took the shuttle about two blocks to the Get-Go gasoline station/convenience store where he obtained a cup of coffee, and returned to the parking lot, where he ate his lunch. The trip took about 5 to 6 minutes. On Monday, June 5, Charlie worked his normal shuttle shift. When no relief driver appeared at the usual lunch break time, Charlie telephoned Briston to ask if he would be getting relief so he could take his lunch break. Briston told him that he no longer had a lunch break; that he had taken the shuttle on Friday for personal use during his lunch hour. As a result, Charlie took no lunch break. In a second conversation on June 5, Charlie asked Briston if he was going to receive the 2 days of vacation he had earlier requested. Briston told him to call her the next day. When Charlie called the next day, Briston told him that he would receive the 2 days of vacation.

Briston testified that she observed Charlie's shuttle at the Get-Go on June 2, and that subsequently a warning memo was placed in Charlie's personnel file. There is no evidence that Charlie was notified of the warning. The written warning stated as follows: "Every employee was given a memo dated September 1, 2005, in regards to using the company vehicles for personal use (see attached). This letter is being given to you, and placed in your employee file as a warning for personal use of the company vehicle. This is against company policy and will not be tolerated in the future. I was on Baum Blvd. this morning and saw our company vehicle parked in the Get-Go gas station on Baum Blvd. with no one in it. If you are not on your assigned work schedule you are to use your own vehicle for personal use. If this happens again your employment with Transportation Solutions will be terminated. If you have any questions regarding this letter you can contact me directly." The warning was signed by Briston. Despite the wording of the warning that it was being given to Charlie in addition to being placed in his personnel file, there is no evidence that the warning was actually presented to Charlie prior to his discharge, and I find that it was not.²⁰

¹⁹ On direct examination, Briston was asked how employees are made aware of the proper way to mark their timecards for lunch breaks. She testified, "We have a staff meeting. If you take a paid lunch, please put it on your time card or time sheet." Briston was then asked a series of questions in an effort to establish at least one such meeting she was present at. Her testimony in response to these questions clearly indicates she has no reliable recollection as to whether she was present at such an employee meeting, or even whether a meeting occurred where the employees were given such instruction, and there is no other such reliable evidence in the record. Further, inasmuch as the Respondent failed to produce any written policy covering the subject of marking lunch breaks on the timecards, I conclude that there was no such written policy, in accord with my ruling on the record to the effect that if the Respondent failed to produce such written policy at the trial, I would conclude that there was no such written policy.

²⁰ There is even some question as to whether Briston placed the warning letter in Charlie's personnel file on June 2, and I cannot conclude that she did such. Thus, on direct examination, when asked by the Respondent's counsel if she did anything in respect to observing Charlie's

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5 The September 1, 2005 memo referred to in the warning letter, addressed to all employees from Briston, states as follows: "It has been brought to my attention that several employees are using company vehicles for their personal use. This will not be tolerated and is in direct violation of company policy, which is listed in your employee handbook (see attached). If at any time you are found to be conducting personal business with a Transportation Solution vehicle you will be given a written warning which be (sic) placed in your employee file. Any further violations, after the written warning, and this will be cause for termination of your employment." The company policy, contained in the employee handbook, referred to in the memo is as follows: "Employees are not allowed to borrow or use Transportation Solutions, Inc. equipment for their own personal use." Briston testified that it is the Respondent's policy to verbally warn an employee for such an infraction before taking other disciplinary action against him.

15 Charlie worked his normal shift on June 7. During the course of the day, Briston appeared at the Baum lot, boarded his shuttle, and told Charlie that "they" wanted to see him in the office at the end of his shift. At the end of his shift, Charlie reported to Steve Simmonds office, where Simmonds, Briston, and Phil Davis were present. Davis said he had bad news for Charlie, and handed him a letter informing Charlie that, "Effective immediately, your employment with Transportation Solutions is terminated. This action is due to the fact that you have falsified time worked on your timecards. This is against company policy. You have been recording your lunch breaks on your time cards as hours worked. Along with this theft of pay you have been using our company vehicles to take these lunch breaks. It has always been policy that **company vehicles are not for personal use.**" (Emphasis contained in original.) As Charlie began to speak, Simmonds said, "you can talk till you are blue in the face, you are done, you are out of here."

30 While the discharge letter explicitly stated that the reasons for Charlie's discharge were improperly marking his timecard and using a company vehicle for lunch breaks, Mayo testified that there were other factors. On direct examination, when asked by the Respondent's counsel to elaborate as to the other factors, Mayo testified, "Generally what we call a poor attitude on the job."

35 There have been other occasions when the Respondent has imposed discipline on its employees for private usage of a company vehicle. For example, Briston testified that she knew that driver Cleveland Brown, in early 2006 took his van home with him overnight without permission on one or two occasions, and further testified that such an infraction is a serious infraction, more serious than the use of a company vehicle to travel two blocks (to the Get-Go) as Charlie did. On March 2, the Respondent issued, in writing, a 4-day "working suspension" to Brown for "personal use of the company vehicle and taking the vehicle to your residence at night." The written suspension states that the Brown had been verbally warned about such in the past. Briston testified that the working suspension was imposed after repeated infractions, and that at the time the suspension was imposed, the Respondent was unaware of the Union's organizing drive.

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50 bus at the Get-Go, Briston testified, "No, I came back (to the office). I marked it on my calendar." Later in the examination, Briston, upon being shown a copy of the memo, testified it was placed in his file. She did not testify as to when it was placed in Charlie's file. Briston also testified that no action was taken against Charlie as a result of the June 2 incident.

Kirk Foster is another employee of the Respondent who used a company vehicle for noncompany business. Foster was hired as a shuttle driver in March. During the first week of his employment, Briston “caught” Foster sleeping in his parked bus with the engine running. Also during that week, the Respondent discovered that Foster had taken the shuttle off-route, without permission, to look at an apartment, after the end of his shift.²¹ The Respondent had learned of Foster’s private usage of the vehicle when “someone” called the Respondent to report the bus parked “catty-corner” into the street. Because of this first week of work, the Respondent, by Davis and Briston, fired Foster.

In late March, Foster asked Briston for a second chance, and Briston tore-up his termination letter, and re-hired him. Briston testified that when she re-hired Foster she did not know whether Foster supported the Union. In late May or early June, Briston received a report from another shuttle driver that Foster had taken his bus off-route into the Hill District, where there was no legitimate business reason for the shuttle to be. Foster did not have management authorization to take the bus into the Hill District. The Respondent imposed no discipline for this infraction, but merely extended his probationary period. On June 19, Briston smelled alcohol on Foster’s breath, but allowed him to drive his shift. Shortly thereafter, Briston observed Foster enter into what was described by Briston as a known crack-house. On June 21, after the alcohol and crack-house incidents, the Respondent discharged Foster. Finally, in 2004, Briston warned driver Tamieka Battle several times for going off-route and for bringing her children to work with her on the bus, and only fired her after repeated warnings for going off-route.

Stephanie Wimbs

Stephanie Wimbs was employed as a shuttle bus driver by the Respondent from her hire on June 17, 2002, until her discharge on November 27.²² She was supervised by Briston. In April 2004, Wimbs began driving the Towerview shuttle route, which she continued until her discharge.²³ Wimbs drove the shuttle from 4:30 a.m. until noon, but marked her timecard as working from 4:15 a.m. till 12:15 p.m., which included pre-trip duties and travel time to and from the location where the shuttle was parked. Wimbs actively participated in the Union’s organizational effort, attending four or five union meetings, and signing an authorization card on March 10.

Her route schedule included a break from 9 a.m. to 9:40 a.m., which Wimbs used for eating lunch in the Towerview garage. The Respondent used this office as its headquarters until early 2006, and Wimbs frequently saw Briston in this area while eating lunch during that time. Indeed, Briston testified that she had been aware “for quite a long time” that Wimbs had been taking a lunch break. While on her lunch break, other drivers would fill-in for Wimbs, including manager Briston.

During her entire time operating the Towerview shuttle, Wimbs did not deduct the lunch break on her timecard, and was paid for the lunch break. Until her discharge, no supervisor or manager ever told Wimbs that her lunch was not supposed to be paid or that she had done

²¹ There is some dispute as to how far off-route Foster drove the bus. Briston testified that it was two blocks “at the most.” But Briston also testified that she didn’t know the name of the street Foster drove to, but that it was in Oakland, off of Atwood.

²² Alleged as a violation of Sec. 8(a)(3).

²³ Except for the period from April 3 to June 26, when Wimbs took a personal leave of absence. To prepare for her return, she asked supervisor Phil Davis whether anything had changed on her route. Davis informed her that there were no changes.

anything wrong in the manner in which she completed her timecard.²⁴ Former Supervisor Leon Rhodes, Briston, or Mayo Jr. periodically reviewed the timecards of shuttle drivers for accuracy. Rhodes credibly testified²⁵ that during the time he served as a supervisor and reviewed time sheets²⁶ completed by drivers, along with Briston, errors were discovered every pay period involving six to seven drivers. Rhodes described one example as a driver “adjusting” his recorded hours to reflect 4 hours of work rather than the actually worked 3-1/2 hours. When such errors were discovered, management simply changed the times recorded on the employee-completed time record document. Rhodes credibly testified that during his tenure, no employee was disciplined for such time recording mistakes.

