Air Contact Transport, Inc. *and* Gary Goode. Case 5–CA–29322

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On July 31, 2002, Administrative Law Judge Karl H. Buschmann issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed limited cross-exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions as modified and to adopt his recommended Order as modified.[2]

We adopt the judge's finding that the Charging Party, Gary Goode, engaged in protected concerted activity at the Respondent's luncheon when he raised his hand and stated that he "had some questions on behalf of [himself] and other coworkers."[3] We also agree with the judge that the memo Goode received from the Respondent on September 22, 2000,[4] reprimanding him for his protected concerted activity at the luncheon was unlawful.

Furthermore, we affirm the judge's finding, for the reasons set forth below, that the Respondent terminated Goode in violation of Section 8(a)(1) of the Act. In so finding, we rely on *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844 (2001), as discussed below.[5]

In addition, we reverse the judge's finding that the Respondent violated Section 8(a)(1) of the Act by telling employees that Goode was terminated for being the instigator of the Union. We find that that allegation was untimely under Section 10(b) of the Act.

I. FACTUAL BACKGROUND

The Respondent transports freight, primarily car parts, in the northeast and mid-Atlantic States. The Company's central hub and main office are located in Netcong, New Jersey, with a terminal facility, as relevant here, in Lorton, Virginia.

In August 2000, the Respondent held a goodbye luncheon at a restaurant for the Lorton terminal manager. Because about four of the Respondent's truckdrivers were unsure if they could attend the luncheon, that morning they asked driver Gary Goode whether he would ask management questions about wages and benefits on their behalf. Goode assured the drivers that he would ask their questions.

All but one of the truckdrivers who had previously spoken with Goode were able to attend the luncheon. As the party was ending, Vince DeCarlo, Respondent's general manager, asked the approximately 12 drivers present whether they had any questions. At this point, Goode raised his hand and stated that "he had some questions on behalf of [himself] and other coworkers." Goode then asked questions regarding evaluations and the Respondent's 401(k) plan. Once Goode began asking questions, the other drivers who had approached Goode earlier that day felt comfortable enough to begin asking their own questions.

On September 22, approximately 6 weeks after the luncheon, Goode's supervisor, Mike Rish, handed Goode a memo from DeCarlo. The memo was entitled "Incident at Group Discussion." In addition to clarifying some issues regarding Goode's wages and benefits in the memo, DeCarlo reprimanded Goode for his behavior at the luncheon. Specifically, DeCarlo wrote that Goode's "challenging, loud, animated and insubordinate tone embarrassed [DeCarlo], [the] operations manager, and . . . [Goode's] own manager when he heard about it." The memo also encouraged Goode to seek other employment if he no longer wished to work for the Company.[6]

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have modified the judge's recommended Order to correct inadvertent errors and to reflect all the violations found. In accordance with the General Counsel's cross-exceptions, we shall also substitute a new notice to conform to the Order.

[3] The Respondent does not contend that Goode's actions at the luncheon were not concerted.

[4] All dates are in 2000 unless otherwise noted.

[5] In finding the discharge unlawful, the judge relied on *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). As set forth in fn. 9 below, Member Walsh agrees with the judge that Goode's discharge also violated Sec. 8(a)(1) under a *Wright Line* analysis. Chairman Battista and Member Schaumber rely solely on the *Kolkka Tables* rationale set forth in this Decision. They do not rely on the judge's *Wright Line* analysis.

[6] The memo, in relevant part, reads:

> In any event, I encourage you to survey other companies similar to ours. Compare and satisfy any curiosity that you may have regarding compensation offered by analogous companies and/or by our competitors. It is possible that somewhere there is something better or more attractive. Although we would miss your experienced abilities, we would understand if you found something more attractive.

After handing Goode the memo, Rish requested that Goode sign it. Goode did not want to sign the memo because he believed that "it [wasn't] true." Rish said that he had not looked at the memo, but was just given instructions to have Goode sign it. Goode asked whether he could have a copy of the memo. Rish stated that he was not authorized to give Goode a copy. Because Rish did not know anything regarding the memo, and because in Goode's words, "it [wasn't] true," Goode stated that he did not feel comfortable signing it. Rather, he expressed interest in speaking with DeCarlo before taking any action regarding the memo. Rish did not object to Goode's decision to speak with DeCarlo. Goode tried to reach DeCarlo, but was unsuccessful.

One week after receiving the memo, the Company's president, Brad Honigsberg, and DeCarlo phoned Goode at his home to find out why he had not signed the "reprimand."[7] Goode stated he felt uncomfortable signing a memo that his own supervisor did not know anything about. Goode also mentioned that he had requested a copy of the memo but Rish declined to give him one. Honigsberg then stated that "Mike Rish told you that you could have a copy once you signed it and turned it back here to Vince [DeCarlo] and . . . upon request, you can get a copy." Goode denied that that was what Rish had told him. But Honigsberg refused to believe Goode's version. Honigsberg then stated that Goode had been insubordinate at the luncheon, insubordinate for not signing the memo, and insubordinate on the phone, and therefore Honigsberg "was cutting ties" with Goode. Thereafter, Goode was officially terminated.

The judge found that Goode's conduct at the luncheon on behalf of himself and his coworkers was protected concerted activity, that the Respondent issued Goode an unlawful reprimand for engaging in this protected activity, and that when Goode refused to sign the unlawful memo, the Respondent terminated him in violation of the Act. He rejected the Respondent's argument that Goode had been discharged for insubordination. Instead, the judge found that, under the *Wright Line* analysis, the Respondent discharged Goode for engaging in protected concerted activity at the luncheon. Because Honigsberg's phone conversation referred to Goode's activity at the luncheon and the subsequent reprimand, the judge found that "the entire scenario revolved around Goode's protected concerted activity." The judge stated:

> It is clear that Goode engaged in protected, concerted activity, that the Respondent knew of it, and objected to it. But for his concerted conduct, the Company would never have issued the memo. And the only reason Goode refused to sign it, was his reluctance to accept a reprimand for his protected conduct.