At the end of her shift on November 27, Hill told Wimbs that “they” needed to see her in the office for a minute. Wimbs reported to the office where Briston and Hill were present. Wimbs was told to wait in the conference room, and then was joined by Briston and Hill. Hill said, “We have to terminate you for falsification of your time cards.” Wimbs asked how the Respondent could tell her that she falsified her timecards. Briston said it was because she didn’t write down her lunch. Wimbs replied that she never had written down her lunch break before. Briston responded that the Respondent had timecards on which she had written her lunch. Wimbs asked Briston to produce the cards. Briston said that Mayo had them. Wimbs asked where Mayo was. Briston said that Mayo wasn’t there.

Wimbs then asked why she wasn’t previously notified if they felt she was doing something wrong. Briston responded, “Because we slept it.” Wimbs responded, “Because you slept it, I get fired?” Briston replied that “it all came from the Labor Board,” that Briston had to do what they told her to do because her hands were tied, and that because Ed Charlie falsified his timecards and she fired him, she couldn’t keep Wimbs. Wimbs asked for her discharge letter, and began to leave. As Wimbs was exiting the conference room, Briston said, “Y’all created this monster.”²⁷ At no time prior to her discharge, did any manager of the Respondent

²⁴ Credited testimony of Wimbs, who impressed as a reliable witness with good memory. Wimbs testified in a forthright and consistent manner, no matter who was asking the questions, demonstrated good recall of substantive events, and exhibited testimonial demeanor indicative of an effort to answer truthfully.

²⁵ The General Counsel called former supervisor Rhodes as a witness. Rhodes occupied the various supervisory positions of road supervisor, safety supervisor, and safety supervisor from sometime in 2002, until he was discharged on June 20, 2006, for alleged poor performance. Rhodes contested the discharge by filing an age discrimination suit. Upon careful observation of Rhodes testimonial demeanor, I find him a credible witness, not withstanding what appears to be an unhappy ending of his relationship with the Respondent. Even upon vigorous cross examination, Rhodes was not hesitant and displayed the inclination to forthrightly answer questions, even when the answers did not necessarily help the General Counsel’s case. Further, his answers to questions of all counsel displayed excellent recall of substantive events. Even on minor matters, such as whether it was driver “time cards” or “time sheets” that he reviewed as part of his job, Rhodes answered in a straightforward manner, even admitting a mistake in his investigatory affidavit. I, thus, credit Rhodes’ testimony here, and elsewhere.

²⁶ In 2006, employees completed their own timecards which recorded hours worked. In prior years, the Respondent and employees utilized time sheets. Rhodes reviewed time sheets, but did not continue this duty after the Respondent switched to timecards.

²⁷ My findings as to what Briston said during and after this meeting are based on the credited testimony of Wimbs. Briston was not asked about her comments and, hence, did not deny them. Throughout my finding of facts, I have declined to credit Briston. In my observations of her demeanor and her testimony, she conveyed the impression of a combative

Continued

ask Wimbs for her side of the timecard issue, or give her a chance to explain what happened. As set forth above, she was simply called into a meeting and discharged. Briston testified that on past occasions when employees had improperly completed their timecards and the Respondent caught the error after the employee received the extra pay, the employee was not disciplined because Briston considered it the Respondent's error for failing to catch the improperly marked timecard.

Wimbs previously had received reprimands from the Respondent in respect to other aspects of her work performance. In July, Wimbs received a "verbal write-up" from Supervisor Hill for violations of the Respondent's dress code for drivers and a written reprimand for failing to contact Hill when her vehicle needed to be refueled. In September, Wimbs received a written reprimand from Hill for being assertedly insubordinate to Hill during an incident involving Hill directing Wimbs to park her shuttle in a place different from that chosen by Wimbs. There is no credible evidence that these reprimands were involved in the Respondent's discharge of Wimbs.

Vaunell Evans

Vaunell Evans was employed by the Respondent as a van driver from April 2005 until his discharge on May 5, 2006. As a van driver, and unlike the shuttle drivers, Evans had no regular route schedule and did not possess, nor was he required to possess, a commercial driver's license (CDL). Evans attended union meetings in late March and early April 2006, and signed an authorization card. On May 5, the Respondent discharged Evans for using a company vehicle on April 28, for 2 hours in order to take care of personal business.²⁸ When supervisor Steve Simmonds discharged Evans, he told Evans that if he had an issue with his termination, he could file with the EEOC, or meet with the Respondent's owner, Mayo.

Evans met with Mayo on May 9. During the course of the meeting, Evans mentioned that he had passed three written tests towards his CDL, and had received his learner's permit. Mayo told Evans to write a statement as to the April 28 incident. Evans thanked Mayo for the meeting. Mayo told Evans that his "grandfather always told me to give people second chances."

Evans and Mayo met again on May 17. Evans handed Mayo the requested written statement. Mayo told Evans that since Evans had his CDL permit, he could get Evans back to work for the Respondent, but driving shuttle buses instead of vans (which did not require a CDL). While Evans was present, Mayo made arrangements with Briston and then driver Ted Hill for Evans to complete his CDL training and test, with Hill training Evans for the driving part of the CDL test. Mayo told Evans that if he received his CDL, Mayo would give him a position

witness more interested in giving answers that she perceived were helpful to the Respondent, whom she has been employed by as a supervisor for many years, than in straightforward answers to questions. For example, in response to questions of the General Counsel, Briston repeatedly denied that she reviewed the drivers' timecards, but then testified to her procedure of reviewing the timecards, and explicitly admitted in her investigatory affidavit that she reviewed the timecards. Additionally, she repeatedly engaged in clashes with counsel, and had to be repeatedly instructed by the undersigned as to refraining from extraneous comments while on the witness stand. Briston's answers to counsel for the General Counsel's questions as to whether Cleveland Brown had further problems with his work performance, at p. 664 of the transcript, are illustrative of her combative and guarded testimony, and her penchant for extraneous comments not responsive to questions.

²⁸ The discharge is not alleged as an unfair labor practice.

as a shuttle driver, where the routes are monitored on a day-to-day basis.²⁹ Mayo told Evans that he had value, that is that Evans was a young man who spoke well, that Mayo appreciated the way he conducted himself, and that Mayo felt Evans would be an asset to the company.³⁰ Before the meeting ended, Mayo told Evans that “a few employees are trying to get a union in, but the union can’t force me to do anything I don’t want to do.”³¹

Hill spent about 3 to 4-1/2 hours training Evans for the CDL examination on 3 days in late May and early June, utilizing one of the Respondent’s vehicles for the training. The Respondent did not charge Evans for the training, nor pay him. Evans took and passed the CDL examination on June 7, utilizing one of the Respondent’s vehicles. That same day Evans completed and submitted a job application, pursuant to Hill’s instructions that Mayo wanted Evans to do such.

The following day, June 8, Evans called Mayo, and asked him when he would start on his shuttle route. Mayo told Evans that he could not hire him back because of the “Union situation”; that if Mayo hired Evans back, he would have to rehire everyone he fired for the same reason. Thereafter, Evans received a letter from the Respondent, dated June 8, and signed by Mayo, which stated: “I understand that you were successful in earning your CDL license. However, I am unable to consider you for rehire. The reason being is that we now have the Teamsters union involved with many of our employees and I have to follow **strict** policy of hiring and termination procedures. We have had to terminate other employees for the same reason that you were terminated and for that reason I cannot reconsider your rehire.”³²

The Respondent’s policy as to shuttle driver job applicants, who are not employees and who do not possess a CDL, has been to offer prospective employment, then train them, without pay, to pass the CDL examination, and then hire them upon successful completion of the examination.³³ If a nondriver position is open at the time of initial application, the applicant is employed to wash vehicles during the CDL training period.

Shana McCoy

Shana McCoy, currently a shuttle driver, has been employed by the Respondent since April 2005. McCoy attended a mandatory employee meeting held by the Respondent on

²⁹ Mayo testified explicitly to this. “But if he received his CDL, I would give him a position as a shuttle driver” In a follow-up question by the Respondent’s counsel as to whether this constituted “a consideration or a . . . guaranteed offer,” Mayo testified, “It was a consideration.” The record contains no further explication as to what counsel or Mayo meant by a “consideration.” Mayo’s statement to Evans was unambiguous. His additional testimony in response to a leading question of counsel does not serve to clarify what is itself unambiguous.

³⁰ The testimony of Evans and Mayo.

³¹ Uncontroverted testimony of Evans. Evans is a reliable witness and I credit his testimony based on my observation of his demeanor. Also he displayed a willingness to forthrightly answer questions of all counsel without being argumentative and good recollection of the substantive events he was questioned about. He was unhesitant in his responses and, in general, displayed the demeanor of a witness endeavoring to accurately and truthfully testify.

³² Mayo’s comments to Evans by telephone and in the letter are alleged as a violation of Sec. 8(a)(1). The Respondent’s actions in failing to rehire Evans or allegedly failing to consider Evans for hire are alleged as violations of Sec. 8(a)(3).

³³ Mayo testified that this is the Respondent’s policy, but that, except for Evans, no nonemployee has been provided such training.

December 9, with a group of about 40 employees. Supervisors Eleanor Briston, Ted Hill, and Phil Davis spoke to the assembled group of employees, as did Dwight Mayo, Jr. Davis told the employees that he just wanted to let them know they were not “good enough” to know what the company was doing, but that the company was moving forward. Davis added that there was not
 5 a union or group that was “going to tell them what to do.”³⁴ The meeting lasted about 90 minutes, and covered other topics such as use of radios on buses. After the meeting, Supervisor Ted Hill asked several employees “if they were going to the other meeting.”³⁵

10 Sometime prior to December 9, McCoy received a notice from Glenn that there would be a union meeting on December 9. After the Respondent’s employee meeting on December 9, McCoy and a group of about five other employees headed to the Union’s hall for a meeting, arriving about 10 minutes early for the 12:30 p.m. scheduled meeting. The meeting, attended by a total of about ten individuals, was held in the Union’s conference room, with windows overlooking Butler Street. Attendees at the meeting included discharged employees Wimbs,
 15 Charlie, Glenn, and Mary Marshall.³⁶

20 Just before the meeting began, McCoy noticed one of the Respondent’s vans on Butler Street driving past the union hall at about 15 to 20 miles per hour, with Supervisor Hill driving and Briston in the passenger seat. About 10 minutes later, McCoy again observed the van moving on Butler Street, this time in the opposite direction, again with Hill driving and Briston a passenger, and again moving at about 15 to 20 miles per hour. McCoy observed both Hill and Briston looking towards the Union’s hall.³⁷ Current employee Roger Rosser, a van driver, attended the entire union meeting, which lasted about 2 hours. As Rosser was getting into his car, after the meeting, he noticed the van with Hill and Briston driving past the union hall at
 25 about 20 miles per hour. Rosser observed Hill and Briston looking at the union hall. Glenn also attended the meeting, arriving late at about 12:40 p.m. As she was driving to the Union’s hall, Glenn noticed the van with Hill and Briston on Stanton Avenue, about a block and a half from the hall.

30 Briston and Hill testified that after they held their meeting with employees on December 9, she and Hill drove, in one of the Respondent’s vans, to a Sears store on Butler Street to shop for a washing machine for garage towels, using Butler Street. Briston testified that after shopping at Sears, she and Hill drove back to the Respondent’s garage, using Stanton Avenue. Finally, Briston testified that she did not, and does not, know where the Union’s hall is located.
 35 Hill testified that he didn’t know where the Union’s hall was located on December 9, that he and Briston did drive by the location where he now knows the Union’s hall is located, that he didn’t see the Teamsters logo when driving past the hall, that returning from the Sears store he drove on Stanton Avenue and a number of other streets, intending to drive to the Respondent’s East

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³⁴ Credited testimony of McCoy. Neither Mayo Jr. nor Davis testified at the trial. Briston and Hill testified, but not in contravention to this testimony of McCoy. McCoy’s overall noncombative demeanor and her straightforward and consistent answers to the questions of all counsel,
 45 combined with excellent recall, demonstrated the attributes of a reliable witness. The comment by Davis to the effect that no union was going to tell the Respondent what to do, is alleged as a violation of Sec. 8(a)(1).

³⁵ Credited testimony of McCoy.

³⁶ Marshall’s discharge is not alleged as a violation.

50 ³⁷ The complaint alleges Briston and Hill, thusly, engaged in surveillance in violation of Sec. 8(a)(1).

lot in the Point Breeze section of Pittsburgh, and that on their way to the East lot he and Briston decided it was “too late,” and instead returned to the Respondent’s offices.³⁸

5 On December 14, supervisor Hill gave McCoy two memos instructing her not to re-fuel her own vehicle.³⁹ That morning, McCoy called Briston to ask about being instructed not to re-fuel her shuttle. Briston told McCoy that the Respondent issued the instructions because it did not want to pay drivers for re-fueling time. McCoy responded, “Y’all slowly but surely are taking my time from me.” Briston replied, “You go stab us in the back. You ain’t nothing but a backstabber because you went to the union.”⁴⁰

10 Later that same day, after her shift, McCoy met with Briston in the Respondent’s conference room. McCoy again complained about not being allowed to re-fuel her vehicle. Briston said that the Respondent had other employees to perform that function. McCoy replied that the Respondent was picking at them (the drivers). Briston called McCoy a backstabber because she went to the union meetings. McCoy asked, “I’m a backstabber because I was at the union meeting?” Briston replied, “You went to the union meeting and everyone there was either fired or getting ready to be fired.”⁴¹ McCoy replied that she didn’t care who was at the union meeting. Briston responded that there were 10 “of us” there (at the union meeting).⁴²

20 The conversation continued with McCoy telling Briston that she didn’t care who was at the union meeting, that she (McCoy) wanted “her hours.” Briston responded that “y’all quick to run down there and tell the white man what’s going on with the company, that all we (the employees) had to do was ask them (the Respondent) what’s going on.” McCoy asked why she was a backstabber, and Briston responded “cause you went to the union.” The conversation ended with Briston telling McCoy that she didn’t know about the union meeting, and McCoy responding that Briston was lying.⁴³

30 ³⁸ McCoy, a current employee, testified that she observed the van with Briston and Hall drive past the Union’s hall twice within 10 minutes, close to the start of the meeting. Rosser, a current employee, testified that he observed the van with Briston and Hall drive past the Union’s hall just after the 2-hour union meeting ended. Glenn testified that she observed the van with Briston and Hall in the area of the Union’s hall about 10 minutes after the meeting began. Rosser and McCoy are both current employees with no direct monetary stake in the litigation, and both displayed impressive demeanor during the course of their testimony. I note that the Respondent’s owner was present in the courtroom during the testimony of Rosser and McCoy, which testimony was generally adverse to the Respondent’s interests. Because they are current employees testifying adversely to their own pecuniary interests, their testimony is likely to be particularly reliable. *Flexsteel Industries*, 316 NLRB 745 (1995). Based on this likelihood and their impressive overall testimonial demeanor, I find that Rosser and McCoy are credible, and credit their testimony as to the drive-bys of the Union’s hall by Briston and Hall. Although not a current employee, Glenn is also a generally credible witness, as is discussed above. To the extent that Briston and Hall deny they repeatedly drove by the Union’s hall during the meeting or that they did not look towards the Union’s hall while driving by, they are not credible, and I do not credit such testimony.

45 ³⁹ McCoy credibly testified, without contravention, that re-fueling her own shuttle had been a source of earned overtime.

⁴⁰ Credited testimony of McCoy. Briston testified, but not as to this conversation. The “stab us in the back” comment by Briston is alleged as a violation of Sec. 8(a)(1).

⁴¹ Alleged as a violation of Sec. 8(a)(1).

50 ⁴² Alleged as creating an impression of surveillance in violation of Sec. 8(a)(1).

⁴³ Credited testimony of McCoy. Briston did not testify as to the phone conversation earlier

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On January 22, 2007, McCoy called Briston to discuss a problem with her shuttle starting that would result in her not being able to access a replacement shuttle in time for the first shuttle run. McCoy told Briston that because of the problem Briston would have to use another driver to cover the first shuttle. A conversation ensued between the two of them during which Briston told McCoy that she should start parking her bus in the Respondent's lot on Second Avenue. McCoy replied that she could not afford to take a taxi from the East Lot to Second Avenue every day. Briston responded that Mayo said he was going to give employees the "extra dollar" after he got the garage built "and everything settled down." Briston said that now that Mayo had to spend all his money on attorney fees, employees won't get a raise.⁴⁴ Briston concluded, "You could afford an extra dollar, couldn't you?"⁴⁵

ANALYSIS AND CONCLUSIONS

Edward Charlie

The complaint alleges that Charlie was discharged in violation of Sections 8(a)(3) and (4). The Respondent contends that Charlie was discharged because he violated the Respondent's policy prohibiting the personal usage of company vehicles and because he failed to record his lunch break period on his timecard, and that the disciplinary penalty imposed was consistent with that meted out to other employees for the same infractions. I conclude that the Respondent's discharge of Charlie violated Sections 8(a)(3) and (4).

In deciding whether Charlie's discharge violated Sections 8(a)(3) and (4), I apply the criteria laid down in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied* 455 U.S. 989 (1982).⁴⁶ "To prove a violation under *Wright Line*, the General Counsel must first show that protected or union activity was a motivating factor in the respondent's decision to take adverse action against the alleged discriminatee. The General Counsel can satisfy this initial burden by proving that the alleged discriminatee engaged in protected or union activity, that the respondent was aware of it, and that the respondent demonstrated some animus towards that activity. The burden then shifts to the employer to demonstrate that the same adverse action would have occurred even absent the protected activity." *American Red Cross Missouri-Illinois Blood Services Region*, 347 NLRB No. 33 (2006). The Respondent must meet its burden of persuasion by a preponderance of the evidence, and is required to show more than it had a legitimate reason for its actions. *Hicks Oils and Hicksgas, Inc.*, 293 NLRB 84 (1989).

in the day, but did testify as to this in-person meeting. Briston was asked on direct examination as to the "substance" of her in-person conversation with McCoy. Briston testified that the "substance" was that McCoy said she went to the union meeting to see what the Union had to say about "what was going to happen," that Briston told McCoy she was "two-faced," that McCoy would "come and tell me about the Union . . . and go back to the Union about what we was doing." Briston testified that she didn't remember calling McCoy a backstabber. For reasons set forth above, I do not find Briston to be a reliable witness, contrary to McCoy, whom I credit.