II. DISCUSSION

A. Analytic Framework for Goode's Termination

1. *Kolkka Tables & Finnish-American Saunas*

In *Kolkka Tables & Finnish-American Saunas*, supra at 848–850, the Board addressed the analytic framework for cases where employees suffer adverse consequences as a result of refusing to obey orders that are in violation of the Act. In that case, the respondent's production manager ordered employee Tena to remove union stickers from Tena's personal toolbox. The production manager believed that the toolbox was company property and began removing some of the stickers himself. Tena refused to remove the other stickers, contending that the toolbox was his property. The production manager directed Tena to remove the stickers three more times and Tena refused each time. As a result, the respondent suspended Tena and ordered him to go home. When Tena refused to leave the premises, the respondent called the police, who escorted Tena from the property. Tena was suspended for the remainder of the day.

The Board found that Tena's refusal to comply with the respondent's unlawful order to remove the stickers did not constitute insubordination justifying discipline. The Board held that a "refusal to comply once with an unlawful order to cease engaging in Section 7 activity is not transformed into insubordination simply because the refusal is repeated each time the unlawful order is reiterated." *Kolkka Tables*, supra at 849. Furthermore, the Board found that, although Tena's repeated refusals to comply with the unlawful order put him in direct conflict with a supervisor, there was no evidence that Tena made any threatening comments or gestures against the supervisor. The Board also noted that he did not direct any profanity or make any other remarks demeaning the supervisor. Therefore, the Board found that Tena's suspension for refusing to remove the stickers was unlawful.

2. Application of *Kolkka Tables & Finnish-American Saunas* to Goode's termination

Contrary to the Respondent's argument, we find that, under *Kolkka Tables*, supra, Goode's refusal to comply with an unlawful order to sign the unlawful reprimand did not constitute insubordination, and the Respondent

[7] At this point, a discussion ensued between Goode and Honigsberg over whether the memo was actually a "reprimand." Goode testified that Honigsberg kept referring to the memo as a "letter of reprimand." Goode told Honigsberg that what Goode received was a memo, and that he did not believe that it was a letter of reprimand. Honigsberg then said, "[O]n the top right hand copy, it says 'reprimand.'" The word "reprimand" did not appear on Goode's copy.

cannot rely on the refusal to sign to justify Goode's discharge. Here, Goode had been repeatedly ordered to sign a memo that reprimanded him for the manner in which he engaged in protected concerted activity at the luncheon. Because we agree with the judge that DeCarlo's memo to Goode constituted unlawful discipline,[8] we find that the Respondent's subsequent orders to sign the memo were also unlawful.

Although the Respondent's memo of September 22 says that Goode's conduct at the luncheon was "challenging, loud, animated and insubordinate," we find that this conduct did not exceed the boundary of Section 7.

Furthermore, as in *Kolkka Tables*, supra, there is nothing in the manner of Goode's refusal to sign the reprimand that would constitute insubordination. Goode's actions may have been in direct conflict with the Respondent's orders, but Goode did not make any threatening remarks or gestures, nor did he direct any profanity towards Honigsberg, DeCarlo, or Rish. Goode also did not make any other remarks demeaning them as supervisors. Thus, Goode did not engage in any unprotected conduct that would justify the Respondent's action.

In sum, we find that Goode's persistent refusal to comply with the unlawful order to sign the unlawful memo did not constitute insubordination. Accordingly, we find that the Respondent's discharge of employee Gary Goode for his refusal to sign the memo violated Section 8(a)(1) of the Act.[9]

B. Amended Complaint Allegation Barred Under Section 10(b)

The General Counsel moved to amend the complaint at trial to include an allegation that the Respondent violated Section 8(a)(1) of the Act when its operations manager, Bill Martin, told employee Robert Via that he thought Goode was fired for being a union instigator "because he had stood up and was asking questions at the luncheon."

The judge granted the General Counsel's motion to amend the complaint at the hearing and subsequently credited Via's testimony. Without addressing the 10(b) issue in his opinion, the judge found that the Respondent violated Section 8(a)(1) because Martin's statement "linking the discharge of an employee to his protected activity is clearly coercive and tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights."

The merits of the Respondent's 10(b) defense turn on whether the otherwise untimely amended complaint allegation is closely related to the timely filed unfair labor practice charge. In deciding whether complaint amendments are closely related to charge allegations, the Board applies the "closely related" test, comprised of the following factors: (1) whether the untimely allegation involves the same legal theory as the allegation in the timely charge; (2) whether the allegations arise from the same factual situation or sequence of events; and (3) whether the respondent would raise similar defenses to both allegations. *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). In this instance, contrary to our dissenting colleague, we find that the General Counsel has failed to satisfy factors (1) and (3) of the test set forth above.

First, we find that the amended complaint allegation does not involve the same legal theory as the timely filed charge. The original charge alleged that the Respondent violated Section 8(a)(1) of the Act by reprimanding

[8] The Respondent contends that this memo did not constitute discipline, but was merely an informative memo answering some of Goode's questions that arose at the group luncheon. The judge found no merit in this argument. We disagree with the Respondent for the following reason. The memo harshly criticized Goode for his conduct, and suggested that he find another job. It, thereby, clearly indicated that Goode's conduct was incompatible with continued employment with the Respondent. In these circumstances, we agree that the memo was reasonably understood to be a reprimand, and a reprimand is a form of discipline.

In finding that the memo constituted unlawful discipline, the judge also cited *Trover Clinic*, 280 NLRB 6, 15 (1986), for the proposition that an "employer's remark has been held to constitute adverse action against an employee when the Board has found that the remark or comment 'would reasonably tend to interfere' with the employee's free exercise of their rights." In agreeing with the judge that the memo constituted unlawful discipline, we find it unnecessary to rely on the judge's citation to and discussion of *Trover Clinic*, supra.

[9] In addition to finding the discharge unlawful under *Kolkka Tables*, supra, Member Walsh would find that the Respondent unlawfully terminated Goode under *Wright Line*, supra. In Member Walsh's view, the General Counsel satisfied his burden under *Wright Line* by showing that Goode engaged in protected concerted activity at the luncheon; that the Respondent knew of this activity as evidenced by its memo to Goode memorializing that knowledge; and that Goode's protected concerted activity was a substantial and motivating factor in the Respondent's decision to unlawfully reprimand and discharge him.