⁴⁴ Alleged as a violation of Sec. 8(a)(1).

⁴⁵ My finding of fact as to this conversation is based on McCoy's credited testimony. McCoy impressed as a witness, as discussed above. Briston testified extensively, but did not testify as to this conversation.

⁴⁶ The *Wright Line* analysis applies to Sec. 8(a)(4) allegations, as well as to Sec. 8(a)(3). *American Gardens Management Co.*, 338 NLRB 644, 645 (2002).

The General Counsel has met its initial *Wright Line* burden here, and the Respondent, in its brief, does not contend to the contrary. Thus, I found that Charlie attended union meetings, signed an authorization card, attended two meetings at the regional office of the Board as a representative of the Union, both of which were attended by Mayo and other representatives of the Respondent, and served as the Union's observer at the election.

The Respondent knew of Charlie's involvement with the Union because Mayo was present at the two meetings at the Board's regional office, and Charlie's presence at the election as the Union's observer was open and obvious. Additionally, as found, Briston told fellow-Supervisor Rhodes that Charlie was going to be the union representative.

Finally, the Respondent has expressed specific hostility to Charlie's involvement with the Union, and animus to the Union in general.⁴⁷ Thus, in the same conversation in which Briston told Rhodes that Charlie was to be the union representative, Briston asked Rhodes whether Charlie had (driving) accidents. When Rhodes answered positively, Briston responded, "Well he won't be hard to get." The Respondent also demonstrated its animus towards the Union in a number of other ways including the other unfair labor practices found herein, blaming the Union for the discharge of Wimbs ("Y'all created this monster"), blaming the Union for its failure to rehire Evans, blaming the Union for reducing McCoy's on the clock time, equating union activity with stabbing the Respondent in the back, and surveilling a union meeting.

Because I have concluded that the General Counsel has satisfied its initial burden under *Wright Line*, the Respondent must show, by a preponderance of the evidence that it would have discharged Charlie, even absent his activity on behalf of the Union. In their brief, the Respondent's counsels assert that at trial the Respondent "has adduced evidence which establishes that the [Charlie] termination would have occurred even in the absence of protected conduct." Respondent's counsels point to Charlie's failure to note his lunch period on this timecard and personal usage of a company vehicle as a justification for its decision to discharge Charlie, arguing that Evans was discharged for one of the same reasons, and that one of the reasons for the discharges of Glenn and Wimbs was a timecard violation. The General Counsel maintains that the asserted reasons for Charlie's discharge were pretextual.

I conclude that the Respondent has failed to demonstrate by a preponderance of the evidence that it would have discharged Charlie for its asserted reasons, and that said reasons were pretextual. Factors I've considered are the haphazard nature of the Respondent's enforcement of its policies at least until the inception of the Union's organizational drive, Briston's comment to Rhodes about Charlie not being "hard to get," Mayo's testimony piling-on "what we call a poor attitude"⁴⁸ as an additional reason for discharging Charlie, and Briston's

⁴⁷ The General Counsel presented testimony to the effect that at a meeting at the Board's regional office, Mayo shook the hands of the other union representatives, but turned away rather than shake Charlie's hand. I make no conclusions as to whether or not this was a display of animus on Mayo's part because it is not possible to determine from the testimony whether this was an intentional display on Mayo's part, or simply happenstance. I, thus, do not rely on this evidence in reaching any conclusions as to animus, nor do I accept or rely on the General Counsel's argument, to the effect, that the fact that Mayo started the Respondent "from scratch" and, along with Briston, built the company over 17 years into "a multi-million dollar company," and that Mayo viewed his employees as "an extended family," predisposes Mayo and the Respondent towards animus.

⁴⁸ The Board has viewed the usage of employee "attitude" as a basis for defending a
Continued

failure to present Charlie with the asserted written warning concerning personal use of a company vehicle even though the Respondent's own policies mandated such a written warning for a first offense.⁴⁹

5 As to the timecards, there is no question that the record demonstrates, and Charlie admits, that he failed to properly account for his lunch hour on his timecard during the only 2-week period during the course of his 5-year employment by the Respondent that he received a lunch break. But, as set forth above, employee mistakes on timecards were nothing new for the Respondent.

10 Former Supervisor Rhodes credibly testified that during the time he and Briston were reviewing employee time reports, a time before the instant organizational activity began, driver time errors were discovered every time period, and the errors simply resulted in management correcting the errors, with no resultant discipline. This is consistent with Briston's testimony that she considered such an error that resulted in payment to a driver to be the Respondent's fault for not catching the error. Under these circumstances, the imposition of the maximum discipline of discharge is inordinate, and inexplicable unless Charlie's union activity is taken into account. Bootstrapping the discharge of two other union activists, Wimbs and Glenn, to support an argument in the Respondent's brief that Charlie's discipline for this offense was consistent, does not help the Respondent, particularly where, as here, there is a history of turning a blind eye to such offenses.

25 Similarly, the Respondent has not demonstrated by a preponderance of the evidence that, notwithstanding union activity, it would have discharged Charlie because he utilized his shuttle bus on one occasion to travel a few blocks to obtain a cup of coffee during his lunch break. Here, the Respondent's counsels maintain in their brief, relying on the testimony of Hill, that Hill specifically advised Charlie not to use the company vehicle. But, as found above, Hill's testimony to such effect is not credible.

30 The Respondent further argues that the Respondent's written policy prohibits personal usage of the Respondent's vehicles. But the written directive reinforcing the policy also specifically provides for a written warning prior to any other discipline, and I have found, above, that Charlie never received such a warning from Briston, at least prior to his discharge, despite Briston's testimony that she placed such a warning in Charlie's personnel file. The obvious purpose of such a warning is to place an employee on notice that any further such violations could lead to discharge and to provide the employee with an opportunity to correct his behavior. Charlie never received such notice.

40 The Respondent maintains that its actions were consistent with the way it treated other employees who violated that policy. But the evidence, and my finding of facts, supports the opposite conclusion. Thus, former driver Tamieka Battle received repeated warnings for going

discharge under *Wright Line* with suspicion. See, for example, *Bronco Wine Co.*, 256 NLRB 53 fn. 4 (1981).

45 ⁴⁹ The obvious purpose of such a warning would be to put the employee on notice that further such violations would lead to discharge. Even if Briston's testimony is credited, which I don't, that she placed such a warning in Charlie's personnel file, the failure to present Charlie with the warning negated its very purpose. Charlie, who had never before taken a lunch hour during the course of his employment by the Respondent, incorrectly filled out the card during the very first time period after receiving a lunch break, and then was summarily fired without any warning concerning his error.

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off-route, before the Respondent eventually discharged her. Similarly, former driver Cleveland Brown received a 4-day “working suspension” for taking his vehicle home with him, but only after repeated infractions. Former driver Kirk Foster, not known by the Respondent to be a supporter of the Union, received no warnings or other discipline from the Respondent, other than extending his probationary period, for taking his shuttle off-route in late May or early June 2006, even after being fired (and then rehired) in March for various infractions, including taking a shuttle off-route without permission. The Respondent’s actions vis-à-vis Battle, Brown, and Foster do not demonstrate that its discharge of Charlie was consistent with past practice and, indeed, suggest to the contrary.

The complaint alleges, as an 8(a)(3) violation, that the Respondent refused to hire (or rehire) former driver Vaunell Evans, but does not allege, as a violation, his prior discharge by the Respondent. While there was limited testimony as to the basis of Evans’ discharge, I found that he was discharged because during the course of his first month of employment he used a company vehicle to run a personal errand for 2 hours. To the extent that the Respondent argues that Evans’ offense is analogous to Charlie’s and, therefore, demonstrates a consistency of discipline, I conclude that it is not. Utilizing a company vehicle for 2 hours for a personal errand is, simply, not analogous to a longer-term employee using a company vehicle for 10 minutes to obtain a cup of coffee during a lunch break. Even if I were to conclude that the Evan’s discharge was analogous to Charlie’s, which I don’t, this would simply serve to demonstrate that the Respondent’s use of discipline to enforce its rule was haphazard, and lacked consistency and uniformity. See, the Board’s discussion of rule enforcement consistency in *Hyatt Hotels Corp.*, 296 NLRB 259, 262 (1989), *affd.*, 939 F.2d 361 (6th Cir. 1991). In *Hyatt*, a somewhat analogous case, the Board rejected a *Wright Line* defense similar to that proffered by the Respondent here, for similar reasons.

For the reasons set forth above, I conclude that the General Counsel has met his initial *Wright Line* burden, that the Respondent has failed to demonstrate by a preponderance of the evidence that it would have fired Charlie even in the absence of his union activity, and that Charlie’s discharge violated Section 8(a)(3). I further conclude that, for essentially the same reasons and utilizing the same *Wright Line* reasoning, Charlie’s discharge violated Section 8(a)(4). *American Gardens Management Co.*, *supra*. In addition to the above discussion as to Section 8(a)(3), Charlie’s appearances as a representative of the Union at the Board’s preelection hearing, at the Board’s preelection meeting, and as an official observer for the Union at the election were well-known to the Respondent.

Stephanie Wimbs

The complaint alleges that Wimbs was discharged in violation of Section 8(a)(3). The Respondent, in its brief, contends that the counsels for the General Counsel failed to meet their *Wright Line* burden in respect to Wimbs, because the “General Counsel adduced no evidence to establish that Respondent knew or had reason to know of Ms. Wimbs’ position [vis-à-vis the Union],”⁵⁰ and that, in any case, Wimbs was discharged for cause, falsifying her timecard. In

⁵⁰ Even if the record established that the Respondent had no knowledge of Wimbs’ union activity or that the General Counsel failed to produce such evidence, which it does not, I would still find a violation here because the General Counsel has demonstrated that a motivation of the Respondent was to insulate its discharge of union activist Charlie from attack. “Beyond doubt an employer who, as here, discharges a nonunion employee to ‘cover up’ and confer an aura of plausibility upon his alleged ‘economic justification’ for the simultaneous discharge of an unwanted union activist—a reprehensible device far from unknown to the Board—is answerable

Continued

deciding whether the discharge of Wimbs violated Section 8(a)(3), I apply the same *Wright Line* burdens and criteria, as is set forth above, and conclude that the Respondent has violated Section 8(a)(3) by its action in discharging Wimbs.

5 As found above, Wimbs engaged in union activity by attending multiple meetings of the Union and signing an authorization card. In addition to the animus discussed above, Briston's comment about the Union to Wimbs, "Y'all created this monster," displayed said animus directly to Wimbs and demonstrated that the Respondent knew, or assumed, Wimbs was among the group of employees that supported the Union. Additionally, because this comment occurred during Wimbs' discharge meeting, while Briston was explaining the Respondent's decision to discharge Wimbs, it inextricably wed the discharge to the union organizational activity, either the activity of Wimbs, or/and the activity of the group of involved employees. Finally, Briston's comment establishes the pretextual nature of Wimbs' discharge. I find that the General Counsel has met its initial *Wright Line* burden in respect to Wimbs.

15 I further conclude that the Respondent has failed to demonstrate by a preponderance of the evidence that it would have discharged Wimbs even in the absence of union activity. Indeed, Briston acknowledged to Wimbs, in effect, that the Respondent was aware that Wimbs, in the past, had not marked her lunch break on her timecard, but had "slept it." As found above, Briston told Wimbs, in effect, that the difference now was that Charlie had been fired for the same reason and the Labor Board was involved.⁵¹

25 What that means, of course, is that for the Respondent to be able to defend its discharge of Charlie before the Board, it needed to discharge Wimbs in order to give the impression of consistency. This testimony fails to demonstrate that the Respondent would have discharged Wimbs absent union activity, but instead demonstrates that the Respondent discharged Wimbs only because of union activity.

30 Further, the record establishes that the timecard violation is the Respondent's only asserted reason for discharging Wimbs. The evidence presented by the Respondent as to Wimbs' previous reprimands for unrelated offenses is not cited in the Respondent's brief, nor is it argued therein that said reprimands provided an additional basis for the discharge. The only reason the Respondent presented to Wimbs for her discharge, was her failure to note her lunch break on her timecard.

35 Vaunell Evans

40 The complaint alleges that the Respondent violated Section 8(a)(3) by refusing to rehire and refusing to consider for rehire, Vaunell Evans. The Respondent's counsels, in their brief, argue that the Respondent had no knowledge of Evans' participation in union activity, and that the Respondent's decision to not rehire Evans was based on legitimate business reasons.

45 under the Act, since such a discharge of a nonunion employee, as well as the discharge of the union activist, interferes with, restrains, and coerces all of the employees in the exercise of rights under Sec. 7 of the Act" *Jack August Enterprises*, 232 NLRB 881, 900 (1977) enfd. 583 F.2d 575 (1st Cir. 1978) (quote from ALJ opinion). The reasoning applies here, even though the discharges were not simultaneous.

50 ⁵¹ See, also, Briston's testimony that at the time the Board's regional office was investigating a charge involving Charlie's discharge and the Respondent was asserting a timecard problem as a basis for his discharge, she was well aware that Wimbs also had a timecard problem, and this presented the Respondent with a problem.

The Board, under the allocation of burdens set forth in *Wright Line*, analyzes refusal to hire cases pursuant to a set of guidelines set forth in *FES*, 331 NLRB 9, 12 (2000), enf. 310 F.3d 83 (3rd Cir. 2002). “To establish a discriminatory refusal to hire, the General Counsel must . . . first show the following . . . : (1) that the respondent was hiring, or had concrete plans to hire at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that that requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.”

In *Wright Line*, the Board provides a set of analytical tools to assist in deciding whether protected or union activity was a motivating factor in a respondent’s decision to take adverse action against an alleged discriminatee. Here, Mayo’s letter to Evans provides the answer as to whether union activity was a motivating factor in the Respondent’s decision not to rehire Evans.

As found, Mayo set forth the following as to the Respondent’s decision not to rehire Evans: “The reason being is that we now have the Teamsters union involved with many of our employees and I have to follow a strict policy of hiring and termination procedures.” I found, above, that Mayo had earlier, explicitly told Evans that he would be rehired as a shuttle driver if he obtained a CDL. The letter makes it plain, that absent the Union’s organizing activities, Evans, who had fulfilled his part of the bargain by obtaining his CDL,⁵² would have been so rehired. While no evidence was adduced that the Respondent was aware of Evans’s participation in union activity, Mayo’s letter explicitly states that the presence of the Union and the activities of employees in support of the Union led to its decision not to rehire Evans.

The record contains no evidence as to whether the Respondent was hiring at the time it declined to rehire Evans. But the testimony of both Mayo and Evans demonstrates that Mayo had agreed to hire Evans, if Evans obtained his CDL. There were no qualifiers in the offer as to whether the Respondent was or wasn’t hiring drivers. Mayo testified unequivocally that he told Evans, that if Evans received his CDL, he would be hired as a shuttle driver.

As to the Respondent’s burden, the Respondent’s counsels, in their brief, do not contend that there was any reason for the Respondent’s decision to not rehire Evans, other than the presence of the Union, nor was there any evidence of such other reason. Under these circumstances, I conclude that the Respondent has failed to demonstrate by a preponderance of the evidence that, absent the Union, it would have refused to rehire Evans. Indeed, the evidence demonstrates to the contrary. Accordingly, I conclude that the Respondent violated Section 8(a)(3) by its failure to rehire Evans. I further conclude that, as alleged in the complaint, Mayo’s notification by letter and phone call to Evans that he would not be hired because of the presence of the Teamsters, and connecting the Respondent’s refusal to rehire Evans to the union activities of other employees, violates Section 8(a)(1). See, *Joseph Stallone Electrical Contractors, Inc.*, 337 NLRB 1139 (2002). No evidence being presented that the Respondent refused to consider Evans for rehire,⁵³ I conclude that the Respondent did not violate the Act in this regard.

⁵² By obtaining the CDL, Evans demonstrated that he possessed the requirements for employment as a shuttle driver.

⁵³ Indeed, the evidence suggests that the Respondent considered Evans for rehire, decided to rehire him, and then decided not to follow through on its decision because of the presence of the Union. Mayo’s usage of the word “consider” in his letter to Evans, is simply a euphemism

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Lisa Glenn

5 The complaint alleges that the Respondent, in violation of Section 8(a)(3), issued Lisa
 Glenn a warning for smoking on August 21, a warning on November 14, for switching shifts with
 another employee without first notifying a supervisor, and discharged Glenn on November 27.
 The Respondent maintains that Glenn's warnings and discharge were for cause, unrelated to
 her union activity. In deciding these issues, I apply the *Wright Line* test, discussed above, and
 10 conclude that the General Counsel has established that Glenn engaged in union activity,⁵⁴ and
 that the Respondent knew that Glenn was so engaged.⁵⁵ I further conclude, as is set forth
 above, that the Respondent has displayed animus towards the Union and the union activities of
 its employees. The burden, thus, shifts to the Respondent to demonstrate by a preponderance
 of the evidence that it would have disciplined and discharged Glenn, absent the Union.