Because the General Counsel satisfied his burden under *Wright Line*, the burden then shifted to the Respondent to show that even in the absence of the protected conduct, it still would have discharged Goode. In Member Walsh's view, the Respondent did not successfully establish its *Wright Line* defense. The Respondent argues that its treatment of Goode was consistent with its treatment of other employees who had refused to sign disciplinary memos. Member Walsh finds this argument without merit. The memo issued to Goode was unlawful because it reprimanded Goode for engaging in protected concerted activity. There is no evidence that the memos issued to other employees were similarly unlawful. Furthermore, although the Respondent argues that it was the refusal to sign the memo that resulted in Goode's discharge, and not the activity at the luncheon, the memo that Goode refused to sign would not have been issued absent the protected concerted activity at the luncheon. Therefore, the Respondent cannot meet its burden under *Wright Line* that Goode would have been discharged even in the absence of his protected concerted activity at the luncheon.

In agreeing with the judge's *Wright Line* analysis, however, Member Walsh does not rely on the judge's finding that the Respondent's "misroute" memos are the same as disciplinary/personnel memos.

Goode for his *protected concerted activity* and then terminating Goode for this activity. The amended complaint alleges that the Respondent coerced employees by telling them that Goode was discharged for being a *union* instigator. We recognize that both allegations involve Section 8(a)(1) of the Act; however, as our dissenting colleague concedes, they do not involve the same legal theory. The charge alleges unlawful discipline of Goode due to his engaging in protected concerted activity, whereas the amended complaint alleges unlawful coercion of employees other than Goode by a manager not involved in Goode's termination who stated that Goode was discharged for being the instigator of a union. Thus, the proposed amendment fails the first prong under *Redd-I*, supra.

Second, we find that prong 3 of the "closely related" test has also not been satisfied. Despite our colleague's belief that the Respondent would raise similar defenses to both allegations, the Respondent did not, in fact, do so. The Respondent's primary defense for the unlawful discharge allegation was that it had a legitimate justification for discharging Goode—insubordination. On the other hand, the Respondent's primary defense for the coercion allegation was that the conversation between Via and Martin never took place. These defenses are not similar. The fact that two separate sets of witnesses were called to testify regarding the separate allegations further supports this conclusion.

For these reasons, we therefore find that the amended complaint allegation is not closely related to the original charge, and thus, we shall dismiss this allegation in its entirety.[10]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Air Contact Transport, Inc., Lorton, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the subsequent paragraphs.

2. Substitute the following for paragraphs 2(c) and (e).

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

"(e) Within 14 days after service by the Region, post at its facility in Lorton, Virginia, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 22, 2001."

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not found.

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 any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT issue any written reprimands or discharge employees, because they engaged in protected concerted activities.

[10] Contrary to his colleagues, Member Walsh would find that the Respondent violated Sec. 8(a)(1) as alleged. In Member Walsh's view, the amended complaint is closely related to the original charge under the factors enumerated in *Redd-I*, supra. First, although the allegations do not involve the same legal theory, they do involve the same section of the Act (Sec. 8(a)(1)). Second, Member Walsh finds, and his colleagues do not dispute, that the amended complaint arises from the same course of factual events as the original charge, i.e., Goode's conduct at the goodbye luncheon and the Respondent's reaction to that conduct. Third, contrary to his colleagues, Member Walsh would find that the Respondent would raise similar defenses to the amended and timely allegations, i.e., that the Respondent discharged Goode for reasons other than his protected concerted or union activity. Accordingly, Member Walsh would not find the complaint amendment to be barred by Sec. 10(b).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Gary Goode full reinstatement to his former position, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Gary Goode whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files the written reprimand and any reference to the unlawful discharge and reprimand of Gary Goode, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the written reprimand and discharge will not be used against him in any way.

AIR CONTACT TRANSPORT, INC.

John S. Ferrer, Esq., for the General Counsel.
Steven R. Weinstein, Esq. (Dunetz Marcus LLC), of Livingston, New Jersey, for the Respondent.
Gary Ray Goode, Pro Se.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Washington, D.C., on April 15–16, 2002, upon a complaint dated January 15, 2002, charging the Respondent, Air Contact Transport, Inc., with violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The underlying charge was filed by Gary Goode, an individual. The allegations include the unlawful issuance of a written reprimand to and the termination of the Charging Party, because of his concerted activities, as well as the coercion of employees by telling them that Goode was fired because he was a union instigator.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a New Jersey corporation, with an office and place of business in Lorton, Virginia, and is engaged in the interstate transportation of freight, primarily car parts. The Respondent has derived gross revenues in excess of $50,000 for the transportation of freight from the State of Virginia directly to points located outside the State of Virginia. It admits and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The Respondent is in the business of delivering car parts from manufacturers to car dealerships overnight. The Respondent has terminals throughout the mid-Atlantic and the northeast region of the United States, with its main office and terminal in Netcong, New Jersey. Gary Goode, the Charging Party, was employed as a truckdriver from July 10, 1995, to September 29, 2000, at Respondent's terminal in Lorton, Virginia. Goode unloaded trailers, dispersed freight among the other drivers, loaded trucks, and delivered materials to dealerships.

A. The August 10, 2000 Luncheon

On August 10, 2000, a goodby luncheon was held for the departing Lorton terminal manager, Mark Blanchard. The drivers had notice of the luncheon from a handwritten note posted at the Lorton terminal. As they were unloading the freight for delivery that day, several drivers discussed the luncheon. Goode told his coworkers that he was planning on attending the luncheon. They told Goode that they might not be able to attend, but that they had questions about their wages and compensation, and that they were curious about the incoming manager for the Lorton terminal.