15 Smoking

The Respondent asserts that because Glenn acknowledges violating the Respondent's
 no-smoking rule, she would have received the warning for doing such, even absent her union
 activity. The General Counsel argues that because there were no passengers on the bus and,
 20 hence, no patients whose health would be put at risk, and because the bus was not moving,
 Glenn's violation was mitigated and it made no sense, absent the Union, for the Respondent to
 impose discipline. The General Counsel further argues that the record contains no evidence
 that the no-smoking rule had ever been enforced or that any other employee had been
 disciplined for such a violation. I conclude that, in fact, the Respondent has demonstrated by a
 25 preponderance of the evidence, that it would have disciplined Glenn for violating the no-smoking
 rule, even absent union activity.

First, I reject the General Counsel's argument that because the bus was stopped and
 there were no passengers, it was senseless for the Respondent to enforce its rule, or that
 30 smoking on the steps of the bus is different from smoking on the bus. The record establishes
 that the buses are used to transport hospital patients, among others, who are subject to various
 infirmities, none of which are improved by the presence of tobacco smoke.

Whether Glenn was smoking on the steps or further inside the bus, it is likely that the
 35 smoke would permeate into and throughout the bus. Even without passengers present at the
 exact moment that Glenn was violating the rule, it is likely that the smoke would linger and be
 present when she resumed driving and picked-up passengers. The Respondent's rule is
 designed to preclude that from happening. Even without the record containing evidence as to
 whether and how the rule was otherwise enforced, I am satisfied that under the instant

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 for its decision not to rehire Evans. As found, Mayo had already committed to rehire Evans,
 upon Evans obtaining his CDL.

⁵⁴ I found that Glenn attended five union meetings, called other employees in support of the
 Union, distributed union literature to other employees, signed an authorization card, and wore a
 45 t-shirt in support of the Union.

⁵⁵ As found, Hill, a supervisor, learned of the Union's organizational activity from Glenn,
 before he was promoted to supervisor. Further, Shana McCoy credibly testified that on the day
 of the election, just after the election, McCoy and 10 to 15 other employees attended a birthday
 celebration for Glenn at "Sunny's Bar." Glenn had informed McCoy of the party. A few days
 50 later, on May 29, Briston told McCoy that McCoy had attended a "Union party." McCoy replied
 that it was a birthday party for Glenn.

circumstances, with Glenn admittedly violating the rule, the Respondent has established that Glenn would have been disciplined, notwithstanding her union activity. Accordingly, I conclude that the Respondent did not violate Section 8(a)(3) by imposing a warning on Glenn for violation of its no-smoking rule.

5

Switching Shifts

The complaint alleges that the Respondent violated Section 8(a)(3) by imposing a written warning on Glenn for switching shifts with another employee without first confirming such switch with a supervisor. The Respondent, in its counsels' brief, contends that Glenn violated a company policy "requiring employees to obtain approval from a supervisor prior to changing shifts with another employee." The General Counsel maintains that there was no such company policy and that no other employee had ever been disciplined for such an asserted infraction. I conclude that, in fact, the Respondent has failed to demonstrate by a preponderance of the evidence that it would have disciplined Glenn by issuing a written warning for switching shifts without notification to a supervisor, absent union activity.

Contrary to the Respondent's argument, I have found that the Respondent has failed to establish that prior to the discipline issued to Glenn, it maintained a policy of requiring employees to notify, or obtain the approval of, supervisors before switching shifts with another employee, and only notified employees of such a policy subsequent to Glenn's discharge. Further, Glenn had switched shifts with other employees in the past without discipline,⁵⁶ and the Respondent failed to produce evidence that the asserted policy was otherwise enforced.⁵⁷ Under these circumstances, and while I have found that Glenn did switch shifts with another employee, I conclude that the Respondent has failed to demonstrate by a preponderance of the evidence that, in fact, it would have disciplined Glenn for switching shifts, absent the Union. To meet its burden of persuasion, the Respondent is required to do more than show that it had a legitimate reason for its action. *Hicks Oil & Hicksgas*, supra. Here, it did not.

Discharge

The complaint alleges that the Respondent discharged Glenn on November 27, in violation of Section 8(a)(3). The Respondent maintains that its discharge of Glenn was based on unauthorized shift switches with other employees, going "off-route," and threatening and swearing at supervisor Hill, and that it was not motivated by union activity.

I found, above, crediting Glenn, that during their conversation on November 24, Glenn may have used strong language, but did not curse at Hill. I did find that Glenn told Hill that it would be in his best interest to leave her alone. But, I conclude that was a reference to her asserted belief that the Respondent was harassing her,⁵⁸ rather than a threat of physical or other harm to Hill. In other words, she was telling Hill that it would be in Hill's best interest to stop harassing her for her protected activities. Finally, there is nothing in the record to indicate

⁵⁶ Credited testimony of Glenn.

⁵⁷ Briston, in her testimony, referenced a "statement" submitted to the Respondent by employee Wayne Goodworth, who Glenn switched shifts with, and who was not disciplined. But nothing in her testimony delineates what the "statement" consisted of. In any case, the Respondent did not produce the "statement" at the trial.

⁵⁸ Glenn referred to the Respondent harassing her, during the course of her testimony. The sense of the testimony and its context, clearly indicate that Glenn believed the Respondent was harassing her in retaliation for her activities on behalf of the Union.

Glenn had driven off-route on November 24, or any other time.⁵⁹ I also note that other than for the incidents alleged as violations in the complaint, Glenn had not been previously disciplined by the Respondent during the course of her employment.

5 Because I concluded that the Respondent's warning to Glenn for switching shifts violated the Act,⁶⁰ that there was no evidence that Glenn had driven off-route, and that Glenn did not curse or threaten Hill, I also conclude that the Respondent has failed to demonstrate by a preponderance of the evidence that it would have discharged Glenn, absent union activity. In reaching this conclusion, I note that Glenn's smoking warning was not asserted by the
10 Respondent to Glenn as a basis for her discharge. I further note that while the Respondent introduced evidence of messages from customers complaining about the operation of the "blue" shuttle, ostensibly driven by Glenn, there is no credible evidence that the Respondent ever disciplined Glenn as a result of these, mainly older, complaints or based its decision to discharge on them.

15 Finally, the Respondent's counsels, in their brief, argue that various other asserted transgressions by Glenn also served as the basis of her discharge by the Respondent. Thus, the Respondent cites in its brief Glenn's violation of the no-smoking policy and her allegedly being asleep on the shuttle bus when initially approached by Hill on November 24. The brief
20 also mentions the customer complaints referred to above. None of these asserted reasons was mentioned by the Respondent either in its discharge meeting with Glenn, nor in its letter to Glenn notifying her of the discharge. Further, the letter unequivocally details the basis of the discharge as being for "threatening a supervisor, swearing at a supervisor, going off-route, and unauthorized shift changes."

25 I reject this attempt to add reasons for the discharge, as an afterthought brought forth for the first time at the trial, or in the brief. I also conclude that the presentation of afterthought and shifting reasons for the discharge supports an inference that the real reason was an unlawful one. *Tracer Protection Services, Inc.*, 328 NLRB 734 (1999), *enfd.* 928 F.2d 609 (2nd Cir. 1991). In reaching my conclusion that the Respondent's discharge of Glenn violated Section
30 8(a)(3), I have also taken into consideration the Respondent's failure to investigate the circumstances of Glenn's November 24 incident with Hill and failure to even seek Glenn's version of the event before discharging her. See, *Prideco*, 337 NLRB 99 (2001), where the Board pointed to the failure of an employer to allow an alleged discriminatee the opportunity to answer allegations as a basis to infer discriminatory motivation.
35

Other 8(a)(1) Allegations

Simmonds' Statement as to Pay Raise

40 Complaint paragraph 8 alleges that on August 21, the Respondent, by Steve Simmonds, advised an employee that it could not reward her job performance with a wage increase because the employees chose the Union. I have found, above, that on August 21 supervisor
45 Simmonds told Glenn as follows in a meeting between the two of them: "I feel bad at this time I

⁵⁹ To the extent Hill questioned Glenn during their confrontation as to why she wasn't at the Baum Building with the shuttle, I found that the Baum building, because of construction, had not been a regular stop on her shuttle route for 2 years. Hill did not accuse Glenn of being "off-route."

50 ⁶⁰ And, thus, cannot be relied on to support a subsequent discharge. See, *Dynamics Corp.*, 296 NLRB 1252 (1989).

can't give you a raise. Our hands are tied because of the Union." This occurred during a conversation during which the two of them discussed, among other subjects, letters that Glenn had received from customers praising her work. Counsels for the General Counsel, in their brief, argue that Simmonds' comment to Glenn violated the Act, citing *Centre Engineering, Inc.*, 253 NLRB 419, 421 (1980). The Respondent does not address this issue in its counsel's brief.

An employer is allowed to truthfully inform employees that expected benefits are to be deferred pending the outcome of an election in order to avoid the appearance of election interference.⁶¹ Here, however, it was the supervisor who raised the subject of a pay raise, and the supervisor did not even attempt to put forth a legal justification for the Respondent's policy, just ascribing its "inability" to grant a pay raise, to the Union. As noted by the counsels for the General Counsel, the Board has found the explicit language "because their hands are tied" to be an illegal effort by an employer to place a stigma on a union for the withholding of a benefit. *Centre Engineering, Inc.*, supra at 421. Here, the words even more directly implicate the Union, because the Union is explicitly mentioned by the supervisor, as the reason that the Respondent's "hands are tied." Accordingly, I conclude that the Respondent so violated Section 8(a)(1).

Surveillance

Complaint paragraph 10 alleges that on December 9, the Respondent, by Briston and Hill, engaged in surveillance of the union activities of its employees. This allegation pertains to the incident involving Hill and Briston driving by the Union's hall on December 9, set forth in detail above. I found that during the course of a union meeting, attended by about ten current and former employees, Briston and Hill, in a van belonging to the Respondent, drove past the Union's hall, more than once, at a slow speed, looking towards the union hall as they drove by. The General Counsel contends that these drive-bys constituted surveillance of the employees' activities in attending the meeting at the union hall. The Respondent, citing *Villa Maria Nursing and Rehabilitation Center, Inc.*, 335 NLRB 1345 (2001) and *Emenee Accessories Inc.*, 267 NLRB 1344 (1983), argues the General Counsel "cannot meet its burden because the 'mere observation of open, public, union activity by an employer on or near its property does not constitute unlawful surveillance.'"

An employer violates Section 8(a)(1) by placing the union activities of its employees under surveillance. e.g. *Cook Family Foods*, 311 NLRB 1299 (1993). Here, I found that during the course of a union meeting at the Union's hall on December 9, supervisors of the Respondent drove by the Union's hall at slow speed more than once, looking towards the hall as they drove by. I reject the testimony of Briston and Hill that they just happened to be on the way to a Sears store to do some shopping, that they just happened to drive by the Union's hall, which just happened to be during the course of a union meeting, and that at the time they drove by they had no idea that the building they were driving by was the Union's hall. I further reject the implied argument in the Respondent's brief that the drive-by of Briston and Hill during the exact time of the union meeting was merely a coincidence.⁶² Indeed, I found above that the

⁶¹ In general, in deciding whether to grant or withhold such benefits, an employer should act as if no union were in the picture. *Essex International, Inc.*, 216 NLRB 575, 576 (1975).

⁶² This argument is further negated by the testimony of the General Counsel's witnesses who observed Briston and Hill in the Respondent's van near the Union's hall at various times before, during, and after the union meeting.

Respondent knew that that the union meeting was going to take place that day, after the earlier meeting the Respondent held for its employees.⁶³

5 The cases cited in the Respondent's brief offer no comfort to the Respondent's legal position. Both *Villa Maria Nursing and Rehabilitation Center, Inc.*, supra, and *Emenee Accessories, Inc.*, supra, involved situations where the alleged surveillance took place at the Respondent's premises. As the Board held in *Milco Inc.*, 159 NLRB 812, 814, enfd. 388 F.2d 133 (2nd Cir. 1968), "union representatives and employees who choose to engage in their union activities at the employer's premises should have no cause to complain that management observes them." This is established law, but has no relevance to the instant case.

10 In reaching a decision that the actions of Briston and Hill constituted surveillance, I have considered the Board's reasoning in *Hoyt Water Heater Co.*, 282 NLRB 1348 fn. 1 (1987). In Hoyt, the Board found no surveillance violation and held, "the mere showing by the General Counsel that the Respondent's management personnel drove down a public road past an employee's house at a speed dictated by the road conditions is not sufficient to establish a prima facie case."

20 Here, the Union's hall is located on a commercial thoroughfare, Butler Street, and there is no definitive evidence in the record as to the speed limit. But the General Counsel, here, also demonstrated that the supervisors' drive-bys occurred more than once, occurred over a period of several hours, occurred during the exact same time that the Respondent's employees were attending a union meeting and that the Respondent was aware that there was to be a union meeting. Based on all of the above circumstances, including the multiple drive-bys, the drive-bys occurring over a period of hours, the fact that Briston and Hill were looking towards the Union's hall, and the timing of the drive-bys occurring at the same time as the union meeting, I conclude that, in fact, Briston and Hill were engaged in surveillance of the union meeting, thereby violating Section 8(a)(1).

30 Statement That No Union Was Going to Tell the Respondent What to Do

35 Complaint paragraph 11 alleges that on December 9, the Respondent violated Section 8(a)(1) when Supervisor Davis advised employees "that no Union or group was going to tell Respondent what to do." The General Counsel argues that by his words Davis, "intended to convey to the employees that it was futile for them to have selected the Union as their collective-bargaining representative because Mr. Mayo would operate the company as he chose to, regardless of the presence of a union." The Respondent does not address this issue in its brief, and Davis did not testify at the trial.

40 I found that Davis spoke to the Respondent's employees at a meeting of its employees, and told the employees, as alleged in the complaint, "that there was not a union or group that was going to tell them what to do." He clearly was referring to the Union, and was telling the employees that the Union was not going to tell the company what to do.

45 Statements by an employer that convey to employees that their union activities are futile, are unlawful. See, e.g., *R.J. Corman Railroad Construction, L.L.C.*, 349 NLRB No. 89 (2007). Viewing Davis' statement to employees in the context of the long-running battle that the Respondent has been engaged in with the Union, the other unfair labor practices found herein,

50 ⁶³ I previously credited McCoy's testimony that, after the Respondent's meeting, Supervisor Hill asked several employees "if they were going to the other meeting."

and Davis' asking employees, just after the same meeting during which he made the alleged statement, if they were going to "the other meeting," I conclude that the statement conveyed, and was intended to convey, to the Respondent's employees the impression that their union activities and attempt to gain recognition of the Union were doomed, and were futile.

5 Accordingly, the Respondent violated Section 8(a)(1) by Davis' statement, as is alleged in the complaint.

Briston's Statements to McCoy

10 Complaint paragraphs 12, 13, 14, and 15 allege various statements made by Briston to McCoy as violative of Section 8(a)(1). My findings as to these allegations are as follows: that on December 14, during a conversation between McCoy and Briston at which McCoy was complaining that the Respondent was taking away paid time from her, Briston told McCoy that "You go stab us in the back. You ain't nothing but a backstabber because you went to the Union." I further found that later the same day during a conversation in which McCoy asked Briston whether she was calling McCoy a backstabber because she went to the union meeting, Briston told McCoy, "You went to the union meeting and everyone there was either fired or getting ready to be fired." Briston added that ten people attended the union meeting. I, further, found that later during that same conversation, McCoy asked Briston again why she was a backstabber, and that Briston answered, "Cause you went to the Union." Finally, I found that during a conversation between Briston and McCoy on January 22, 2007, during which McCoy told Briston that she couldn't afford to take a taxi to work, Briston told McCoy that Mayo had planned to give employees "the extra dollar" after the garage was built "and everything settled down," but "now that Mayo had to spend all his money on attorney fees, employees won't get a raise."

The General Counsel contends that Briston, in telling an employee she was a backstabber for attending a union meeting violated Section 8(a)(1), that Briston's statements to McCoy as to how many employees attended the Union's meeting and that all the employees who attended were either fired or getting ready to be fired, conveyed an impression of surveillance in violation of Section 8(a)(1), and that Briston's statement that, in effect, Mayo would have granted employees a \$1 pay raise, but the money was already spent on attorney fees, violated Section 8(a)(1). The Respondent, in its counsels' brief, argues that the General Counsel "has not established how Ms. Briston or any of the Respondent's employees⁶⁴ allegedly interfered with Ms. McCoy's Section 7 rights."

An employer who tells employees that they have stabbed the employer in the back because they contacted a union, conveys a message to its employees that engaging in union activity is tantamount to employee disloyalty, and carries with it an implicit threat of unspecified reprisals. *Hialeah Hospital*, 343 NLRB 391 (2004). Here, I found that Briston repeated the expression several times to McCoy. In the context of the other unfair labor practices found herein, and in light of Briston being the senior operations manager and part of the Respondent's management team, the message of disloyalty conveyed to McCoy was unmistakable. Under these circumstances, the Respondent violated Section 8 (a)(1) by Briston's comments to McCoy about stabbing the Respondent in the back, as alleged in the complaint.

As argued by the counsels for the General Counsel in their brief, the Board's test for determining whether an employer has created an impression of surveillance of their union

50 ⁶⁴ I assumed that counsels' reference to "employees" was inadvertent, and that the word intended was "supervisors."

activities, is whether the employee would reasonably assume from the statement in question that employee union activities had been placed under surveillance. “The rationale behind finding an impression of surveillance as a violation of Section 8(a)(1) is that employees should be free to participate in union organizing activities without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways.” *Grouse Mountain Associates II*, 333 NLRB 1322 (2001).

Here, Briston gave McCoy an accurate count of about the number of employees attending the union meeting, and by accurately informing McCoy that some of the attendees at the union meeting had already been fired, let McCoy know that she had direct knowledge of some of the details of the meeting. An employee who was told by a supervisor such detailed information about a union meeting would reasonably assume from the statement that the union activities of the employees had been placed under surveillance by the Respondent. Accordingly, I conclude that the Respondent, by Briston’s statements to McCoy, created an impression of surveillance in violation of Section 8(a)(1), as alleged in the complaint.