According to Goode's testimony, he was approached by four drivers. Joseph (Joe) Nocera asked Goode to bring up the issue of direct deposit of wages and the problem that their checks were not promptly deposited. Joseph (Joe) Hanna asked Goode to suggest that "swing" drivers receive more benefits because they possessed better knowledge of the routes. Mark Mercing asked Goode to get an explanation to why some drivers were getting low evaluations, but receiving the same pay raise as the drivers with high evaluations. Also, James Publicover asked Goode to find out the identity of the new terminal manager for the Lorton terminal. In their respective testimonies, Nocera, Hanna, and Publicover confirmed that they had authorized Goode to pose the questions on their behalf. Hanna further testified that he, Mercing, and Goode had discussed "benefits and stuff" that morning. General Manager Vincent (Vince) DeCarlo and Operations Manager Kevin Frank, who were visiting the Lorton terminal that morning, testified that they did not see any employees conversing.

The luncheon was held at a local restaurant starting at about 11:30 a.m. in a separate room connected to the main part by a double-door walkway. The 10 or 11 drivers and the 3 members of management, DeCarlo, Frank, and the departing Terminal Manager Mark Blanchard, sat at one large table. Goode arrived at the luncheon at about 12:30 p.m. after he had finished his delivery route. Nocera, Hanna, and Publicover were also able to attend but arrived later than Goode after they had finished their routes.

After about an hour, Blanchard announced that he was leaving and said his farewell. DeCarlo, Frank, and Martin accompanied Blanchard outside. DeCarlo then came back into the restaurant to announce that he was also leaving and, according to his testimony, asked if anybody had any questions. Goode then raised his hand and said he "had some questions on behalf of myself and other coworkers." Goode's testimony that he asked questions "on behalf of myself and other coworkers" was corroborated by the testimony of Publicover, Nocera, and Hanna, all of whom testified that Goode had indeed spoken on behalf of himself and others. Publicover and Nocera further testified that none of the drivers had any objections to Goode's statements. Only DeCarlo and Frank disputed this scenario in their testimony.

DeCarlo inquired if they could discuss the matter in private. Goode replied that his questions involved mutual concerns and proceeded to ask why some employees who were getting lower evaluations, were receiving the same $25 raise. According to Goode and Publicover, DeCarlo answered that the Company considered evaluations as well as a driver's driving record in considering pay raises. Goode then continued, asking him to explain why some drivers were receiving a $25 raise when the had not even been evaluated yet. DeCarlo did not respond. Goode also raised the issue of the Company's 401(k) plan, and whether contributions would increase. DeCarlo replied that the Company would look into it.

Goode asked why raises had decreased despite the Company's growth. He disputed DeCarlo`s reply about overhead and observed that the Company has a lot more trailers coming in. Goode turned to his coworkers behind him and characterized DeCarlo`s reply as a bunch of baloney. DeCarlo explained that the Company had lost "our Ford account," and that despite the decrease in business, the drivers were still getting a full paycheck. Several of the drivers interjected that the Company had picked up three accounts, and that the volume of freight had increased. Goode, still speaking about wages and the 401(k) plan, said that drivers from the New Jersey terminal were reporting to them that "Brad and Vince are telling you guys that they can't do better on those things, but Brad just pulled up in a brand new 500 Series Mercedes." DeCarlo pointed out that the drivers still received full paychecks even when the Company was not doing well.

Publicover, Nocera, and Hanna testified that at no time during this question and answer period did Goode appear to be angry, raise his voice, or act disrespectful towards DeCarlo, nor did DeCarlo order Goode, or any of the other drivers to lower their voice or calm down. According to the testimony of DeCarlo and Frank, however, Goode became heated and acted in an "agitated" and "loud" manner as he continued to pose his questions and that Goode cut DeCarlo off when Goode tried to answer his questions. Both DeCarlo and Frank stated that DeCarlo motioned that Goode calm down. Other drivers also asked DeCarlo questions. Nocera asked DeCarlo about the direct deposit of paychecks. According to Goode and several other witnesses, driver Steve Hall then said to DeCarlo, "Dude, dude, you're trying to tell us in this day and age with the computers and stuff, we can't get our paychecks on time? . . . . that's bullshit." When asked about Hall, DeCarlo stated that he had not heard Hall refer to him as "dude" or his use of the word "bullshit" and that there was "no foul language or any four letter words used throughout."

Driver Charlie Justice who had briefly attended the luncheon testified for the Respondent. He opined that Goode, Publicover, and Hanna were arguing with DeCarlo, with Goode being "more or less a spokesman for the group." He described "the group" as "all very boisterous and loud," and Goode as "very argumentative."

After approximately an hour, the discussion between DeCarlo and the employees ended when DeCarlo announced that he was leaving and that if anybody had any other questions or concerns, they could feel free to call him at his office. DeCarlo and Frank then shook hands with the employees and left. Goode testified that when he shook hands with DeCarlo, he did not appear to be upset with him.

B. The "Incident at Group Discussion" Memorandum to Gary Goode

On September 21, 2000, 6 weeks later, DeCarlo had prepared a memorandum to Goode entitled "Incident at Group Discussion." During his testimony, DeCarlo stated that the purpose of the memorandum was to provide Goode with additional information, which he could not provide at the luncheon. He also testified that the delay was due to his efforts to obtain Goode's personnel files and the need for its review by the Respondent's CEO (Brad Honigsburg). The memo states:

> You were very public in your loud voicing of your discontent for all those around you to hear regarding what more you felt that you were owed and what additionally you thought you were worth. It is your absolute right to talk to whomever you please regarding pay and benefit related issues. However, the challenging, loud, animated and insubordinate tone embarrassed me, our operations manager, and as it did your own manager when he heard about it. It was a scene caused by you that was not necessary, out of place and served no useful purpose to your fellow coworkers who, in fact, walked away in a seemingly embarrassed fashion.
>
> . . . In any event, I encourage you to survey other companies similar to ours. Compare and satisfy any curiosity that you may have regarding compensation offered by analogous companies and or by our competitors. It is possible that somewhere there is something better or more attractive. Although we would miss your experienced abilities, we would understand if you found something more attractive.

At the bottom of the memo there is a blank for Goode's signature, below which reads:

> Please sign above and return this memo to your manager to acknowledge receipt of this memo and that you understand its content and meaning.

DeCarlo testified that the above language was intended to express his own embarrassment and the embarrassment of other members of management for Goode's actions at the luncheon, but that the memo was not intended to serve as a reprimand.

On the next day, September 22, the new terminal manager at Lorton, Mike Rish, handed the memo to Goode for his signature with the comment, I have something from Vince for you concerning the meeting. Goode read the memo and became visibly upset, because he believed the second page to be inaccurate. Goode asked for a copy of the memo. Rish told Goode that he could not provide him with a copy until it was signed. Goode explained that he "didn't feel comfortable" signing something that was not true. Rish suggested that Goode add his comments to the memo or call DeCarlo about it. Goode agreed that he would call DeCarlo and handed the memo back to Rish who placed it into an envelope in his desk.

Driver Hanna testified that when he approached the two men, he asked if Goode was in trouble, Rish responded, "[n]o."

After leaving the Lorton terminal, Goode stopped at a pay phone and tried to call DeCarlo but was not able to reach him. The following Monday, September 25, Goode returned to the Lorton terminal for work. Goode performed his usual duties and spoke to Rish again before heading home that afternoon. Rish testified that he asked Goode if he had talked to DeCarlo, and Goode replied that he had not.

C. The September 29, 2000 Discharge of Gary Goode

From Tuesday, September 26, to Friday, September 29, Goode did not report for work because of a back injury. On Friday, September 29, Goode called Rish asking whether anything had been brought up about the memo. Rish said, no, but added that they needed to take care of the situation during the following week. Rish asked again if Goode had spoken to DeCarlo. About an hour later, Respondent's owner, Brad Honigsberg, called Goode from the speakerphone in his office. Honigsberg asked if he was going to sign the memo and why he had not already signed it.[1] According to DeCarlo and Frank, Goode attempted to "skirt the issue," making the excuse that the memo was inaccurate. DeCarlo and Frank also testified that Goode became loud and defensive, similar to his demeanor during the August 10 luncheon. DeCarlo remembered the conversations as follows:

> At that point Mr. Goode became defensive, loud over the phone. He was basically on the same attitude and the same voice in terms of loudness that he had exercised during the luncheon meeting. He was skirting the issue of why he was not going to sign, a couple of times making the excuse that that was not what transpired.

Goode finally asked Honigsberg if he was going to fire him. Frank recalled Honigsberg's words as follows (Tr. 351):

> You know, Gary, you were disrespectful to Vince on August 10th at the meeting. I dislike you being disrespected to me now on the phone" due to his—you know, again to he was being loud, heated and vocal.

Goode stated that Honigsberg responded by telling Goode that he was insubordinate during the meeting, that he was insubordinate for not signing the memo, and that he was being insubordinate on the phone. Honigsberg then told Goode that they were going to "cut ties" with him, and Goode hung up the phone. Contrary to DeCarlo and Frank's testimony, Goode stated that at no time during the conversation with Honigsberg did he become loud or raise his voice.

The following Monday, October 2, 2000, Goode reported to the Lorton terminal to work. When Goode arrived, he asked Rish if he was still employed. Rish replied that he was not. According to Goode, he then asked Rish for a letter of termination and for a reason why he was being let go. Rish stated he could not do so. Goode also testified that Rish had told him that "he hated how this all happened" and that "if I was you, and I didn't say this, but I would take Brad and his company to court and sue them." Rish then told Goode that he had to leave the property, which Goode did without incident. Prior to his termination, Goode had never been disciplined or suspended by the Respondent.

D. The Union Threat

Approximately 2 weeks after Goode's discharge, driver Robert Via testified under subpoena that he had a conversation with the operations manager, Bill Martin, regarding Goode's discharge. According to Via, he was helping Martin load a truck that was running Goode's old route, when Via commented to Martin that he "saw a difference in how things were being handled since Gary had . . . lost his job," and that it was a "detriment to the company." In response, Martin told Via that he thought Goode "brought it upon himself," and that "the company fired Gary because he was the instigator of the union down at the Lorton facility."[2] Via testified that he asked Martin why he thought this, and Martin told him "because he had stood up and was asking questions at that luncheon."

In testimony for the Respondent, Martin stated that he did not have a conversation with Via in October 2000 about the discharge of Goode. Further, Martin testified that he had never told Via, or any other employee, that he believed Goode had been fired because he was the instigator of a union.

III. DISCUSSION

Section 7 of the Act, gives employees the right to "engage in . . . concerted activities for . . . mutual aid or protection." Section 8(a)(1) of the Act, makes it an unfair labor practice for employers to "interfere with, restrain, or coerce employees" who exercise the rights guaranteed by Section 7. The General Counsel argues that driver Gary Goode exercised his Section 7 rights at the August 10, 2000 luncheon when Goode asked General Manager Vince DeCarlo questions, "on behalf of myself [Goode] and other coworkers." The General Counsel also argues that the Respondent interfered with Goode's Section 7 rights by taking adverse employment actions against him. Specifically, the General Counsel alleges that the Respondent violated Section 8(a)(1) when it: (1) issued a written reprimand[3] to Goode for his conduct at the luncheon; (2) discharged Goode for not signing the reprimand; and (3) coerced employees by telling them that Goode was fired for being a union instigator. In response, the Respondent argues that Goode was not engaged in protected, concerted activity, and that even if he were, the Respondent did not fire him for concerted activity, but rather for a legitimate reason; namely, not following company policy by refusing to sign the memo. Further, the Respondent denies any coercion, asserting that Manager Martin did not tell an employee that Goode was fired for being a union instigator.

[1] DeCarlo and Frank, who overheard, testified about this conversation. Honigsberg did not testify.

[2] Antecedent to the events described herein, the Respondent faced an organizing campaign at the New Jersey facility. Lorton employees became aware of the organizing effort at the New Jersey facility through Honigsberg's dissemination of information regarding unionization and by word-of-mouth from the Company's tractor-trailer drivers.

[3] The Respondent admits to issuing a "written reprimand" to Goode on September 22, 2000. However, the Respondent argues that this reprimand was not issued for disciplinary purposes, and was thereby not an adverse employment action. This issue is resolved below.

A. Protected Concerted Activity

The Board has defined an employee's activity as "concerted" when an employee acts "with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand, *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). This standard "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers II*, 281 NLRB at 885. As new factual circumstances arise, the Board considers additional factors in determining if activity is concerted, such as (1) whether the comments involved a common concern regarding conditions of employment, and was the issue framed as a common concern;[4] and (2) the context under which the alleged concerted activity occurred—did the employer address the employees as a group.[5]

According to the General Counsel, Goode clearly engaged in concerted activity at the August 10 luncheon, when he raised issues concerning the working conditions of all employees at a "group meeting." Goode was authorized by the employees to act on their behalf, and by asking about conditions of employment related to all employees. The Respondent argues that Goode did not state that he was speaking on behalf of other employees, that his inquiries related to his individual concerns and that he did not act as their spokesman.

I find that Goode had engaged in concerted activity for purposes of Section 7 of the Act. Goode was expressly authorized to ask questions on behalf of his coworkers. In resolving the issue of whether or not Goode said that he had some "questions on behalf of myself and other coworkers," I credit the testimony of Goode. Goode's testimony on this issue was corroborated by current drivers Publicover and Nocera, and former driver Hanna. Further, upon my questioning of Goode at the hearing, he remained consistent and steadfast in his answers. The assertions to the contrary by DeCarlo and Frank, were inconsistent and vague in recounting the incident. For example, Frank testified that driver Steven Hall asked questions regarding evaluations, while DeCarlo stated that he "had a hard time remember[ing] that he [Hall] was even there." DeCarlo, however, who specifically remembered that Goode had phrased his questions in "terms of 'I' and 'me,'" testified that Goode had asked about the Company's evaluation systems.

Further, Goode's testimony and that of three of his coworkers confirm that he acted as their spokesman when he stated that he "had some questions on behalf of myself and my coworkers," and none of the drivers in attendance objected. Their acquiescence confirmed Goode's version of the events.[6]

That Goode acted on behalf of his coworkers is also illustrated by the discussion among Goode, Mercing, and Hanna about the issues of compensation and evaluations. Hanna recalled that the discussion involved "different things that we wanted to bring up at the meeting." Mercing, who did not attend the event, specifically asked Goode to bring up the Respondent's evaluation system. Once DeCarlo solicited questions from the employees, Goode asked about the Respondent's evaluation system and its relation to pay raises.[7] This and subsequent questions from Goode regarding the Respondent's rate of contribution to the 401(k) plan and the profit margin of the Company in relation to raises clearly involved conditions of employment of common concern to all employees.

The Board has held, "in a group meeting context, a concerted objective may be inferred from the circumstances." *Chromalloy Gas Turbine Corp.*, 331 NLRB at 863 (quoting *Whittaker Corp.*, 289 NLRB at 934). And further that "[d]issatisfaction due to low wages is the grist on which concerted activity feeds." *Whittaker Corp.*, 289 NLRB at 934 (quoting *Jeanette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976). I find that Goode's questions at the luncheon amounted to concerned activity, and I reject the Respondent's assertion that Goode`s inquiries were of an individual nature. The fact that other employees also asked questions does not negate the concerted nature of Goode's activity. Indeed, Goode's question sparked an hour-long question and answer session, in which other employees voiced additional concerns.

The Respondent does not object to a finding that Goode's activity was protected activity. Indeed, according to the Respondent, a credibility resolution as to "whether Mr. Goode acted disrespectful to Mr. Honigsberg or not," is unnecessary. In any case, I find that Goode's concerted activity was protected, because his conduct was not so egregious or of such conduct so as to lose the protection of the Act. *Consumer Power Co.*, 282 NLRB at 132.

[4] See *Neff-Perkins Co.*, 315 NLRB 1229, 1232 (1994) (questions relating to quality of equipment and the setting of employees' wage rate found to be of "common concern to all employees," and thereby indicative of concerted activity); *Whittaker Corp.*, 289 NLRB 933, 933 (1988) (voicing of concern regarding wage policy, phrased in the context of "we" considered to be concerted activity); *Rockwell International Corp.*, 814 F.2d 1530, 1535 (11th Cir. 1987) (objection to lowering volume of radios found to be concerted activity and not a "purely personal griping").

[5] See *Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 863 (2000), enfd. 262 F.3d 184 (2d Cir. 2001) (Board finds comments regarding break policy concerted activity, noting that "the objective of 'initiating . . . or . . . inducing group action . . . may be inferred from the context of the group meeting."); *United Enviro Systems*, 301 NLRB 942, 944 (1991) (complaints voiced at weekly sales meeting conducted by employer's supervisors considered to be concerted activity); *Whittaker Corp.*, 289 NLRB at 934 (objections voiced at meeting of employees called by employer to announce change in policy found to be concerted activity); *Rockwell International*, 814 F.2d at 1535 (in finding concerted activity, the Eleventh Circuit noted that the company called employees together "to discuss the group issue of noise from the radios").

[6] See *Consumer Powers Co.*, 282 NLRB 130, 131 (1986) (Board finds that charging party acted on the authority of another employee when the other employee acquiesced to the charging party's suggestion that they inform management of possibly dangerous working conditions).

[7] In his testimony, Publicover corroborated Goode's testimony, stating that during the luncheon, Goode asked, "[A]bout the way the company evaluated the employees for their yearly raises," and DeCarlo answered that the company used a "merit raise" system.

B. Adverse Action in Response to Protected, Concerted Activity

1. Issuance of the "Incident at Group Discussion" memo

The General Counsel contends that the Respondent violated Section 8(a)(1) of the Act by issuing a "reprimand" to Goode. The Respondent, on the other hand, asserts that the issuance of the memo did not violate the Act because "the memo did not impose any discipline—was not couched as a warning—no indication—that any adverse action would be taken against Mr. Goode," and that the memo was unrelated to any protected activity.

An employer's remark has been held to constitute adverse action against an employee when the Board has found that the remark or comment "would reasonably tend to interfere" with the employee's free exercise of their rights. *Trover Clinic*, 280 NLRB 6, 15 (1986). Written warnings of future disciplinary action are considered to be in violation of Section 8(a)(1) when such warnings are given in response to an employee's "communication of the expressions of concern of her fellow employees about an employment condition." *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 405 (1993).

A memorandum issued to an employee by the employer in response to their conduct at work can be considered either a warning or as counseling. If the memo has an "adverse consequence or effect on the employee's terms and conditions of employment and 'may be a foundation for future disciplinary action,'" then the memo will be considered to be a disciplinary warning. *Whirlpool Corp.*, 2000 WL 33664309; JD–99–00, 18 (NLRB, Div. of Judges 2000) (quoting *Trover Clinic*, 280 NLRB at 16). The memo will be construed as counseling if the memo is not a part of a formal disciplinary procedure and has no adverse effect on the employee's terms and conditions of employment.

I find that the "Incident at Group Discussion" memo issued to Goode was a disciplinary warning, and that this warning violated Section 8(a)(1), because it was the direct result of Goode`s protected, concerted activity. As properly observed by the General Counsel, the Respondent admitted in its answer that the memo was a written reprimand. DeCarlo and Rish admitted in their testimony that the memo issued to Goode was a "reprimand" or "disciplinary-type" memo. The Respondent listed reprimands in a document entitled, "Similar Discharges and or Reprimands in the Recent Past," attributing Goode`s discharge to his "Refusal to Acknowledge Receipt of Memo, Failure to Follow Reasonable Direction, Abusive, Arrogant, 'Bossy,' Disruptive, Loud Insolent Behavior Directed Toward a Manager in a Very Public Manner in A Public Place" (GC Exh. 4).

The Respondent's very insistence upon Goode signing the memo indicates that it was intended as more than a friendly reminder. Even though none of the other guests at the farewell luncheon considered Goode`s behavior to be inappropriate, he received a memo 6 weeks after the "incident," and was eventually discharged for not signing it. It was sufficiently significant to the Respondent that its president personally called Goode at home to check if he had signed it. The Respondent argues that "the tone of his voice and the loud manner of his conduct," not the substance of his questions, was DeCarlo's concern. However, the Respondent's argument is in direct conflict with the language in the memo, which accuses Goode of, "voicing . . . discontent . . . regarding what more you felt that you were owed." A finding of violation of Section 8(a)(1) is fully supported by the record. See *Chromalloy Gas Turbine Corp.*, supra.

2. The September 29, 2000 discharge of Gary Goode

According to the General Counsel, the discharge of Goode on September 29 violated Section 8(a)(1), because the alleged insubordination was a mere pretext to Goode`s protected, concerted activity. The Respondent submits that the General Counsel has not satisfied the first prong of the *Wright Line* test, and has failed to satisfy the burden of persuasion in showing that Goode's alleged protected conduct was a motivating factor in Goode's discharge and that Goode would have been fired regardless of any alleged concerted activity. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1981), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The General Counsel must demonstrate that the adversely affected employee was engaging in protected activity, that the employer knew of this activity, and that the adverse actions taken by the employer were motivated by the employee's engagement in the protected activity. *Western Plant Services*, 322 NLRB 183, 194 (1996); *Best Plumbing Supply*, 310 NLRB 143 (1993). Once the General Counsel has established this, the burden of proof then shifts to the employer, who must demonstrate that the adverse action would have been taken "even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089.

In assessing the General Counsel's case, the Board looks at the totality of the evidence, including several different factors, the employee's past work record, an employer's deviation from past disciplinary practices, the disparate treatment of certain employees in comparison to other employees who engaged in similar misconduct, and the severity of the discipline in relation to the employee's alleged misconduct, id. at 1193. *FiveCAP, Inc.*, 331 NLRB 1165, 1192 (2000), enfd. 2002 U.S. App. LEXIS 12842 (6th Cir. 2002).

In the present case, it is clear that Goode engaged in protected, concerted activity, that the Respondent knew of it, and objected to it. But for his concerted conduct, the Company would never have issued the memo. And the only reason Goode refused to sign it, was his reluctance to accept a reprimand for his protected conduct.

As a driver, Goode's performance was admittedly "satisfactory." In the written reprimand, the Respondent referred to his "experienced abilities." DeCarlo testified that Goode "was a very efficient worker." Goode had generally a good work record. He had incurred only two disciplinary memorandums. The first, issued in December 1996 as a result of an accident at a dealership, warning that Goode should be more careful in the future, the second, issued in December 1999 as a result of Goode failing to report missing freight. Goode signed both memos, writing on the December 1999 memo that the missing freight was loaded onto the wrong truck, and that it was not his fault.

In this instance, when initially confronted by his terminal manager with the memo, Goode acted appropriately and perfectly reasonable when he hesitated in signing something that he believed to be incorrect. Rish who did not know what the memo was about not only accepted Goode`s explanation but suggested that he speak with DeCarlo first. Goode agreed, he never stated that he would not sign it. Goode remained in contact with his supervisor, Rish, by calling him. He was assured that he was not in any trouble. Considering the Respondent's 6-week delay in the issuance of memo, there appeared to be no urgency. Goode did not receive an ultimatum to sign, nor had there been an outright refusal to sign the memo.

On September 29, Honigsberg called Goode to ask if he was going to sign the memo. In response, Goode explained he was not comfortable signing the memo, and denied that he had been directed to sign the memo.[8] Honigsberg then told Goode that he was insubordinate at the meeting, he was insubordinate for not signing the memo, and he was being insubordinate to him (Honigsberg) on the phone, and for these reasons, the Respondent was going to "cut ties" with Goode. By all accounts, Honigsberg referred to Goode's activity at the farewell luncheon, as well as his discussion on the phone involving the memo which was unacceptable to him. Clearly, the entire scenario revolved around Goode's protected, concerted activity. This was the first and last time Goode was approached by management regarding his alleged insubordination. He never received a "final warning," as other employees had received in the past. He was clearly not insubordinate by expressing his reluctance to sign a memo, which was critical of his protected activity. Under these circumstances, the discharge was totally unjustified and clearly demonstrates an unlawful motive on the part of the Respondent in firing Goode. An employer may not compel an employee to sign an unlawful disciplinary warning. *Joe's Plastics*, 287 NLRB 210, 211 (1987). See also *Vought Corp.*, 273 NLRB 1290, 1295 fn. 31 (1987). Here, as in *Joe's Plastics*, the Respondent violated the Act for discharging an employee for refusing to sign an unlawful warning. The Board made a similar ruling in *Kolkka Tables & Finnish American Saunas*, 335 NLRB 844 (2001), where an employee refused a supervisor's order to remove union stickers from his toolbox, a practice protected by Section 7.

The burden having shifted, the Respondent has failed to establish that the conduct for which Goode was given a warning was sufficient to rebut the prima facie case. As the Board observed in *Joe's Plastics*, supra at 211, "Nor can the Respondent establish that it would have discharged [the employee] for repeatedly refusing to sign the warning even in the absence of union activity because the warning system itself was unlawfully instituted in response to union activity." Moreover, the record does not show that the Company had a policy of discharging employees for refusing to sign warnings. None of the drivers heard of such a policy. The Respondent seems to concede that the Lorton employees, specifically Goode, were unaware that they were required to sign disciplinary memos. Publicover and Nocera testified that they had refused to sign memos for misrouted freight but were not disciplined.

The Respondent's reliance on the discharges of other employees who had refused to sign memos is not justified and distinguishable from the facts in this case. For example, Kevin Saunders, a driver in New Jersey, had refused to sign five company memos for poor work performance. After refusing to sign a final warning he was fired. Marvin Goldfarb received a final warning after repeatedly refusing to comply with management directives regarding parking. Victor Gonzales had refused legitimate work assignments and received a disciplinary, final warning. Also, Ron Gear received a disciplinary warning after using obscenities and profanities towards a terminal manager.

Here, the Employer also tried, but failed to establish a distinction between disciplinary-type memos and "misroute" or warning memos. Not only were the employees unaware of such a distinction, but even the Respondent seemed confused by first suggesting that the memo, "Incident at Group Discussion" was not intended to be a written reprimand and at other times arguing that it was a "disciplinary-type" memo. The Respondent also appeared inconsistent, by stating, on the one hand, that the Company's memo was concerned with Goode's "tone of his voice and the loud manner of his conduct," at the luncheon and complaining about his similar conduct during his conversation with Honigsberg, namely, "louder and more confrontational, arguing—and acting disrespectfully," and, on the other hand, arguing that the termination "was in no way motivated by the events of August 10 or Mr. Goode's conduct on that day." Finally, also inconsistent with usual practice, Goode did not get a final warning before he was discharged.

According to *Kolkka Tables & Finnish American Saunas*, 335 NLRB at 850, a discharge is unlawful if it resulted from a refusal to comply with an order which interfered with an employee's Section 7 rights. I find that the Respondent violated Section 8(a)(1). *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

C. The Coercion of Goode's Coworkers

The General Counsel's allegation that the Respondent violated the Act is based upon a conversation between Assistant Terminal Manager Bill Martin and driver Robert Via at the Lorton facility, approximately 2 weeks after the discharge of Goode. According to the testimony of Via, Martin told him that "he [Martin] thought that the company fired Gary because he was the instigator of the union down at the Lorton facility." When Via asked him why he thought that, Martin replied that it was "because he had stood up and was asking questions at the luncheon." Martin denied having made the statement to any of the Respondent's employees. The Respondent asks that the testimony of Martin be credited, referring to his distinguished service in the U.S. Air Force.

In resolving the credibility issue, and crediting the testimony of Via, I have not only relied upon the demeanor of the witnesses. At the time of the hearing, Via was a driver for the Respondent and testified under subpoena. As the General

[8] According to DeCarlo and Frank, Goode "danced around the issue" when asked why he had not signed the memo. Both stated that Goode was insubordinate on the phone with Honigsberg, as he had been with DeCarlo at the luncheon. Honigsberg, the most competent witness for the Respondent on the matter did not testify, even though he was present at the hearing.

Counsel pointed out, Via had nothing to gain, and much to lose by testifying against his Employer. Via testified adversely to his own interests, and as "the Board has frequently noted . . . such witnesses are inherently credible." *Chromalloy Gas Turbine Corp.*, 331 NLRB 858, 862 (2000) (citing *Flexsteel Industries*, 316 NLRB 745 (1995)); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961), enfd. as modified 308 F.2d 89 (5th Cir. 1962). The record also shows that a union conducted an organizing campaign at the New Jersey terminal in 2000 and that Honigsberg distributed information about unions to the Lorton employees.

Section 8(c) of the Act states that an expression of views or opinions does not rise to an unfair labor practice if the expression does not contain a threat or reprisal. Here, the statement by a supervisor, linking the discharge of an employee to his protected activity is clearly coercive and tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. "It sends the message to employees that, if they engaged in those activities, they could be discharged." *Benesight, Inc.*, 337 NLRB 282, 283 (2001). I therefore find that the Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Air Contact Transport, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By issuing a written reprimand to its employee, Gary Goode, and discharging, Gary Goode, because he engaged in protected, concerted activities, the Respondent violated Section 8(a)(1) of the Act.

3. By informing employees that Gary Goode was discharged because he was a union instigator, the Respondent violated Section 8(a)(1) of the Act.

4. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(1) of the Act by issuing reprimand and by discharging Gary Goode, it is necessary to order the Respondent to offer Gary Goode full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to withdraw the reprimand and to remove from its files any and all references to the unlawful charges, and to notify in writing that this has been done and that the discharge will not be used against him in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Air Contact Transport, Inc., Lorton, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees that the Company fired Gary Goode, because he was the instigator of the Union.

(b) Issuing written reprimands, or discharging employees, or otherwise discouraging employees from engaging in concerted activities.

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

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

(a) Within 14 days from the date of this Order, offer Gary Goode full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Gary Goode whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, with interest, in the manner set forth in the remedy section of this decision.

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

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

(e) Within 14 days after service by the Region, post at its facility in Lorton, Virginia, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or

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

[10] 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."

covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 2, 2001.

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