As described above, the complaint alleges Briston’s statement to McCoy to the effect that employees who attended the Union’s meeting were either already fired or would be fired as a violation of Section 8(a)(1), separate from another allegation that Briston’s words created an impression of surveillance. Counsels for the General Counsel’s brief, however, limits its argument as to Briston’s comments to its effect of creating an impression of surveillance and does not argue that said comment otherwise violates Section 8(a)(1). But upon consideration of the impact such words would have upon an employee listening to them, I conclude that they unmistakably carried with them an implied threat to discharge those employees who had attended the meeting, but had not yet been discharged. I, thus, find that said statement by Briston violated the Act as implying a threat to discharge employees for their participation in union activities.⁶⁵

Finally, while an employer may truthfully inform employees that benefits or prospective pay increases have been deferred in order to avoid the appearance of interference in an election campaign, Briston’s statement to McCoy that a planned \$1 pay increase had been cancelled because the money for the pay increase had been used for the Respondent’s attorney fees is a clear allusion to the Union, and without any supporting foundation either during Briston’s conversation with McCoy or at trial. As such, and in the context of the other unfair labor practices found herein, I conclude that Briston’s comment to McCoy was simply an effort by the Respondent to place a stigma on the Union for its withholding of a pay increase, and violated Section 8(a)(1) of the Act, as alleged in the complaint.⁶⁶

⁶⁵ The fact that Briston’s comment was not pled nor argued as a threat does not present a due process issue because the statement by Briston was pled in the complaint as a violation and fully litigated at trial.

⁶⁶ I note that all of the conduct found to violate Sec. 8(a)(1) occurred subsequent to the election on May 26, 2006, and prior to the Board’s certification on February 20, 2007, when the Respondent’s objections to the conduct of the election were finally resolved. The Board has held that this period of time between the election and the final resolution of objections, when parties are “still in the midst of a long unresolved representation case” is part of the critical period, characterized by the Board as being in a “preelection context.” See *Leland Stanford Jr. University*, 240 NLRB 1138 fn. 1 (1979).

CONCLUSIONS OF LAW

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

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2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

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3. By discharging Edward Charlie on June 6, 2006, Lisa Glenn on November 27, 2006, and Stephanie Wimbs on November 27, 2006, by refusing to rehire Vaunell Evans on June 8, 2006, and by imposing a disciplinary warning on Lisa Glenn on November 14, 2006, for switching a work shift with another employee without confirming such switch with a supervisor, the Respondent has been discriminating in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(3) and (1) of the Act.

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4. By discharging Edward Charlie on June 6, 2006, the Respondent has been discriminating against employees for filing charges or giving testimony under the Act, in violation of Section 8(a)(4) and (1) of the Act.

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5. By the following actions, on the dates set forth below, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act by the following actions in respect to its employees:

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(a) On August 21, 2006, advised employees that the Respondent could not provide a wage increase because of the Union.

(b) On June 8, 2006, advised a former employee that the Respondent could not rehire him because of the presence of the Union.

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(c) On December 9, 2006, engaging in surveillance of its employees union activities.

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(d) On December 9, 2006, advising employees that no union was going to tell the Respondent what to do, thereby warning employees of the futility of union representation.

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(e) On December 14, 2006, telling employees that they had stabbed the Respondent in the back by participating in union activities, thereby equating participation in union activities with disloyalty to the Respondent.

(f) On December 14, 2006, creating an impression among its employees that their union activities were under surveillance.

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(g) On December 14, 2006, implying a threat that its employees who attended a union meeting and had not yet been discharged, would be discharged.

(h) On January 22, 2007, informing its employees that they would have received a wage increase, but for their union activities.

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6. The unfair labor practices set out in paragraphs 3, 4, and 5, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent, in no manner other than that specifically found herein, including any other manner alleged in the complaint, has violated the Act.

THE REMEDY

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Having found that the Respondent has engaged in certain unfair labor practices in violation of Sections 8(a)(1), (3), and (4) of the Act, as is set forth above, it will be ordered to cease and desist therefrom and from any like or related conduct. Having found that the Respondent has unlawfully discharged the three employees named in the conclusions of law, it will be ordered to offer them immediate and full reinstatement to their former positions of employment or, if those positions are no longer available, to substantially equivalent ones without prejudice to their seniority or any other rights or privileges they may have previously enjoyed and make them whole for any loss of earnings and benefits they may have suffered by reason of the Respondent's discrimination against them. Backpay will be computed in accordance with the Board's decision in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for Retarded*, 283 NLRB 1173 (1987). Further the Respondent will be ordered to remove from its files any references to the unlawful discharges and notify said employees that it has been done so and will not use their discharges against them in any way.

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Having further found that the Respondent unlawfully refused to hire Vaunell Evans as a shuttle driver, it will be ordered to offer him employment in the position of shuttle driver, or if the position is no longer available, to a substantially equivalent position, without prejudice to his seniority, or other rights and privileges to which he would have been entitled absent the discrimination against him, and make him whole for any loss of earnings or benefits he may have suffered by reason of the Respondent's discrimination against him in the manner described above in this section.

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It will also be ordered that the Respondent post a remedial notice.

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On these findings and conclusions of law, and on the entire record, I issue the following recommended⁶⁷

ORDER

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The Respondent, Transportation Solutions, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Telling employees that the Union is to blame for its decision not to grant wage increases.

(b) Advising individuals that they will not be hired or rehired because of the Union.

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(c) Surveilling its employees' union activities, or creating an impression of engaging in such.

⁶⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the Board shall, as provided in Sec. 102.48 of the Rules, adopt the findings, conclusions, and recommended Order and all objections to them shall be deemed waived for all purposes.

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(d) Conveying the message to its employees that the Respondent equates their union activities to disloyalty to the Respondent.

5 (e) Discharging, or impliedly threatening to discharge, employees, or refusing to hire individuals, because they or employees participated in union activities.

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

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(a) Within 14 days from the date of this Order, offer full reinstatement to Edward Charlie, Lisa Glenn, and Stephanie Wimbs to their former jobs or, if those jobs no longer exist, offer them substantially equivalent positions, without prejudice to their seniority and other rights or privileges previously enjoyed.

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(b) Within 14 days, offer instatement to Vaunell Evans to the position of shuttle driver or, if said job no longer exists, offer him a substantially equivalent position, without prejudice to his seniority and other rights and privileges he would have been entitled to absent discrimination against him.

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(c) Make whole Edward Charlie, Lisa Glenn, Stephanie Wimbs, and Vaunell Evans for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay is to be computed as set forth in the remedy section.

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(d) Within 14 days from the date of this Order, remove from its files any reference to the discharges of Edward Charlie, Lisa Glenn, and Stephanie Wimbs, the refusal to rehire Vaunell Evans, and the disciplinary warning issued to Lisa Glenn involving switching shifts, and notify each of them in writing within 3 days thereafter that this has been done and that evidence of the unlawful actions will not be used against them.

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(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 designated by the Regional Director, all payroll records, Social Security payment records, timecards, personnel records and reports, and all other records, including electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under terms of this Order.

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(f) Within 14 days after service by the Region, post at its Pittsburgh, Pennsylvania facility copies of the attached notice marked "Appendix."⁶⁸ Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the 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 the Respondent to ensure that the notices are not altered, defaced, or covered by any other materials. In the event that, during the pendency of the proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its

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⁶⁸ 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."

expense, copies of the notice to all employees and former employees of the Respondent at any time since January 1, 2006.

5 (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.

Dated, Washington, D.C. August 1, 2007

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Mark D. Rubin
Administrative Law Judge

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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 on your behalf.
Act together with other employees for your benefit and protection.
Choose not to engage in any of these activities.

WE WILL NOT tell you that the Union is at fault when we decline to give you a wage increase.

WE WILL NOT tell you that you will not be hired or rehired because of the union activities of our employees.

WE WILL NOT engage in surveillance of your union activities, nor will we create the impression that we are doing so.

WE WILL NOT tell you, or convey the message to you, that we believe you are disloyal to us if you engage in union activities.

WE WILL NOT discharge or discipline employees or refuse to hire or rehire individuals, because of their union activities, or the union activities of our employees.

WE WILL, within 14 days from the date of the order, offer full reinstatement to Edward Charlie, Lisa Glenn, and Stephanie Wimbs, 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, within 14 days from the date of the order, hire Vaunell Evans to the position of shuttle driver, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges he would have been entitled to absent discrimination against him.

WE WILL make whole Edward Charlie, Lisa Glenn, Stephanie Wimbs, and Vaunell Evans for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.

WE WILL, within 14 days from the date of the order, remove from our files any reference to the unlawful discharges of Edward Charlie, Lisa Glenn, and Stephanie Wimbs, the unlawful refusal to rehire Vaunell Evans, and the disciplinary warning to Lisa Glenn concerning switching shifts.

TRANSPORTATION SOLUTIONS, INC.

(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.nlr.gov

Two Chatham Center, 112 Washington Place, Suite 510
Pittsburgh, Pennsylvania 15219
412-395-4400
Hours: 8:30 a.m. to 5:00 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 OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER.